

# PR Outline Review

## Basic Elements of Law Practice

### Model Rules of Prof Conduct

- written by Ls
- accepted by highest court in each state before becoming enforceable
- job stagnation
  - technology makes getting docs easier
  - jobs going overseas (outsourcing)
- Ls need to learn to adapt to changing technologies

### Why regulate?

- need to protect vulnerable Cs (1.6 confidentiality, and loyalty to Cs)
- need to promote integrity and rep. of legal profession
- administration of justice (profession doing good in world)
- economic interests for L and C
- want to promote rule of law (Ls in best position to regulate and challenge law)

### Professionalism and basic elements of law practice

- professionalism = adhere to uniform values regardless of personal morality
- law as business (resistance to accept this)
- 3 concepts of professionalism (traditional, business/professional dichotomy, characteristics of professionalism)
- sources of laws that govern Ls
  - all ABA does is create model rules
  - PR rules dont have any pull until highest court in state adopts
    - in MI, is ACG -> investigates complaint, can file charges, admonish L, probation, or dismiss
    - if charges, moves to ADB (prosecutorial function)
    - after sanctions, can appeal and goes to highest court
- ABA revises rules a lot (all states diff w/ how much adopt and how vigorously enforce)
- punishments for Ls
  - probation (supervised training)
  - reprimand (public/private)
  - suspended license/disbarment
  - restitution to C
  - fined levied against attorney
  - civil/criminal law
  - administrative regulations that impact ability to practice
- diff rules = MRPC, state ethics code, other laws/COA, cases, advisory ethics opinions
- goals of MRPC
  - prevent access to providing legal servs by non-Ls (protect consumers)
  - promote justice
  - protect image

- protect economic benefit

#### Model Rule 5.5

- L can't practice in jrx in violation of regulation of legal profession in that jrx, or assist other in doing so
- L not permitted to practice in jrx cant
  - establish office/continuous presence for practice of law (no phys presence required)
  - hold out to public/otherwise rep permitted to practice there
- L admitted in other US jrx and not disbarred/susp from jrx can provide legal servs on temp basis that
  - are undertaken in assoc w/ admitted L
  - reasonably related to potential proceeding
- L admitted in other jrx and is not disbarred/susp in any jrx can provide legal servs through office/other systemic and continues presence that
  - are provided to L's employer or org. affiliates
  - are servs that L authorized by law to provide

#### Comment

- def'n of legal practice varies by jrx, but want to protect public
- doesnt prohibit employing paraprofessionals
- can provide instruction to non Ls whose emp. requires knowledge of law
- L can counsel non-Ls who want to proceed pro se
- rationale -> protect public, economic -> do we need Ls to do all these things?
- if non-attorneys can practice, Ls wont be self serving and drive down quality

#### Non-Ls providing assistance

- can sell printed material claiming to explain legal practices/procedures
- type forms from information provided in writing by Cs
- cant advise Cs as to remedies/assist in prepping forms or make inquiries/answer questions about which forms are needed or how to fill out
- all states have own def of UPL, but hinge on advice giving function

#### FL Bar v. Brumbaugh

- can sell and fill out forms but no advice pertaining to forms (i.e. LegalZoom)
- focus on advice function! (we have prof training for specifically tailored info)

#### NY County Ls Assn. v. Dacey

- can publish a book because no personal contact w/ individual
- focus on tailoring advice to situation or person
  
- legal software? programs helping consumers fill out legal forms; asks consumers to answer personal ?s re: circumstances and preferences; helps fill forms out based on answers and suggests provisions tailored to needs
  - not UPL b/c legislature passed law to allow (may be diff. per jrx)

#### Rule 5.3 Ls working w/ non-Ls/providing ancillary non-legal servs

- Ls make reas. efforts to ensure non-L conduct complies w/ prof resp. of Ls

- responsible for conduct that violates rules if: orders or ratifies w/ knowledge, is partner/ managerial auth. in form that employs person or has direct supervisory auth. and knows of conduct at time when could be mitigated

#### Rule 5.1 Responsibilities of Partner/Supervisory Partner

- partner and L who individually/together possess comparable managerial auth. must make reas. efforts to ensure Ls are adhering to MPRC
- L w/ direct supervisory auth. over another L resp. for reas. efforts to ensure conforms to MPRC
- L resp. for another L's conduct if
  - L orders/ratifies conduct
  - L in auth. position, knows of conduct & no steps to remedy

#### Rule 5.2 Responsibility of subordinate L

#### Rule 5.4 Professional Independence of L

- L/firm cannot share legal fees w/ non-L unless
  - agreement by L w/ firm, partner, associate may provide for payment of \$ to L's estate or specified persons for reasonable time after L's death
  - L that purchases practice of deceased, disabled, disappeared L may pay ti estate/rep's of L purchase price
  - L/firm can include non-L emps. in compensation/retirement plan even if based on profit-sharing
  - L can share court-awarded legal fees w/ non-profit who employed him
- L cant form partnership w/ non-L if any activities consist of practice of law
- L cant permit person who recommends, employs, or pays L to render legal services for another to direct L's prof judgment in rendering legal services
- L cant practice w//in form of prof. corp. or assoc. authorized to practice law for non-prof if
  - non-L own interest therein, is corporate director, has right to control prof judgment of L
- comment
  - pub policy problems -> hard for new L to start comp. w/ innovative ideas because cant raise funding. convergence of tech. w/ prof. resp. rules.
  - can get around by creating i.e. tech comp. first then partnering w/ law group

#### 5.7 Responsibilities re: Law Related Services

- L shall be subject to MRPC re: provision of law-related services if law re: services are provided
  - by L in circumstances not distinct from L's provision of legal services to Cs; or
  - by entity controlled by L individually or w/ others if L fails to take reas. measures to assure person obtaining law re: services knows not legal servs and protections of L/C relationship don't exist
- term law re: services denotes services that may reas. be performed in conjunction w// in substance are related to provision of legal servs. and are not prohibited as UPL when provided by non-Ls

- comment
  - when L/C relationship exists w/ person referred by L to separate law re: service entity controlled by L, must comply w/ 1.8(a)
  - broad range of economic and other interest of Cs may be served by Ls engaging in delivery of law-related services. e.g. financial planning, accounting, trust servs, real estate counseling, lobbying, tax prep, etc.

#### In re Wilkinson

- Wilkinson failed to supervise younger attorney before passed bar
- rules 5.1 and 5.3
- 60 day sanction -> not just to punish L, but maintain appropriate standards of prof conduct to safeguard public, integrity, deter other Ls

#### **Creating and Ending L/C Relationship**

- relationship arises when
  - person manifests to L intent that L provide legal services and either
    - L manifests consent
    - fails to manifest lack of consent, and knows/should know person reasonable relies services
- even if say cant provide, actions may indicate otherwise

#### Morris v. Margulis

- looks to C's belief to see if there's a relationship; reasonable C believes relationship to be
- no explicit agreement needed, time w/ attorney, payment of fees, execution of K, consent of attorney, actual employment
- can be w/ more than one L/firm on same matter
- dont want to form if COI, no time, not economically attractive

#### Rule 1.13 Organization as C

- L repping org. reps org. acting through authorized constituents (officers) -> officers not Cs of L; any comms protected via 1.6
- even when officers communicate w/ L

#### Westinghouse v. Kerr-McGee

- court would not create per se rule that rep. of trade assoc. creates L/C relationship w/ each member of assoc., but stated it could occur depending on circumstances
- Ls have duty to constituents in org. received confidential information from, even though not Cs.
- many situations where not express L/C relationship, but is fiduciary obligation or implied professional relation (C not just person walking into law office)

What about moral dilemmas?

#### Rule 6.2 Accepting Appointments

- court can appoint you to have a L/C relationship, and have to continue unless have out (outs through 6.2)
- if repping C likely to result in violation of MRPC or violation of other law
- repping C likely to result in unreasonable financial burden
- C or cause so repugnant to L it will impair L/C relationship to or ability to rep C
- discrimination not an out!

#### Board of Prof Resp. of Sup. Ct. Tennessee (Ethics Opinion)

- moral beliefs must yield to moral beliefs/legal rights of D
- counsel can request to WD, if deny, can appeal, but have to continue w/ rep
- in TN are additional requirements -> know your jrx!

#### Nathanson v. MCAD

- attorney cannot turn down non-female Cs -> cannot assert discriminatory agenda as grounds that unable to advocate zealously b/c required to follow law
- assoc. rights are not hindered b/c association are not selective or exclusive and not intimate type of relation w/ const. protection
- cant discriminate when choosing who to rep!

#### Rule 1.16 Ending L/C Relationship

- restatement s.31 -> mutual consent usually a prereq to creating L/C relationship, end of consent usually ends relationship; consent may end b/c C or L WDs consent, or not able of valid consent; also, L may have completed rep or become incapable of providing services to completion
- L must w/draw if
  - representation will result in violation of rules of professional conduct or other law
  - L's physical or mental condition materially impairs L's ability to represent the C; or
  - L is discharged
- L may w/draw when
  - w/drawal can be accomplished w/o material adverse effect on interests of C
  - C persists in course of action involving L's services that L reasonably believes is criminal or fraudulent
  - C has used L's services to perpetuate crime or fraud
  - C insists on taking action that L considers repugnant or w/ which the laqyer has fund. disagreement
  - C fails subs to fulfill an obligation to L and has been given reasonable warning that the L will w/draw if continues
  - the rep will result in an unreasonable financial burden or has been rendered unreasonably difficult by C or
  - other good cause exists
- L must comply w/ applicable law requiring notice to or permission of a tribunal when terminating a representation
- L shall take reasonable steps to protect his or her C's interest in event of w/drawal
- comments
  - mandatory WD

- must decline/WD from rep if C demands engage in conduct that is illegal or violates MRPC
- when L been appointed to rep C, usually requires approval of appointing authority
- similarly, court approval/notice to court often required by applicable law before lawyer w/draws from pending litigation
- note -> court may request explanation for w/drawal and L may be bound to keep confidential the facts that would constitute such an explanation; L's statement that professional considerations require termination should ordinarily be sufficient
- discharge
  - C has right to discharge L at any time, w//w/o cause, subject to liability for payment
  - if C has severely diminished capacity, the C may lack legal capacity to discharge the L, and in any event the discharge may be seriously adverse to C's interests. L should make special effort to help C consider the consequences and may take reasonably necessary protective action under 1.14

#### Whiting v. Lacara

- appellees want to dictate legal strategies and then sue counsel if strategies not followed; but counsel in impossible situation
- hard to w/draw once take on C!

