I. **Client-Lawyer Relationship** - the obvious most regulated relationship is that between a lawyer and his client. These rule govern who may be represented as well as dos and don'ts of the representation.

A. **Competence – Rule 1.1** – the rule provides that a lawyer shall provide competent representation to a client – the required elements of such representation is knowledge, skill, thoroughness and preparation. This rule does not require a pattern of misconduct to be violated, but only a single violation

1. **Legal Knowledge & Skill** - a lawyer must have the knowledge a skill to handle a case – the rules note that competence is to be presumed and allow competence to be established through preparation or association – thus incompetence is often only a result of failure to seek it.

a) **Factors in Determining Necessary Skill** - the rule enumerates several factors to be used by lawyer/board to determine if he/she is competent to handle a matter:

1) Relative Complexity or Specialized Nature of Representation
2) General Experience of Lawyer-
3) Training in a Specific Field-
4) Preparation & Study of Lawyer-
5) Ability to Refer Matter
6) Ability to Consult Other Lawyer
b) Special Training Usually Unnecessary- special training or prior experience with a type of matter are not required by the rule – only that a lawyer acquire knowledge on the matter – specifically the comment mentions that newly admitted lawyers are not considered incompetent because of their novice status.

c) Emergency Exception- a lawyer may handle a matter that he would normally not be considered competent to handle – if the matter cannot be referred to another competent attorney. Assistance should be limited to what is necessary to resolve the emergency situation.

d) Achievement of Competence through Preparation Allowed- a lawyer may accept a case where he does not have the requisite competence but can achieving the competence through preparation.

2. Thoroughness & Preparation- the thoroughness and preparation required to have competent representation is proportional to the complexity of the matter being handled by the lawyer.

3. Maintaining Competence- to maintain competence a lawyer should engage in continuing study and education.

4. Duty to Reject if Not Competent- note that a lawyer shall not put forward representation that is not competent – therefore he mustn’t take a case where he is not competent.

B. Scope of Representation – Rule 1.2- this rule governs the general limits on what a lawyer may do as his client’s representative. Specifically the rules establishes limits on a lawyer’s conduct on his client’s behalf and establishes what decisions he may make on a client’s behalf.

1. Decisions for the Client- a lawyer is to defer to the client on matters that determine the objectives of the lawsuit/representation – specifically, the following are the exclusive decision of the client and not the lawyer (Subsection A of 1.2):

   a) Filing Suit
   b) Accept Settlement Offer
   c) Testify in Criminal Trial
   d) Plead Guilty
   e) Jury or Bench Trial
   f) Appeal of Decision
   g) Monetary Limits- a client may also instruct a lawyer not to depose someone or follow certain procedures on the basis that they will cost more than they are willing to pay – i.e. lawyers don’t have a blank check.
h) 3rd Person's Wellbeing- a lawyer should also defer to a clients wishes where they feel being called as a witness or being deposed, etc. may be detrimental to a clients wellbeing.

2. Decisions for the Lawyer- generally procedural decisions of how to proceed in a lawsuit are the province of a lawyer – and the lawyer has the power to make the following decisions without consulting the client:
   a) Court to File in-
   b) Depositions-
   c) Discovery Requests-
   d) Continuances-

3. Independence from Client's Views/Activities (sub. B)- a lawyer's representation of a client in no way indicates endorsement of his/her political, economic, social or moral views or activities.

4. Limit on Services/Scope of Representation (sub. C)- a lawyer may after initial consultation limit the scope of his representation of a client to certain matters- if the client consents. Terms of representation may represent limits on scope or objectives of the representation. The agreement may exclude objectives that the lawyer find repugnant or imprudent.

5. May Not Engage or Assist in Criminal Conduct (sub. D)- the rule provides that a lawyer shall not counsel a client to engage, or assist a client in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of an proposed course of conduct and aid the client to determine that validity, scope, meaning or application of law.
   a) Where Client Expects Illegal Conduct (Sub. E)– Must counsel regarding the limitations of the lawyers representation. The lawyer must explain his withdrawal.
   b) Comment Distinction Between Aiding/Counseling- the comment makes clear the lawyer may discuss possible questionable conduct but is not to suggest ways to avoid the law to commit fraud or crime w/o consequence.
   c) If Using Advice for Impermissible Purpose = Must Withdraw- if lawyer discovers that his advice to a continuing client is being used for a criminal purpose – he has an obligation to withdraw from the representation – note that confidences are still protected by rule 1.7.

C. Diligence – Rule 1.3- a lawyer shall act with reasonable diligence and promptness in representing a client. Specifically, a lawyer will be his clients zealous advocate.

1. Needed not press every advantage- the rule gives the lawyer professional discretion in his role as a zealous advocate to determine the means of pursuing a matter and does not require that he exploit every possible advantage.
2. **Prompt Action Preferred** - the comment notes that no professional habit is less desirable than procrastination – a lawyer should not procrastinate, because of potential harm to a client's interests.

3. **Termination of Representation Should Be Clear** - when a matter is resolved a lawyer should make clear if the resolution terminates the relationship so the client is not under a false presumption that the lawyer is still looking out for his interests – this may be done through a specific agreement in the representation agreement or through other notice. A lawyer should always advise a client of the possibility of appeal.

**D. Communication – Rule 1.4** - The duty to communicate has two separate provisions – a lawyer must keep a client reasonably informed of the status of a matter; must comply with requests for information; additionally a lawyer is required to explain any information to allow the client to make an informed decision. Therefore a lawyer's communication must be appropriate based on a client's ability to comprehend.

1. **Settlement/Plea Offers** - A lawyer has a duty to inform his client promptly of settlement/plea offers unless the client has made it clear the proposed settlement would be unacceptable.

2. **Trial/Negotiation Strategies** - A lawyer should explain the general strategies that will be pursued by him in a representation, however, it is not required that the lawyer explain in great detail the specifics but should fulfill reasonable client expectations of information.

3. **Practicality of Communication** - Where a lawyer is representing an organization, his duty may be fulfilled by communicating with designated contact person(s), rather than the organization as a whole, additionally, where a lawyer is representing a continuing matter(s) etc. – a system of limited or occasional reporting may be adopted.

4. **Withholding Information** - In limited circumstances a lawyer may withhold information for a client where he would be likely to react imprudently to an immediate communication. A lawyer may not withhold information for personal interest or convenience. Additionally non-disclosure may be compelled by court order.

**E. Fees – Rule 1.5** - A lawyer’s fee shall be reasonable.

1. **Factors in Determining Reasonability (Part A, 1-8)**

   a) **Time & Labor Required** – based on novelty and difficulty of the questions involved and required skill.

   b) **Precluding Other Cases** – extent to which case will preclude the lawyer from taking other work

   c) **Customary Local Fees** - for similar services.

   d) **Amount in dispute & results** – (contingency fees)

   e) **Time limits on work** - either imposed by client or nature of the work
2. **Rate/Fee Must be Communicated to Client** - when a lawyer takes on a client – the terms of fee should be *promptly communicated*. This should just be a basic understanding of a the fees and need not be broken down overly in to specifics. The comment suggests that a written document be furnished to the client and that it may simply be a standard fee schedule given to the client.

3. **Contingent Fees** – fee arrangements based on the outcome of cases are appropriate in some circumstances, with the following exceptions:

   a) **Cannot Take Domestic Case on Contingency (sub. D(1))** - a lawyer may not take a divorce or child custody matter for a fee based on outcome, however, note that past due alimony is a debt action and not a domestic case and such a fee is acceptable.

   b) **Cannot Take Criminal Case on Contingency (sub. D(2))** - for public policy reasons, a lawyer may not take a criminal case on a contingency basis.

   c) **Contingency Must Not Create “Stake in Outcome of Litigation”** - see infra rule 1.8(j) that precludes certain types of contingencies based on the payment of part of the matter being litigated to the lawyer.

