Professional Responsibility classnotes, Spring 2005. Dean Burnett.

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Monday, January 10

Introduction to the course

- Professionalism versus markets
    - Markets provide an avenue for taking opportunities.
    - Professionalism provides for the selection of which opportunities to take.

- Lawyers as part of the third branch of government
    - The third branch speaks to the profession through the promulgation of rules.

- Aims of this course:
    1. Study legal ethics
    2. Preprare for the MPRE

Tuesday, January 11

Philosophical ethics

- Utilitarianism
    - Here, we're looking at *aggregate* happiness. Note how this means that a large group can oppress a minority (or, at least so says Burnett—I think this is just a valuation problem).
    - Also note efficient breach, and just the general *compensatory* legal system that we have.
- Golden Rule
- Kantianism
    - Kant said that there's a lot of value to having people who beliee they are part of a *just system of laws*. I.e., just law adds to happiness.
    - Here, both the ends and the means must be good (Burnett focuses on this). E.g., More & Roper.

Problem 1.1 (p1)

- [Secretary hands you a document sent by an adversary's attorney—nothing on the cover page indicates that you were an intended recipient.]
    - The current ABA rule doesn't prohibit you from reading this. *But*, it does require that you notify the other party. (Note how the former, and not the latter, is something that can be readily ascertained and enforced.)

Problem 1.2 (p2)

- [You served family in legal matters for a long time. When mom and dad died, son and daughter inherited 0.75m each. Now, you represent son, and you've concluded that he has a serious drug problem, and daughter has asked you to

petition a court to appoint a conservator for son. You know son will adamantly oppose this idea.]

- As a prior attorney for the decedent, you would almost certainly have confidential information. So, the safest thing is to just *walk away*.
- Once you walk away, though, note how the new L would have an interesting dilemma: help son get what he wants, even though what he wants may be unwise? Or treat son as having a disability?
    - (If L treats son as having a disability, there's a rule about what to do—RPC 1.14.)

Problem 1.3 (p3)

- [L represented C in a worker's comp matter three years ago, which ended in a settlment and the insurance company has been sending L checks, from which L deducts 10% and sends the rest to C. Just recently, L discovered that the insurance company has been sending twice the amount that C's entitled to. C tells L, "don't rock the boat."]
    - There is a short-term versus a long-term problem with not here:
        - Short-term: cash flow.
        - Long-term: the risk of discovery and the resulting penalties.
    - If C refuses to allow L to inform the company, L might be able to noisily withdraw.

Tuesday, January 18

"Professionalism"

- Note that the rules can't cover *everything*. Thus, there's a lot of professional judgment required. This judgment is now commonly called, the commitment to "professionalism."
    - Pro bono: this idea is (almost) unique to the legal profession. Why?
        - The privilege of being a lawyer (compare public utilities, which, in exchange for their monopoly must sell to everyone (who can pay, at least)).
        - Subsidization of legal education (about 50% of actual cost at public institutions).
    - In a civil matter, could the entire bar refuse to represent a party? Not really, because the tribunal can appoint someone who then, basically, has to represent the party.
    - N.b. the special roles of prosecutors and criminal defense attorneys.
    - Is the law too complicated? Perhaps it has to be—unlike in the sciences, human affairs cannot be replicated (e.g., there's no *second* wrongful death action).

- How would you summarize "professionalism" in one sentence?

Monday, January 24

- Review of the last three class meetings
  - Video about Lawyer's Trust Accounts, where stealing led to drinking, which both led to disbarment and prison and civil liability.
  - Ethics versus legal ethics:
    - Ethics: three examples:
      1. Utilitarianism
      2. Golden rule
      3. Kantianism
    - Legal ethics: the lawyer's roles:
      - Representer of the client
      - Officer of the legal system
      - Public citizen with a special responsibility for justice
  - The calling of a noble profession
    - A market model for the legal profession, but modified by professional duties and values
    - Service to the public
    - Regulation of the profession
      - This regulation is largely done *within* the third branch
        - RPC: a "floor" for conduct. It has gaps, and there's often room for interpretation.
        - Professional reputation.
        - Professional discipline, imposed by the state supreme court.