#### 3.1 Meritorious Claims and Contentions

- L shall not bring or defend proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not material or frivolous, which includes good faith argument for extension, modification, or reversal of existing law
- L for D in crim proceeding, or respondent in proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of case be established
- if court denies WD, cant

#### Duty of Competence

- goals of safeguarding public, deterring wrongful behaviour, and preserving reputation of profession

#### Discipline v. Malpractice Liability v. Const.

- diff. standards for malpractice and discipline; can be charged for both, or one or other
- discipline covered by professional conduct rules
  - highest court in each state
  - deter future negative conduct
  - administrative body, not always court
  - can be appealed to higher court
  - counseling, suspension, lose license

- malpractice dictated by CL
  - damages for C who was wrong
- const. standard is ineffective assistance of counsel
  - L didnt perform as reasonable L would in circumstances
  - result different but for unprofessional error

### Rule 1.1

- L must provide comp. representation to C
- competent rep requires legal knowledge, skill, thoroughness, and prep reasonably necessary for rep.
- comments
  - factors to determine competence 1) complexity of matter 2) L's general experience 3) training/experience in field 4) prep and study L can give to matter 5) ability to work w/ L competent in field
  - L may be able to provide comp. rep. even if new in field if enough study and prep
  - in emergency, can give advice in matter which no special skill normally required if referral impractical
  - before L retains/contracts w/ other Ls outside Ls firm, L should obtain informed consent from C and must reasonably believe L's servs will contribute to competent/ethical rep of C
  - when Ls from >1 firm providing servs to C, should consult each other about reps
  - rule 1.1 does not have exception allow attorney to neglect case
  - only requires knowledge/skill of L to be reasonable

### Duty of Competence - Malpractice liability

- restatement s.48 -> a L is civilly resp. for professional negligence to person whom the L owes a duty of care if L fails to exercise care and that failure is a legal cause of injury
- restatement s. 52 -> standard of care is the competence and diligence normally exercised by Ls in similar circumstances (some state standards, some national standards; L may be held to higher standard if she has special skill or tells C have more expertise or more time to develop expertise on issue)
- sometimes a duty to non-Cs
  - restatement s.51 -> if L or L's C w/ acquiescence gives non-C advice and non-C relies on advice
    - L knows C intends as one of primary objectives of rep. to use Ls services to benefit non-C
    - L's C trustee/guardian for non-C
- legal mal claim can br brought as contract or tort claim depending on facts/jrx
- law firm liability -> w/ exception of NY, law firms generally not vicariously liable for discipline but law firm subject to civil liability for mal from any principal/emp of firm acting in ordinary course of firm's business w/ their authority
- mal liability for prospective Cs

- restatement s.15 -> L must use reas. care to extent that L provides legal serv to prospective Cs
  - when prospective L and C talk about possible rep, L may comment on: whether has promising claim, whether appropriate for claim, whether COIs, what other Ls could rep
- L cant harm prospective C via unreas delay after saying may rep

## Mal for Settlement Claims

### Ziegelheim v. Appollo

- just because settlement fair and equitable does not mean attorney competent and free from future liability
- P's need to allege facts about claim, not just general complaints

### Rule 1.2(a)

- L shall abide by C's decision whether to settle a matter
- in crim case, L shall abide by C's decision, after consultation w/ L as to whether plea is to be entered, to waive jury trial, whether C will test.

### Rule 1.8(g)

- L that reps 2 or > Cs shall not participate in making an aggregate settlement of claims unless each C gives written, informed consent
- L's disc must include existence and nature of each person
- law of mal provides duty to follow lawful instructions
- when attorney disobeys can be liable for losses that result
  - if followed instructions, no liability if another course would've been better, as long as explained other course

## Limiting L's Liability

### Rule 1.8(h)

- L shall not
  - make agreement prospectively limiting liability to C for mal unless independently repped in making determination
  - settle claim for liability unless C advised in writing of desirability of seeking and has opportunity to gain other counsel
- sometimes L may be asked to go through arb instead of lit; not violate 1.8(h) if C forced to bring mal claim through arb

### Rule 1.2(c) Scope of Rep. and Allocation of Auth. b/w L/C

- L can limit scope of rep if limitation reas. under circumstances and C gives informed consent
  - such limitation may exclude actions C thinks too costly or that L regards as repugnant/imprudent

- comment 7 -> limitation must be reas under circumstances; if C's objective limited to securing general info about law for specific problem, agreement can be made that servs will be limited to brief phone convos, but, such limitation wouldn't be reas if time allotted was not sufficient to yield advice C could rely on
  - although limitation doesnt exempt L from providing comp rep, factor to be considered when determining legal knowledge, skill, thoroughness, skill to reas rep.

#### Lerner v. Laufer

- not a breach of standard of care to limit scope of rep to not perform services in course of repping a matrimonial C
- letter unmistakable that he didnt want to/wouldn't performed named services; could not render opinion

#### Duty of Competence - Ineffective Assistance of Counsel (Const. Liability)

- const standard that did not perform at level of reasonable L and result would be diff if not for error -> higher bar w/ bigger consequences

#### Strickland v. Washington

- ineffective assistance of counsel is deficient performance by counsel leading to prejudice, performance being measured against objective standard of reasonableness under prevailing professional norms

#### Rompilla v. Beard

- ineff ass. = deficient performance resulting in prejudice, w/ performance measured against objective standard of reasonableness
- ABA guidelines call for investigations into mitigating evidence which should compromise efforts to discover all reas available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by prosecutor
- here, failed to make reas efforts to review prior conviction's file
- result would have been diff. but for professional errors (would have provided mitigation)

#### Allocating Decision Making b/w L/C

##### Rule 1.2 (a)

- L shall abide by C's decisions concerning objectives and as req'd by 1.4 shall consult w/ C as to means by which pursued
- L may take such action on behalf of C as impliedly authorized to carry out rep.
- shall abide by C's decision to settle
- in crim case, abide by decision as plea, to waive jury trial, and if will test.
- L decides means, C decides objectives
- \*\*\* to analyze allocation of decision making authority, identify 1.2, talk about in context of problems discussed, talk about how values of dignity/autonomy drive decision between values/means

#### Jones v. Barnes

- no procedure established D has const. right for attorney to press non-friv points if counsel decides not to present b/c of professional judgment
- ultimately, L decides means

#### Rule 1.2(c)

- L may limit scope of rep if limitation reasonable under circumstances and C gives informed consent
  - comment 6 -> scope of rep may be limited by agreement/under terms by which rep made available to C; such rep maybe appropriate if C has limited objective and C may exclude certain means to limit that might otherwise be used to further C's end
  - comment 7 -? limitations not allowed if C attempting to limit it to too little time to provide sufficient advice
  - comment 8 -> all limitations must comply w/ MRPC

#### Argument for autonomy

- current practice of means/end dichotomy does not usually work in practice
- often objective and means are same thing

#### Trustees v. Schroeder

- whenever L disobeys lawful instructions of C, liable for loss that ensues from act
- damages not presumed but C bears burden to prove damages resulted
- under mal law, attorneys must follow instructions, but MRPC unclear

#### Boyd v. Brett-Major

- at trial, showed P hired attorney not to win, but just to delay action to pay back debt

#### Rule 8.9 Legal Mal

- C can instruct to perform tasks or to act in specified manner
- instructions must be ethically proper and not offend public policy
- C must est. failure to follow caused dmg.
- no liability if explained options and followed C's instruction

#### When Death Sentence at Issue -> Gilmore v. Utah

- where D knowingly waives fed rights that could be asserted as defense to death pen, execution cant be abandoned

#### Rule 1.2(d) Assisting in Crim Activity

- shall not counsel to engage, or assist, in conduct that knows criminal/fraudulent
- L can discuss legal consequences of proposed course of conduct
- assist to make good faith effort to determine validity, scope, meaning, application of law

#### People v. Chappell

- if L uses license to violate ethical/prof standards of provision, must be disbarred
- also violated 8.4(b) (prof mis to commit criminal act by aiding C to commit crime), 8.4(c) (prof mis to engage in conduct involving fraud, deceit, misrep), 3.3(a)(2) (not

knowingly fail to disc material fact to tribunal when disc necessary to avoid crim/fraud act by C)

- rule 1.2(d) gives broad ability to give advise, but other entities can infringe -> trying to strike down balance in terms of what kind of advice L can give

### Rule 2.1 Using Other Justifications to Advise C

- in rep, shall exercise independent prof judgment and render candid advice; in rendering advice, may refer to law and other considerations (moral, econ, soc. etc) that may be relevant

### Kids/Disabled Cs

- if possible, maintain normal L/C relationship
- if believes at risk of subs phys, fin, or other harm (unless action taken) and C cant act, can take reas protective action (consult fam, surrogate decision maker)
  - maintain respect/comm w/ C
  - can follow fam members to be involved if wont impact L/C R
- impliedly authorized by 1.6(a) -> reveal info only to extent necess to protect Cs interest
- kids should be consulted where feasible -> look to them for guidance how to proceed

### Diminished Capacity

- if asks to do something and C believes diminished capacity, may
  - seek appointment of guardian -> 1.14(b)
  - consult w/ C's fam -> 1.14 comment 5
  - ask court permission to WD from rep tenant -> 1.1(a)

### Finding Cs

- advertisement pros -> more revenue, reduce production costs, better info received by public, cons -> increase costs, risk consumer knowledge if L has bad rep

### Solicitation

- refers to direct contact w/ potential Cs (1 on 1) while advertising refers to indirect contact
- rules permit ads and prohibit soliciting (monitor more closely)

### Rule 7.3

- L shall not in person, live phone, real time electronics solicit professional emp. from prospective C when significant interest is \$ gain, unless person is
  - another L
  - fam, close personal, or prior prof relationship w/ L
- should not solicit prof emp. from prospective C by written, recorded, electronic comm. or by in person, telephone, or real time electronic contract, even when not other prohibited by above if:
  - prospective C made known doesnt want to be solicited
  - coercion, duress, harassment

### Ohralik v. Ohio State Bar

- face to face interaction in hotel room w/ \$ as motive not OK
- face to face coercion demands immediate response (coercive)
- state can place limits on how solicit Cs!