4. **Division of Fees (sub. E)** - this is only an issue where lawyer are *not* members of the same firm – in that situation, fees may be split in any manner by lawyers. Additionally, fees may be split with retired members of the firm. This is an issue in referral fees.

   a) **Where Not Members of Same Firm** - when splitting with lawyer not in the same firm all of the following must be met:

      1) **Total Fee is Reasonable**

      2) **Client Doesn’t Object** - this implies that the client is informed of the fee splitting.

      3) **Work Done is Proportional to Fee Received/Set a Clients consent** - it is this third requirement that most often make referral fees precluded by the rule. The only way around the proportional rule is the clients agreement and that both are fully responsible for the representation.

   b) **Fee Splitting with Non-Lawyers** - in general a lawyer may not split fees with a non-lawyer. Except the following:

      1) **Heirs of Lawyer** – heirs of a lawyer with whom fee were to be split with may still collect the share they are entitled to.
2) **Retirement or Compensation Plan for Firm Employees** - if the money is being paid into a firm benefit plan, then the splitting arrangement is ok.
5. **Terms of Payment** - A lawyer may accept property in payment for services, such as ownership interest – however such interest cannot be in the subject matter of the litigation – proscribed by Rule 1.8 infra. However, such transactions are subject to greater scrutiny.

6. **Client Interests Paramount** - When determining fee structure, the lawyer should not be wasteful in an hourly arrangement and should be forthcoming with clients regarding the likely expenses to avoid termination/re negociations fees in the middle of the representation. Additionally, a lawyer should explain fee alternatives.

7. **Dispute of Fees to be Paid** - Lawyers should follow any local procedures for disputed fees, such fees should be kept in the trust account until the dispute is resolved.

**F. Confidentiality – Rule 1.6** - A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation. **Note that this rule is much broader than the Attorney-Client Privilege Evidentiary Rule.**

1. **Exceptions to Rule** - The rule has a couple of qualified exceptions, under this situation a lawyer may reveal a client confidence:

   a) **Future Criminal Act** - To prevent a client from committing a criminal act that the lawyer believes likely to result in imminent death or great bodily harm. However, the lawyer should first attempt to dissuade the client from the course of action.

   b) **Establish/Defend Claim Against Client** - Such a fee collection, etc.

   c) **Defend against charge/claim based on conduct on behalf of client** - In order to clear the lawyer’s name in suits involving fraud, etc. The claim need not be actually filed, but merely threatened by a third party. Confidences should only be revealed to the point necessary to exonerate the lawyer.

   d) **Compelled by Court Order** – Where a competent court requires disclosure of information, such an order trumps the rule. (Comment 19)

2. **Authorized Disclosures** - A lawyer may be authorized by the client to make certain disclosures of otherwise confidential facts – this authority may be explicit or implicit. Additionally, a lawyer may discuss confidential information with other members of the firm, unless otherwise instructed by the client.

3. **Continues After Termination of Relationship** – Note that duty of confidentiality continues even after the termination of the relationship.

   a) **Even where Withdrawal Compelled** – Even where the lawyer was compelled to withdraw based on client’s illegal actions – the lawyer must still not reveal any client confidences.

**G. Conflict of Interest – General Rule – Rule 1.7** - A lawyer shall not represent a client where a conflict of interest exists. This conflict may be between the lawyer and the client or between two clients of the lawyer.
1. **“Directly Adverse” to Another Client- sub. A** – this applies even where the matter is wholly unrelated, a lawyer *may* only represent clients with directly adverse interests where:

   a) *Reasonably believes the representation will not adversely affect the other client* and

   b) *BOTH clients consent after consultation*

2. **“Materially Adverse” to Another Client or the Lawyer**— a lawyer shall not represent a client if such representation *may* be materially limited by the lawyer’s responsibilities to another client or himself (i.e. interest in fees or matter being litigated), the key is the *likelihood the conflict will eventuate* as determined by the lawyer, —unless—

   a) *Reasonably believes the representation will not be adversely affected and*

   b) *Client consents after consultation*

3. **Multiple Clients in Same Matter**— if a lawyer undertakes representation of two parties in the same suit (driver & passenger of car, etc.) he has an obligation to explain the risks and advantages of joint representation. This may arise where there is inconsistency between the stories the clients intend to assert etc.

4. **Determining Conflicts**— the comments offer the following factors to be considered in determining if a conflict exists. The determination of is a conflict exists is primarily the decision of the representing opinion,

   a) *Duration & Intimacy of Relationship (YEAH BABY!!*)

   b) *Functions Performed by the Lawyer*

   c) *Likelihood of Actual Conflict and/or Prejudice of Interests*

5. **Avoiding Conflicts**—

   a) *Reasonable Procedures to determine Conflicts*- a lawyer is required to have reasonable procedures that are appropriate for the size and type of firm in place to detect conflicts of interest.

   b) *Where Conflict After Representation Begun*— where the conflict arises after a lawyer has undertook the representation – the lawyer *should* withdraw – a lawyer may continue to represent one of the clients if such representation does not violate Rule 1.9 (not bloody likely).

   c) *Organizational Matters*- often a lawyer may end up

   d) *Conflicting Positions*— there is normally no prohibition on a lawyer arguing different opposing positions in two different cases, however, when the two cases are before a court of appeal, such representation could be in conflict.
e) Lawyer Should Make Relationship Clear - the lawyer should clearly identify to the client etc. who is the client and who fiduciary duties are owned, where it is confusing. E.g. drafting a will – duty to writer, sometimes to beneficiaries. Also where a lawyer represents a lawyer may represent and corporation – and is therefore not necessarily the lawyer of the Board of Directors, etc.

6. Limits on Consent – although both sub. A and B allow a lawyer to represent a client even where a conflict is present as long as the client consents – however, a lawyer cannot properly ask the client to consent where another ‘reasonable’ lawyer would conclude that the client should not agree to the representation.

7. Interest of Person Paying for Services - the situation may arise where the lawyer is paid by a third party (i.e. an insurance company) to represent someone else. The agreement should make clear that the duty of the lawyer is to the client and not the paying party.

H. Conflict of Interest – Prohibited Transactions – Rule 1.8 – a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessor, security or other pecuniary interest adverse to a client.

1. Exceptions - in addition to the exceptions below, the comment to the rule notes that "standard commercial transactions" are completely excluded from any prohibitions.

   a) Terms are “fair and reasonable” to client – and must be fully disclosed to the client in understandable terms.

   b) Independent Counsel - Client is given a reasonable opportunity to seek the advice of independent counsel.

   c) Client Consents.

2. Effect = Exceptions subsume rule – because of the breadth of the above exceptions this rule is easily complied with.

3. Shall not use Confidences to Clients Disadvantage – unless the client consents to the use of such information. This may be interpreted as a broad prohibition against using such information where it is ‘inside info’ (comment 1)

4. Cannot benefit from own Instrument (Sub C) - a lawyer shall not prepare an instrument giving the lawyer a person directly (1st Degree) related to the lawyer any substantial gift including a testamentary give, except where client is related to the donee. (small gifts are not excluded – comment 2).

5. Book/Movie Rights (sub D) – prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based on events relating to the representation.

6. No Loans to Client – a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except:
a) *Court Costs & Expenses of Litigation* – repayment may be made contingent on outcome of a matter.

b) *Indigent Client* – May pay court costs & expenses outright

7. **Shall only be Paid by Client** - a lawyer may only be paid by the client *unless* all of the following occur:
   a) Client consents after Consultation – 3pts for alliteration.
   b) No interference with Professional Judgment of Lawyer
   c) Client info is still subject to 1.6.

