

Ethical Lawyering - Outline

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- **Introduction**

- Inquisitorial system (Used in Great Britain & Australia) - Judges are more active & ask Qs
- Adversary system - Judges are passive. We depend on the parties to bring out the relevant info
- Wasserstrom -The adversary system requires lawyers to act w/ simplified morals, amorally, or even sometimes immorally - role differentiated behavior
 - Lawyers pay a social price for this - they become the role, even in their personal lives
- Chemerinski - Counter-attitudinal advocacy theory - if we advocate positions we don't believe in, we start to believe in them

- **Bar Admission & Discipline**

- Reciprocal discipline amongst the states - Almost all states have similar levels of sanctions.
- The power to regulate lawyers lies with the legislature, which steps in with much tougher rules when the state bar isn't getting the job done.
- Admission to state courts does not equal admission to federal court.

- **Sources of Regulation**

- California lawyers are governed by:
 - The California Rules of Professional Conduct, enforced by the California State Bar
 - The CA Business and Professions Code, enforced by the California State Bar
 - The rules in both states when CA lawyers violate ABA rules in other states.
 - ◆ CA lawyers can be disciplined by both the CA State Bar and the state bar where the violation occurred.
- Lawyers in other states are regulated by:
 - Their state-enacted version of the ABA Model Code enforced by their State Bar organization
 - The rules in both states when out of state licensed lawyers violate CA rules. Out of state lawyers who violate CA rules can be disciplined by the CA State Bar and the Bar of their original state of license.

- **Disciplinary Procedure**

- **Process**
 - Complaint comes in (from judge, LE officer, insurance company, banks (mishandled trust account), etc.)
 - Preliminary Investigation. If it indicates lawyer misconduct, goes to Office of Trials
 - Office of Trials
 - CA Supreme Court (affirms, rejects, modifies)

CA Rule 9.20 - If you are an attorney who is disbarred, suspended or resign, you:

- Must notify all clients being represented in pending matters of the discipline
- Must notify clients where they can pick up their legal file
- Must notify all co-counsel, all opposing counsel, and all courts in which are matters pending of the discipline
- Must send all required notices by certified mail
- Must provide proof of compliance to an assigned probation officer appointed by the State Bar

- **The obligation to report**
 - ◆ In model states:
 - ◇ Lawyers must report conduct of other lawyers whose conduct represents a substantial question about their ability to practice law unless you are representing them
 - ◆ In CA: No obligation to report others. Obligation to self report.

- ◇ Three or more lawsuits in a 12 month period for malpractice or professional wrongful conduct
- ◇ The entry of a judgment against the lawyer for fraud, misrepresentation, etc
- Bar Admission Requirements
 - Minimum Requirements for a CA Law License
 - Be at least 18 years of age;
 - Be of **good moral character**;
 - Have completed two years of college *or the equivalent*;
 - Register with the Committee of Bar Examiners, complete educational requirements and;
 - Pass the **CA Bar Examination**, OR the **CA Attorney's Exam** (Same exam but no multistate component.)
 - Good Moral Character
 - California rules defines "good moral character" as:
 - ◆ "...qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process."
 - You may have a problem with a lack of good moral character if your past includes:
 - ◆ *A pattern of deceit* as opposed to an isolated incident; (several convictions)
 - ◆ Lack of remorse
 - ◆ Lack of candor and cooperation with a disciplinary board
 - ◆ Failure to act in a fiduciary relationship
 - ◆ Intentional dishonesty for the purpose of personal gain
 - Conviction for misdemeanor or felony in recent past => Title 10 hearing
 - ◆ Person has the burden to convince them he is not a danger to the public and won't breed contempt for lawyers.
 - ◇ Themes: Danger to the public / Perception of the profession.
 - ◇ Not as bad as commission of a crime AFTER you've become a lawyer. Show you've rehabilitated yourself.
 - ◇ Kwasnik Case:
 - ▶ NY lawyer gets in car accident and kills someone. Declares bankruptcy to avoid judgment. 17 years of unblemished driving record since. CA S.Ct. allows him into the bar because he was rehabilitated. Court says he's not a danger to the public and the whole incident didn't affect the public confidence in the legal profession.
 - DIFFERENCE between CA and Model Rules
 - ◆ Model Rules will only be harsh if you've done something relevant to your practice of law. e.g.: Committing fraud: yes. Soliciting prostitutes: No.
 - ◆ In CA, ANY misdemeanor or felony going to moral turpitude is bad, regardless of being relevant to practice of the law. Almost anything amounts to moral turpitude because it shows you don't respect the law.
 - What other Crimes would likely keep you from passing moral fitness?
 - ◆ Murder
 - ◆ Child molestation
 - ◆ Securities or tax fraud
 - ◆ Multiple DUI convictions [just one DUI and CA will likely allow you to rehabilitate]
- Multi Jurisdictional Practice
 - Model Rules
 - Multi jx rules allow us to:
 - ◆ Perform ADR

- ◆ Client interviewing
 - ◆ Fact investigation
 - ◆ Take a deposition / get a declaration
 - ◆ Prepare a client
 - BUT, it does NOT allow court practice. Only Two Ways in which we CAN practice in another state:
 - ◆ If we can be admitted *pro hac vice*, we can represent someone in another state on that case only. Need to be in good standing in CA and be petitioned in.
 - ◆ We can take and pass the state's bar exam (because there's no reciprocity in CA)
 - CA
 - To practice in CA, lawyers licensed in other states:
 - ◆ Must meet all requirements for admission to the CA bar;
 - ◆ Must apply to register with the State Bar of CA;
 - ◆ Must not have failed the bar in CA within five years prior to an application;
 - ◆ Must file an application for determination of Moral Character in CA with the State Bar; and
 - ◆ Must agree to be subject to the discipline of the State Bar in CA.
 - Unauthorized Practice of Law
 - Three types:
 - ◆ When lawyers practice law in a jurisdiction in which they are not licensed
 - ◆ When lay persons practice law or give legal advice, usually by filling out legal forms while not under the direct supervision of a lawyer
 - ◆ When law students give legal advice or complete legal forms for others while not under the direct supervision of an attorney.
- Competence/Malpractice
 - What is "competent?": Competence involves two components:
 - **The requisite ability** – the skill and knowledge to perform the services up to the existing standard in the community, and
 - Services must be performed with the requisite **care** – that is, with the thoroughness and preparation reasonably necessary for the representation. Even though counsel may be competent, the services still need to be performed properly.
 - Model Rules
 - **Requires a lawyer to provide competent representation to a client. A lawyer shall possess or acquire the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**
 - Must possess or acquire
 - CA Rules
 - **Requires a lawyer to perform services competently, which means the lawyer must have or acquire the requisite diligence, learning and skill, and mental, emotional and physical ability reasonably necessary for the performance of legal services.**
 - Must have or acquire. Must also have MENTAL, EMOTIONAL, and PHYSICAL ability.
 - ◆ e.g.: Close to nervous break down, substance abuse, no crazy ass workload.
 - Legal Malpractice

- A lawyer is civilly liable for professional negligence:
 - if an attorney client relationship existed (hence, a duty of care);
 - if the lawyer fails to exercise care;
 - if there is legally recognizable harm to the plaintiffs; and
 - but for the lawyer's conduct, the plaintiffs would have been successful in the underlying action. This is the "case within the case."
 - Just as in any other tort action, each element must be proven by a preponderance of the evidence, or the claim fails.