### In re. Primus

- free rep. in furtherance of poli/soc ideal and not money is permissible under 1st am.
- "collective act. undertaken to obtain meaningful access to courts is fund. right w/in protection of 1st am."

### Rule 7.1

- L shall not make false/misleading comm. about L or L's services
- comm is false/misleading if contains material misrep of fact or law, or omits fact necessary to make statement considered as whole not misleading
- comment 2 -> truthful statements that are misleading
  - omit necessary facts
  - if subs likelihood lead to reas person to formulate specific conclusion about L's services for which no reas factual foundation
- comment 3 -> advertisement that truthfully reports achievement on behalf of C/former C can be misleading if present to lead reas person to form unjustified expectation that same results could be obtained in similar matters w/o reference to specific factual/legal circumstances

### Rule 7.2(c)

- cannot pay someone for recommending servs

## **Fees and Billing Cs**

### Rule 1.5(a)

- cannot make agreement for, charge, or collect unreas fee/amount for expenses
- factors to be considered:
  - time/labor required, novelty/difficulty of questions, skill requisite to perform legal service properly (fee doesnt only have to reflect time spent. cant take into account below factors as long as total cost reasonable
  - likelihood, if apparent to C, that acceptance of particular emp will preclude other emp by L
  - fee customarily charged in locality for similar servs
  - amount involved and result obtained
  - time limitations imposed by C or circumstances
  - nature and length of prof relationship w/ C
  - experience and rep of particular L
  - whether fee fixed/contingent
    - as long as % w/ contingent fee reas., courts will usually enforce
- court determines whether reas/value of servs from C's perspective
- note -> L cannot take C's wealth into account when setting fees (unless to lower for poor C)

### Rule 1.5(b)

- scope of rep/basis of rate or fee and expenses C will be resp for shall be communicated to C before/reas time after commencing rep, unless L will charge regularly repped C on same basis or rate
- all changes need to be communicated

### Rule 1.5(e)

- division of fees b/w Ls not in same firm made only if
  - division in proportion to servs performed/assumes joint resp for rep
  - C agrees to arrangement, including share, and confirmed in writing
  - fee total is reas.
- not ethical to bill two Cs hourly fees for work at same time
- can bill reas travel expenses, but not 2 Cs for same time unless agreement allowing
- if can re-use work product dont re-earn hours already comped for.
- firms often pay jr. assocs. less than billed out to Cs
- if firm purchases counsel from outside firm, improper to charge over and above amount actually incurred absent disc. to contrary

### Comment 4

- L can request fee paid in advance of rep, as long as unearned part refunded at term of rep

### Hourly Billing Controversy

- dont want to encourage padding hours
- could promote efficiency if C only wants to pay a certain amount
- flat fee? system in place?
- if Ls unethical, will abuse any method

### Contingency Fees

- people not normally able to afford legal rep can get in court
- gives Ls incentive to seek Cs success and encourage Cs w/ claims that have subs likelihood of succeeding
- fees enable C to share risk of losing w/ L, who usually better able to assess risk and bear by undertaking similar arrangements in other cases
- not allowed:
  - 1.5(d)(2): crim cases
  - 1.5(d)(1): domestic relations matters
- for contingent fee agreement, must be in writing signed by C; writing must indicate how fee will be determined, which expenses deducted from recovery, and whether the contingency % is to be calculated before/after deduction of expenses
  - non-contingent fee arrangement are preferred in writing, but not required

### Fee Shifting Statutes

- courts will sometimes award attorney fees although Cs usually required to compensate attorneys

- sometimes , legislatures create fee-shifting statute
- when congress concerned law not enforced because people cant afford to bring to court, will impose fee-shifting statute that provide attorney fees will be awarded to prevailing party
- if D is violating particular law, attorney can assess and will be willing to bring civil rights actions, and attorney will be comped.
- american rule -> each party pays own legal fees w/in judicial controversy
  - exceptions
    - orgs. like ACLU
    - contingency fees - awarding fees for other party who wins; court awards attorney fees to side who wins case
- most common way of assessing fees here
- rate usually adjusted up or down depending on complexity, quality of work, uncertainty of

### Evans v. Jeff D.

- SC says unless you go to court and obtain judgment, are not prevailing party for fee shifting statute (D does not have to pay attorney's fees)

### Purdue v. Kenny A.

- can be enhancement of fees in certain cases:
  - attorney performance
  - results obtained
    - superior results relevant only to extent can be shown they are result of superior attorney performance

### Rule 5.4(a) L/Firm shall not share fees w/ non-L

- 5 exceptions
  - 1) non-Ls can be paid on salary/hourly basis, as long as income not tied to fees
  - 2) non-Ls can participate in firm wide comp or retirement plan even though plan is based on profit sharing arrangement
  - 3) payments may be made to dead attorney's estate by surviving members of firm for reasonable time after death
  - 4) payments may be made to estate or other representative of deceased, disabled, or disappeared L by a L who purchases his practice
  - 5) court-awarded legal fees may be shared w/ non-profit org. that employed, retained, or recommended employment of the L

## **The Duty of Confidentiality**

### Reasons for strong ACP and Confidentiality Protections

- C able to disclose all relevant info
- are almost selling ability for someone to come talk and say whatever
- no other professions like this where confidentiality as strictly guarded
- protect C's interest, want to be able to trust you, personal and professional reputation that is at stake here

- confidentiality can't be breached when there is death/subs bodily harm that will result to someone
- Ls need full information to provide better representation; Ls do better work the more they know
- Cs know enough about ACP that it has come to be cultural expectation

#### Difference b/w confidentiality and L/C privilege

- confidentiality is ethical standard that comes from Model Rules 1.6; broader than L/C privilege
- LCP common law standard deriving from fed. rules of evidence

#### Scope

- confidentiality
  - broad and covers all related to representation
  - irrelevant if C tells you in room of people, disclosed to 3rd party, etc.
  - info that has nothing to do w/ rep can be confidential if came up during course of rep
  - MRPC protect info whether or not C asked to be kept confidential or would harm or embarrass
- LCP more narrow
  - covers comms between L and C in which C seeking advice/services
  - test
    - comm between privileged persons (L/C, L and prospective C, L's assistants and C)
    - that C reasonably believes is confidential
      - cannot happen in crowded room
      - if board agrees to do IPO, therefore intent is to make info public, there is no expectation of confidentiality
    - and the purposes of which is to seek legal advice and services or provide legal advice and services

#### Enforcement

- confidentiality (1.6) enforced in disciplinary action. can be fined, sanctioned, lose license
- ACP: lose privilege, evidence not be excluded
- both can lead to mal liability

#### A/C Privilege

- protects C from being compelled to disclose communication w/ the L, but does not protect C from being compelled to disclose underlying facts
- act of comm. to L being protected
- spoken/written, but not appearance
- L can't refuse to testify information gathered in ways other than comm (visual observations not likely to satisfy)
- docs written by C may be privileged if deal w/ seeking legal advice, but other docs not seeking legal advice not privileged just b/c handed to L

- phys evidence given to L not privileged
- priv belongs to C; may reveal info been comm to L if to his advantage (C can testify about advice given by L)
- L = duty do disc privilege
- priv extends after C dies unless agrees to release
- extends to people no longer Cs (1.18)
- L/C P does not apply to
  - matter between two former joint Cs (husb/wife) -> L/C P requires priv of comm; 3rd party usually destroys
  - test by will-drafting L after C's death, when L's test deals w/ circumstances of rep and exec of C's will, and lit is between claimants under/against will
  - situations where C tries to use servs to aid/allow commission of crime/fraud
  - situations where comm relevant to dispute b/w L and C arising out of rep

#### Rule 1.8(b) Prohibits L from using confidential info to C's detriment

#### Rule 3.4

- C may not hide behind priv by giving docs w/ evidentiary value to L
- if preexisting docs would have been discoverable in C's possession, will be in L's as well
- L shall not alter, destroy, conceal doc w/ potential evidentiary value or counsel a person in such an act

#### County of Erie

- predominant purpose of advice; as long as is legal advice, rest of advice not severable
- taken as whole
- want to stay in LCP when comm w/ C (most protection)

#### Upjohn (Priv in corporate context)

- protect info given by employees to Ls at direction of upper level management or employees who can legally bind company
- hard to find privilege in corporate context

#### Grand Jury Subpoena

- person seeking to invoke LCP must prove C/sought to become C
- context of L functioning in corp., so more of a burden on C to est. LCP exists

#### Hatcher

- prison recording device destroyed LCP
- aware of recording so couldn't expect to be private (like a 3rd party being there)

#### Confidentiality

#### Rule 1.6(a)

- L shall not reveal info re: rep of C unless gives informed consent
- disc impliedly auth. in order to carry out rep, or disc permitted by paragraph (b)
- if more than one C, all need to give consent

#### (b)

- L can reveal info relating to rep to extent L believes reas necessary

- 1) to prevent reas certain death/subs bodily harm
  - 2) prevent C from committing crime/fraud reas. certain to result in subs injury to financial interest or property of another
  - 3) prevent subs injury to financial interests/property of another that is reas certain to result or that result from C's commission of crime/fraud in furtherance of what C has used L's service
  - 4) secure legal advice about compliance w/ rules
  - 5) to establish defense for L when charged w/ crime or against C
  - 6) comply w/ court order
  - 7) detect/resolve COI rising from L's change in emp. or from changes in composition/ ownership of firm, but only if revealed info would not compromise LCP or otherwise prejudice C
- note -> if opposing party requests information not protected by priv, but by confidentiality, must turn over doc as long as lawful demand
  - to be covered by 1.6, not necessary that information comes from C himself

#### Rule 3.3 (b)

- L must reveal C confidences to prevent crim/fraud act by C during litigation, including offering false evidence

#### Rule 5.3

- L has general duty to preserve confidences of C; duty carries responsibility to control conduct of L's employees and non-L assistants

#### Rule 1.6 Interaction w/ Rule 4.1

- 1.6 deceptive in giving impression that revelation of fraud is always discretionary; may be mandatory when read w/ 4.1
  - 4.1 -> in course of repping C, L shall not make false statement/fail to disclose material fact when disclosure is necessary to avoid assisting fraud by a C, unless disclosure is prohibited by 1.6
  - 4.1 effectively requires disclosure; shall not knowingly fail to disc. a material fact when necessary to avoid assisting material fraud