8. **Joint Settlements = Only with Both Consent/Consult (Sub. G)** – a lawyer who represents two or more clients shall not participate in making an aggregate settlement in civil or criminal cases unless each client consents after consultation, including disclosure of all claims involved and each persons role in the settlement.

9. **Shall Not Limit Malpractice Liability (Sub. H)** – a lawyer shall not make an agreement *prospectively* limit the liability for malpractice unless permitted by law and the client is independently represent in making the agreement or *settle* such a claim with an *unrepresented or former client* without first advising that person in writing that independent representation is appropriate.

10. **Related to Other Lawyer = Cannot Represent (Sub I)** – where a lawyer is a first degree relative of another lawyer, he *shall not* represent a client in direct adversity to a person known to be represented by that lawyer. *Except* by consent of the client after consultation. This conflict is *not* imputed to the lawyer’s firm as a whole (Comment 6).

11. **Cannot Acquire Proprietary Interest in Litigation (Sub J)** – a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer in conducting for a client, *except* that the lawyer *may*:
   a) Acquire a lien granted by law to secure a fee for services
   b) Contract for contingent fee

I. **Conflict of Interest – Former Client – Rule 1.9** – a lawyer who has formerly represented a client in a matter *shall not* thereafter represent another person in the *same or substantially related matter* in which that person’s interest are *materially adverse* to the interests of he former client *unless the former client consents after consultation*. (sub A) Such a waiver must be fully informed as to the lawyer intent to take on a new client (comment 12).

   1. **Imputed Disqualification – Former Firm (sub B)** – a lawyer shall not *knowingly* represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (burden of proof is on firm sought to be disqualified – Comment 7)

      a) Whose interest are materially adverse to that person – AND –
b) About whom the lawyer acquired information protected by 1.7 or 1.9(c) that is material to the matter. This knowledge should be actual and not constructive. (Comment 6)

2. **Prohibited Use of Past Client Confidences (Sub C)** - a lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

   a) Use Information Relating to the Representation to Disadvantage the former client interest-except where it has since become generally know or would be allowed by 1.6 or 3.3.

   b) Reveal information relating to the representation except as Rule 1.6 or 3.3 would permit or require.

J. **Imputed Disqualification – General Rule – 1.10** – while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of the practicing alone would be prohibited from doing so by rules against conflict of interest. (sub A)

   1. **Former Lawyer = OK if Not “Substantially Related” (sub B)** – when a lawyer has terminated an association with a firm, the firm is not prohibited thereafter representing a person with interest materially adverse to those of a client represented by the former lawyer and not currently represented by the firm unless:

       a) Matter is the same or substantially related to previous matter

       b) Any lawyer remaining with the firm has information protected by Client Confidence Provisions 1.6 or 1.9(c).

   2. **May be waived** – a conflict that arises under this rule may be waived in the same manner and situation described in Rule 1.7

   3. **What is a “Firm”?** – for the code, it includes private firms, legal departments, legal service organizations, any 2 lawyers with access to the same information essentially. (Comment 1) Note that the government does not count as firm for this rule because it is subject to rule 1.11 instead. (Comment 5)

K. **Successive Government & Private Employment – Rule 1.11**- except a permitted by law, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate agency consents after consultation.

   1. **Firm Also Disqualified** – the firm of a lawyer disqualified under the above is also disqualified by imputation unless: (this is allowed to avoid deterrence to entering public service comment 3).

       a) Disqualified Lawyer is Screened from matter

       b) Disqualified Lawyer receives no fee split from the matter- this does not include a prior general partnership spit agreement, but only to the instant case’s revenue (comment 5)
c) Written notice is promptly given to government agency to assure compliance. Such notice is still considered prompt if it’s earlier disclosure would have materially harmed the clients interests. (Comment 6)

2. **Cannot Use Confidential Government Info Against Private Opponent (sub B)**- where CGI was acquired about a person while serving as a public officer, a lawyer shall not represent another person against that person. The firm will also be disqualified unless the lawyer is screened and apportioned no fee from the representation. This knowledge must be actual, not just imputed. (comment 7)

3. **Cannot Represent Government Against Past Private Client (sub C)**- a lawyer serving as a public officer shall not: (this disqualification is not imputed to the rest of the agency – Comment 9)
   
   a) Participate in a matter in which the lawyer participated personally & substantially while in private practice or non-government employ – unless no one else may act in the place of the attorney in the matter by law.
   
   b) Negotiate for private employment- with any person who is involved as a party or lawyer in a matter in which the lawyer is participating personally & substantially except as provided in 1.12(b).

4. **What is a “Matter” – (sub D)**- any judicial or other proceeding involving an order, contract, claim, controversy, investigation, charge, accusation, or arrest involving a specific party or parties or covered by the conflict of interest rules of an agency.

5. **What is “Confidential Government Information” – (sub E)** – is information obtained under governmental authority and which at the time this rule is applied the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

6. **Government to Government** – where a lawyer moves between two governments or agencies, the prior agency should be considered a private employer for purposes of rule. (Comment 4).

7. **Doesn’t Prohibit Joint Representation**- the rule should not be read as prohibiting joint government and private representation where permitted under the conflict rules (Comment 8).

**L. Former Judge or Arbitrator – Rule 1.12** – a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties consent after consultation. (sub A)

1. **Cannot Seek Employment** – a lawyer shall not seek employment with any person involved as a party or lawyer in a matter in which the lawyer is participating personally and substantially as a judge, etc. A law clerk may, but only after the lawyer has notified the judge.

2. **Firm is Disqualified** – if a member of the firm would be disqualified by Sub A, then the entire firm would be unless:
a) **Disqualified Lawyer is Screened**

b) **Disqualified Lawyer receives no fee split for representation**

c) **Tribunal is promptly notified to assure compliance with A & B**

3. **Exception – Partisan Panel** – (sub d) – a lawyer is not disqualified under Sub A if he was appointed to a partisan arbitration panel.

**M. Organizational Clients – Rule 1.13** – a lawyer employed by an organization is subject to control by its duly authorized constituents. (sub A)

1. **Duty Organization, Not Officers (Sub B)** - a lawyer shall proceed in the best interests of the organization if he knows an officer, etc. of an organization (who controls him under A) is acting inappropriately to the best interest of the organization. The lawyer is to consider a number of factors (such as procedures of organization and impact, etc.) in determining his action. Such measures may include:

   a) **Asking for reconsideration of a matter**

   b) **Advising that a separate legal opinion on the matter be sought**

   c) **Referring the matter to higher authority, in serious issues the highest authority- of the organization.**

2. **May Withdraw if Insists (sub C)** – if a lawyer attempts to prevent action he sees as clearly a violation of law and likely to injure the organization, he may withdraw pursuant to 1.16.

3. **Must explain Organization as Client to Officers (sub D)** – in dealing with an organization's constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interest are adverse to those of whom he is dealing.