Problem 2.1 (p29)

- [What requirements must you meet to be admitted to practice law?]
  - In Idaho, to be admitted to the ISB:
    - A law degree
    - The bar exam
    - Character and fitness, where they look at:
      - Crimes
      - Abilities (to communicate, to learn, etc.)
      - Dishonesty
      - Disloyalty
      - Irresponsibility
      - Candor

The burden is on the applicant. And you must release certain otherwise confidential information. (Is there anything the bar *can't*i

ask about? Maybe.

In re DeBartolo (Illinois) (p33)

- The applicant here, with as many as 400 parking tickets, with inaccuate information on his application, and with a conviction for impersonating a police officer, it not admitted. He's a scofflaw, Burnett says.

In re Mountain (Kansas) (p43)

- This guy is disbarrd for doing all kinds of things wrong (see p45), including charging an excessive fee (why do we care about the amount of the fee? Because L is a fiduciary for C).

In re Holmay (Minnesota) (p45)

- This guy is suspended—a pretty serious sanction—for forging and falsely notarizing C's signature.
- N.b., the two roles of notaries public:
    1. Certifying affidavits
    2. Doing "acknowledgements" (verifying who signed something)

Problem 2.3 (p29)

a. [Must you become a member of the state bar association?] In Idaho, yes.
b. [What about the city or country bar association?] No, in Idaho.
c. [What about the ABA?] No.

Problem 2.4 (p29)

a. [Can you represent C in the U.S. District Court for the Northern District of the state in which you're admitted to practice?] Not unless you are admitted by that court.

N.b. MRPC 5.5 ("Unauthorized practice of law; Multijurisdictional practice of law"), which has liberalized the rules for "MJP" (multijurisdictional practice).

Tuesday, January 25

- Multijurisdictional practice
    - Note how MRPC 5.5(c) (MJP) opens the door just a tad on MJP, especially in transactional matters.
    - Why not, in this global age, do we not just do away with state-specific regulation of lawyers?
        - Regulation of the bar is within states' police powers.
        - There is a diversity of state laws.
        - Efficiency—states may be able to provide more "nimble" regulation.
        - Sense of place—Ls are more likely to feel the "calling" of

professionalism if regulation is local; a sense of community.

Problem 2.4 (p29)

f. [Your law partner T wants to open a branch office of the firm in another state. T is admitted in both this and that state, but you and the other firm Ls are admitted just in this state.] You can open the office, but you must disclose the jurisdictional limitations of any specific Ls identified in advertising and letterhead (see MRPC 7.5(b)).

Problem 2.5 (p30)

[Lawyer L comes to you for legal advice, and tell you that he and others have formed a real estate investment venture and entrusted L with a lots of money, but he diverted it to his own use; they haven't discovered it yet.]

a. [If L was in the venture in his personal, not his lawyer, capacity, is he subject to discipline?] Yes—see MRPC 8.4, which does *not* say "in the course of representing a client" or anything like that.

b. [Must you report L to the bar?] See MRPC 8.3(a), which is the general rule, and then see 8.3(c), which is the exceptions. Also note 8.3 cmt. 4, which says the the duty to report doesn't apply if you're representing an L whose professional conduct is in question.

- N.b., that some states don't have any kind of mandatory reporting rule (some call these "integrity rules," others call them "snitch rules"). Idaho does have a mandatory reporting rule.
- Also note which things trigger MRPC 1.18 ("Duties to prospective client") and which things don't.
    - What triggers an actual L-C relationship? See Restmt. § 14:
        1. The subjective impresion of C...
        2. ...that is objectively reasonable (and sincere).

Starting and ending the lawyer-client relationship

- Appiontment
    - *Bothwell* (U.S.D.C. Nebraska) (p55)
        - Why does the court itc. say it can appoint cousel in this *civil* matter?
            - The court says it has a job to do—and so it has *inherent* authority to get that job done (and thus to appoint counsel, if that's necessary to get the job done).
        - And, the court says, L must accept the appointment because L is an officer of the court.
        - The court cites to MRPC 6.1 (pro bono) and 6.2 ("Accepting appointments"). MPRC 6.2 says that an L should not avoid an appointment unless there's good cause (examples of good cause are listed in the rule).
        - However, having done all of that, the court still doesn't actually

excercise its inherent authority, citing "marketability." That is, the court finds that C couldn't find a lawyer because his claim was simply no good, or not "marketable."