- **Failure** to perform services competently is **malpractice** in either a CA or Model Rules jurisdiction if all elements of the tort are met. The standard of care to which a lawyer must adhere:
 - Lawyers must use the skill and knowledge ordinarily possessed by lawyers under similar circumstances in the community. (AKA the reasonably prudent lawyer)
 - Failure to conduct reasonable fact finding / discovery can = malpractice.
 - Medmal example: Find eye witnesses, conduct fact finding on the hospital operations, find state statutes regulating staff ratios
 - Settling for malpractice - Attorney must tell client about conflict of interest; should seek independent legal counsel.
 - Non Lawyer Conduct
 - Partners or shareholders have an obligation to make sure that institutional procedures are in place to give reasonable assurances that non-lawyers will comply with the rules of professional conduct
 - Lawyers who directly supervise non-lawyers have a duty to take reasonable steps to assure compliance by non-lawyers with the rules of professional conduct
 - Lawyers are responsible for the conduct of nonlawyers if they direct, ratify, or fail to correct their misconduct
- **The Lawyer Client Relationship**
 - **Models of the Relationship**
 - Traditional Model:
 - Lawyer is the dominant party, assessing the best course of conduct for the client
 - Client is passive, relying on the judgment of the lawyer
 - Lawyer identifies the problem and the solution
 - Participatory Model:
 - Lawyer and client share the responsibility relating to the success of the representation
 - Lawyer actively solicits frequent client input
 - Lawyer tailors options and solutions to the needs of the client
 - Lawyer provides sufficient information to allow the client to make an informed decision whenever appropriate.
 - Hired Gun Model:
 - Client is dominant, calls the shots; lawyer is passive recipient of client instructions
 - Not very prevalent
 - **Forming the Relationship**
 - A Good Retainer Agreement specifies
 - The ***scope of the services*** to be provided, including limitations on any services to be provided;
 - e.g.) Limit to settlement offer, through trial but not appeal, or through appeal.
 - The ***duties of the client***, as well as conduct by the client amounting to a breach of the agreement, such as failing to pay fees or making representation unreasonably difficult for the lawyer;
 - ***Fees to be paid by the client*** - retainer deposits and hourly rates, if applicable, including those of paraprofessionals and investigators. Billing rates for phone calls, meetings, waiting in court and travel are also specified;
 - ***Anticipated costs*** of the case to be paid by the client;
 - When ***discharge*** and/or ***withdrawal*** is allowed or appropriate;
 - Sets forth good cause: e.g.) client doesn't pay
 - NOTE: You cannot hold client's file hostage for unpaid fees. There is also a requirement to let them know they have the right to fee arbitration.
 - Whether ***malpractice insurance*** is carried by the lawyer in California

- Factors as to whether you created an Implied Attorney Client Relationship
 - Did you volunteer your services or agree to investigate a matter without a disclaimer that investigation is a pre-requisite to accepting the matter?
 - e.g.) Use Retainer agreement limiting the scope.
 - Did the person seek legal advice from you? Did you give legal advice?
 - NEVER DO THIS INFORMALLY
 - Was confidential information disclosed by the caller or speaker without interruption or disclaimer? Did you listen to a lengthy client story in a passive manner, without interruption or disclaimer?
 - Tell them up front that by listening you're not promising to represent them.
 - Did the client rely on the legal advice given?
 - Reliance can equal an implied relationship. DISCLAIM REPRESENTATION!
 - Did your behavior, such as ensuring a private office visit for confidentiality purposes, without disclaimer, create a "reasonable expectation" that you consent to accept representation?
 - How to Avoid the Inadvertent Lawyer Client Relationship
 - Don't provide services without an *express retainer agreement* setting forth or limiting the *scope* of representation. Are you only accepting the case on a limited basis to investigate the facts? If so, expressly limit the scope of your services until you make a decision to accept or reject the case.
 - If you are consulted about a potential problem in a non-office setting, tell the person immediately (before discussing the details of the matter) that the consultation is not appropriate in an informal setting. If you are competent to offer advice, *suggest an appointment in your office*.
 - Don't leave a dangling client! If you don't want the case after a consultation, write a *non-engagement letter* expressly stating that you are not handling the matter.
 - ◇ The letter includes references to applicable deadlines and statutes of limitation.
 - ◇ Let client know about the potential for claims being lost due to SOL, and to see another attorney promptly, whether you've identified the SOL or not.
 - Are Lawyers Obligated to Take a Case?
 - CA Rules
 - It is the duty of an attorney: (h) Never to reject for any consideration personal to himself or herself, the cause of the defenseless or oppressed.
 - BUT, this rule is aspirational. There's no rule that REQUIRES us to do pro bono work.
 - Model Rules
 - 6.2 (com. 1). Lawyer not required to take a case repugnant to the lawyer.
 - If you can't give the loyalty, it's a conflict of interest problem and you have to reject the employment.
 - 6.2(b) - Can be excused if taking a case would cause an undue financial burden.
 - Same applies to court appointments. We should not refuse court appointments lightly, but if the cause is repugnant or we're not competent, we must refuse. The judge cannot appoint you to do work pro bono in an area in which you have no experience.
- Maintaining the Relationship
 - Rules Encouraging Client Participation
 - Model Rules
 - Instruct lawyers to **abide by a client's decisions** regarding the objectives of the

representation, and further instructs that both the lawyer and the client have authority and responsibility in the objectives and means of representation.

- **Communication** - Places the lawyer under a **mandatory duty** to explain a matter to a client so the client can make an informed decision.
 - CA Rules: 3-500
 - Communication is similar; requires lawyers to keep clients reasonably informed about significant developments in the case.
 - Settlement Offers
 - Model Rules
 - The decision to accept or reject a settlement offer is the client's decision alone. Lawyers must relay settlement offers and must abide by the decision of the client.
 - Even if you don't think it's a good offer, you MUST tell them about every offer.
 - CA Rules
 - CRPC 3-510 says a lawyer shall promptly communicate all terms and conditions of any offer in a criminal matter and all amounts, terms and conditions of any *written offer* in all other matters.
 - But note, any offer, **whether written or not**, is still subject to CRPC 3-500, that says a lawyer shall keep a client reasonably informed about significant developments relating to the...representation.... (A settlement offer is a significant development)
 - Ultimately there is no difference. Must relay the offer to the client.
 - Accepting Employment Violates the Rules When:
 - Model Rules
 - 3.1: Lawyers can't take a position that is **frivolous**; lawyers can't bring or defend a cause unless a good faith argument exists for extension, modification or reversal of existing law.
 - CA Rules
 - CA B & P Section 6068 c says lawyers can only maintain such actions as appear to be just; and
 - CRPC 3-200 says a lawyer shall not seek, accept or continue employment if the objective is:
 - to bring an action, conduct a defense, assert a position or take an appeal without probable cause and for the purpose of harassing or maliciously injuring a person; or
 - to present a claim or defense that is not warranted under existing law unless it can be supported by a good faith argument for an extension, modification or reversal of existing law.
- **Ending the Relationship - Termination/Withdrawal (Model Rule 1.16 and CRPC 3-700)**
 - Mandatory Withdrawal: L must withdraw where:
 - The lawyer knows the client is bringing an action or asserting a position without probable cause for the purpose of harassing or injuring another;
 - The lawyer knows or should know that continuing representation will violate the rules;
 - The lawyer's physical or mental condition renders it unreasonably difficult to carry out the employment.
 - The lawyer is fired by the client, but within judicial limitations.
 - Permissive Withdrawal: L may seek to withdraw where:
 - The client seeks to present a claim or defense that is not warranted by existing law or a reasonable extension of existing law;

- The client proposes engaging in an **illegal course of conduct**;
 - The client insists that the lawyer engage in an illegal course of conduct;
 - The client makes it **unreasonably difficult** for the lawyer to carry out the employment;
 - The client insists the lawyer engage in **conduct that is contrary to the lawyer's judgment and advice**;
 - The client freely agrees to terminate the relationship;
 - The client **breaches the fee agreement**.

