**Autonomy**

**Agency**

Client will be bound by lawyer's actions (though can sue att'y if improper)

**Rule 1.2(a)**: Lawyer must follow client's decisions about objectives of rep. & consult w/ client about means, if to accept settlement/plea, and if to testify.

**Rule 1.4**: Keep client reasonably informed & explain matter if necessary for client to make informed decisions.

Olfe v.Gordon: Atty may be liable for all losses caused by failure to follow instructions of client. (violated explict prohibition).

Jones v. Barnes: Lower ct. said lawyer had to present all nonfrivilous bases for appeal requested by client. Sup. Ct. rejects, have to let atty use professional skill, more advantageous to limit ground of error

Taylor v. Illinois: Lawyer willfuly withheld name of witness, so punishment was not allowed to put witness on stand. Can client be disadvantaged because of lawyer's misconduct? Yes. Lawyer has full authority to run trial, can't have clients suing because lawyer made bad strategy decision. *Dissent:*Unfair unless D was personally involved in misconduct, only lawyer should be sanctioned. Otherwise pits lawyer's interest (no discipline) against client's (allow witness).

(Cine 42nd St.: Can dismiss claim for atty's gross professional negligence.)

**Interference:**

**Rule 4.2 / DR 7-104(a)**: Lawyers can only have contact (regarding matter) with opposing party in the presence of their lawyer (unless other lawyer consent).

\*Kicks in at beginning of judicial proceedings or when client taken into custody (Dobbs indicates). Some cases go against pre-arraignment interviews outside presense of atty., if think done for that purpose (Foley).

U.S v. Hammond: Gov't was aware D had lawyer & used informant to get info. Informant here=alter-ego of gov't, but case-by-case decision.

Dennis: Defense counsel can't talk to represented witness w/o counsel (?but prosecutor can suponea represented witnesses?)

\*\*Clients can speak directly to each other.\*\*

\*\*Knowledge that someone has representation can be inferred.\*\*

Corporations: Opposing counsel can talk to low-level employees (those whose actions in relevant matter don't bind corp) without corp. lawyer present (Niesig--but different in different states).

**Q:**--How do you know who fits this standard before talking to them? What about former employees? Can employees with own lawyer ignore corp. lawyer?

**Termination**

**Rule 1.16(b):** May withdraw if not material adverse effect on client's interest OR **(1-2)** criminal stuff, **(3)** imprudent or repugnant objective, **(5)** unreasonably difficult or financial burdensome, **(6)** other good cause.

**DR 2-110(C)(1)(a)**: Client insists on claims that is not warranted under existing law, **(d)** unreasonably difficult to carry out employment.

Timing Issues: enough time for new lawyer to learn record, not unduly lengthen time client in jail. See **Rule 1.16(d)**: reasonable steps to protect client's interest.

**confidentiality**

**Privileged Information**

• Priveleged Info=rules of evidence, can't be court-ordered to reveal

• Ethically protected info=code or rules protect (called "secrets")

**Rule 1.6(a)**: Can't reveal info relating to representation of client, unless consents or implied authorization to represent. See exceptions below.

(See also **DR 4-101**: very similar)

\*\*Privelege may be lost if shared in front of 3rd party.\*\*

In re Pool: Defense att'y, worried about client's ability to pay, told DA where safety deposit w/$$, gun, ID was in exchange for getting $$ out. Then lied to client. Violated confidentiality. Disbarred.

Whose Information in Confidential? In corp., privilege extends to agents and employees (Upjohn (U.S.) decides this issue on case-by-case basis.) Other courts had held it was only "controlling group".

**Q:--**Increase corporate secrecy / invulnerability? Use lawyers to do dirty work?

\*\*Privilege only kicks in if person is **acting as a lawyer**, and there is a lawyer-client relationship.\*\*

**Exceptions**

If reasonably believe revealing info is necessary to:

**• Prevent Crime**: Client going to commit criminal act likely to result in imminent death or substantial bodily harm. (**Rule 1.6(b)(1)**). (Code allows if client intends to commit any crime. **DR 4-101(C)(3)**).