#### Rule 1.6 Interaction w/ rule 1.16

- i.e. if services will be used by C in committing fraud/crime, L can w/draw from rep.
- impacts confidentiality b/c L may disclose to opposing and 3rd parties, must still respect secrets/confidences after w/drawal and cannot say reason for WD

#### People v. Belge

- before MR 1.6 -> interest in protecting LCP outweighed interests of society
- 1.6(b)(4) allows to reveal information w/ other Ls to secure advice about compliance w/ rules (may be a stretch)

#### Rule 1.18 - Duties to Prospective Cs

- person who discusses w/ L possibility of forming LC relationship w/ respect to matter = prospective C

- even if no LCR ensues, L who has discussion w/ prospective C shall not use/reveal information learned in consultation, except as rule 1.9 would permit re: former C
- L shall not rep C w/ interests materially adverse to those of prospective C if L received info from prospective C that could be significantly harmful to that person in the matter; no L/firm associated w/ L can take on rep, except under paragraph (d)
- (d) -> rep is permissible if
  - both affected C/prospective C gave informed consent
  - L who received information took reas measure to avoid exposure to more DQ information than was reas necessary to determine whether to rep a prospective C; and
    - DQed L is timely screened from matter and apportioned fees from it
    - written notice promptly given to prospective C

### Confidentiality duties to former Cs

- L has duty to preserve confidences of former Cs as well as present/prospective
- L should not accept employment that would require use of former C's confidences, and should not disc confidential info of former C to another C
- if info becomes generally known, L may use confidential information against former C
  - does not apply to current Cs
- LCP exists only between two people w/ existing relationship as L and C
  - new comms from former C who has discharged L not covered (1.16(a)(3))

### COI

- want to protect reas expectation of Cs re: loyalty and confidentiality expected of Ls
- fund fairness in how expect justice to be administered; public interest in knowing have fair system of justice
- ensures Ls are competent
- however, if Ls were never allowed to rep when there are conflicts, it would shrink our pool of Ls and limit public's choice of representation
- public has interest in Ls having economic success

### COI Walkthrough

- 1) who are Cs? (prospective, current, former)
  - restatement 114 gives test for determining when LCR forms (less obligation to former than current C)
  - arises when
    - person manifests to L intent that L provide legal services for the person and either
      - L manifests to person consent to do so;
      - or L fails to manifest lack of consent, and L knows/should know reasonably relies
    - tribunal w/ power to do so appoints L to provide services
- 2) what is nature of conflict (imputed, gov't, etc.)
- 3) is it consentable? conflict always consentable unless:
  - prohibited by law

- both sides of v.
- L doesn't really believe can provide competent/diligent rep to each C
- consent must be informed and in writing
- 4) is it screenable?
  - w/ screening, don't need informed consent
  - screening never w/ rule 1.7, offers heightened security for current Cs
  - screening available for lateral moves (1.10), paralegals and secretaries (1.10), government Ls (1.11), judges and law clerks (1.12), and prospective Cs (1.18)
  - screening essentially means whatever L has conflict must be kept from any information about rep; keeping information related to rep away from attorney w/ conflict

#### COI: current Cs

- except as provided in paragraph (b), L shall not rep C if rep involves concurrent COI; concurrent COI exists if
  - rep of one C directly adverse to another
  - significant risk rep of one or more Cs will be materially limited by L's responsibilities to another C, former C, or third person or by personal interest of L
- notwithstanding existence of concurrent COI under (a), L may rep C if
  - reas believes will be able to provide competent/diligent rep to each affected C
  - rep not prohibited by law
  - rep does not involve assertion of claim by one C against another repped by L in same litigation or other proceeding before tribunal (doesn't apply to mediation, only lit -> L can rep husband and wife in mediation, but has to w/draw when gets to lit)
  - each affected C gives informed consent in writing
    - can't violate confidentiality to get consent
    - level of info must be given for consent to be informed depends on C
- comment -> can't screen L for current conflicts
- can always be informed consent unless
  - L does not reas believe can provide comp/diligent rep
  - prohibited by law
  - L repping both sides of v.
- to determine if COI, L should adopt reas procedures, appropriate for size and type of firm; ignorance caused by failure to have procedures won't excuse violation of rule
- if conflict arises after rep undertaken, L ordinarily must WD from rep, unless L obtained informed consent
- DIRECTLY ADVERSE
  - loyalty to current Cs prohibits undertaking rep directly adverse to their interest w/out informed consent; cannot advocate in one matter against person L reps in another matter, even when wholly unrelated
  - directly adverse conflict may arise when L required to cross-ex C who appears as witness in lawsuit involving another C, as when test will be damaging to C who is repped in lawsuit
  - w/o consent, L may not act as advocate in one matter against same C in another matter even when wholly unrelated

- cant rep Mrs. Smith in one matter and sue in another/cross ex in another
- MATERIAL LIMITATION
  - COI exists if significant risk L's ability to consider, recommend, carry out appropriate course of action will be materially limited as result of L's other responsibilities/interests
    - i.e. L asked to rep several people seeking to form joint venture likely to be materially limited in L's ability to recommend or advocate all possible position that each may take because of duty to others
  - critical questions are likelihood that difference in interests will eventuate
    - if likely will be diff, still have to ask if would materially interfere w/ L's ability to give rep; not enough that just diffs

#### Sanford v. Commonwealth

- same L cant rep >1 Ds where Ds may have to blame one another to be free from liability for death
- DQ necessary to ensure/preserve integrity of bar
- no L could reas believe could give competent rep here

#### Ls resps to former Cs and other 3rd persons

- L's duties of loyalty and independence may be materially limited by resps to former Cs under 1.9

#### Personal interest conflicts

- L's own interests shouldn't be able to have adverse impact on C
- L cannot allow related business interest to impact rep i.e. referring Cs to somewhere they have financial interest
- L related to another L usually cant rep C in matter where repping other party unless Cs give informed consent
- no sex w/ Cs unless relationship predates LCR

#### Interests of person paying for L's servs

- L can be paid from source other than C, including co-C if C is informed of fact and consent and arrangement does not compromise L's duty of loyalty/independence to C

#### Prohibited Reps

- Cs can normally consent to rep notw/standing a conflict but some conflicts are non-consentable
  - when L does not reas believe can provide comp/diligent rep to each C
  - in some states, subs law provides same L may not rep more than one C in capital murder case

#### Informed consent

- info required depends on nature of conflict and risks involved; when rep of >1 Cs in single matter undertaken, information must include implications of common rep, including possible impacts on loyalty, confidentiality, LCP

- in some cases, might be impossible to make necessary disc to obtain consent, like when repping many Cs and one refuses to consent to disc necessary to permit other to make informed decision
- needs to be confirmed in writing
- can revoke consent at any time!

#### Consent to future conflicts

- if L can request C to waive conflicts that may arise in future generally determined by extent to which C understands material risks waiver entails
- specificity/sophistication are keys to see if waiver is effective; even if meet these hurdles, waiver can be invalid if unforeseen circumstances arise
  - depending on sophistication of C, may need more/less info to give informed consent
  - more specific about what C is waiving, more likely will be enforced

#### Litigation conflicts

- simultaneous rep of parties whose interest in lit may conflict (i.e. co-Pros and Defs), governed by P(a)(2) -> potential for conflicts in repping many Defs in crim case so grave that ordinarily a L should decline to rep ore than one co-Def
- positional conflicts -> normally, L can take inconsistent legal positions in diff tribunals at diff times on behalf of diff Cs; mere fact that advocating legal position on behalf of one C might create precedence adverse to interest of C in unrelated matter doesnt create conflict
  - but, in situations where decision favoring C will create precedent likely to weaken position of another C, could be material limitation
- Cs ability to choose own rep is protected; thats why allowed to take diff positions for diff Cs

#### State Bar of CA

- Ls should consider likelihood of harm to C, C sensitivity, and must be looked at case by case
- suggests Ls cant systematically track issue involved
- hard in large law firm to know if happening

#### Non-Lit Conflicts

- relevant factors to determine potential for material limitation include duration and intimacy of L's relationship w/ C(s), functions performed by L, likelihood disagreements will arise, likely prejudice to C from conflict (i.e. estate planning; called to prepare for many fam members)
- L cannot rep >1 parties to negotiation whose interests are fund antagonistic, but common rep Ok where Cs generally aligned in interest even if diff among them

#### Special Consideration in common Rep

- in some situations, risk of failure so great multiple rep is plainly impossible
- if relationship between parties already assumed antagonism, possibility C's interests can be adequately served by common rep not good

- important to consider impact on conf and LCP; re: LCP, prevailing rule that when commonly repped Cs, does not attach, therefore, must be assumed that if lit eventuated b/w Cs, LCP will not protect any such comms
  - for confidentiality, cont'd common rep will be inadequate if one C asks L not to disclose to other information re: common rep; each C has right to be informed of anything bearing on rep that affects his interests

#### Ware v. Ware

- L can never rep both parties in prenup agreement
- Knake says would be able to under 1.7 (but shouldnt)
  - reas believes comp/diligent rep (if split 50/50), no indication prohibited by law, not litigation, can get informed consent here

#### Organizational Cs

- L who reps corp/org. doesnt necessarily rep any constituent/affiliate org.
- not barred from accepting rep adverse to affiliate

#### Rule 1.7 Walkthrough

Test -> will rep of one current C be directly adverse to another?