4. **May Represent Director, etc. (sub e)** – a lawyer may represent an organization and its directors in a matter where there is no conflict of interest as prohibited in rule 1.7. The organization may consent to dual representation where consent is given by the proper authority. This is particular issue in derivative suits. (Comment 10, 11)

5. **Confidences with Organizations** – while the employees of an organization are considered to be part of the client and therefore protected from outsiders by 1.6; statements by employees are not protected from being used by the organization against the employee, since the lawyer is not the employee's lawyer, but the organization's. Additionally, the lawyer cannot disclose confidences of the organization to an employee w/o authorization (comment 2). This should be explained to the individual. (comment 7, 8)

6. **Governmental Agencies** – a lawyer’s client in the government context may be considered to be the entire government rather than a specific agency, additionally a government lawyer may have a greater duty to question the actions of officials. (Comment 6)
N. **Client Under Disability – Rule 1.14** - in general, even where a client’s ability to make decisions are impaired (minor, mental defect), a lawyer should make *as far as reasonably possible* efforts to maintain a normal client-lawyer relationship with the client. (sub A). However a lawyer *may* seek the appointment of a guardian or other protective action *only when* he reasonably believes that the client cannot adequately act in the client’s interest. (sub B)

1. **De Facto/Emergency Guardian** – a lawyer may act as de facto/emergency guardian if none is available in a required situation (Comment 2, 6). Conduct as guardian should be limited to that reasonably necessary until a proper guardian can be appointed.

2. **Fiduciary Duty Client Trumps Guardian** - if a guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct. (Comment 4)

3. **Should Consider Client’s Interest In Seeking Appointment** – a lawyer must consider if the act of seeking a guardian would be detrimental to a client’s interests or violate confidences before doing so, (comment 5, 7).

O. **Safekeeping Property – Rule 1.15** - a lawyer shall hold property of clients or 3rd persons that is in a lawyer’s possession in connection with a representation *separate* from the lawyer’s own property. Property must be appropriately safeguarded. (i.e. a safe deposit box, comment 1) Records must be kept for 5 years after termination of representation. A lawyer should also participate in a client loss fund where it exists (comment 4).

1. **Client Funds** – must be kept in separate account located in bank within the state of the lawyer’s office, or elsewhere with consent.

2. **Promptly Notify of Receipt of Property (sub B)**- upon receipt of funds or other property in which a client or third person has an interest a lawyer shall promptly notify the person. Unless agree otherwise, the lawyer shall promptly deliver possession. And upon request, promptly render full accounting.

3. **Joint Interest = Separate Account (sub C)**– when in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interest, the portion in dispute shall be kept, but the rest disbursed.

4. **Disputed Funds = Hold in trust** – (comment 2) where there is a dispute over funds, there should be held in trust by the lawyer until the dispute is resolved. Undisputed funds must be promptly distributed.

5. **3rd Party Debtor**- a lawyer may have an obligation to inform a 3rd party when a client receives payment and may be required to maintain possession of the property to protect the interests of the 3rd party.

6. **Declining or Terminating Representation – Rule 1.16** –
1. **Lawyer shall not represent a client & must withdraw where (sub A) except where ordered by the court:**

   a) *Representation would Violate Code*

   b) *Lawyer’s Physical or Mental Condition Impair ability*

   c) *Lawyer is Discharged by Client* - a lawyer is terminable at will by the client, however, a client may be prevented from discharging an appointed counsel (comment 4, 5), if client’s mental condition is at issue, may have to seek a conservator pursuant to 1.14.

2. **A Lawyer May Withdraw (sub B)–** unless ordered by the court where:

   a) *Withdraw can be accomplished without material adverse effect on client.*

   b) *Client persist in a course of action where lawyer reasonably believes services will be used in criminal or fraudulent manner.*

   c) *Client has used lawyer’s services to perpetrate a crime or fraud*

   d) *Client insist on pursuing an objective that is repugnant or imprudent to lawyer*

   e) *Client fails substantially to fulfill an obligation the lawyer regarding services-- and the client has been given reasonable warning that services would be withdrawn unless obligation was fulfilled. Generally this is not paying his tab.*

   f) *Representation will result in unreasonable financial burden*

   g) *Other good cause*

3. **Must Follow Court order to continue (Sub C)-** when ordered by a tribunal, a lawyer shall continue representation irrespective of other good cause.

4. **Must Continue to Protect Client interests (Sub D)-** upon termination, lawyer must to extent *reasonably practicable* protect a client interests, through:

   a) *adequate notice of termination*

   b) *allowing time to find replacement counsel*

   c) *surrendering paper and property of the client*

   d) *refunding any advance not earned.*

5. **Still Subject To Confidentiality** - Comment 2 notes that a lawyer must not reveal client confidences in order to explain his withdraw to a tribunal, but should only sight generally that he must withdraw or violate the code.

6.
Q. **Sale of Practice of Law - Rule 1.17** - we never covered this, so if he tests us on it, I will be very very angry.

II. **Lawyer as Counselor** – these rules govern a lawyer’s role as a counselor to his client – specifically what kind of advice and role a lawyer may play in certain situations.

A. **The Lawyer as Advisor – Rule 2.1** - this rule provides that a lawyer **shall** provide candid advice to a client. Advice need not be limited to the law, but **may** include considerations such as morals, economics, social and political factors, relevant to a clients situation.

1. **Shouldn't shy from unpleasant facts** - comment provides that a lawyer should disclose unpleasant facts to a client, but **may** sugar-coat them to make them more palatable if necessary.

2. **Should include moral factors** - the comment cautions against purely technical advice and states that a lawyer should include moral and ethical considerations in advice to client. Particularly where a client is a novice in the legal field the lawyer should include other considerations to assure a client in aware of them.

3. **May refer to others for advice** - where a clients situation includes other problems where others should perhaps be consulted a lawyer should refer to others, however, if the experts conflict – the lawyer should offer his opinion to the client.

4. **Offering Advice** - a lawyer is under no affirmative duty to offer advice to a client who has not asked for any. However, the lawyer **may** offer advice where doing so appears to be in the clients best interest.

B. **Lawyer as Intermediary – Rule 2.2** - a lawyer may act as an intermediary between two clients in the following circumstances, this actions can be in a formal or informal setting, as long as the lawyer does the following (note that this situation does **not include** the situation where the lawyer is acting as an arbitrator):

1. **Consults, Informs & Consents** - the lawyer consults with each client concerning the implications of the common representation, risks & benefits, impacts on confidentiality and obtains consent. The burden on the lawyer is to make sure the arrangement is understood by all parties (including fee responsibilities).

2. **Reasonable Believes in Solution** - the lawyer must have a reasonable believe that the problem can be resolved compatible with the clients’ best interests. Specifically, each client can make an **informed decision** and there is little risk of **material prejudice** to those interests if an agreement is not reached.

   a) **Must Consult to Assure Adequately informed decisions (sub. B)** - the rule requires that the lawyer keep a party informed before making a decision of the consequences of the decision.

   b) **Client more responsible for decisions** - the lawyer should make clear he is not a partisan advocate, as in most situations, assuming this is done, a client must assume greater responsibility for decisions than when each client is independently represented.
c) Must take seriously – possible further costs – the lawyer must consider whether the clients interests and attitudes have become too hostile as to make the intermediary unsuccessful- this is to save clients the expense of a doomed attempt to intermediate.

3. Reasonably Believes in Impartiality- the lawyer believes that his representation will be impartial to both sides.
   a) Consider Past Relationship w/ Parties- in determining if he can be impartial, a lawyer must consider past relationships with the parties – i.e. has he been representing one for years, etc. – that would make being impartial difficult.

4. Withdrawal (sub C)- a lawyer shall withdraw if he believes the conditions in 1, 2 & 3 are met anymore, or at the request of either client. Upon withdrawal, shall not continue t represent any of the client in the matter further.

5. Privilege Does Not Attach- the prevailing rule is that since this is considered to be joint, the attorney-client privilege is not considered to attach to communications and client should be advised as such, however, this does not negate the duty of the lawyer to provided loyal and diligent representation.

C. Evaluation for Use By 3rd Persons – Rule 2.3- a lawyer may undertake an evaluation of a matter affecting a client for someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship and the client consents. The most common use for this is where a lawyer is asked to due an audit or other opinion valuation, common in real estate, securities, etc.