- *Withdrawal by a Lawyer in a LITIGATED Matter:*
 - The lawyer must file a **noticed motion** before the trial judge seeking to be relieved as counsel if the client does not consent;
 - "Irreconcilable differences" - Big buzz word in CA. Means that lawyer is requesting withdrawal because client wants to do something illegal or another confidential reason.
 - The judge **may or may not allow** the lawyer to be relieved. The judge will evaluate the possibility of disruption, delay or prejudice to the court, case or client, and the ability of the client to obtain new counsel without significant delay to the court, the calendar or opposing counsel;
 - If the motion to withdraw is granted, the lawyer still has obligations to the client:
 - all original file materials must be **returned to the client** (not including attorney work product) and any **unearned fees** must be returned to the client.
 - The attorney must continue to honor client confidences and secrets despite the fact that the attorney client relationship is terminated.

- *Withdrawal in a NON-LITIGATED Matter:*
 - A lawyer shall not withdraw until he or she has taken steps to avoid **reasonably foreseeable prejudice** to the rights of the client.
 - Reasonable steps to avoid prejudice to the rights of the client require the lawyer to give **reasonable notice** to the client (preferably in an unambiguous letter), such that the client has sufficient time to find another attorney.
 - The lawyer must promptly surrender **all papers and property** to the client and **return unearned fees**. A wise lawyer always has a clause in the retainer agreement allowing the lawyer to terminate representation on proper notice and in accordance with the provisions of the rules.

- *When the Client Discharges the Lawyer:*
 - Clients have an absolute right to terminate the services of a lawyer, unless the attempt to terminate services causes delay or disruption to a court.
 - If not discharged for cause, the lawyer has a **quantum meruit** claim for unpaid fees, but subject to the top limit of the contract.
 - Whether terminated by the client for cause or without cause, a lawyer **must still return the client file**, other property or unpaid fees.

- **Confidentiality**
 - Attorney-client confidentiality duties arise from the Evidence Code and from broad ethical duty statutes adopted in each state.
 - ATTORNEY-CLIENT PRIVILEGE: Both CA and all Model Rule states have adopted an evidence code "Attorney-Client Privilege."
 - The ACP only comes into play when the government attempts to compel an attorney by way of a subpoena to disclose a confidential client communication.
 - If the communication from the client to the attorney is in fact privileged under the elements set forth in the evidence code, then the government cannot force an attorney to testify about the substance of the communication, unless the client consents to the disclosure.

- certain to result in the death or substantial bodily harm to an individual
 - *No other state has this duty*
 - Lawyers who choose not to reveal confidential information as allowed by this rule do not violate the rule.
- California common law also allows lawyers to reveal certain confidential information to the extent necessary to:
 - Establish a fee
 - Establish a defense if accused of wrongdoing or misconduct
- Comments for 3-100 helpful to understand the rule for good review.
 - Disclosure is only a last resort to preserve the sanctity of human life.
 - If we make the decision to rat out our client the A/C relationship is done. Must seek to withdraw.
- **Important Rule Differences**
 - California only allows discretionary disclosure when a **criminal act** is threatened
 - California imposes a **duty to counsel** where circumstances permit if the lawyer intends to reveal confidential information as allowed by the rule; no such duty is contained in the Model Rule
 - The Model Rule contains a **crime/fraud exception** relating to substantial financial injury. California has no such exception. (Though very few jx have adopted it)
 - The Model Rule contains a clear exception to reveal information to establish a fee or establish a defense if the lawyer is accused of misconduct or wrongdoing. The California rule contains no such exception, although lawyers are allowed to reveal confidential information for this purpose by CA common law
- **Noisy Withdrawal Difference**
 - CA has a higher standard of confidentiality than the model rules; not allowed to disaffirm.
 - Examples:
 - CA: “I withdraw as attorney of record for John Smith in any pending transaction for the Bank of Commerce.” (not a noisy withdrawal and preserves confidentiality)
 - Model Rules (Allowing disaffirmance): I withdraw as attorney of record for John Smith in any pending transaction for the Bank of Commerce and **disaffirm** any work done on his behalf in any transaction at the Bank of Commerce.”
- **Conflicts of Interest**
 - Lawyer-client conflicts usually fall into general groups:
 1. When a **third party** tries to interfere with the judgment of the lawyer, for example:
 - When a third party (not the client) wants to pay L’s fees;
 - Where the interests of an **insurance company** threaten the **independent judgment** of a lawyer, and/or
 - When **close professional or personal relationships** with third parties such as relatives or friends affect the independent judgment of the lawyer.
 2. When L’s interests conflict with that of his or her client, for example:
 - When L’s **financial interests conflict** with those of a client, such as doing business with a client;
 - When L has a **sexual relationship** with the client; and/or
 - When L’s **personal, political or religious beliefs threaten L’s undivided loyalty to the client** or competent representation of the client.
 3. When L represents two or more clients (**concurrent clients**) with conflicting interests, for example:
 - L represents multiple clients who seem to have harmonious interests at the outset but whose **interests diverge as the case progresses.**
 - Very strict rules.
 4. When the interests of **former clients** and **current clients** conflict, for example:

- When private lawyers switch firms representing opposing clients
 - When a judge leaves the bench to work at a firm that had cases before her as a judge
 - When a government lawyer (such as an IRS lawyer) leaves the IRS to work at a private firm representing taxpayers in disputes with the IRS
- **Model Rules**
 - Even though a conflict or a potential conflict exists, a lawyer can still represent a client **so long as**:
 - The lawyer's own interests do not materially limit the representation; and
 - The lawyer reasonably believes the representation will not be adversely affected; and
 - The client **consents in writing** after proper conflict **disclosure** and consultation.
 - Specific scenarios that are potential conflict situations:
 - **Financial deals** with a client (aside from legal fees) presumably create a conflict unless 4 tests are met:
 - a) The transaction must be objective, fair and reasonable;
 - b) The terms of the transaction must be in writing and in language understandable to a layperson; and
 - c) The client must be given a reasonable opportunity to seek independent counsel; and
 - d) The client must consent in writing.
 - **Gifts from clients** are not generally permitted because they create the possibility of undue influence.
 - **Book and media rights** may not be negotiated until the representation is concluded.
 - **Standard commercial transactions** between a lawyer and a client, such as the sale of a car or piece of property, are OK.
 - **Financial assistance to clients**: lawyers are not allowed to provide financial assistance to clients except to advance litigation costs.
 - **Proprietary interest in cause of action**: lawyers cannot obtain a proprietary interest in the cause of action or subject matter of litigation except:
 - a) To acquire a lien or secure payment of a fee; or
 - b) To handle a matter on a contingency.
 - **Lawyer as witness**: A lawyer should not represent a client where the lawyer will likely be a necessary witness, unless:
 - a) The testimony relates to an uncontested matter; or
 - b) The testimony relates to the value of legal fees; or
 - c) Disqualification of the lawyer would work a substantial hardship on the client
 - **Sex with clients**: Lawyers should not have sex with clients unless a consensual sexual relationship existed prior to representation.
 - ◆ Very difficult to be objective while in a personal relationship with your client.
 - ◇ Model Rule 1.8(j): Prohibits a sexual relationship unless it existed at the beginning of the relationship.
 - ◇ CPCR 3-120 is a little looser. It says lawyers shall not demand sex as a condition of the representation, coerce sex, or to continue a sexual relationship if it results in incompetent representation.
- **CA General Conflict Rule: A different approach**
 - The California rule focuses less on specific scenarios and more on **relationships** that may substantially affect a lawyer's judgment.
 - Note differences between providing disclosure and obtaining informed written consent
 - A lawyer must **provide written disclosure** to a client where:
 - L has or had a legal, business, financial, professional or personal relationship with a party or witness in the same matter that would
 - a) **Substantially affect L's judgment** or ability to provide objective competent