- does L reas believe will be able to provide comp/diligent rep to each C?
  - if no, no rep
  - if yes
    - is rep prohibited by law?
      - if yes, no rep
      - if not
        - does rep involve assertion of claim by one C against another repped C in same lit/proceeding before tribunal?
          - if yes, no rep
          - if no
            - has each affected C given informed consent?
              - if no, no rep
              - if yes, conflict waived
- if no
  - is there a significant risk that rep of one or more Cs will be materially limited by L's resps to another C, former C, or 3rd person or by personal interest of L?
    - if yes, begin at above test
    - if no, can rep

#### Rule 1.8: Current Cs -> Special Conflict Rules

- all 1.8 conflicts rules imputed onto firm, except for sex
- L shall not enter into business trans w/ C/knowingly acquire ownership, possessory, security, or other pecuniary interest adverse to C unless:
  - trans and terms on which L acquires interest are fair and reas to C and are fully disclosed and transmitted in writing in manner that can be reas understood by C
  - Cis advised in writing of desirability of seeking and given reas opportunity to seek advice of independent legal counsel
  - C gives informed consent in writing signed by them

- L cant use info relating to rep of C to disadvantage of C unless informed consent
- L cant solicit subs gift from C, including testamentary gift, or prepare on behalf of C in instrument giving L or related person of L any subs gift, unless C related to L
- prior to conclusion of rep of C, L cant make/negotiate agreement giving L lit/media rights to portrayal/account based on info re: rep
  - after is OK
- L cant provide financial ass. to C in connection w/ pending or contemplate lit except
  - can advance court costs and expenses of lit, the repayment which may be contingent on outcome
  - L repping indigent C can pay court costs and lit expenses
- L cant accept comp for repping C from anyone otehr than C unless
  - informed consent
  - no interference w/ L's independence of prof judgment
  - info relating to rep of C still protected (1.6)
- L who reps 2 or more Cs cant participate in making aggregate settlement of claims unless each C gives informed consent in writing; L's disclosure shall include existence and nature of all claims/please involved and of participation of each person
- L cant
  - make agreement prospectively limiting liability to C for mal unless C independently repped when agreeing
  - settle claim for such liability w/ unrepped C or former C unless advised in writing of desirability of seeking and is given reas opportunity to seek advice of independent legal counsel
- L cant acquire proprietary interest in COA or subject matter of lit L conducting for C, except can
  - contract w/ C for reas contingent fee in civil case
  - acquire lien authorized by law to secure L's fee or expense
- L cant have sex relations w/ C unless existed before LCR
- comment
  - business transactions between L and C
    - worry that L cold overreach when conducting other business w/ C
    - terms of trans must be fair to C and communicated to C in writing
    - C must also be advised of desirability of seeking ind. legal counsel
  - use of information re: rep
    - use of info re: rep to disadvantage of C violates duty of loyalty
    - i.e. if L learns C intend to purchase and dev. several parcels of land, L may not use info to purchase one of parcels in comp w/ C or to recommend that another C make such purchase
    - does not prohibit uses that dont disadvantage C
- gifts to Ls
  - L can accept gift if meets general standards of fairness
  - due to concerns about overreaching and imposition on Cs, L may not suggest that subs gift be made to him
- literary rights
  - agreement by which L acquires literary or media rights concerning conduct of rep creates conflict between interest of C and personal interests of L

- this is L's self-interest competing w/ C's so there is heightened standard to protect C
- only applies prior to conclusion of rep
- Beets v. Collins
- basically every court to consider COI arising from media rights K has condemned practice
- usually in capital murder case, odious to think counsel hopes to gain fee by marketing tragedy of C
- media K was unethical, but didn't create actual conflict or adversely affect performance, so not ineffective ass. of counsel
- court said Texas Bar is appropriate to determine if MRPC violations
- financial assistance
  - Ls cannot subsidize lawsuits or administrative proceedings brought on behalf of Cs, including making loans for living expenses, because this would encourage Cs to pursue lawsuits that may not otherwise be brought, and gives Ls too much financial interest in rep.
- person paying for legal servs
  - Ls often asked to rep C and have 3rd party comp for rep. because 3rd party payers often have interests differing from C, Ls cant accept unless determines there is no interference w/ independent professional judgment, and is informed consent from C
- aggregate settlements
  - diffs in willingness to make or accept offer of settlement are among risks of common rep of many Cs by single L; under 1.7, should be discussed before undertaking rep.
  - rule 1.2(a) protects C's right to have final say in deciding whether to accept settlement
- limiting liability and settling mal claims
  - agreements settling a claim/potential claim for mal are not prohibited by this rule; still, in view of danger L will take advantage of C, L must first advise person in writing of appropriateness of independent rep and must give C reas opportunity to find/consult ind counsel
- acquiring property interest in lit
  - traditional rule is that L prohibited from acquiring a prop interest in lit' designed to avoid giving L too much interest in rep, and makes hard for C to discharge L
- sex relations w/ C
  - interests -> C autonomy, position of power L has over C, emotional detachment (dont want L's judgment to be clouded), conf of information
- imputation of prohibitions
  - prohibition on conduct by individual L for everything but sex also applies to all Ls associated in firm w/ the personally prohibited L

### Rule 3.7 L Advocate as Witness

- L shall not act as advocate at trial in which L likely to be necessary witness unless
  - test relates to uncontested issue
  - test relates to nature/value of legal servs rendered in the case; or

- allows L to argue should be paid; normally under 1.6 we would never be able to talk about nature and value of servs rendered, but here we can (3.7 and 1.6 interaction)
- DQ of L would impose subs hardship on C
- L may act as advocate in trial in which another L in firm is likely to be called as witness, unless precluded from doing so under 1.7 and 1.9
- comment
  - combining roles of advocate and witness can prejudice tribunal and opposing party and can also involve a conflict of interest between C and L
    - witness is required to testify on basis of personal knowledge while advocate is expected to explain and comment on evidence given by others; may not be clear whether a statement should be taken as proof/ analysis of proof
    - apart from two exception, balancing required between interests of C and those of tribunal and opposing party; whether tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on nature of case, importance and probable tenor of L testimony, and probability that L testimony will conflict w/ that of other witnesses
  - conflict of interest
    - in determining whether can act as advocate in trial likely to be witness in, L must consider 1.7 and 1.9 conflicts, like if likely to be conflict between test of C and L
    - if COI, L must get C's informed consent in writing; in some cases L wont be able to get informed consent

#### Rule 1.9 Former Cs

- less restrictive than 1.7, 1.8 and 3.7; extremely limited in scope and only extends to confidentiality arising from same issue to repped C for in past
- L formerly repped a C in matter shall not rep another person in same/subs related matter in which that person's interests are materially adverse to the interests of the former C, unless the former C gives informed consent in writing
- L shall not knowingly rep person in same/suns related matter in which firm w/ which L formerly was associated has previously repped a C;
  - whose interests are materially adverse to that person; and
  - about whom the L had acquired info protected by rules 1.6 and 1.9(c) that is material to matter
    - unless former C gives informed consent, confirmed in writing
- L who was formerly repped C in matter or whose present or former firm has formerly repped a C in a matter shall not thereafter:
  - use information relating to rep to disadvantage of former C except as rules permit or when the information has become generally known; or
  - reveal info relating to rep except as these rules would permit or require w/ respect to a C

#### MR 1.10: 1.9 Conflicts can be screened

- under MR 1.10, if DQd L

- is timely screened from participation
- apportioned no part of fee; and
- written notice is promptly given to affected former C
- then all other Ls in firm may undertake rep
- comment
  - after termination of LCR, L has continuing duties w/ respect to confidentiality and conflicts
  - when L has been directly involved in specific matter, subs rep of other Cs w/ materially adverse interest is clearly prohibited; however, if he only handled certain type of problem for C, he is not precluded from later repping another C in a factually distinct problem of that type if it involves a position adverse to prior C
  - subs related
    - matters are subs related if they involved the same trans or legal dispute or if there is otherwise subs risk that confidential factual information as would normally have been obtained in the prior rep would materially advance the C's position in the subs matter i.e L repping business person, learning of his financial info, cant rep spouse in divorce
  - materially adverse
    - even if same/subs related matter, dont have to deal w/ this rule if interests are not materially adverse

- Ls moving between firms
  - when L leaves a firm, ? of whether he should undertake rep is more complicated, and are lots of competing considerations
    - C repped by former firm must be reas assured principle of loyalty not compromised
    - rule shouldn't be so broadly cast as to preclude others from having reas choice of legal counsel
    - rule should not unreas hamper Ls from forming new associations and taking on new Cs after leaving previous assoc.
- P(b) DQs L only when actual knowledge of info protected by 1.6 and 1.9(c); therefore, if L while w/ one firm acquired no knowledge/info re: C and later joined another firm, neither L or second firm DQd from rep another C in same/related matter
- can screen L who has conflict under lateral move exception; if L moves from one firm to another, not be attractive to new firm if brings all conflicts w/ him; makes easier to change jobs for Ls

#### Westinghouse v. Gulf Oil

- to determine if interest here, court looks at 1) amount of time L repped former C 2) amount of time elapsed since rep; court found too much specific knowledge and services were too specifically related
- test = likelihood L will come across confidential info, not whether actually did; info must also be "materially adverse" to former C in new piece of lit.

#### Knake's Rule 1.9 Successive Conflict (i.e. Former C) Test

Test -> is current C's work the same matter/subs related to former C?

- if no, no conflict

- if yes

- new C's interest materially adverse to former C's interests?

- no, no conflict

- yes: has former C given informed consent?

- no, rep barred

- yes, conflict waived

- do you have 1.9(c) information?

- if yes, cant use

1.9(b) -> conflicts brought into firm by lateral attorney

- test -> are you repping person in same/subs related matter in which your former firm previously repped a C whose interests are materially adverse to that person?

- if no, no issue

- if yes

- did you acquire material information protected by 1.6 or 1.9?

- if no, no conflict

- if yes, has former C given informed consent?

- if no, rep barred; if yes, waived

- screening -> under MR 1.10, if DQd L is 1) timely screened from participation and 2) apportioned no part of fee and 3) written notice promptly given to affected former C, all other Ls in firm may undertake rep

#### Rule 1.10 Imputed Conflict

- under this rule, proper method to screen DQd L

- timely screened from participation

- apportioned no part of fee

- written notice promptly given to affected former C

- then all other Ls may undertake rep

When can you screen?

- lateral moves (1.9)

- gov Ls, law clerks, paralegals, secretaries

- screening gets around informed consent requirement

- not available for current Cs!