- Problem 3.1 (p52)
  - [L's grandparents narrowly escaped suffering during the Holocaust, and now a court is appointing L to represent a member of the ANP.] MRPC 6.2 says L can refuse only for "good cause," such as an unreasonable financial burden (6.2(b)) or a cause so repugnant that it would likely impair the L-C relationship or L's ability to represent C (6.2(c)).

- Pro bono
  - Problem 3.2 (p52)

Monday, January 31

- Review: the structure of lawyer regulation
  - Bar admission
    - Court rules provide for the process
    - The bar commission determines eligibility
    - The applicant has the burden of persuasion
    - The process is state-specific, though residency requirements have largely disappeared.
  - Discipline
    - Imposed by the state supreme court, upon recommendation by the state bar.
    - The bar has the burden of proving misconduct, by a preponderance of the evidence.

- Review: starting the L-C relationship
  - Lawyers are *not* public utilities...
    - ...but:
      - The attorney's oath: "never to reject, for any consideration personal to myself, the cause of the defenseless or oppressed."
      - 50-hr. pro bono expectation (MRPC).
      - Appointment by the court.
  - When does the L-C relationship come into existence?
    - When the prosepective client manifests and intent to enter the relationship, AND
    - Either:
      - The lawyer manifests consent, OR
      - L knows or should know that C thinks there's a relationship.
  - A new rule, MRPC 1.18, requires that L protect the property and confidences of a *prospective* C.

- L, or his firm, may not represent someone with adverse interests to even a prospective C (unless the L with adverse interests can be "screened" out).
- *Written* confirmation or declination of an L-C relationship is encouraged, but it isn't required by the rules.

Problem 3.3 (p52)

- [When would an L be subject to discipline for accepting or continuing employment in a matter?]
  - Conflict of interest
  - Lack of competency (MPRC 1.1) (this does *not* mean, however, that you can't ever expand your practice)
  - Illegality (MRPC 1.2(d))
  - Outside of jurisdiction
  - C, or a court, has discharged L

Ruskin (Illinois) (p68)

- Why is this case here? Because it shows the balancing of the principles of (1) client sovereignty and (2) court administration and fairness to the parties.

Rosenberg (Florida) (p69)

- Why does the court decide to award whichever is *less* as between quantum meruit and the contract price, when discharging an L?
  - Because otherwise, it would put a heavy burden on clients who want to excercise their sovereignty.
  - Also because of policy reasons, viz. that L-C contracts are not commodities contracts.

Y.J.A. Realty Corp. (New York) (p73)

- Why does the court let the L get out of representing C here?
  - Because C is a nasty client.
  - And because no "note of issue" has been filed in the case yet. (A "note of issue" is an old paper where L told the court that the case was ready for trial, triggering the court to set a trial date.)

Kriegsman (New Jersey) (p74)

- Why does the court *not* let L get our of representing C here?
  - Out of fairness to C. The burden of taking the case to its conclusion is a burden on L, here, but not an unreasonable one. So, the court recognizes the firm, rather than C, as the better risk calculator and amortizer.

- Frivolous claims: see MRPC 3.1.

- "The Ethics of Dealing with Bad Clients," a handout, was discussed. N.b. noisy withdrawal.

Tuesday, February 1

Problem 3.4 (p53)

- [Is it true, as some judicial opinions state, that "C has a right to discharge L at any time, with or without cause, subject to liability for payment for L's services"?]
    - Not in the case of court-appointed attorneys.
    - See *Ruskin* (p68), e.g., also.

Problem 3.5 (p53)

- [L is fired by C; what can L recover?] Recall the three measures discussed by the court in *Rosenberg* (p69):
    1. Contract price
    2. Quantum meruit
    3. Lesser of contract price and quantum meruit (which the *Rosenberg* court settled on)

Finally, not that the L-C relationship is a product of a fiduciary duty—it's not a creature of contract, even though it may appear to be so at times.