**• Self Defense**: Needed in any contraversy between lawyer & client (collecting fees) or in defense of suit by others relating to representation (**Rule 1.6(b)(2)**). (Don't have to wait until formal charges brought if seem immenent: Friend)

**Q**:--Worry that opposing parties will always sue lawyers as aiders so that confidential info will emerge in lawyer's defense.

**• Waiver**: Waiver implied if client puts forward issue in litigation (U.S. v. Miller), though not simply if denies criminal intent. If reveal to 3rd party, probably waived. "Fairness doctrine": if reveal part in ct., have to reveal whole.

\*\*No privilege if lawyer involved with furthering crime or fraud\*\*

\*\*Fee & Identity information not privileged.\*\*

**conflict of interest**

**Conflict with Attorney's Interest**

**Rule 1.8(a)**: Lawyer shouldn't enter business relationship with client unless terms are reasonable, full disclosure, given opportunity to consult other lawyer, AND client consents in writing.

**DR 5-104(A)**: No business transactions if different interests & client expects lawyer to protect client unless client consents after full disclosure.

Goldman v. Kane: Lawyer gave loan to client, then foreclosed to collect. Said he advised against own loan! Ct: Because of fiduciary relationship, lawyer has duty to inform and to have client seek independent counsel. (Stronger than Rule 1.8)

Media Rights: **DR 5-104(B)** prohibits. Worry that conflict between exciting story and client's interest (trial v. plea). Hard for people w/ nothing else to sell?

Financial Assistance: Not allowed to loan expenses. But contradicts contingency fee arrangement, yes? Idea is not to disadvantage lawyers who can't offer that.

**Concurrent Conflicts Among Clients**

**Rule 1.7(a)**: Can't represent client if will be directly adverse to another client unless won't affect relationship with other client AND each client consents.

(Similar to **DR 5-105(C)**)

Cinema 5: When relationship is on-going, adverse representation is prima facie improper. **Burden on att'y** to show no actual or apparent conflict of loyalty.

IBM v. Levin: Even if **no actual harm**, can't have conflict under rule because of image of lawyers.

Fianda v. Cunningham (legal services: prisons v. students) Rejected settlement offer to prisoners that was against students' interests. Lower ct. didn't disqualify because loss of time/expertise--improper. But unclear that offer would have been accepted anyway, so harmless error. (Opposite side protesting, not clients).

\*\*Nonclients can object to conflict if prejudices their own rights.\*\*

Partial Group? Union lawyer could defend union against suit by female members of union because no loyalty to those women (!!Nyquist)

**Q:**--How to define "adverse": different interpretations of law? in same court?

**Q:**--Problem: what if no other lawyers available (legal services)??

**Q:**--If both are continuing clients, how to choose which to represent?

**Successive Conflicts**

**Rule 1.9**: If have former client, can't represent another client in same or substantially related matter materially adverse to former client unless former client consents after consultation.

Analytica: Lawyer can't represent adversary of former client if subject matter of cases is "substantially related" because fear that lawyer could have obtained confidential info which would have been relevant in 2nd matter. Irrelevant whether such info was actually obtained. (Hired to do co.'s stock rearrangment, can't later represent partner against the co.)

Hot Potato: Can't terminate one client to get around concurrent conflict rules because client has interest in continuing representation. (Jelco). Can only withdraw under Rule 1.16 or DR 2-110.

**Q**:--Savy client could neutralize opponents by retaining lots of different law firms. In small region, could make it difficult to get representation.

**Affiliated Lawyers**

**Rule 1.10(a)**: If lawyer is barred by conflict, no other lawyer in that firm can accept unless disqualified lawyer is screened from participation & gets no fee AND written notice given to gov't agency.

**DR 5-105(D)**: If lawyer disqualified, no lawyer from firm can accept.

Changing Firms:

See **Rule 1.9(b)** (for lawyer) and **Rule 1.10(b)** (for firm).

Schiessle v. Stephens: If lawyer changes firms and sides of dispute, rebuttable presumption that lawyer received confidences from 1st client and shared them with new firm unless institutional mechanisms preventing ("Chinese walls").