- while Ls associated in firm, none shall knowingly rep C when any of them alone would be prohibited under 1.7 or 1.9 unless

- prohibition based on personal interest of DQd L and doesnt present risk of limiting rep of C by other Ls in firm; or

- prohibition based on 1.9(a) or (b) and arises out of DQd L's association w/ prior firm and

- DQd timely screened from matter and not apportioned fee from it

- written notice given promptly to affected former C to enable to ascertain compliance w/ provisions of rule; must include description of screening procedure, statement of firm's compliance, statement that review may be

- available from tribunal, agreement by firm to promptly respond to inquiries re: screening; and
- certifications of compliance w/ rules and w/ screening procedures are provided to former C by screened L and by partner of firm at former C's request
- when L terminates an association w/ firm, firm not prohibited from repping person with interests materially adverse to those of client repped by former lawyer and not currently repped by firm unless
  - matter in same/subs related to matter where L formerly repped C
  - any lawyer remaining in firm has information protected by 1.6 and 1.9(c) that's material to matter
- DQ may be waived by affected C

#### Rule 1.10, 1.8(k) Imputed Conflicts

- is conflict personal?
  - if yes, not imputed as long as no risk of materially limiting rep of C by remaining L's in firm
  - no
    - conflict under 1.7, 1.8(a)-(i), or 1.9?
      - no, no imputation
      - yes, no other lawyer may rep C where any one of them practicing alone would be prohibited under these rules

#### 1.10(b) -> Conflicts remaining in firm after L leaves

- is firm seeking to rep person with interests materially adverse to those of C repped by L left firm?
  - no, no imputation
  - yes
    - is matter the same/subs related to where former L repped C
      - no, no imputation
      - yes
        - does L remaining in firm have info protected by 1.6/1.9 that's material to matter?
          - no, no imputation
          - yes, no other Ls in firm may rep client where any practicing alone would be prohibited under 1.7 or 1.9

#### Rule 1.11 Government Lawyers

##### Former Gov Lawyers

- test -> is rep in connection with matter in which former gov L participated personally/ subs?
  - no, no conflict
  - yes, appropriate gov agency must give informed consent, confirmed in writing, to rep

- screening -> if DQd lawyer is 1) timely screened from participation 2) apportioned no part of fee 3) written notice given to appropriate gov agency, then all other Ls in firm can undertake rep
- test -> will rep involve use of confidential government information about person known to L in way that would materially disadv that person?
  - no, no conflict
  - yes, no rep
  - screening -> if DQd L is (same 3 steps from above)

#### Present gov Ls

- test -> cant participate in matter where participated personally and subs while in private practice or NGO emp. unless appropriate gov. agency gives informed consent
- subject to MR 1.7, 1.9 and 1.11

#### Rule 1.12 Judges etc.

- test -> shall not rep anyone in connection with matter in which participated personally and subs as judge, arbitrator, law clerk, etc. unless all parties to proceeding are given informed consent
- screening -> if DQd L is 1) timely screened from participation and 2) apportioned no part of the fee and 3) written notice is promptly given to appropriate gov. agency, then all other lawyers in the firm may undertake the rep.

#### Rule 1.18 Prospective Clients

- test -> did you discuss the possibility of forming a LCR
  - if no, no conflict
  - if yes
    - does the rep involved a client with interests materially adverse to those of the prospective client in the same or subs related matter
      - if no, no conflict
      - if yes
        - did you learn confidential info disclosure of which could be significantly harmful to the prospective client
          - if no, no conflict
          - if yes
            - did both the affected client and prospective C give informed consent, confirmed in writing?
              - if yes, conflict waived
              - if no, no rep
- screening -> if the DQd L is 1) took reasonable measures to avoid exposure to more DQing information than was reasonably necess to determine rep, and is 2) timely screened from the participation and 3) apportioned no part of the fee and 4) written notice is promptly given to prospective C, then all other lawyers in the firm may undertake the rep

### **The Lawyer's Duty to the Legal System and Non-Clients**

- the rule 3s are rules that go to heart of lawyer's role as advocates

### Rule 3.1 Meritorious Claims and Contentions

- lawyer can't bring/defend proceeding or assert or controvert an issue therein unless basis in law/fact for doing so that isn't frivolous; includes good faith argument for extension, modification, or reversal of existing law
  - L for D in crim proceeding, or respondent in proceeding that could result in jail, may defend proceeding as to require that every element of case be established
- comment -> advocate has duty to use legal procedure for fullest benefit of client's cause but also to not abuse legal procedure
- note -> FRCP 11(b)(2) prohibits filing frivolous claims, but (c)(2) gives L 21 days to WD claims; if get rid of frivolous claim in this time, no FRCP sanctions

### Rule 3.2 Expediting Litigation

- L shall make reas efforts to expedite lit consistent with interests of client
- comment -> although occasions when L may properly seek postponement for personal reasons, not OK to routinely fail to expedite lit solely for convenience; ? is whether comp lawyer acting in good faith would regard the course of action as having some subs purpose other than delay

### Rule 3.3 Candor Toward Tribunal

- lawyer can't knowingly
  - make false statement of fact/law to tribunal or fail to correct false statement of material fact/law previously made to tribunal
  - fail to disc to tribunal legal auth. in controlling jrx known to L to be directly adverse to position of C and not disc by opposing counsel; or
  - offer evidence that L knows is false; if L, C or witness called by L offers material evidence and comes to know of falsity, has to take remedial measures including disc. to tribunal if necessary
    - L can refuse to offer evidence, other than test of D in crim matter, that believes (reas) is false
- L who reps C in adjudicative proceeding and who knows person intends to engage, is engaging, or has engaged in crim/fraud conduct re: proceeding shall take reas remedial measure, including, if needed, disc. to tribunal
- duty continues to conclusion of proceeding and apply even if disc requires info covered by 1.6
- comments
  - applies in ancillary proceedings (i.e. depositions)
  - (a)(3) requires L refuse to offer evidence knows false no matter C's wishes
  - if L knows C intends to test falsely/wants L to introduce false evidence, should seek to persuade that evidence shouldn't be offered; if doesn't work, must refuse to offer false evidence; if only portion of test will be false, L may call witness but not elicit test. knows false
  - prohibition against offering false evidence only applies if KNOWS false; reas. belief false doesn't preclude presentation
  - lawyer should resolve doubts and can't ignore obvious falsehood

- except for crim Ds, permitted to refuse to offer test that reasonably believes false (ability to test const. protected here)
- if L knows test given was false, remedial measure to cure; confer with C confidentially, advice duty of candor to tribunal, seek client cooperation; if wont work, WD not allowed or wont remedy effect of false evidence, L must disclose to tribunal even if info protected by 1.6
  - even if L does not rely on perjured test once he knows it is false, does not diminish duty to take reas remedial measures
- L may be required by 1.16(a) to seek permission of tribunal to WD if L's compliance with rule's duty of candor results in such extreme deterioration of LCR that L can no longer competently rep client
  - in connection w/ request for permission to WD that is premised on C's misconduct, L may reveal information re: rep only to extent reas necessary to comply with this rule or as otherwise permitted by 1.6
- you aren't required to disclose perjury that occurred in prior action; only governs until conclusion of proceeding; if rule 3.3 doesn't apply, then would look to 1.6 to see if proper for lawyer to fail to disclose

#### Nix v. Whiteside

- whatever scope of const. right to test, is elementary that such right doesn't extend to falsely testifying
- real ? is how lawyer should navigate competing obligations; L's role not to assess truth of what client say (this is jury)

#### Rule 3.4 Fairness to Opposing Counsel

- lawyer cant
  - unlawfully obstruct another party's access to evidence to unlawfully alter, destroy, or conceal a doc or other material having potential evidentiary value; lawyer cant counsel/assist another person to do any such act
  - falsify evidence or offer inducement to witness prohibited by law
  - knowingly disobey an obligation under rules of tribunal
  - make frivolous disc request/fail to make reas diligent effort to comply with a proper disc request
  - in trial, allude to any matter that L does not reas believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when test as witness, or state a personal opinion as to justness of cause, credibility of witness, culpability of civil litigant, or guilt or innocence of accused
  - request non-client to refrain from voluntarily giving relevant info to another party
- comment
  - not improper to pay witnesses expenses/compensate expert on terms permitted by law; improper to pay on contingent basis; restatement 117 suggests that L cant pay witness more to test than expenses incurred and value of witness's time; but, exception for experts
  - not improper for L to give personal opinion about W's credibility during trial
  - is improper for L to suggest that W what would be helpful to opposing counsel leave jrx for vacation

### Rule 3.5 Impartiality and Decorum of Tribunal

- lawyer cant
  - seek to influence judge, juror, or prospective juror
  - communicate ex parte with any such person during the proceeding unless authorized to do so
  - comm. with juror/prospective juror after discharge of jury if
    - comm is prohibited by law or order
    - juror has made known to lawyer a desire not to communicate; or
    - comm involves misreps, coercion, duress, harassment
  - engage in conduct intended to disrupt a tribunal
- note -> L cant comm ex parte with judge on pending matter without first advising opposing counsel or without it being auth. by court; restatement 113 comment (c) suggests that this does not apply to routine comms such as scheduling

### Rule 3.6 Trial Publicity

- lawyer who is participating or has participated in investigation or lit of mater shall not make extrajudicial statement that lawyer knows or reas should know will be disseminated by means of public comm and will have subs likelihood of materially prejudicing an adjudicative proceeding in matter
- notwithstanding paragraph (a), a lawyer may state
  - claim, offense, or defense involved, and except when prohibited by law, the identity of the persons involved;
  - info contained in public record
  - investigation of matter is in progress
  - scheduling ore result of any step in lit
  - request for ass. in obtaining evidence and necess. info.
  - warning of danger concerning behaviour of person involved when is reason to believe exists likelihood of subs. harm to individual or public interest
  - in any criminal case, in addition to above, lawyer may state
    - identity, residence, occupation, and fam status of accused
    - if accused hasn't been apprehended, info necessary to aid in apprehension
    - fact, time, place of arrest
    - identity of investigating/arresting officers
- notwithstanding P(a), L can make statement reas. L would believe required to protect C from subs, undue, prejudicial effect of recent publicity not initiated by L or C
- comment
  - hard to strike balance between protecting right to fair trial and safeguarding right to free expression
  - special rules of conf. may govern proceedings in juv, domestic, and mental disability proceedings
  - some subjects more likely to have material prej. effect on proceeding.
    - character, credibility, rep, or crim record
    - in crim case with jail time, possibility of guilty plea or existence/contents of any confession, admission or statement given by suspect

- identity/nature of phys evidence expected to be presented
- any opinion as to guilt/innocence of D or suspect in crim case
- info lawyer knows likely to be inadmissible at trial

#### Gentile v. Nevada State Bar

- concerns that L should not be acting as witness for client by saying "i believe my C is innocent"
- SC in this case suggested L speech will be subject to balancing test; unclear if applies to Ls or how will be performed