- representation, or
 - ◇ (Substantially affect judgment is your subjective call)
 - b) L has or had a legal, business, financial or professional interest in the **subject matter of representation** (3-310 (B))
 - After disclosure, its up to the client to determine whether to continue
 - If a disinterested lawyer later disagrees with us, we get discharged.
 - A lawyer must **obtain informed written consent** of each client where:
 - i. A lawyer has multiple clients with potentially conflicting interests or actually conflicting interests; or
 - a) NOTE: No confidentiality BETWEEN the multiple clients.
 - ii. A lawyer represents clients in matters that are directly adverse. (3-310 (C))
 - iii. A lawyer wants to accept new employment adverse to a former client if L has confidential information material to the employment. 3-310 (E)
 - Lawyers **shall not accept fees from a third person** who is not the client unless (under both CA and the Model Rules):
 - i. There is no interference with L’s professional judgment; and
 - ii. There is no interference with the attorney-client relationship; and
 - iii. Confidential information is preserved; and
 - iv. The client provides informed written consent. 3-310 (F)
- **Procedure for DISCLOSING CONFLICTS OF INTEREST and OBTAINING INFORMED CONSENT**
 - CA and the Model Rules prohibit a lawyer from representing clients when interests conflict unless the lawyer first obtains the *informed written consent* of all affected clients. Conflicts are curable with disclosure and informed written consent in most circumstances.
 - i. Before asking for written consent, *disclosure* requires the lawyer to discuss the following:
 - a) All facts and circumstances that give rise to the conflict or potential conflict (CRPC 3-310 (A) (1) and Model Rule 1.7, Comment 18); and
 - b) A description of actual and reasonably foreseeable adverse consequences to the client (CRPC 3-310 (A) (1) and Model Rule 1.7, Comment 18);
 - c) If L represents multiple clients in a single matter, disclosure must include the implications of common representation, the possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks of multiple client representation. (Model Rule 1.7, Comment 18 and Comments 29-33).
 - ii. Following the disclosure discussion, L must confirm the consent of the client *in writing*. (Model Rule 1.7 (b)(4) and Comment 20 and CRPC 3-310 (A)).
- **Overriding Conflicts Test**

- 1) Is there any possibility that the lawyer’s complete loyalty to his or her client will be compromised in any way?
 - 2) Is there any possibility that confidential information obtained from any client or former client can be used to the detriment or disadvantage of the client?

 - If the answer to either question is yes, then a conflict or a potential conflict exists. **Disclosure** and **informed written consent** must occur.
- **When is consent not “informed?”**
 - Some conflicts are so obvious or potentially detrimental to the lawyer’s client that the lawyer cannot properly ask for consent, and consent obtained under such circumstances is invalid.
 - Most jurisdictions rely on the “disinterested lawyer” or “disinterested judge” test to determine whether consent was properly obtained.

- a) Would a disinterested judge or lawyer, looking at all of the circumstances,

conclude that consenting to the conflict is not in the client's best interests?
b) If so, the lawyer cannot ask for informed consent and cannot claim that consent has "cured" the conflict. Lawyers who make mistakes in judgment usually get disqualified.

- e.g.) Lawyer for husband and wife getting a divorce. Husband feels lawyer isn't being fair and fires him. Original lawyer can no longer represent wife.
- **Accepting Compensation from 3rd Parties (Model and CA)**
 - L shall not accept compensation from a 3rd party other than the client unless:
 - The client gives written informed consent;
 - There is no interference with the lawyer's professional judgment in the matter;
 - There is no interference with the attorney- client relationship
 - Confidential information is protected on behalf of the client

Business Transaction Rules

- **Model Rule 1.8 (a)** says a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - The terms are fair and reasonable to the client and
 - The terms are fully disclosed, given to the client in writing and are reasonably understood by the client; and
 - The client is advised in writing to seek the advice of independent counsel regarding the transaction; and
 - The client gives informed consent in writing to the terms of the transaction and the lawyer's role in the transaction
- The California rule is similar.
- **There is nothing wrong with business transactions, or doing legal work in exchange for trade.** Just follow the rules.
- **Lending Clients Money**
 - Model Rules
 - Lawyers cannot provide financial assistance to clients unless its an advance on litigations costs.
 - If it's not a litigated matter (it's a transactional matter), Lawyer could probably do it under a straight promissory note. Just don't take a lien out on the house or you have to follow business rules.
 - In CA, you can, as long as you get the promise to pay back in writing.

Business Transaction Rules do not apply in a contingency fee arrangement (in CA?)

- Example 1, the lien arrangement – business transaction rules apply:
 - "I will take a lien on the future sale of your house in your divorce matter to secure my legal fees at the rate of \$250 per hour."
- Example 2, the contingent arrangement – business transaction rules do not apply:
 - "If I am successful in obtaining a beneficial financial settlement for you in your divorce case, I take 30% of whatever I recover to compensate me for legal fees irrespective of the number of hours I spend. The more I can recover for you, the better off I will be and the better off you will be. If I am not successful in obtaining a financial settlement, I take nothing."
- Why do the business transaction rules apply in Example 1, but not in Example 2?
 - In example 2, the better the lawyer does the better the client does. There's no conflict of interest. Lawyer has every incentive to do the best job for the client.
 - In CA, do not need to use business transaction rule in contingency.

- Hypos:
 - Sarah advises her client to put his cottage up for public auction to cover delinquent taxes and pay off other debts.
 - Can Sarah have her brother bid on the cottage as an undisclosed principal?
 - ◆ Is her professional judgment affected by her own personal interest in the cottage? Can she be as objective? Probably not
 - ▶ Model Rules - If her judgment is affected by these factors, she should not continue to represent the client absent full disclosure and informed consent from Willis in writing.
 - ▶ CA - if her professional judgment is affected it is clear that CRPC 3-310 requires her to get written disclosure and she must obtain informed written consent.
 - Can she purchase it directly from Willis?
 - ◆ Must follow Model Rule 1.8(a) - Business transaction rules
 - J has a farm and H has a farm (represented by L). There is a boundary dispute between their properties. Can L purchase portion of H's farm (would business transactional rules help?)
 - No, because now he has a personal stake in the ongoing dispute. His judgment would be clouded. Once you have a financial stake in your client's case the potential for misjudgment is much higher.
 - ◆ A disinterested lawyer would say to wait until the litigation is over before selling to the lawyer, or enter into a contingent deal.

- **“Former Client” Conflicts Test**

Making this Analysis Simple:

- Is confidential information involved that can be used to the detriment of either party? If no,
 - 1) Are the matters substantially related? AND
 - 2) Are the interests adverse?