\*\*Could make second part (sharing) irrebutable, since unbelievable.\*\*

**Q:**-- But won't confidential info be disclosed in trying to rebut presumption??

(Gov't lawyers, see Rule 1.11)

**Ethics in Advocacy**

Question: How to reconcile zealous advocacy with truth-seeking process?

• Frankel: Should emphasize truth-seeking, or else power, skill, endurance, and resources end up winning in the adversary system. Wants rules: share info, report false or omitted evidence, and question witnesses only to get truth.

• Schwartz: More information leads to more justice. Talking about civil system.

• Rifkind: Point is not "truth" in lay terms, but to resolve contraversies within a certain universe of rules. Rules recognize policies besides "truth-seeking."

• Ball: Truth is always relative, depends on identity of "knower." Litigation is one construction of that truth.

• Post: Contradiction in lawyer's "performance": must act in client's interest only, but must conceal that that's what is motivating him from jury, etc.. (Rule 3.4(e))

**Disclosure Duty**

Q: What to do if know client is doing something fraudulent?

**DR 7-102(B)**: If while you represent her, client has perpetrated fraud on person or court, ask her to rectify. If refuses, reveal to court or person **unless** priviledged informaiton.

**Rule 3.3**: (a)(2) Must disclose material facts to court to avoid assisting crime or fraud by client (*even if protected by 1.6 confidentiality?*).

**Rule 4.1**: must disclose material fact to 3rd person if necessary to avoid assisting crime or fraud **unless** priviledged information under Rule 1.6.

**Rule 1.2**: can't counsel or assist in illegal action, but can discuss consequences

**Q:**--Time limits on duty? End of proceedings, whole case, or representation?

**Q:**--If asked question by judge about client confidences? Ask judge to excuse you from answering question (p. 315, n.5).

**Client Perjury**

• **No Testimony**: Conflict with client right to direct own representation? See Rule 1.2(a): lawyer must abide by client's decision about whether to testify (exception under (d): assisting fraudulent acts?).

•"**Narrative Solution**" (ask no direct questions, client talks) But alerts other side to what's up.

• **Withdrawl**: threaten to withdraw if client perjures self

Nix v. Whiteside (U.S. 1986): No violation of 6th Amend. because within range of professional behavior and didn't probably prejudice client (since did not have right to perjure self)

Rule 1.16: Can withdraw IF won't adversely impact client, client uses lawyers's services in a way lawyer reasonably believes is criminal/fraud, client insists on "repugnant or imprudent" objective, or other good cause. Must withdraw if representation will violate conduct rules or other law.

**Q:**--Certainty: How does lawyer know client is lying? Asking lawyers to make credibility call, but not supposed to be fact-finder.

**Q:**--Incentive not to tell lawyer everything (& for lawyer not to want to know...)

**Misleading Presentation**

Q: When does a misleading presentation become fraud/unethical?

**DR 7-102(A)**: Can't participate in creation or preservation of evidence that is obviously false or knowingly use perjured testimony or false evidence.

**Rule 3.3(a)(4)**: Can't offer evidence known to be false. If finds out later, mst take "reasonable remedial measures." (which is??)

Bronston v. US (1973): Literal truth isn't perjury, even if evasion. Responsibility of opposing counsel to cross-examine. (Swiss bank acct.)

**Q:**--Can lawyer "coach" witness to do this?

\*\*Fraud is almost always interpreted to be affirmative misrepresentation, not just failure to disclose.

**Frivilous Suits**

**F.R.C.P. Rule 11 Sanctions**: Mandatory, but not necessarily $$

(Similarly Rule 38 (friv. appeal), Rules 16, 26, 37 (discovery abuses)

**Q:**--Disproportionate impact on civil rights (new law) claims? Who decides what is frivilous?

Cooter & Gell v. Hartmax (1990): 1) Rule 11 violated when papers filed, even if later withdrawn; 2) appellate review of sanctioning is "abuse of discretion";

3) costs awarded don't include appeal (otherwise never ending).