#### Rule 3.9 Advocate in Nonadj Proceeding

- L repping C before legis body/admin agency in non-adj proceeding shall disclose that appearance is in rep capacity and shall conform to provisions of rule 3.3(a)-(c), 3.4(a)-(c), and 3.5
- comment
  - legislators and agencies have right to expect Ls to deal with them as deal with courts
    - L who appears in legis hearing should identify capacity in which they appear; does not matter that lawyer believes C's position that is in best interest of public

### **L's duty to bars and lawyers**

#### 4.1 truthfulness in statements to others

- in course of repping a C, L shall not knowingly
  - make false statement of material fact/law to 3rd person
  - fail to disc. material fact to 3rd person when disc is necessary to avoid assisting a crim/fraudulent act by client, unless disc prohibited by rule 1.6
- comment
  - misrep
    - L required to be truthful when dealing with others on client's behalf, but generally has no affirm duty to inform an opposing party of relevant facts
    - a misrep can occur if L incorporates or affirms statement of another person that L knows is false
    - misreps can also occur by partially true but misleading statements or omissions that are the equivalent of affirm false statements
- statement of fact
  - under generally accepted negotiation conventions, certain types of statements ordinarily are not taken as statements of material fact, such as estimates of price or value and an intention to accept settlement
- crime or fraud by client
  - under rule 1.2(d), a lawyer is prohibited from counseling or assisting a C in conduct that L knows is crim or fraud; P(b) of 4.1 addresses the situation where a client's crime or fraud takes form of lie or misrep
    - normally, L can avoid assisting C's crime/fraud by WD; in extreme cases, L may have to disclose information relating to rep to avoid being deemed

to have assisted in crime or fraud; if is the case, L required to disclose info

- when reading 1.6 and 4.1 together, if disc. necessary to avoid assisting crim or fraud act, lawyer required by 4.1 to disclose, even if info would otherwise be protected by 1.6

#### 4.2 Comm with persons repped by counsel

- in repping a client, a L shall not comm about subject matter of rep with person the L knows to be repped by another L in matter, unless L has the consent of the other L or is authorized to do so by law or court order
- comments
  - rule protects against overreaching by other Ls
  - rule applies even tho rep person initiates or consents to comm; a L must immediately terminate the comm
  - rule doesnt apply to matters outside rep or preclude comm with repped person who is seeking advice from L who is not otherwise repping a C in matter
  - L cant make comm prohibited by rule through acts of another
  - in case of repped org., rule prohibits comms with constituent of org who supervises, directs, or regularly consults with org's L concerning the matter or has authority to obligate the org to an act
  - in event the person with whom L comms is not known to be repped by counsel in the matter, the L's comms are subject to rule 4.3

#### 4.3 Dealing With Unrepped Person

- in dealing on behalf of C with person who isn't repped by counsel, a L shall not state or imply that the L is disinterested; when the L knows or reas should know that the unrepped person misunderstand the L's role in matter, the L shall make reas. efforts to correct the misunderstanding
- L shall not give legal advice to an unrepped person, other than advice to secure counsel, if the lawyer knows or reas should know that interests of such person are or have a reas possibility of being in conflict with interests of client
- comment
  - unrepped person may assume lawyer is disinterested in loyalties; to avoid misunderstanding, L will need to identify his C and explain that C has interests that oppose the unrepped person
  - sophistication of C relevant
  - after tell someone officer of course, and misunderstand L's role, is affirmative duty to correct misunderstanding
- rule doesnt prohibit L from negotiating or settling with unrepped person as long as L has explained reps an adverse party and isn't repping the person
- note -> when dealing w/ unrepped person, need to be careful. can tell party they should get L; L should inform unrpped person they should get own L and have legal rights/entitlements that can be claimed; this balances a bit with obligation to own client

#### 4.4 Respect for rights of 3rd persons

- in repping a client, lawyer cant use means that have no subs purpose other than to embarrass, delay, or burden a 3rd person
  - while L should put C's interests above others, cant disregard rights of 3rd persons
- docs or ESI are sometimes inadvertently sent to L, such as when email addressed to wrong person; if L knows was sent accidentally, rule requires to notify sender so can take protective measures
  - whether L required to take more steps like returning doc or ESI is beyond scope of rules
  - metadata creates obligation only if receiving lawyer knows or should know that was inadvertently sent to receiving L
- where L is not required to do so by law, decision to return or delete is matter of prof judgment usually reserved to L

#### 5.6 Restrictions on right to practice

- L cant participate in offering or making
  - partnership, shareholders, operating emp, or other similar agreement that restricts right of L to practice after termination of relationship except agreement concerning benefits upon retirements
  - or an agreement in which restriction on L's right to practice is part of settlement of client controversy
- comment
  - non-compete limits prof autonomy and freedom of Cs to choose L

#### 8.2 Judicial and legal officials

- L shall not make statement L knows to be false/reckless disregard as to truth or falsity concerning qualifications/integrity of judge, adj officer, or public legal officer, or of candidate for election or appointment to judicial or legal office
- L who is candidate for poli/legal office shall comply with code of judicial conduct
- comment
  - expressing honest/candid opinion on these matters contributes to improving admin of justice, however, false statements can unfairly undermine public confidence in admin of justice
  - Ls encouraged to continue trad efforts to defend judges and courts unduly criticized

#### Standing Committee on Discipline v. Yagman

- court held that allegation of dishonesty const. immune
- allegation judge drunk on bench, but disciplinary comm failed to show false
- outlier case!

#### 8.3 Reporting Professional Misconduct

- L who knows another L has committed violation of rules that raises subs question as to L's honesty, trustworthiness, fitness as L in other respects shall inform appropriate professional auth.
- L who knows judge committed violation of applicable rules of judicial conduct that raises subs question as to judge's fitness for office shall inform appropriate auth.

- rule doesn't require disc. protected by 1.6 or information gained by L or judge while in approve L's assistance program
- comment
  - rule limits reporting obligation to those offenses that self-reg profession must vigorously endeavor to prevent; term subs refers to seriousness of possible offense and not quantum of evidence of which L is aware
  - duty to report prof misconduct doesn't apply to lawyer retained to rep a L whose professional misconduct is in question

#### In re Hiimel

- any unprivileged information must be turned over to disciplinary committee if is violation of rules; 1.6 is very broad and protects confidential information, but LCP not as expansive which is why attorney was suspended here
- Hiimel not how 8.3 functions under MR; court's requirement for reporting broader than 8.3

#### 8.4 Misconduct - general rule!!!!

- prof misconduct for lawyer to
  - violate/attempt to violate MRPC, knowingly assist or induce another to do so, or do so through act of another
  - commit criminal act that reflects adversely on lawyers honesty, trustworthiness, or fitness as L in other respects
  - engage in conduct involving dishonesty, fraud, deceit, or misrep
  - engage in conduct that is prejudicial to admin of justice
  - state or imply ability to influence improperly a govt agency or official or to achieve results by means that violate MPRC or other law; or
  - knowingly assist a judge or judicial officer in conduct that is violation of applicable rules of judicial conduct
- comment
  - paragraph (a) doesn't prohibit lawyer from advising C concerning action C is legally entitled to take; fine line! between assisting crime and advising client
- note -> book reps 3 part test to see if lawyer violates duty when advising C about breaking law
  - C engaged n a course of conduct that violates crim law or is an intentional violation of civill obligation, other than failure to perform a K or failure to sustain good faith claim to prop
  - L has knowledge of facts sufficient to reas discern that C's behaviour is such a violation; and
  - L facilitates C's course of conduct by giving advice that encourages to pursue conduct, indicates how to reduce risk of detection, or by performing act that furthers course of conduct
- normally, line between crimes that reflect adversely on Ls and those that dont in terms of offenses involving moral turpitude
  - offenses w/ violence, dishonesty, breach of trust, serious interference with admin of justice fall here
  - pattern of repeat offenses even if minor can indicate indifference to legal obligation

- L who knowingly manifests prejudice or bias through discrim violates P(d) when actions prejudicial to admin of justice
- L's abuse of public office can suggest inability to fulfill professional role of Ls

## **Judicial ethics**

### 2.4 L serving as 3rd party neutral

- L serves as 3rd party neutral when assist two or more persons who aren't Cs of L to reach resolution of dispute/other matter (arb, mediator, etc)
- L serving as 3rd P neutral shall inform unrep parties that NOT repping them
- comment
  - depending on sophistication of C, diff info may be required to disclose; when appropriate, L should tell unrep Ps of important differences in role as neutral 3rd P and L, like LCP
  - L who serves as 3rd P neutral subsequently may be asked to serve as L in same matter (1.12)

### 1.3 Diligence

- L must act with reas diligence and promptness when repping C
- comment
  - workload must be controlled so that each matter is competently handled
  - C's interests often adversely impacted by time passed or change in conditions; even when C's interests not affected in subs, unreas delay can cause client needless anxiety/undermine confidence in L's trustworthiness

### 2.9 Exparte Comms

- judge cant initiate, permit, or consider ex parte comms or consider other comms made to judge outside of presence of Ps or their Ls, concerning a pending or impending matter, unless
  - ex parte comm for scheduling, admin, or emergency purposes id no party will gain advantage, and judge promptly notifies all parties of contact
  - judge can obtain written advice of disinterested expert on law applicable to proceeding before judge if gives advance notice to Ps of person to be consulted and subject of advice
  - can consult with court staff and officials whose functions are to aid judge in carrying out judge's adj responsibilities, or w/ other judges, provided judge makes reas effort to avoid receiving factual info that is not part of record and doesn't abrogate responsibility personally to decide matter
- if ex parte comms occur, judge shall promptly tell Ps of substance of comm and give chance to respond
- comment
  - judge can consult other judges on pending matters, but have to avoid ex parte discussions of case with judges previously DQ
- note -> if ex parte contact happens for emergency reasons, L's must give judge all info relevant to make decision (heightened duty)