Advertising

- It used to be that there were *no* ads and *no* solicitation allowed.
    - There was a single exception—the solicitation of pro bono clients was allowed. This exception remains, but only when the pro bono solicitation is not in any way a part of getting money (e.g., the ACLU doesn't benefit from the exception, because it bolsters membership by taking cases).
- Then, two things happened:
    1. There were antitrust concerns.
    2. The commercial speech doctrine arose (see *Virginia Pharmacy*).
- And then there was *Bates* (1977) (p86)
    - There are two threads to itc.:
        1. Am1 commercial speech analysis
        2. The Court, made up of lawyers, was not persuaded by the state bar's parade-of-horribles argument
    - Acceptable limits on ads:
        - A state can completely outlaw deceptive ads, because that commercial speech has not value at all, the Court says.
        - A state can regulate all other ads with respect to time, place, and manner.
- After *Bates*:
    - *Ohralik* (1978) (p94x)

        - Here, we have solicitation in a hospital and the use of a hidden tape recorder (deception).
        - The Court distinguishes *Bates* on the ground that the tactics used here have significant danger to the layperson.
            - Note, though, that this doesn't square well with am1 jurisprudence. So, we've got a kind of hybrid, am1-ethics jurisprudence now.
    - *Primus* (1978) (p96x)
        - The Court distinguishes *Ohralik* on the grounds that:
            - The facts here involve pro bono solicitation (to some extent, at least).
            - This solicitation was aimed at providing access to the courts. That is, this was public interest litigation. So, we now have a public interest exception.
- On the basis of this caselaw, the ABA crafts model rules:
    - MRPC 7.1: no misleading communications.
    - 7.2: advertising
        - A lawyer *may* advertise, subject to rules:
            - L can media-buy.
            - Ls can make referral agreements:
                - Cs must be notified of the agreement.
                - The agreements can't be exclusive.
                - L can't give any consideration for the agreement.
            - Ads must *say* that they're ads.
    - 7.3: solicitation
        - No telephone solicitation.
        - No real-time online solicitation.
    - 7.4: specialties
        - Advertising of specialties must not be misleading.

- Note the gray area between advertising (which is regulated) and solicitation (which is mostly prohibited).
    - *Zauderer* (1985) (p97x): a targeted toxic tort ad, here, is closer to an ad than a solicitation.
    - *Shapero* (1988) (p98x): targeted mailings are loser to the middle, because letters are solicitation-like, but less coercive than face-to-face solicitation.
    - *Went For It* (1995) (p99)
        - "Went For It" was a group of claim brokers that would send stuff to victims immediately after a plane crash, e.g.
        - These letters have the *timing* of the *Shapero* letters.
        - But, the Court is beginning to wonder what it had created with *Bates*.
            - Plus, the Florida bar provided the Court with empirical evidence (no state bar had done this for SCOTUS, before).
                - (Even so, so what if the public hates lawyers? Well, it matters because the courts and the profession have only

their integrity to stand on.)

- And so the Court distinguishes the prior cases because here there's a sufficient privacy interest. Thus, this tactic can be regulated.
- (But, as Ls now argue in Florida, the fact that you can regulate Π's lawyers doesn't mean you're keeping the insurance adjusters away!!)

Monday, February 7

Problem 4.1 (p81)

a. [Can you join a social club just to lure clients?] Yes.

b. [Can you call other Ls at their offices and tell them you're willing to take on work they're too busy to handle?] This is common—but beware of giving anything of value (7.2(b)). Note also 7.2(b)(4), which prohibits exclusive referral agreements (7.2(b)(4)(i)) and requires that referral agreements be disclosed to clients (7.2(b)(4)(ii)).

c. [Can you volunteer to give a seminar hoping to get legal business from attendees?] This is okay, but make sure you don't start an L-C relationship by answering questions.

d. [Can you sign up at a court for appointments?] Sure, but be certain to avoid 7.6 (political contributions to judges) problems.

e. [Can you list your name with the local bar's referral service?] Yes (7.2(b)(2)).

g. [Can you have a brochure for your practice?] Yes. And you can do it on the web, too, because that's still Cs coming to you, not you going to them (which would be solicitation). However, beware of snazzy domain names that could create false expectations.