Pavelic: Only person who signs will be sanctioned

Business Guides: Permits client to be sanctioned as well. Requires a "reasonable inquiry into the facts" prior to any cout filing.

Dilatory Tactics

**Rule 3.2**: make "reasonable efforts to expedite litigation consistant w/ intersts of client"

**Q:**--What if delay is in client's best interest?

**Destruction of Evidence**

**Rule 3.4(a)**: Can't unlawfully obstruct access to evidence or alter, destroy, or conceal that with potential evidentiary value, or advise someone else to do it.

People v. Meredith: D tells lawyer location of evidence, lawyer gets it & gives it to police w/o saying where it was. Client's statement is priviledged, but if then remove or alter evidence, have to say where it was, or else blocking police work.

ABA Criminal Justice Standard 4-4.6: Evidence implicating client only need be turned over to police if required by law, under court order, or if contraband w/ risk of physical harm (guns, drugs) and can't destroy or keep safely.

(Evidence in lawyer's possession is as privileged as it would be if client had it.)

**DR 7-109**: (A) Can't suppress evidence required to produce, (B) can't advise someone to secrete themself so they won't be called as witness, (C) you can only pay witness costs, loss of time, & expert fee.

**Disclosure of Adverse Evidence**

Controlling Precedent: No selective omission of binding adverse authority

(see Rule 3.3(a)(3) and DR 7-106(B)(1)).

Jorgenson v. Volusia (1988): Must cite controlling precedent even if arguing that its inapplicable.

**Corporate Lawyers**

**Duty of Care**

O'Melveny: Duty to corp. involved reasonable investigation of the officier's assertions used to intice investors. (FDIC can step into corp.'s shoes to sue, but not estopped by corp.'s "unclean hands.")

**Q:**--Hard to distinguish legal from business decisions...which invoke malpractice?

**"Wrongful Acts" by Co.**

**Rule 1.13 (b)**: If employee violating obligation to co. or violating law in a way likely to be attributed to co. (resulting in substantial injury), then lawyer must do what is "reasonably necessary in best interest of org." Weigh factors & risks.

(c) If that doesn't work, lawyer may resign (can't reveal confidences).

**Q:**--Very vague!!

*Comment 7*: Applies to gov't lawyer, but more important to stop wrongful acts since public business involved.

Balla v. Gambro: (Tells FDA about defective medical products). No whisteblowing protection for lawyers, no claim for retaliatory discharge. Because atty-client relationship is trust-based so don't want to force and might chill communication between them. Also, state ethical rules required reporting so don't need incentive (unfair to make co. bear cost of these rules).

**Q:**--What do you do about past violations?

**Conflicts of Interest**

**Rule 1.13 (d-e)**: When dealing w/ employees (& other constituents), lawyer shall explain corp. is client IF it appears the person's & co's interests are adverse.

(e) Can represent constituents also if isn't Conflict of Interest (Rule 1.7).

Evans v. Artek: Lawyer hired by co. prez. is not corp. lawyer if only answer prez's questions & look after interest of minority stockholder.

**Regulation of Lawyers**

**Bar Requirements: Residency:**

New Hamp. v. Piper: Residency requirement for bar admission violates "Privileges & Immunities" clause & doesn't survive strict scrutiny. (Same for only allowing reciprocal admission to permanent residents. Friedman)

**Q:**--But residents more available to court, more invested in state--public service, know local issues/rules, take more care because concerned with reputation?

"New Jersey Problem": in-state lawyers compete w/ NYC & Philly lawyers

Leis v. Flynt: No constitutional right to represent "pro hac vice" (out-of-state lawyer allowed to practice for this one case only). *Dissent*: 14th Amend. protects

**Bar Requirements: Morality**

Cord v. Gibb: Can't refuse to give certificate of "moral standing" to applicant because she's living w/ someone. No rational connection to lawyering.

Law Students v. Wadmond: OK to ask questions about moral character, advocacy of overthrow of gov't, & loyalty to Constitution as prerequisite to bar admission.