- No conflict if only one prong is met, UNLESS lawyer obtained confidential information from the former client - then you need the former client's consent.
 - Former client will not likely consent.
- Rationale: There is a presumption that if you represent a client you've obtained confidential information. And if there's a potential for use of that confidential information adverse to the former client, that trumps even if you don't meet both prongs.

- **The Former Client Dilemma: When Confidential Information Rules the Conflict!**

- Hypo 1:
 - Plaintiffs A and B vs. Defendant D in a civil case:
 - ◆ A lawsuit involves Plaintiffs A and B. Lawyer Lisa represents plaintiff B
 - ◆ Plaintiff B discharges Lawyer Lisa, becoming a former client of Lawyer Lisa
 - Can Plaintiff A now hire lawyer Lisa?
 - ◆ **Yes.** B is now the *former* client of Lisa. Although the matter is the same, the interests of plaintiff A and B are not materially adverse. No conflict. Lisa can represent A even if B objects.
 - Same result if Lisa obtained confidential information during the representation of B which could be used to B's disadvantage?
 - ◆ **No,** *not* the same result.
 - ◆ MR 1.9c1: A lawyer may not use information gained in representing a former client to the disadvantage of the former client unless the *former* client gives informed written consent.

- Q: Is Plaintiff B likely to consent? NO!
- Hypo 2:
 - Larry represents client A in a contracts case. The case concludes; A is now a former client. Larry is retained by new client B to sue former client A in a completely unrelated matter.
 - ◆ Part of the test is met:
 - ◇ the interests of the former client and the current client are materially adverse.
 - ◇ However, the new matter is neither the same nor substantially related.
 - ◆ No conflict, so Larry can represent B even if A objects.
 - Q: Same result if Larry obtained confidential information regarding A during representation of A that he could possibly use to the detriment of A?
 - ◆ **No.** Again, *not* the same result.
 - ◆ MR 1.9 c1: L can't use info relating to the representation to the disadvantage of the former client.
 - CA rules are substantially the same. Under 3-310E, Larry can't accept employment adverse to a former client if he obtained confidential information from the former client adverse to the new employment, unless the *former* client gives informed written consent.
- Hypo 3:
 - CARED hired Adler to draft legal lease forms to comply with the state's "Plain English" requirement. Leon's landlord uses the form, but Leon later wants to get out of the lease. He goes to Adler to challenge the form in court.
 - The moment Adler sees this client, he knows he has a conflict on his hands. What should he do?
 - ◆ Stop Leon immediately before he continues with his story. Tell Leon that he drafted the form. If Leon talks at length about the law suit, Adler will have Leon's confidential information.
 - ◆ Analysis:
 - ▶ Are the matters substantially related? - YES
 - ▶ Are the interests adverse? - YES
 - ▶ Is confidential information involved that can be used to the detriment of either party? - YES!
- Hypo 4
 - Driver D, passengers A, B, & C. Involved in accident. Go to one lawyer.
 - Review of multiple clients situations: They appear to be harmonious, but that may not remain. One may want a settlement and others may not. If conflict materializes, withdrawal is usually required. Once you withdraw from one, you probably need to withdraw from them all (risk of confidential information being used because there's no confidentiality between the concurrent clients.)
 - ◇ What if the driver is partially at fault?
 - ◇ What if passenger A later comes to you and tells you that D had a lot to drink before they picked up B & C but they don't know? Lawyer has to give up all the clients, and the lawyer needs to tell all the clients why he's withdrawing! Lawyer couldn't keep just B&C because:
 - ▶ Is confidential information involved that can be used to the detriment of either party? - Yes; he learned about D&A drinking
 - ▶ Are the matters substantially related? - Yes; same set of facts
 - ▶ Are the interests adverse? - Yes, because now they have an additional claim against D
- Hypo 5
 - ◆ Divorce (takes place in a fault state - as opposed to no fault state like CA). In a

fault state one party needs to prove fault against the other.

- ◆ Divorcing couple thinks they have an agreement and go to the same lawyer for him to represent them.
 - ◇ He has to provide full multiple client disclosure, tell them about no attorney client privilege between the two of them, and that if it gets to the point where one wants their own lawyer, they both need to get their own lawyer. Needs informer written consent.
 - ◇ Lawyer should tell clients that the grounds for divorce will be a part of the public record.
- ◆ L also needs to decide if he can loyally represent the interests of both without adverse effects to either.
- ◆ A really good lawyer would advise each of them to consult with independent counsel; many people consider this type of dual representation to amount to an inherent incurable conflict.
- ◆ Former Client Analysis if one leaves
 - ◇ Is confidential information involved that can be used to the detriment of either party? - Yes
 - ◇ Are the matters substantially related? - Yes
 - ◇ Are the interests adverse? - Yes

▪ Hypo 6

- ◆ Co hires L in a civil collection action against V.
- ◆ V and his friend later get arrested for robbery.
 - ◇ Criminal defendants charged with the same caper must have different lawyers. Friend gets public defender. V needs his own. Judge asks L to defend V.
- ◆ Is there a conflict here?
 - ◇ Not substantially related
 - ◇ No adverse interests
 - ◇ And there's no confidential information. The civil suit is a public record
- ◆ May still want to decline because V probably won't trust him.

○ Switching Lawyers

○ Rosenfeld Principles

- If a substantial relationship exists between the former representation and the current representation, the attorney's knowledge of confidential information is presumed; and
- Courts will not inquire into the nature and extent of the confidential information. If the attorney was involved in both matters **in depth**, then confidential information exists.
- **If a substantial relationship exists, the conflict exists and disqualification is the proper remedy.**

The whole firm need not be disqualified if the other firm agrees to screening, but they likely won't. If they don't want to allow screening, then they can ask the court to make a determination on whether the other side's screening was sufficient.

○ Substantial Relationship Analysis: When can screening cure the conflict?

- i. Does a substantial relationship exist between the prior and present representation? If no *substantial relationship*, no ethical problem.
- ii. If a substantial relationship is found between a current matter and a prior matter, did the attorney gain confidential information in the prior matter? There is a presumption of shared confidences within the prior firm, but if there are *no shared confidences*, then there is no need to disqualify anyone.

- iii. **Model Rule 1.10:** Has the presumption of shared information been protected by specific institutional screening mechanisms that will prevent the flow of confidential information from the quarantined attorney to other members of the law firm? The factors to be considered are:
 - a) Whether the firm is sufficiently large and whether the structural divisions are separate to minimize contact between the quarantined lawyer and the others
 - b) The likelihood of contact between the quarantined lawyer and the others;
 - c) The existence of safeguards and procedures to protect against access to files, information, etc. (e.g., locked files, passwords to information, prohibition on fee sharing).
 - d) Is there a prohibition on fee sharing in the matter with the infected lawyer?
 - e) The timeliness of the implementation of screening procedures: were they implemented in time to actually quarantine the infected lawyer?

Take Away: Always start former client or switching lawyer analysis with how much confidential information is involved.