Problem 4.2 (p82)

a. [With a chemical mass tort case, can you put an ad in the newspaper informing workers of their rights wrt. exposure to the chemical and inviting interested persons to contact you?] Yes—this is like the Dalkon Shield case.

b. [Can you send an informative letter to each worker who might have been exposed to the chemical, inviting them to contact you?] No—this is like *Shapero* (p98x).

c. [Can you hire a team of phoners to contact each worker and invite them to contact you?] Definitely not—this is solicitation. See 7.3.

d. [Can you stand on the public sidewalk outside a factory at quitting time and pass out handbills stating your willingness to represent workers?] No—this is in-person solicitation.

Problem 4.3 (p83)

- [You're in the courthouse when you see a tired woman with a crying baby, obviously confused and needing help. You speak to her and she asks in bad English where to go, handing you a summons. You respond in her native

language, explaining the nature of the hearing and asking if she has a lawyer. She says no and you offer to represent her for a modest fee.] You can't do this if you're going to ask for a fee—it's solicitation. In fact, if you do it for *any* pecuniary gain, it's improper, as solicitation.

- Review: ads and solicitation
  - History
    - Antitrust attack (didn't work)
    - Am1 attack (more successful)
  - State's burden to show their ad regulation is legitimate—three-prong test
  - In-person solicitation continues to be prohibited
  - ABA rules have been developed within the caselaw framework

Fees and fiduciary duties

Robert L. Wheeler, Inc. (Oklahoma) (p113)
- The court here is sending a message to the bar—no file churning will be permitted.
- Also itc., the court says that the complexity of the issues was not proportional enough to the amount at stake.

Tuesday, February 8

- MRPC 1.5 ("Fees") serves as a *fence* separating attorney fees from market influence.

Robert L. Wheeler, Inc. (Oklahoma) (p113)
- Itc. stands for the fact that a reasonable fee inquiry is more than just a multiplication problem.
  - The client shouldn't have to pay to get the lawyer to baseline competency (cf. MRPC 1.1 ("Competence") in an area of law, unless the client understands that that's what's going on.
  - If the client puts high demands on the lawyer, that can be reflected in the fee, but there is a limit to this.
  - "Customary" fees aren't usually very helpful in a reasonable fee inquiry —because, as here, you will almost always have widely divergent expert opinions.

- Contingent fees and risk
  - Contingent fees aren't allowed in certain kinds of cases:
    - Domestic relations matters (1.5(d) and 1.5 cmt. 6).
    - Criminal defendants (policy: don't exacerbate the already high unethical pressures that result from C's liberty and reputation being at stake).
  - Contingent fee agreements *must* be in writing (and *all* fee agreements *should*

be in writing, although the rules don't require it for other types):
    - Any out-of-pocket expenses that C must pay have to be set out in the writing.
- Contingent fees may be higher, usually, than fixed fees, because of the risk involved.
    - If there is no real contingency, then L has a duty to:
        - Reduce the percentage of the contingent fee, OR
        - Give the client the option of electing for a fixed or hourly fee.

ABA Formal Op. 93-379 (p117)
- *If* a fee is based upon time, it it *never* permissible for a lawyer to charge two clients for the same time.
    - This doesn't mean you lose out for being more efficient—it just means that as you become more efficient, you should stop billing hourly. Use a fixed (or, if permitted, a contingent) fee.
- Other charges
    - Overhead: generally, you can't charge C for this. You have to build it into your fee.
    - Extraordinary expenses: you can pass these on to C *at your cost*. You can't build a profit center here.
    - In house provision of unusual services: Ls tend to not charge for this—and charging for it is discouraged, too.

- The billable hours culture: when you're getting paid by billable hour, your personal life costs *you* your hourly rate.

Monday, February 14

- Loans to clients
    - Generally, you can't do this (1.8(e)).
        - Why not? It creates another relationship, and that could have undue influene on L's judgment.
        - MRPC 1.8(e) does, though, create exceptions for loans of court costs and expenses.
        - N.b. also, 1.8(a).
- N.b. "fee forfeiture," where a fee, otherwise earned, is lost.
- Trust accounts
    - MRPC 1.15 ("Safekeeping property"): upon receiving money for C, L must provide and notify C promptly.
    - What about assignments made by Cs? L is subject to the law of assignments (note that there is an Idaho Ct. App. opinion, written by Burnett, about this: *Bonanza Motors*, 104 Idaho 234, 657 P.2d 1102 (1983)).
    - What about disputed entitlements? MRPC 1.15(e) addresses this—L must

keep the property separate until the dispute is resolved.