*Dissent* Might violate 1st Amend & requires due process to deprive of profession

**Q:**--Why screening prior to admission? Should just kick out if do wrong later...

(But don't always know & clients are already hurt)

**Discipline**

• Disbarment (with or without time limit on reapplying)

• Suspension

• Public Reprimand

• Private Censure / Warning

• Ethics Classes (new)

**Honor Code / Squeal Rule**

**Rule 8.3(a):** If lawyer knows about another lawyer's lack of honesty, trustworthiness, or fitness (violating rules), must report.

**DR 1-103(A)**: If have unprivileged knowledge of violation/misconduct, report.

Not enforced (Himmel is exception: lawyer helped client exploit other lawyer's violation to get money)

**Unauthorized Practice of Law**

Prohibited by **Rule 5.5 & DR 3-101** but neither defines. (up to states).

Proposals to license paralegals or allow other professionals to do easy tasks.

**Pro:** Lower costs & increase availability. Gives clients choices.

**Con**: Do lots of things for people's own good--consumer protection. Unfair to have some doing same job with less training / restrictions. Loss of profession.

Tandon: "Adjusters" were practicing law w/o being qualified because job involved knowledge of rights and liability & representing in negotiation.

El Gemayel v. Seaman: Can't invalidate K of out-of-state lawyer for a few in-state phone calls regarding legal matter and one visit after issue concluded.

**Financing Legal Services**

**Rule 1.5**: fee regulations, "shall be reasonable" plus factors considered.

• Standard for fee review is "unconscionable" (Brobeck: Telex too sophisticated for fee to be unconscionable, Busham: fee for welfare recipient=unconscionable)

**Q:** Will poor people be given less autonomy to get representation they want??

• Doesn't require client to complain: integrity of system (Jones v. Amalgamated)

(Worry lawyer will sell client short for recovery of big fees from other side)

No syndication of law suits: can't invest if not interested party (Refac) p.162

**marketing legal services**

**Written Advertisement**

Bates (1977): Allow advertising by lawyers because commercial speech entitled to 1st Amed protection. State can prohibit false or misleading ads, and may be able to require warnings and prohibit certain statements.

Zauderer: Ad that encourages litigation is OK. Need substantial gov't interest to restrict commercial speech. Not like in-person because less chance of pressure. Can require ads to say that contingency clients still have to pay court fees if lose.

**DR 2-101**: (A) No fraudulent, misleading, self-laudatory, or unfair advertising.

(B) May advertise in "dignified manner" certain info (1-25)

(C) If want to expand, must submit to state agency

(E) Can only charge fee advertised (bound for 30 days or next issue)

(See also **Rule 7.2** & **7.3(c)**)

**In-Person Solicitation**

Ohralik v. Ohio: In-person solicitation of unsophicated, injured & distressed person. In-person soliciation is different from advertisement and can be prohibited because may involve pressure, demands. Speech less vital part, so less 1st Amend protection, and doesn't add info about range of services (unlike ad).

**Rule 7.3:** Can't solict in-person or by telephone unless prior relationship.

**DR 2-104**: If give in-person unsolicited advice to get lawyer or take legal action, can't accept employment as a result unless friend, relative, or former client, or seeking other members of class action suit.

**DR 2-103**: (A) Can't recommend self for employment if person hasn't sought advice. (B) Can't pay someone else to recommend you. (C) Can't request anyone else to recommend you unless certified referral service, legal aid, or army.

(--Danger is lawyer will try to keep recommender happy above client's interests)

**Exception**: ACLU-type lawyers could approach potential clients because working in public interest (In re Primus)

**Targeted Direct Mailing**

Shapero v. Kentucky: Direct mailing to those known to be in circumstances needing lawyers=OK. Different from in-person because no pressure and written record of interaction. Alternative: require approval by state agency of letters.

*Dissent*: Personalized letter sends message that writer is knowledgeable about your situation=pressure. Ads erode professionalism.

**Rule 7.3**: changed to allow targeted mailing as long as contents OK under 7.1

**Q:--**Should Sup. Ct or states decides what is valid? Where to draw line? Does it impact "dignity of profession"? Increase availability of affordable services?