1. Evaluation Doesn’t = Investigation – therefore a duty to disclose may be limited by the client privilege since the lawyer works for the evaluated entity, the lawyer should make this relationship clear to parties to whom the results are made known. Specifically, the evaluation may be limited in scope by the request of the client.

2. Duty to Third Person if a lawyer cannot render a valuation and still be consistent with his duties in his professional judgment (i.e. is currently defending entity on fraud charges – would be obligated to disclose) he should not perform the valuation – a lawyer must not lie in a valuation.

III. Lawyer as Advocate- a lawyer is his client’s zealous advocate, however, this duty must be balanced with a duty not to abuse the legal process. The following rules mark the balance between these two duties.

A. Meritorious Claims & Contentions – Rule 3.1 – a lawyer shall not bring or defend a proceeding or assert an issue unless there is a basis for doing so that is not frivolous, including a good faith argument for revision of existing law.

1. Criminal = May Defend Guilty- the rule makes exclusive provision that in a criminal matter a “no defense” defense may be used to “require that every element of the case be established.”

2. Use to Fullest Benefit, But Not Abuse- the advocate has a duty to use the legal process for the fullest benefit for a client, but has a duty not to abuse the system.
3. May Expect to Discover Facts – a suit filed by a lawyer without factual basis will not be frivolous where a lawyer expects to develop facts through discovery, unless it is filed with the intent to harass!

B. Expediting Litigation – Rule 3.2- a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

1. Must Have Purpose Other than Delay – the question of the purpose is to be decided on the standard of if a competent lawyer acting in good faith would regard the course of action as having substantial purpose. Realizing financial or other benefit from otherwise improper delay is not a legitimate interest, nor is convenience or frustration of purpose.

C. Candor Towards Tribunal – Rule 3.3- a lawyer must not during a proceeding and discovery fail to have candor towards the tribunal (sub B.) specifically, he shall not knowingly:

1. Make False Statement of Material Fact or Law
   a) Pleadings/Filings- a lawyer is not required to have personal knowledge of the contents of pleadings, etc. However, anything submitted to the court should be made on if the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

2. Fail to Disclose Fact to Prevent Fraud or Criminal Act by Client

3. Fail to Disclose Controlling Legal Authority Directly Adverse to the Position of the Client- where it is not disclosed by opposing counsel. This is not a duty to due any more than disclose its existence – there is no obligation to distinguish (although that would be good). Failure to disclose is considered to be conscious misleading of the tribunal.

4. Offer Evidence Known to be False. If a lawyer has offered the material evidence and later discovers it is false, he shall take remedial measures.

5. May Refuse to Offer Evidence Reasonably Believed to be False

6. Ex Parte – Must offer adverse material facts – which will enable the tribunal to make and informed decision.

7. False Evidence/Perjury by Client- one of the most difficult situations is where a lawyer knows a client has/will perjure himself in the proceeding. In that situation, the lawyer is obligated to do the following:
   a) Attempt to Dissuade Client/Get Client to Rectify – either not to perjure or to correct any past statements. I.e. threaten to withdraw, etc.
   b) Seek to Withdraw- if the client will not correct the matter, the lawyer must seek to withdraw in order to avoid breaching the duty of candor, but without breaching client confidences – i.e. w/o telling the court why he is trying to withdraw.
   c) Criminal = Disclose to Court – if the court will not let the lawyer withdraw or he believes withdraw will not cure the problem, he must disclose the perjury to the court,
d) Past Proceeding = Must Keep Quiet - the duty to disclose concludes at the end of trial. So information discovered later, doesn’t make the lawyer have to run back to the courthouse. Comment 13.

8. Solutions to Perjury by Criminal Client- the comment to the rule suggests the following solutions to the criminal perjury situation.

   a) Allow Accused to Testify by Narrative
   b) Lawyer Excused from Duty to Report Perjury of Own Client
   c) Require Disclosure to Court to Correct – this one seems to be favored by the comment.

D. Fairness Towards Opposing Party and Counsel – Rule 3.4- out of fairness, a lawyer must not do any of the following:

1. Obstruct, alter, destroy, or Conceal Evidence- from another party, or instruct or assist another person to do the same.

2. Falsify Evidence, Assist a False Witness- or Offer Prohibited Inducement to a Witness – however, this does not preclude – compensating an expert witness on terms permitted by law (no contingent fee), or paying an occurrence witness for travel expenses and loss of time at work.

3. Knowing Disobey and Obligation under Court Rules – unless openly challenging the validity of the rule.

4. Make Frivolous Discovery Requests or Failing to Comply with Opposing Requests-

5. As Part of a Trial Proceeding-

   a) Allude to irrelevant and/or inadmissible evidence
   b) Assert Personal Knowledge of Facts In Issue
   c) Assert Personal Opinion- as to the Justness of a cause, credibility of a witness, or guilt or culpability of a client/opponent.

6. Request a Witness Refrain From Testifying- or otherwise giving information to another party, unless:

   a) Witness is the client of the lawyer
   b) Witness is relative, employee, or agent of Client
   c) AND Lawyer Reasonably that person’s interests will not be adversely affected by refusal to testify.
**E. Impartiality and Decorum of the Tribunal – Rule 3.5** – a lawyer shall not seek to sway the impartiality of a proceeding in an improper matter, specifically a lawyer **shall not**:

1. **Seek to Influence Judge, Juror or Prospective Juror or other official by means prohibited by law.**

2. **Communicate Ex Parte with such a Person** except as provided by law. A lawyer on a case shall not communicate with a juror on the case at all. No lawyer shall speak to a juror about matters involved in a currently pending case. Any post trial conduct must not sour a juror on the jury system – i.e. you can't yell “why did you vote that way you stupid jerk!”

3. **Engage in Conduct Intended to Disrupt a Tribunal.**

**F. Trial Publicity – Rule 3.6** - a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated if the lawyer knows or reasonably should know it will have a substantial likelihood of **materially prejudicing** the adjudication of the matter. This likelihood will vary with the **nature of the proceeding** – the comment mentions that a criminal jury trial is most susceptible, which a bench trial or proceeding is considered less likely.

1. **The following statements will comply with the rule: (sub B)** the comment notes this rule is not an exhaustive list, but examples.

   a) **Information in the Public Record**

   b) **Statement that “investigation is continuing”**

   c) **Scheduling or Result of Litigation**

   d) **Request for Assistance in Obtaining Evidence**

   e) **Warning of Danger** – concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm.

   f) **Criminal Cases** – additionally in a criminal case the following statements are also included in the rule:

      1) **ID, Residence & Family Status of Accused**

      2) **Info necessary to aid in apprehension of accused**

      3) **Time & Place of Arrest**

      4) **Identity of Arresting Officers/Agency**
2. **Comments Prohibited by Rule** – the comment to the rule notes that the rule is likely to prohibit comments on the following:

   a) Character or Credibility of a Party or Witness
   b) Possibility for Plea, Contents of confessions, or Person’s Refusal to Make Statement
   c) Refusal of a Party to Submit to Testing/Examination or the result of such tests
   d) Weight or nature of Physical Evidence
   e) Opinion as to Guilt or Innocence in Criminal Cases
   f) Evidence reasonably thought to be inadmissible
   g) Statement of Charge without qualifying as “accusation”

3. **Statements Necessary to Protect Client from Material Prejudice** – (sub C) – subject to the restrictions of the rule, a lawyer may make statements that he reasonably believes necessary to prevent undue prejudicial effect of recent publicity. Statements must be limited to such information necessary to mitigate the adverse publicity.

4. **Imputability** - (sub D) – the provisions of the rule apply to all lawyers in the firm(s) of the lawyer associated in the litigation – including government agencies. Other lawyers are not prohibited from commentary.