## 2.11 Disqualification

- judge shall DQ hself in proceeding where impartiality may reas be ?ed, including but not limited to
  - judge has personal bias/prejudice concerning party's lawyer or personal knowledge of facts in dispute
  - judge knows that themselves, their spouse, or person in 3rd degree of relationship to them is -> party to proceeding, acting as L, person who more than de minimis interest that could be impacted, likely to be material witness
  - judge or immediate fam has econ interest in matter
  - judge has made pub statement not in court that commits judge to come out certain way
  - judge served as L in matter or served in govt emp in such capacity
- comment
  - judge DQd when impartiality may reas be ?ed, regardless of if above applied
- note -> as long as no personal bias/prejudice, or knowledge of facts, judge can disclose on record basis of DQ, and if all parties agree, go forward (DQ based on relative's financial interest can be waived)

## Caperton v. Massey Coal

- against DP to have judges decide
- majority worried about public perception/trust in judiciary
- idea that CEO of corp could buy off justice through campaign contributions
- ethical implications of campaign finance

## Cheney v. US District Court

- Scalia requested to recuse because went on duck hunting trip with Cheney; wished could recuse but had obligation not to
- SC different; if SCOTUS member recuses, run risk of 4-4 vote
- Scalia thinks higher threshold for SC recusal

## 2.10 Judicial Statements on pending and impending cases

- judge shall not make public statement that may be expected to affect outcome/impair fairness of matter in any court, or make any non-public statement that may subs interfere with fair trial/hearing
- judge cant, in connection with cases, controversies, or issues that are likely to come before court, make pledges or promises inconsistent w/ duties of judicial office
- judge should require court staff/others to do same

## 2.7 Responsibility to decide

- judge shall hear/decide matters assigned to them unless DQ required by 2.11 or other law
- comment
  - unwarranted DQ may bring pub disfavor to court and judge personally

## 3.12 Compensation for extrajudicial activities

- judge can accept reas comp for extrajudicial activities permitted, unless acceptance would appear (to reas person) to undermine judge's independence, integrity/ impartiality

- comment
  - judge permitted to accept honoraria, stipends, fees, wages, salaries, royalties or other comp for speaking, teaching, writing, and other judicial acts, provided comp is reas and commensurate with task performed

### 3.13 Acceptance and reporting of gifts, loans, bequests, benefits, or other things of value

- judge cant accept above things if prohibited by law or would appear to reas person to undermine ind, integrity, or impartiality
- unless otherwise prohibited, can accept w/o publicly reporting
  - items with little intrinsic value like plaques, trophies, etc.
  - gifts from friends, relatives, or other persons whose appearance before judge would in any event require DQ
  - comm/financial opportunities and benefits, including special pricing and discounts, if same opportunities made to no-judges
  - books, mags, other resource material supplied by publishers
- unless otherwise prohibited by law or (a), can accept an report
  - gifts incident to public testimonial
  - invitations to judge/spouse or guest to attend, without charge
    - an event associated with bar-related function or other activity relating to law
    - event associated with judge's educational, religious, charitable, or other acts if same invitation offered to non-judges

### 3.14 reimbursement of expenses and waivers of fees/charges

- unless otherwise prohibited, can accept reimbursement of necess/reas expenses for travel, food, lodging, etc.; if are in connection with judge's participation in permitted extrajudicial activity

### Republican Party of MN v. White

- when judges talk about hot button issues, problems arise on campaign trail
- if disagree with ethics requirement, can litigate it!

### **Prosecutor Ethics**

- prosecutors have broad discretion on how to investigate a case, whether to bring charges, how to present evidence at trial, and how t make sentencing/post-conviction motions; even if believes D is guilty, may choose not to bring charges for many reasons
- rules and const. law place additional duties on them beyond normal L

### 3.8 special responsibilities of prosecutor

- prosecutor in crim case shall
  - refrain from prosecuting charge that prosecutor knows not supported by prob cause

- doesn't matter whether crime person charged for would be first time anyone has ever been charged w/ that crime; prosecution may appear pre-textual
- In re Lionhart -> disbarred b/c brought charges knew not supported by PC
- McKittrich v. Wallach -> no hard/fast rule requiring discovery in certain case; here, prosecutor exercise his discretion in good faith, so shouldn't be required to forfeit office
- Pugach v. Klein -> US attorney's office acts as arm of exec branch; attorney has right to balance public interest against right of accused; decision should be left to attorney
- make reas efforts to assure that accused has been advised of right to, and procedure for, obtaining counsel and has been given reas opportunity to obtain counsel
- not seek to obtain from unrepresented person a waiver of important pretrial rights
  - doesn't apply to someone appearing pro se with approval of tribunal
- make timely disclosure to defense of all evidence/information known to prosecutor or that tends to negate the guilty of accused/mitigates the offence, and, in connection with sentencing, disclose to the defense and tribunal all unprivileged information known to prosecutor
  - other Ls have more limited disc obligation
- not subpoena L in grand jury or other crim proceeding to present evidence about a past/present client unless prosecutor already reas believes
  - info sought not privileged
  - evidence sought needed for successful completion of investigation or prosecution
  - no other feasible alternative to obtain information
- except for statements needed to inform public of nature/extent of prosecutors action and that serve a legit law enforcement purpose, refrain from making extrajudicial comments that have subs likelihood of heightening public condemnation of accused
  - serves to supplement rule 3.6, prohibiting extrajudicial statements that have subs likelihood of prejudicing a client
- when prosecutor knows of new, credible and material evidence creating reas likelihood that convicted D didnt commit offense, prosecutor must
  - promptly disclose evidence to appropriate court/auth
  - if conviction obtained in their jurisdiction
    - promptly disclose that evidence to D unless court authorizes delay
    - undertake further investigation/make reas efforts to cause investigation, to determine whether D was convicted of offense he didn't commit
- when prosecutor knows of clear/convincing evidence that D in jrx was convicted of offense didn't commit, prosecutor shall seek to remedy situation
- comments

- prosecutor's resp is for justice, not to be advocate; extent of mandated remedial action debated in different jrxs
- prosecutors are also subject to 5.3 and 5.1
- independent judgment, made in good faith, that new evidence not of such nature as to trigger obligations of s. (g) and (h), though subs determined to be erroneous, don't constitute violation of rule

#### Refusing to prosecute certain kind of crime

- several reasons
  - determination not worth expenses
  - concern for public backlash

What happens when decides to go forward, then realizes people not guilty of offenses they are charged with?

- paladium murders -> people wrongfully accused and convicted; Bibb did not WD/ resign because was concerned another L would go forward with prosecution, and didn't want to see innocent men convicted; judge commended him
- some have stepped down because can't go forward with rep

#### Factors bearing on prosecutor's discretion to charge

- ABA standards require only bring charges supported by PC and admissible evidence to support conviction
- factors to consider -> extent of harm caused, improper motives by complainant, coop by D

#### U.S. v. Armstrong

- have to show federal prosecutorial policy had discriminatory effect
- failed here
- have to show that similarly situated people of diff race were not prosecuted

#### Unprosecuted similar conduct

#### U.S. v. Parham

- evidence not sufficiently similar to acts of voter frauds by D
- D accused of voting more than 1 time, where whites accused of intimidation
- "where D cannot show anyone in similar situation who was not prosecuted, hasn't met threshold point of showing there has been selectivity in prosecution"

#### Right to counsel

- prosecutors duty to make sure accused has been advised of right to counsel
- also part of 3.8(b)

#### U.S. v. Hammad

- implicated 4.2 not allowing L to communicate with repped party
- here, D said prosecutor commed directly w/ him through gov informant
- prosecutor cant use middle man to get info from potential crims once knowns person repped by counsel

#### Plea bargaining

### Bordenkircher v. Hayes

- court says prosecutors can choose to pursue all claims with prob cause under law; D could have been charged in first place with most serious charge
- may be no correct answer to ? of whether prosecutor can ethically offer plea agreement when all degree D would be pleading guilty to crime did not commit
- 3.8(a) says cant charge crime when not supported by PC, but cases where allow people to plead guilty to minor traffic offenses when really committed other crimes

### Discovery Cases

- Brady rule
  - prosecutors must make exculpatory evidence available to D if specifically requested; must make timely disc to D of all evidence or info known to prosecutor that negates guilt of accused or mitigates seriousness of offense
    - evidence favorable to accused and not turned over to D upon request violates DP where evidence is material to guilt, irrespective of good/bad faith of prosecution

### United States v. Agurs

- when request for info not specific, general request really no different than none at all
- no const. obligation that prosecutor must release possibly exculpatory evidence
- only matters if evidence creates reas. doubt in light of entire record
- omission must be evaluated in context of entire record; if no reas doubt about guilt, whether or not the additional evidence is considered, there is no justification for new trial
- if verdict is already of questionable validity, additional evidence of minor importance might be sufficient to create that reas. doubt

### U.S. v. Bagley

- suppressed evidence is material under standard only if reas. probability that has evidence been disclosed to defense result of proceeding would have been different

### Const. v. ethical perspective

- no prosecutor obliged to share weaknesses of own case as opposed to exculpatory evidence
- ethical duty to do justice may be different

### Sentencing

#### PN v. Dejesus

- in Chambers court held use of religious text like bible to make argument for death sentence was prejudicial
- in some instances, send a message arguments accepted by court
- here, L encouraged people to make decision not by weighing/mitigating and aggravating circumstances, but rather based on idea they should send message

## Inverted sentencing

- happens when multi-D cases, and one D may get of lighter because of gov's need for coop
- re: package deals, where gov't requires all Ds to plead guilty or settlement off
  - save resources!
  - but, can be considered coercive to targeted D a
  - prosecutors can also be coercive when targeted D persuades others to take package deal beneficial to self

## **L speech and the 1st amend.**

### Rules that limit L's ability to speak

- 1.6 -> cant talk about things client tells you w/o consent
  - 3.6 -> pretrial publicity
  - 7.1, 7.3
  - 3.3, 4.1 -> candor to tribunal -> forced to speak sometimes
  - 6.2 -> appointed to rep a client and cant get out of it
  - 1.9 -> duty to former C
  - 1.18 -> duty to prospective C
  - 3.7 -> limiting L's role as witness
  - 3.1 -> limiting kind of claims you can bring on client's behalf
  - 8.2 -> comments about judges
  - 8.3 -> reporting requirements
  - character and fitness process
  - 1.2(d) -> what kind of advice lawyer can give
- 
- when you sign up to be L, giving up free speech rights; cant speak out in way could before
  - who governs?
    - highest court in state creates
    - legislatures
    - state statutes

policy -> what of MRPC can be critiqued for making law more expensive, inaccessible, or keeping people from coming back for legal services?