- o **Government Lawyers & Judges.**

- o Model Rule 1.11: When government lawyers switch to private practice:
 - Former government lawyers (FGL) cannot represent a private client in a case or matter if the government lawyer participated substantially and personally (meaning confidential information is probably involved) in that case as a government lawyer, unless the government agency gives informed consent in writing. Even if the government lawyer would otherwise be disqualified, *another lawyer* in the firm can handle the matter, if:
 - ◆ The FGL is timely screened off the matter; and
 - ◆ The FGL gets no fees from the matter, and
 - ◆ The government agency gets written notice of the screening procedures so it can determine if the private firm is in compliance with the procedures.
 - ◆ The government agency consents to the screening procedures.
- o Model Rule 1.12: When judges or arbitrators switch to private practice:
 - Former judges, arbitrators or mediators (FJ, FA, FM) cannot represent a private client in a case or matter if the FJ, FA or FM participated personally and substantially in that matter as a judge unless all parties give informed consent in writing. If the former J, A or M is disqualified, another lawyer in the new firm may take the matter if:
 - o The FJ,A or M is timely screened from all participation; and
 - o The FJ, A or M gets no fees from the matter, and
 - o The appropriate agency gets written notice of the screening procedures so it can determine if the private firm is in compliance with the procedures.
 - o The former agency consents to the screening procedures.
- o **Cho Case**
 - Judge Younger. Younger had the Cho case come up before him on the bench. In a settlement conference, he shuttles in the Chos and their lawyers; and then the other side. He gets confidential information from both sides to try and come to a middle ground. So he knows everything about the case.
 - Leaves the bench and joins the defendant's firm before case is over. The firm immediately began screening procedures. Plaintiff firm objects.
 - CA S.Ct.: He had so much confidential information, which was so sensitive, that no screening was enough to change the appearance of impropriety.
 - o There are cases in which no amount of screening can ever cure.

- **Attorney's Fees**

- **Reasonableness of a fee**

- CA - Cannot be illegal or unconscionable
- Factors in determining the reasonableness of a fee
 - The amount of the fee in relation to the value of services performed;
 - The sophistication of the lawyer and the client;
 - The difficulty of the case;
 - The skill required to perform the services
 - The amount involved and the results obtained;
 - Time limitations (for example, handling an emergency matter like an injunction);
 - The experience, reputation, and ability of the lawyer
 - The time and labor required
 - The informed consent of the client to the agreement

- **CA Business and Professions Code**

- 6146 - Contingency contracts must be in writing
- 6148 - All cases with fees and costs above \$1000 must be in writing
- 6200 - Arbitration of fees is always mandatory if the client requests it.

- **Fee Rule Summary**

- Under the Model Rules and under the California rules, contingent fee agreements must be in writing.
- Under the Model Rules, other fee agreements, such as an hourly agreement, do not need to be in writing.
- In CA, if the total cost of the services to be provided is \$1,000 or more, the agreement must be in writing.
- Model Rule states do not allow contingent fees in a criminal case or a family law case
- CA does allow contingent fee agreements in criminal or family law cases, so long as the agreements are in writing.

- **Retainers**

- True engagement retainer
 - Client pays you a set amount monthly to be available.
 - Does not need to go in client trust account - it's the lawyer's money immediately.
- Retainer that is an advance on hourly fees
 - Must be deposited in client trust account

- **Fees**

- Contingency
 - Normal reasonableness in CA for contingency cases - 33.33% if it settles.
 - What if discharged?
 - If terminated without cause, you can get quantum meruit when the case settles.
[usually in proportion to the number of hours you worked vs. the new attorney]
- Criminal cases
 - CA: Allowed to take a bonus on acquittal.
 - Not so in the model rules states (they end up just charging more in the initial retainer).
- Family law cases
 - Model rules do not allow contingency in these types of cases
 - CA: This is allowed - can get a portion of what is recovered
 - Most lawyers take liens on property instead, but means you have to abide by rules of doing business with clients.

- "Double billing"
 - Hypo: client pays for time you're in the airplane, and while on the plane you do work for another client.
 - ABA opinion says this is a violation of the reasonableness requirement.
- Think and worry time
 - Not improper - still working on the client's case.
- **Referring Cases**
 - Scenario 1 - Bring in a specialist from another firm (both lawyers work on it)
 - Total fee has to be reasonable
 - Fee can't be higher than it would have been without adding the new lawyer/firm
 - MR says the client must be advised
 - CA - Need consent
 - Scenario 2 - Lawyer refers the case to a second lawyer who takes it over entirely
 - CRPC allows the new lawyer to pay the referring lawyer a referral fee (usually 10% of the total fee paid at the conclusion of the case) IF:
 - The client consents in writing
 - The fee is not higher than it otherwise would have been
 - The referral fee is not offered as an inducement to provide further referrals.
 - MR 1.5: Does not allow traditional referral fees, and imposes three limitations on division of fees between lawyers who are not in the same firm:
 - Division must be in proportion to the services performed by each lawyer, or lawyer assumes joint responsibility for the representation.
 - The client agrees to the arrangement and it is confirmed in writing
 - Total fee is reasonable
- **Handling Client Funds**
 - Must promptly notify client of the receipt of any funds.
 - No commingling of funds
 - Have to set up a client trust account
 - All funds held by the benefit of clients, including advance retainer funds, must go into this account
 - No funds belonging to the law firm shall go into this account
 - The lawyer cannot withdraw any portion of the fees claimed until they are "fixed." That means the client agrees that the lawyer's portion of the money is actually earned by the lawyer.
 - ◇ If the amount is in dispute, then the lawyer cannot withdraw any portion of the fees claimed by the lawyer until the dispute is resolved.
 - ◇ The lawyer must always promptly return any undisputed portion of the money that is owed to the client to the client.
- **Advertising and Solicitation**
 - **Advertising**
 - Involves:
 1. Print or media communications,
 2. Directed at the public at large,
 3. With the purpose of making the public aware of a lawyer's services
 - Communications considered "advertising" include:
 - Stationery, letterhead, signs, business cards, brochures or other written material describing the law firm
 - Bus or bench ads
 - Newspaper, television and radio ads
 - Telephone book ads

- Web sites
- Solicitation
 - Solicitation is:
 - Face to face, telephone contact, *or real-time electronic contact*,
 - Which is initiated by the lawyer,
 - With a lay person with whom the lawyer has no prior family or professional relationship, and
 - Involves the significant motive of pecuniary gain by the lawyer (i.e. - not pro bono)

- **CA LAW**

Communications:

- Must be true
- Must not be false, deceptive, misleading
- Must indicate that it is an advertisement
- Can't be transmitted in any manner involving intrusion, duress, compulsion, intimidation, threats
- Lawyer can't claim to be a "specialist" unless certified as one with the State Bar

- True case: lawyer started sending pizza every night to an emergency room with his flyer. He got busted because he was trying to entice traumatized pizza.
- **A communication (ad) is presumed to violate the rule if:**
 - It contains a guarantee, warranty, or prediction regarding the results of representation
 - ◆ e.g.: Larry Parker got me 2.5 million dollars.
 - It contains a testimonial without the stated disclaimer that the testimonial is not a warranty or guarantee about the results of representation
 - ◆ e.g.: Larry Parker got me money. Needs a disclaimer that it is not a warranty or guarantee
 - It is delivered to a potential client who may not be in a physical or mental state to exercise reasonable judgment
 - ◆ e.g.: Pizza guy
 - It is transmitted at the scene of an accident or en route to a hospital or medical care center
 - ◆ Cannot approach people under duress
 - It does not state that it is an "advertisement" and contain the name of the responsible party
 - ◆ Must say this is an advertisement by xyz firm
 - It misrepresents that nature of a lawyer's relationship to a firm
 - ◆ e.g.: It's not really a law firm, but a referral service.
 - It implies the lawyer is participating in a certified lawyer referral service when that is not the case
 - It is a dramatization and fails to state on it "this is a dramatization"
 - It says "no fee without recovery" and fails to add that the client is liable for costs
 - It says services will be provided in another language, and there is no attorney who speaks that language, then the ad must state the name and title of the person who does speak the language.
 - ◆ Cannot imply attorneys speak Spanish when its just support or paralegal staff. Or if an attorney does speak Spanish, you must list their name and Esq.
 - It lists a fee for services which is not honored by the lawyer when such listed fees must be valid for 90 days unless a shorter period of time is expressly stated