- IOLTAs: *Washington Legal Foundation* said that IOLTAs are "takings" but have no damages.

Problem 5.1 (p109)

- [C wants L to represent him against a customer over a $6K unpaid bill. C wants a flat fee; L hasn't handled precisely this kind of case before and will have to o about two hours of legal research that an experienced lawyer wouldn't have to do. In addition to those hours, L figures that it will take about 10 billable hours.]
    - [What if the amount in controversy is $60K rather than $6K?] This may merit a higher fee—consider the reasonable fee factors.

Problem 5.2 (p110)

a. [At a firm, the partner in charge of the matter does the billing. P totals the hours worked and multiplies those hours by the billing rate for each L. The more skill and experience an L has, the higher the billing rate. Sometimes P makes adjustments up or down.] This is okay if this practice is reflected in the fee agreement.

b. [L spends 30 hours researching an IP issue that he would have known was easy had he taken IP in law school. L doesn't dare bill for more than 10 hours.] You can't charge to brig yourself up to the level of competency that the client *is entitled to expect*.

d. [L hears that she should never log less than 8 billable hours each day or 40 hours a week. Making five two-minute phone calls and billing 0.1 hour for each is a tip she hears about. She also hears about billing for "think and worry" time.] Having something in the back of your mind is not enough—it is a question of *focus*.

e. [What about billing the amount of time it *used* to take you to do certain forms?] If your billing is based on time, you must bill for *actual* time spent.

Problem 5.3 (p112)

- [L gets keys to C's boat, which it got through repossession. L received the keys while in trial and so put them in an office safe, until the trial ended at which time she got the keys to C.] The question is whether this is "promptly" enough to satisfy MRPC 1.15(d). It was sixteen days here, and that's too much to be promptly. To make matters worse, during all of those sixteen days, the risk of loss on the boat might be on L.

- Review: attorney's fees
    - Must be "reasonable" (MRPC 1.5)
    - L must adhere to the fee agreement (or go lower)—e.g., no "bonuses" unless C agrees to them.
    - No file churning
    - No billing multiple clients for the same minute

- Special rules for contingent fees
- Categories of costs, with different rules for the billing of each category
- L cannot enter into a debtor-creditor relationship with C, other than for L's own legal services (although note that there are some limited exceptions to this rule)
- "Retainer" has two meanings:
    1. An advance (this must always go into the client's trust account).
    2. The purchase of L's availability (this is actually earned and L can keep it).
- IOLTAs

Malpractice liability

- Note the difference between a disciplinary proceeding and a malpractice proceeding.
    - Disciplinary proceeding
        - The bar complains
        - There don't have to be damages for the bar to proceed
        - The tribunal is looking for an RPC violation
    - Malpractice proceeding
        - The victim complains
        - Damages are required
        - There must be legal basis for liability other than RPC (e.g., tort or contract)
- An RPC violation does *not* mean there has necessarily been malpractice. However, the RPC may help clarify a common law duty of L.
- Liability to nonclients
    - Prospectie clients
    - Intended beneficiaries
    - Invited reliers
    - Fiduciary beach by *client* to a third-party

Tuesday, February 15

- Standard of care
    - Is there any distinction made based on geography?
        - There's no geographic distinction wrt. a specialty
        - For generalists, though, there's a locality aspect to the standard of care —usually at the *state* level.
    - What if L just makes the wrong decision about something?
        - Well, L simply has to have done some research, if necessary, and have developed a well-informed opinion.
- Causation and proximate cause
    - Proximate cause is the forseeable zone of risk (consider, e.g., wills and who could be harmed).