5. **Court Ordered Silences** - other situation may require that a lawyer refrain from public statements – such as juvenile proceedings, etc. Such orders must be followed.

**G. Lawyer as Witness – Rule 3.7** - Because of the potential conflict of interest, a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

1. Testimony is on Uncontested issue - here the potential conflict in only theoretical and does not prejudice either side.
2. Testimony relates to legal services rendered in case - such testimony may be necessary in trials of matters that allow the recovery of attorney’s fees – the exception prevent the need for a separate proceeding to be had for that purpose.
3. Disqualification of the Lawyer would cause substantial hardship to client. – this is narrow exception as interpreted by the courts. A classic question here is where the lawyer is the sole person who overhears a conversation between a witness and someone else that could be critical evidence.
4. Imputed to Firm – additionally, no lawyer that would be precluded by 1.7 or 1.9 should appear in as an advocate in the case.

**H. Special Responsibility of Prosecutor – Rule 3.8** - because a prosecutor’s goal is **justice** and not victory, a lawyer acting in that capacity is subject
to rules that don’t apply in a normal adversarial setting. Specifically, a prosecutor shall:

1. **Refrain from prosecuting charge known to be frivolous**

2. **Make efforts to insure accused is aware of right to counsel**—and given an opportunity to seek council. This does not apply where the accused has waved right to counsel and silence, or is proceeding pro se.

3. **Not seek waiver of pre-trial rights by unrepresented accused.**

4. **Make Timely Disclosure of Exculpatory or Mitigating Evidence**— except where excused from that obligation by the tribunal. (This may include protection of witnesses, etc.)

5. **Prevent Staff from Making Precluded Extra-Judicial Statements**—a prosecutor must exercise reasonable care to keep staff from violating Rule 3.6 which precludes some statements made during an ongoing proceeding.

6. **Not subpoena a lawyer to testify about client info**—*unless* it is genuinely necessary to intrude on the lawyer/client relationship and the prosecutor reasonably believes that the following are true:

   a) **Information is not protected by privilege**

   b) **Evidence is essential to investigation or prosecution**

   c) **No other feasible alternative**

7. **Refrain from comments that have substantial likelihood of heightening public condemnation of the accused**—this is essentially a broader version of rule 3.6’s prohibition on extra-judicial remarks. It is intended to preclude remarks that have no legitimate law enforcement purpose.

   **Advocate in non-adjudicative proceedings**—Rule 3.9—a lawyer may appear as a lobbyist, etc. for a client, this rule applies in those situations. The rule provides that a lawyer representing a client before a legislative or administrative tribunal in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and conform to rules on candor, fairness, and inappropriate influence.

   1. **Don’t need to disclose name of client**—the rule only compels the lawyer state he is there in a representative capacity, not who he is there representing.

   2. **Bound even though non-lawyers are not bound**—the comment notes that even though non-lawyers appearing in such capacities are not bound, this is an example of a lawyer being a lawyer 24 hours a day.

**IV. Transactions with persons other than clients**—a lawyer may represent a client’s interest in deals with 3rd parties that do not involve the court (unless you screw up), the follow rules apply to lawyers when dealing with 3rd parties.

   **A. Truthfulness in statements to others**—Rule 4.1—In the course of representing a client, a lawyer shall not make a false statement of material fact or
law to a third party or fail to disclose the same when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

1. **Obligation to Disclose Subject to Confidentiality Rule** - this rule subordinate to client confidentiality rule (Rule 1.6). However a lawyer may be required to disclose in order to avoid being considered part of the fraud.

2. **Includes Failure to Correct False Assumption** - the comment notes that failure to correct the statement of another person that the lawyer knows to be false may also be considered a misrepresentation.

3. **Puffing v. Lying - What is a Fact?** – the comment notes that many subjects of negotiation such as value placed on an item or party’s intention is not considered a material fact under the rule, so long as they are accepted conventions in negotiation and their use is considered mere puffing.

**B. Communication w/Person Represented by Counsel – Rule 4.2** – in the representation of a client, a lawyer shall not about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or authorized by law. This includes matters relating to any negotiation or adjudicative proceeding. “Jo, you ever talk to one of my clients again, I’ll have you disbarred. Friends?”

1. **Communications not prohibited** - a comment to the rule notes that several forms of communication are not prohibited:
   
   a) rule does not prevent lawyer from talking to a represented person about some unrelated matter
   
   b) Does not prevent the client from talking to a represented person directly.
   
   c) Does not prevent from talking to unrepresented 3rd party witness
   
   d) Lawyer may have a statutory right to talk to government official even where government is opponent.

2. **Organization = Agents & Managers** – the comment notes for purposes of representing organizations, the rule will be applied to any managerial authority or any person capable of conduct to be imputed to the organization or of making a statement that could serve as an admission against the organization. However, if that person is represented by separate counsel, only their consent is necessary.

3. **Must Have Actual Knowledge** – in order for a lawyer to be subject to this rule, he must be actually aware that is represented on the matter, however the comment notes that such awareness may be inferred from the circumstances.

**C. Dealing with Unrepresented Person – Rule 4.3** - in such a situation the lawyer shall not state or imply that he is disinterested. When a lawyer knows or reasonably should know that the party misunderstands the lawyer’s role – the lawyer shall make reasonable efforts to correct the misunderstanding. The only advice a lawyer may render is that the person obtain counsel.

**D. Respect for Rights of 3rd Persons – Rule 4.4** – In representing a client, a lawyer shall not use means that have no substantial purpose other than embarrass,
delay or burden a third person or use methods that violate their rights to obtain evidence.

V. Law Firms and Associations- special problems may be presented where lawyer work together – like honor among thieves - special rules apply where lawyers are amongst each other.

A. Responsibility of a Partner or Supervisory Lawyer – Rule 5.1 – lawyers in supervisory roles, whether in a traditional partnership, professional corporation, government situations, senior or intermediate have a number of obligations related to the supervision of the lawyers under them- Liability under the rules is explicitly limited to the below provisions by the comment to the rule, but doesn’t mean other civil or criminal liability may be incurred outside the liability.

1. Partners – Respect Code of Conduct (Sub A)– partners shall make reasonable efforts to ensure that the firm has in effect measures to assure the compliance with the code by lawyers in the firm.

2. Supervisory Attorney – Respect Code – (sub B) – a supervisory attorney (partner or senior associate) having direct authority shall make reasonable efforts to assure supervised attorneys conform to code.

3. Responsible for Subordinate Violation – (Sub C)- a supervising attorney will be responsible for the violations of a junior attorney where:

a) Lawyer Orders or Ratifies Conduct – where lawyer orders or with knowledge of the specific conduct, ratifies it. –OR-

b) Partner/Supervisor has Knowledge & Allows – the lawyer is aware of the conduct of the junior lawyer at a time when its consequences can be avoided and fails to take action to avoid or mitigate the consequences.

4. Still Obligated to Report – nothing in the rule absolves the attorney of the general rule to report ethical violations of other attorneys, therefore, a supervisor may be subject to a violation for failure to report the violation after he becomes aware of it. (Rule 8.3)

5. Firm SizeDictates “Reasonable Efforts” – the comment suggests that while informal procedures may be established to prevent violations in a small firm, in larger workplaces a formal system should be established to assure compliance.

6. Direct Supervisory Authority = Question of Fact – whether a lawyer was supervising another’s work is a question of fact. Note that a violation of Sub. B may occur regardless of if a violation of Sub. C occurs.

B. Responsibilities of a Subordinate Lawyer – Rule 5.2- A subordinate lawyer is always subject to the Code, even if acting at the direction of some other attorney. However, a subordinate lawyer does not violate the code if acting in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty. (i.e. the Nuremberg Defense can work for subordinate lawyers.)