○ **Model Rules**

MODEL RULE 7.1: COMMUNICATIONS

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is misleading if it:

- Contains a material misrepresentation of fact or law
- Omits a fact necessary to avoid being misleading
- Is likely to create an unjustified expectation about results a lawyer can achieve or the means that can be used to achieve them
- Compares services with those of other lawyers unless the comparison can be factually substantiated

Covers mostly same stuff as CA

MODEL RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

A lawyer cannot use in-person or live telephone contact to solicit professional employment from a prospective client with whom the lawyer doesn't have a prior family or professional relationship when the significant motive for the contact is the lawyer's pecuniary gain.

Very similar again to CA

○ **Television, Print, and Electronic Advertising Analysis**

- Any false or misleading statements?
- Are there representations that can't factually be substantiated?
- Are there any guarantees or warranties about results?
- Are there words or symbols that suggest *quick cash or a quick settlement*?
- Is there a clear indication it is an "advertisement"?
- Does it mislead as to specialty?
 - There are state bar specific regulations re: specialty types.
 - e.g.: CA has no medical malpractice specialty, thus cannot claim to be such.
- Is there a dramatization of an accident or other events *without disclosing* that it is a dramatization?
- Is it clear that the client pays *costs*?
- Is the name of the responsible person indicated?
- Is there a language representation?

○ **Discussion Hypos**

- Join a social club for the purpose of meeting them and bringing them in as clients?
 - NO. If you initiate the conversation inviting them to your office then you are soliciting.
 - If you call other lawyers and let them know you've opened a practice for referrals, then you're not soliciting LAY people.
 - You can offer to compensate for referrals (say 10%). Under the model rules you can only pay them what they earn on an hourly basis, NOT a set percentage
- Giving seminars
 - You have to be competent in the subject area
 - Good practice is to tell on the outset that you're not giving specific legal advice for specific questions, just giving legal overviews. Avoid implied attorney relationships.
 - Must be careful to be truthful and not misleading.
 - No predictions or guarantees
 - Don't say you're a specialist if you're not.
- Targeted direct mailing ok => Considered an advertisement.

- Handing out handbills would be fine, but you can't communicate b/c that would be solicitation.

- **Litigation Ethics and Candor**

- **When Zealous Advocacy Goes Bad**

- Lawyers who file lawsuits for an improper purpose (e.g., harassment) or lawsuits that are frivolous (facts without evidentiary support);
- Lawyers who display overzealous, disrespectful or offensive conduct or language (e.g., demeaning and/or offensive language directed at court staff, opposing counsel or witnesses);
- Lawyers who are not candid with the court in disclosing legal authority in the controlling jurisdiction which is directly adverse to her client's position that was not disclosed by opposing counsel;
- Lawyers who allow a client to lie before a tribunal;
- Lawyers who improperly contact represented persons;
- Lawyers who knowingly make a false statement of material fact or law to opposing counsel, fail to correct one previously made, or "puff up" contentions to the edge of making a false statement;
- Lawyers who conceal or suppress evidence they know they have an obligation to disclose;
- Lawyers who exert or attempt to exert improper influence over a judge, a jury or witnesses.
- If judge sanctions you for \$1000 or more, you need to report yourself and the judge will also report it.

Model Rule 3.3 - Candor Toward the Tribunal

A lawyer shall not knowingly:

- Make a false statement of material fact or law to a court or fail to correct one previously made by the lawyer
- Fail to disclose to the court:
 - Legal authority in the controlling jurisdiction
 - Known to be directly adverse to his client's position
 - Which was not disclosed by opposing counsel
- Offer evidence the lawyer *knows* is false. If the lawyer comes to know evidence offered by a client or witness is false, the lawyer shall take reasonable remedial measures, including disclosure to the court. If a lawyer reasonably believes a witness will offer false evidence, then the lawyer can refuse to call the witness.
- These duties continue to the conclusion of the proceeding. They apply even if compliance requires disclosure of information that would otherwise be protected as confidential.

CA Rules (No parallel to 3.3)

B&P 6068

- It is the duty of an attorney:
 - To maintain respect for courts and judges
 - To maintain only such actions as are just
 - To employ means only as are consistent with the truth, and never seek to mislead a judge by artifice or false statement of fact or law

CRPC 5-200

- In trial, a lawyer shall
 - Employ means only as are consistent with the truth
 - Not mislead a judge or jury by an artifice or false statement of law or fact

- Not intentionally misquote a book, statute or decision
- Not knowingly cite invalid authority (e.g., overruled decision or repealed or unconstitutional statute)
- Not assert personal knowledge of facts unless called as a witness

CRPC 5-220, Suppression of Evidence

A lawyer shall not suppress any evidence that the lawyer or his/her client has a legal obligation to produce.

Discussion problems

1. You represent a client, applicable law is NY. You find out authority that supports adversaries position, but judge and opposing counsel don't know of it.
 - You must disclose controlling authority to a judge under both Model and CA rules.
 - However, no obligation to counsel opposing party outside of court. Only while in a tribunal
 - Practically speaking: you want the first crack at disclosing it and diffusing it.
2. You represent defendant in negligence case and discover evidence from an eyewitness the other side never found. Do you have to disclose?
 - Expert witnesses: You have to list them 90 days before trial so they can be cross examined.
 - Lay eyewitness: No . (Like in *Spalding* case - aneurism)
 - There is no affirmative duty to inform an opposing party of relevant facts.

○ Client Perjury - The lying *criminal* client

Model Rules:

- Cannot offer evidence we know is false.
- If client lies on the stand we need to take remedial measures. If client won't recant, we need to disclose the lie to the court. (No such rule in CA)
 - First, I'll counsel my client against presenting false evidence. He could add a perjury charge to his rap sheet. I could ask the court to allow me to withdraw as counsel, but it is unlikely a judge would allow me to withdraw on the eve of trial or during trial.
 - I'll counsel him to change his mind and not testify about the lie.
 - I'll tell him that I won't allow his friends to take the stand to corroborate his lie about the alibi.
 - Finally, I'll have to tell him that if he does lie, I have to inform the court about the lie.
 - If he actually does lie, then I'll talk with him confidentially at the next appropriate point in the trial. I'll counsel him to take the stand again and recant the lie. If he won't, I have to be sure he knows that I must inform the court about the portion of his testimony that I know to be a lie.
- Duties continue until conclusion of the proceeding, and is not protected by confidentiality rules. But comments modify it to include through appeals etc.

CA:

- Not required to disclose lies to the court. You tell the judge that you are going to allow the client to testify "in the narrative."
 - Essentially you're signaling the veracity of the statement is in question. Kind of like not being able to disaffirm in withdrawal (no noisy withdrawal in CA)
 - Prosecutor then goes in and undermines the credibility.
- Argument against CA law: Monroe Friedman (Legal Ethicist) argues that you never know when your client is lying or not. The adversary system itself should be

responsible for sorting it out.