**Q**:--Class questions. Ad restrictions affect least affluent part of bar most.

**Malpractice**

**Pro:** "Professionalism" rhetoric wasn't working, consumer protection, lawyers created atmosphere of suing so just that it's used against them

**Con**: Making lawyers timid & self-centered, not in best interest of clients, reducing professionalism

**Standard of Care:**

"Ordinary Prudence" : for lawyers in jurisdiction, and, if state specialty, within that specialty.

If uncertain about law, do the safest thing for client (Copeland).

"Error in Judgment" can't be malpractice.

Fiduciary Duty**:** higher duty. If escrow, have duty to both parties.

Ethical Rules: Violations should not be used in malpractice cases (according to code/rules). But courts do all the time (just not per se malpractice).

\*\*Appointed lawyers held to same standard. No immunity for PDs.

**Q:** --Do you have to prove you would have won the case? If client didn't lose any money, courts may reduce or eliminate lawyer's fee as compensation.

**When is a Person a Client?**

Malpractice only kicks in if lawyer is **acting as lawyer** (vs. board member or business person). Problem of defining.

Togstad: Initial interview, & didn't take the case. Negligent because didn't do minimal research, didn't warn about statute of limitations, and because clients thought they were given legal opinion that they didn't have a case.

(\*Partners have joint & severable liability for each other\*)

**Liability to Non-Clients**

"Third-party Beneficiaries": may be treated like clients if purpose of lawyer's action was mainly to benefit them.

\*\*Lawyers not liable to 3rd party for misrepresenting law (vs. facts). p.659

Greycas v. Proud: Lawyer misrepresented client's position to loaner, to loaner's detriment. Nonclient can sue for negligent malpractice/misrepresentation because purpose of lawyer's work was to benefit or influence nonclient.

**Q:**--Other jurisdictions may have balancing test, but problem of predictability

(See MISCONDUCT for specifics)

**MISCONDUCT**

**Criminal / Fraudulent**

Warhaftig: Taking clients money prematurely, even if always replaced, is stealing. Lawyer disbarred.

Austen: Can't aid client in conduct that is fraudulent (DR 7-102(A)(7)) and must withdraw (Rule 1.16(a)(1), DR 2-110(B)(2)). Even if no one was hurt. Lawyer publicly censured.

Colin: Convicted for tax evasion. Already punished, so just give censure.

**Q:**--Why does tax evasion get treated so lightly? Image v. actual hurt...

**Incompetence**

**DR 6-101(a)(1)**: requires competence, adequate preparation & no neglect

**Rule 1.1**: Competence = legal knowledge, skills, thoroughness & preparation

Neglect (not returning calls, etc..) most pervasive problem.

Not usually basis for discipline. Some courts require willfulness to discipline.

More often malpractice claims (market forces v. overloaded gov't regulation).

\*36 states require continuing education.

**Lack of Supervision**

**Rule 5.1**: partners & supervisors have to make reasonable efforts to ensure all lawyers (and nonlawyers, Rule 5.3) in firm comply with rules.

Liable even if didn't know of misconduct if result of negligent supervision (Vaugh) or if should have known (In re Gladstone).

**Sex with Clients:**

Split about whether can be malpractice--

Suppressed v. Suppressed: No compensation for mental anguish as result of being required to have sex for legal services.

McDaniel: Yes, compensation for emotional distress and malpractice for required sex. BUT doesn't address issue of sex with clients per se (not required)

**Discipline**: not explicitly addressed in Rules or Code. ?Implied from:

DR 1-102(A)(6): Prohibits actions that reflect badly on fitness to practice law.

See also EC 1-5 & EC 9-6 (uphold dignity of profession, etc..)

Iowa State Bar v. Hill: Client couldn't pay lawyer in custody suit, so offered sex. Great potential for prejudice against client in marital reconcilliation or obtaining custody. Reflects negatively on whole profession.

Proposed Rules: Usually target matrimonial and criminal proceedings. Exception for relationships that pre-date representation. May require adverse results, incompetence, or coercion.