1. No Excuse for Clear Violation- note that the rules exculpatory provision is severely qualified, under no circumstances is the conduct to be excused where it is a clear violation.
C. **Responsibilities Regarding Non-Lawyer Assistants – Rule 5.3**
where a non-lawyer is employed or retained or associated with a lawyer, these obligations are similar to those for attorneys:

1. **Partner – Respect Code (sub A)** – similar to an attorney, a partner shall make reasonable efforts to ensure that the firm has in effect measures to give reasonable assurance that the person’s conduct is compatible with the Code.

2. **Supervisory Attorney – Respect Code – (sub B)** – an attorney having direct authority shall make reasonable efforts to assure supervised employees conform to code.

3. **Lawyer Responsible for Acts of Non-Lawyer** – a lawyer will be responsible for the acts of a non-lawyer that would violated the code if that person were a lawyer, where:

   a) *Ordered Conduct or Knowingly Ratification*

   b) *Lawyer is Partner/Supervisor of person – fails to stop or mitigate conduct while its consequences can be avoided.*

4. **“Reasonable Efforts” for Non-Lawyers** - the comment notes that procedures for insuring the compliance of non-lawyers to the code may require more assistance or supervision due to their lack of legal training nor are they subject to professional discipline.

D. **Professional Independence of a Lawyer – Rule 5.4** – the code establishes strict limits on when fees collected for services of practicing law may be disseminated to non-lawyers. Specifically, a lawyer:

1. **Shall Not Share Fees with a Non-Lawyer (sub A)**- this broad prohibition is subject to several exceptions:

   a) *Fees to be Paid to a Lawyer’s Estate/Heirs* - this includes fees on clients existing when the lawyer died, or death benefits conferred on the estate.

   b) *Non-Lawyer Employees’ Retirement or Benefit Plan*

2. **Shall Not Form Partnership with a Non-Lawyer to Practice Law (sub B)** – even if the practice is ancillary to other parts of the partnership, such a relationship is not proper if the lawyer is selling legal services. Note that this is different that performing legal work within the partnership.

3. **Shall Not Practice in a Firm w/Non-Lawyer Owner (Sub D)** - a lawyer shall not practice for a firm for profit, if any of the following:

   a) *Non-Lawyer Has Ownership Interest* - unless the interest is acquired through a devise – then the fiduciary of the estate may briefly own a share.

   b) *Non-Lawyer is Director or Officer of Firm - OR*

   c) *Non-Lawyer has the right to control the Professional Judgment of Lawyer.*
4. **Client/Payer Cannot Control Opinion (sub C)** – where a third party pays a lawyer for his services, that party *shall not be permitted by the lawyer* to direct or regulate the lawyer’s professional judgment in rendering such legal services.

E. **Unauthorized Practice of Law – Rule 5.5** – A lawyer *shall not* practice law in a jurisdiction where doing so is in violation of the regulation of the legal profession or *assist* a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

1. **Does Not Preclude Paralegal** – the comment specifically provides that paraprofessionals so long as the lawyer supervises the delegated work and retains responsibility for it.

2. **Does Not Preclude All Advice**- Additionally the advise of a lawyer to someone wishing to proceed *pro se* will also not constitute aiding the unauthorized practice of law. Also a lawyer may advise persons who *require knowledge of the law*, but are not going to practice.

3. **What is “Practicing Law”?** – what constitutes “practicing” may vary by jurisdiction, however, generally things that involve legal knowledge or skill, or concern binding legal rights, or activities traditionally performed by lawyers:

   a) **Activities that Constitute Law Practice**

   1) **Drafting Wills, Contracts** – significant legal documents

   2) **Settlement Negotiations**

   3) **Depositions**

   4) **Appearing in Proceeding**

   b) **Activities that DON’T Constitute Law Practice**

   1) **Scrivener Activities – Filling in Forms**

   2) **Interviewing Clients/Witnesses**

   3) **Writing Memos**
F. **Restrictions on Right to Practice – Rule 5.6** - a lawyer shall **not** offer or make a partnership or employment agreement that restricts the **right of a lawyer to practice** after termination of the relationship. **Nor** shall a lawyer be restricted in rights to practice as part of the settlement of a controversy between private parties.

1. **Exception – Retirement Benefits** – however, a lawyer’s retirement benefits may be made contingent on not practicing, etc.

2. **Exception – Sale of Practice** – a lawyer may be restricted in the sale of practice – see rule 1.17.

G. **Restrictions Regarding Law-related Services – Rule 5.7** – a lawyer’s professional code obligation extends to **law related services**.

1. **What are “Law-Related Services”?** (sub B) – denotes services that might reasonably be performed in conjunction with and in substance are related to provision of legal services, but may be performed by non-lawyers. And services are provided as follows (sub A):

   a) **Non- Distinct Services** - By the Lawyer in circumstances that are not distinct from legal services to clients – **OR** –

   b) **Unclear Nature** - By the Lawyer as part of a separate entity where it is unclear to a person obtaining the services that services provided by the lawyer are not legal services. Even when provided by a separate entity that the lawyer practice:

   1) **Client May Assume Privilege Attaches** – the comment notes that a person when consulting a lawyer regardless of nature, that privilege and other ethical obligations (zealous advocate, conflict, etc.) would apply, and that assumption should be protected.

   2) **Subject to Rule 1.8**- note that where services are provided by a separate entity that the agreement is subject to Rule 1.8’s limits on business transactions with clients.

   3) **Can be avoided through explanation** – the comment (6) to the rule notes that application of 5.7(a) if the lawyer adequately explains that the services are not being provided in the attorney’s capacity as a lawyer. The burden to demonstrate this communication is on the attorney, such explanation must be based on a client’s ability to comprehend the explanation. (comment (7-8))
2. **Some Rules Apply at All Times** – comment 3 notes that the some obligations of a lawyer apply at all times, regardless of any perception of legal services being provided. Additionally, when the relationship is not governed by the rule of professional conduct, it will be governed by other rules such as common law agency, etc.

3. **Included Activities** – the comments list the following as law related activities, it is not an exclusive list:
   
a) Providing Title Insurance
   
b) Financial Planning & Accounting
   
c) Trust Services
   
d) Legislative Lobbying
   
e) Psychological Consulting

VI. **Public Service** – this rule covers a lawyer’s general obligation to attempt to aid the public through pro bono work, this is based on the monopoly that lawyers have over access to the court system- some rules are aspirational, rather than required.

   A. **Voluntary Pro Bono Publico Service – Rule 6.1**- a lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. These services should be rendered substantially for free to the following:

   1. Persons of Limited Means
   
   2. Charitable Religious, Civic, Community Organizations in Matters designed to aid persons of limited means.
   
   3. **Discounted/Free Services to Others**- services that are offered a severe discount may also count as part of pro bono hours, but should not comprise the substantial majority of pro bono hours. These services include:

   a) Non-Profit Agencies – where paying full price for legal services to further their purposes would significantly deplete the services of the organization.
   
b) Substantially Reduced Fees to persons of limited means
   
c) Participation in activities for Improving the Law
   
   4. Judges Exempted- where lawyers professional duties preclude such practices (such as Judges) the law is not expected to fulfill the required hours.