- These types of lawyers tend not to use the narrative if there's even a little bit of wiggle room.
- Blanco agrees.

○ **Juror Rules**

Model Rule 3.5, says a lawyer shall not:

- seek to influence a judge, juror or prospective juror by illegal means;
- communicate *ex parte* with a judge, juror or prospective juror unless authorized to do so by law or court order;
- talk to a juror after the case is over if prohibited by law or court order, if the juror doesn't want to talk or if the communication involves misrepresentation, coercion, duress or harassment.
- Engage in disruptive conduct

CRPC 5-320 is more explicit. A lawyer shall not:

- Communicate directly or indirectly with a juror or someone known to be from the jury pool;
 - Communicate directly or indirectly with a trial juror in the lawyer's case
 - Incidental Contact with a juror - still need to tell the judge. Judge will evaluate the potential damage to the case.
 - After the case, make comments to jurors intended to harass or embarrass them
 - Conduct an out of court investigation on jury pool members likely to influence the state of mind of the juror
 - Can't communicate with them, but you can search public records
 - Communicate with family members of a juror or someone in the jury pool
 - Fail to promptly reveal to the court juror misconduct or misconduct by another towards a juror
 - "Juror" means a present, past or excused juror.
- CA allows polling of the jury.
 - No *ex parte* communication with the judge.

○ **WITNESS CATEGORIES AND RULES OF ENGAGEMENT**

- a. Is the witness a lay witness?
 - Informal contact is OK if she wants to talk
- b. Is the witness a lay witness represented by counsel on this matter?
 - The "no contact" rule applies and you must contact her lawyer to arrange to talk to her (usually through a noticed deposition)
- c. Is the witness an expert witness?
 - The "no contact" rule applies and you must contact opposing counsel to talk to her (usually through a noticed deposition)
- d. Is the witness a current employee who fits in one of the protected categories? (*See Below*)
 - The "no contact" rule applies; you must contact her attorney to talk to her
- e. Is the witness a former employee who does not fit in one of the protected categories?
 - Informal contact is OK if the employee agrees to talk

○ **Represented Persons**

- Model Rule 4.2
 - In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized... by law or court order.

- CRPC 2-100 is similar
- **Categories of Employees Considered to be “Represented”**
 - Persons who supervise, direct or regularly consults with the organization’s lawyer concerning the matter;
 - Persons who have authority to speak on behalf of the corporation with respect to the matter; and
 - Persons whose act or omission in connection with the matter may be imputed to the corporation for purposes of liability.

○ **Payment of Witnesses**

Model Rule 3.4: Fairness to Opposing Party and Counsel
 A lawyer shall not:

- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.
- Comment [3] says “it is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay a lay witness a fee for testifying and that it is improper to pay an expert witness a contingent fee.

CRPC 5-310: Prohibited Contact with Witnesses

- A member shall not:
 - (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
 1. Expenses reasonably incurred by a witness in attending or testifying.
 2. Reasonable compensation to a witness for loss of time in attending or testifying.
 3. A reasonable fee for the professional services of an expert witness.

- Note that this rule finds that it is perfectly proper to pay an expert witness, although neither an expert witness nor a lay witness may be paid contingent on the outcome of the case.

- Discussion Problem:
 - Former employee who does not fall into one of the protected categories - he is a lay witness. What can we pay him?
 - Can only pay for his time is he is an expert witness
 - We can pay to **make him whole**; compensate for lost wages, travel expenses, etc.

○ **WHAT IS “PUFFING?” WHAT IS LYING? WHAT ARE THE RULES?**

- Puffing - Gray area, but not actually a lie. Lawyers can make evasive statements that do not rise to material misrepresentation (a lie).

Model Rule 4.1: Truthfulness in Statements to Others says:

- In the course of representing a client a lawyer shall not knowingly:
 - (a) Make a false statement of material fact or law to a third person; or
 - (b) Fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

CRPC 5-200: Trial Conduct, says:

- In presenting a matter to a tribunal, a member
 - (a) Shall employ...such means only as are consistent with the truth.

Business and Professions Code 6068:

- It is the duty of an attorney, in subsection (d), to use means consistent with the truth.

General Differences: CA and the Model Rules, Updated

- **Confidentiality:**
 - In CA, an attorney may disclose confidential info to prevent a criminal act an attorney reasonably believes is likely to result in death or substantial bodily harm, but has a counseling obligation to the client if reasonable to do so.
 - Under MR, may disclose info to prevent reasonably certain death or substantial bodily harm and to stop or cure fraud where lawyer's services were used. Both jurisdictions allow exceptions to establish a fee or defend against accusations of misconduct.
- **Reporting professional misconduct:**
 - CA attorneys "self report" while MR lawyers must report misconduct of other attorneys raising a substantial question about lawyer's honesty, trustworthiness, fitness, etc.
- **Contingent fees** in criminal, family law cases:
 - OK as to both in CA
 - Prohibited as to both under MR
- **Pecuniary interest** in the subject of representation:
 - Directly prohibited under the Model Rules.
 - Allowed in CA if business transaction rules are followed
- **Written fee agreements:** Contingency agreements in CA and MR must be in writing.
 - CA requires a written agreement in any case where costs and fees are expected to exceed \$1,000.
 - In hourly fee case under Model Rules, no requirement of writing, but recommended that agreements be in writing.
- **Client perjury:**
 - Model rules require reporting client perjury to the court.
 - CA follows narrative approach in criminal cases. CA lawyers must report perjury to the court if someone other than the client commits it.
- **Referral fees:**
 - Traditional referral fees allowed in CA so long as not used as an inducement to obtain future referrals.
 - Model rules do not allow referral fees. A referring lawyer can only be paid in proportion to the services performed. Any other arrangement makes the referral lawyer jointly responsible for the case.
- **Advancing money to clients:**
 - Under the MR, lawyers can only advance clients money to cover court costs and fees.
 - In CA, lawyers can loan clients money for any purpose so long as a promise to repay is in writing.
- **Noisy withdrawal:**
 - Under MR in pending matters, lawyer may withdraw and "disaffirm" prior work.
 - Not allowed at all in CA; a lawyer must preserve client confidentiality in withdrawal.
- **Trial lawyer as witness:**

- Under MR, lawyer can only testify as to non-contested matter or if not testifying creates a substantial hardship to client.
- In CA, lawyer can testify on any issue if client consents in writing.
- **False or misleading advertising:**
 - In CA, an advertisement that violates any of the standards that are part of the rule is - *presumed* to be misleading.
 - The Model Rules do not adopt this presumption, but do prohibit a false or misleading communication about the attorney or the attorney's services.
- **Prospectively Limiting Liability:**
 - MR 1.8 says that a client must be represented by independent counsel before signing an agreement with lawyer A saying I will not sue you for malpractice, i.e. prospectively limiting liability.
 - CA 3-400 says you are not allowed to prospectively agree to not sue your attorney for malpractice.
- **Lawyer for Corp.:**
 - If an agent of a corp/organization is planning or acting in a way that violates the law, then the attorney has a duty to try to persuade the agent to stop and to tell the agent that whatever they discuss is not confidential, because the company is the client. If the agent refuses to curtail his illegal behavior, the attorney can refer the matter to the highest authority. If the highest authority fails to address the issue, then the lawyer can under the MR, disclose the information, whether 1.6 permits disclosure or not.
 - Under CRPC, the attorney can not reveal the information and can only withdraw, under the circumstances of 3-700.