   B. **Accepting Appointments – Rule 6.2**- a lawyer has a pro bono obligation to defend the defenseless and do free service, this is codified in this rule. An appointed lawyer has the same obligations as any other. The rule provides a lawyer **shall not** seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

   1. Representation would Result in Violation of Code
a) **Incompetence** - the comment points out that incompetence may be a valid reason for declining a matter

2. Representation would Place Unreasonable financial burden on attorney

3. Client or Cause is So Repugnant – likely to Impair Attorney/Client Relationship

C. **Membership in Legal Services Organization – Rule 6.3** - a relaxed standard exists for conflict of interests rules for Legal Organizations in order to prevent lawyers from not associating with the organizations to avoid conflicts. The policy of the organization should be in written form to reassure clients. The rule provides a lawyer may serve as a director officer or member of a legal services organization even if the organization may have interest adverse to a client of the lawyer, however the lawyer **shall not knowingly**:

1. Participate in a decision or action incompatible to an Obligation to a Client – specifically conflict rule – Rule 1.7

2. Participate in a decision or action that could have materially adverse effect on the representation the organization’s client whose interests are adverse to the lawyer’s client.

D. **Law Reform Activities Affecting Client Interests – Rule 6.4** - a lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration even though the reform may affect the interests of a client or the lawyer. Again, like 6.3 the purpose of the rule is to prevent lawyers from not taking roles in organization out of fear of conflicts.

1. **Favorable to Client – Must Disclose** – the rule requires that where a lawyer knows a decision in which he participates *may* be materially beneficial to a client, the lawyer **shall** disclose the *existence but not the name* of the client.

2. **Participation Limited by Conflict of Interests** – the comment points out that a lawyer’s role in the organization is still limited by the general rule prohibiting conflicts of interest – Rule 1.7

VII. **Information About Legal Services** - traditionally advertising by lawyer has been strongly disfavored and is strictly regulated – there is still a strong prohibition against solicitation or “ambulance chasing.”

A. **Communications Concerning a Lawyer’s Services – Rule 7.1** - a lawyer **shall not** make a false or misleading communication about the lawyer or his services. A communication is false or misleading where:

1. Contains material misrepresentation of fact or law

2. Fails to Contain a fact necessary to make the not Materially Misleading

3. Is Likely to create an unjustified expectation - specifically – about results in a suit, or state or implies that the lawyer can achieve result through conduct that violates the law or professional conduct. The comment state such statements may include:

   a) **Amount of Damages collected in past**
b) Result obtained by other clients

c) Lawyer record of favorable verdicts

d) Some Client Endorsements

4. Compares lawyer's services to another – unless such a comparison is factually based.

B. Advertising – Rule 7.2- subject to Rule 7.1 and 7.3 a lawyer may advertise through public media (including Yellow Pages, legal directory, Television, Billboard Periodical, radio, etc.).

1. Copy Retained for 2 Years – a copy of the ad must be kept for two years as well as a record of when and where it was used. However, the advertisement is not subject to review before dissemination.

2. Shall not give anything of value to a person for recommending services, except:

   a) Reasonable Costs of Advertising or Communications allowed by rule

   b) Charges usually payable to a non-profit referral service.

   c) Pay for a practice as provided in Rule 1.17

3. Acceptable Information – a comment to the rule notes that the following information is acceptable:

   a) Firm Name, Address, Phone

   b) Kinds of Services Provided

   c) Basis for Fee Arrangements- including prices for specific services

   d) Payment forms Accepted

   e) Languages Spoken

   f) Names of Reference or Clients- with consent

   g) Legal Notice – Class Actions, etc.

C. Direct contact with Prospective Clients – Rule 7.3 – a lawyer shall not by in person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has not family or prior professional relationship when a significant motive for the lawyer’s doing so it the lawyer's pecuniary gain.

1. All Solicitation prohibited where:

   a) Prospective Client made known to lawyer a desire not to be solicited
b) It involves Coercion, Duress, or Harassment

2. All Solicitation Material must be marked “Advertising Material” – on the outside envelope and at the beginning and end of any recorded communication. This does not include notices of personal or location changes or other general announcements.

3. Prepaid or Group Legal Service Plan – such a plan may be participated in by a lawyer so long as it is not owned or directed by him. This agency may use live telephone or in-person to solicit membership from persons not known to be in need of legal services.

D. Communication of Fields of Practice – Rule 7.4 – a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. As lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field except as follows:

1. Patent Attorney – where admitted to appear before the PTO.

2. Admiralty Law – may designate

3. Certifying Organizations- if allowed by the jurisdiction, a lawyer may advertise/communicate that he has been certified by a named organization. However it must be disclaimed with the sentence that such an organization is not an organization of the bar association or state where not sanctioned.

4. Use of the Term “Specialist” - a lawyer is generally allowed to use the terms specialist, specialty or specializes in, so long as it is not considered to violate the false and misleading standard in Rule 7.1.

E. Firm Names and Letterheads – Rule 7.5 – a lawyer shall not use a firm name, letter head or other professional designation that violates Rule 7.1. (i.e. false & misleading) – the name must not imply connection with the government or other volunteer service agency. Trade names are permitted.

1. Jurisdictional Limits (sub B) – a firm w/multiple offices in different jurisdictions may identify all lawyers in the firm, but shall indicate jurisdictional limits on practice.

2. Public Office Restriction- (sub C) where a lawyer is in public office, his/her name shall not be used in the name of a law firm or in communications on its behalf, while the lawyer is not practicing w/the firm for a substantial period.

3. True Partnerships- a lawyer must only state or imply that they practice in a partnership or other organization only when that is the fact.

4. Deceased Names OK - a firm may continue to be known by deceased members. However the deceased lawyer must have been part of the firm.

VIII. Maintaining the Integrity of the Profession- these rules deal with the governance of the Bar – through discipline and admission.

A. Bar Admission and Disciplinary Matters – Rule 8.1- an applicant for admission to the bar, or lawyer in connection with an application or with a disciplinary matter shall not.
1. Knowingly make a false statement of material fact.

2. Fail to disclose fact necessary to avoid misapprehension of a material fact.

3. Fail to respond to a request for information from admission or disciplinary body – subject to Rule 1.6 on client confidences and the Fifth Amendment, however such assertions of privilege must be done openly.

B. Judicial and Legal Officials – Rule 8.2 – a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

1. Candidate for Judicial Office (sub B)- a candidate for judicial office must comply with the applicable provision of the Code of Judicial Conduct.

C. Reporting Professional Misconduct – Rule 8.3- a lawyer having knowledge that another lawyer has committed a violation of the Code that raises a substantial question as to that lawyer’s honesty, as a lawyer in other respects, shall inform the appropriate professional authority. RAT OUT YOUR FRIENDS!!!

1. Important to Self-Regulation – this is an obligation based on lawyer self regulation, the comment notes that it is particularly important where the victim of the conduct may not become aware of it.

2. Definition of “Substantial” – is defined by the comment as referring to the seriousness of the offense and not the evidence of which the lawyer is aware.

3. Subject to Client Privilege – by the comment, lawyers are not required to report the violations of their clients who are lawyers, and therefore protected by Rule 1.6.

D. Misconduct – Rule 8.4- it is professional misconduct for a lawyer to:

1. Violate or Attempt to Violate the Code, or knowingly assist or induce another to do so or through the acts of another.

2. Commit are criminal act of dishonesty or general fitness to practice - these are considered to be crimes of moral turpitude. A pattern of small violations may be sufficient to demonstrate unfitness and make the lawyer subject to discipline. This also includes abuse of a public office or fiduciary duty.

3. Engage in fraudulent or dishonest conduct

4. Engage in conduct prejudicial to the administration of justice. – this includes statements regarding race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status prejudice the administration of justice.

5. State or imply ability to improperly influence governmental agencies or officials.

6. Knowingly assist a judge or judicial officer in conduct that is a violation of Rules of Judicial conduct.
E. Disciplinary Authority – Choice of Law – Rule 8.5- a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of the jurisdiction, regardless of where the conduct occurs. A lawyer may be subject to discipline in more than one jurisdiction.