- Measuring damages
    - Note the "trial within a trial" phenomenon, for determining damages (e.g., where L missed the statute of limitations).
- Defenses
- Waiver of malpractice claims
    - This *cannot* be done in advance: it's unethical and unenforceable.
    - However, you *can* settle *after* a mistake:
        - MRPC 1.8(h) and 1.8(a). These settlements must be:
            - In writing
            - Made after counseling the client
            - Fair and equitable
- Vicarious liability
    - The firm is liable for any individual lawyer's malpractice. Thus, each general partner's investment is at risk (unless the firm is a limited liability entity).
    - Generally, there is no vicarious professional misconduct, however.
        - Except, see MRPC 5.1 ("Responsibilities of partners"). (It's also very likely that a supervising L who is subject to discipline under 5.1 will be liable for the malpractice of a subordinate L, too.)
        - Also see MRPC 5.2 ("Responsibilities of subordinate lawyer"): a subordinate lawyer is not off the hook unless the professional duty in question was debatable.
        - And see MRPC 5.3 ("Responsibilities regarding nonlawyer assistants").
- Malpractice insurance
    - "Tail coverage," n.b., which is for when you decide to leave practice—it covers anything that you did during practice but that doesn't come up until after you retire.
    - Insurance rates are currently very high, due at least in part to low interest rates and rates of return generally.

<u>Tuesday, February 22</u>

- Criminal liability versus professional discipline versus civil liability
    - Forum
        - Criminal: a criminal court, with appeal to a supreme court
        - Professional: administrative proceeding in the state supreme court
        - Civil: civil court, with appeal to a supreme court
    - Source of law
        - Criminal: criminal statutes
        - Professional: RPC
        - Civil: common law of tort or contract (RPC are not separate grounds for liability)
    - Standard of proof
        - Criminal: reasonable doubt

- Professional: preponderance
- Civil: preponderance

Lawyer misconduct can trigger any or all of these (criminal, professional, or civil).

- Potential plaintiffs
  - Clients
  - Prospective clients
  - Nonclients
    - See the Restatement, but note that it is slightly ahead of the caselaw (much like the Restmt. of Torts used to be ahead of the courts on products liability law).

- Theories of civil liability
  - Intentional tort: (note that this may not be covered by malpractice insurance)
  - Fiduciary duty
    - Here, no causation need be shown—it is presumed.
    - Fiduciary duty breach is an oft-used gateway to punitive damages.
  - Breach of L-C agreement
  - Negligence
    - Standard of care
      - Note MRPC 1.1 ("Competence"), 1.3 ("Diligence"), and 1.4 ("Communication").
      - The level of performance required is based on the relevant "professional community": the state, for generalists; the nation, for specialists.
    - Causation: both cause-in-fact and proximate cause ("zone of risk" analysis).
    - The "error of judgment" doctrine: that a well-informed judgment, even if mistaken, isn't negligence.
    - N.b., of course, the possibility of contributory negligence, assumption of risk, and in pari delicto—things that the client could find will mitigate L's fault.
    - Statute of limitations
      - Doesn't start running until:
        1. C knows or should know of the malpractice
        2. ??????
      - Tolls if:
        - L continues to work on the same matter, OR
        - L fraudulently conceals the malpractice
    - Damages
      - Taxonomy
        - Special
        - Consequential
        - Punitive

        - May require a "case within a case" to determine damages.
    - Vicarious civil liability
        - A law firm is liabile for one of its L's malpractice, under respondeat superior—and a limited liability form for business cannot shield against malpractice liability.
        - Principals in the firm generally do not have individual vicarious liability.
        - Firms are generally not "vicariously" subject to professional discipline.

- Settlement of civil liability disputes
    - L cannot *prospectively* limit his malpractice liability with C.
    - *But*, C *can* settle an existing malpractice claim. Still, though, L can't pressure C, and the agreement must be fair, and L must advise C to seek independent counsel.

- Noncompete agreements with lawyers are *not* allowed.
    - Why? Because of the value we place on *client sovereignty*.

- MDP: it's fallen out of favor since Arthur Anderson. See MRPC 5.4 ("Professional independence of a lawyer").

Problem 6.1 (p142)
Problem 6.2 (p142)

Problem 6.3 (p143)
- [L let SoL run on a matter; L meets with C and settles for $2K more than the medical costs.] L is still subject to discipline and non-enforcement of the settlement because L didn't advise C to seek independent counsel (MRPC 1.8 (h)(2)).

Problem 6.4 (p143)

a. [C claims malpractice because L failed to consult with an expert.] This is a hospital case, and you probably need an expert. In any case, though, there is no breach of duty if L made a well-informed judgment.
b. [C claims that L only used one expert.] This is a judgment call.
c. [C claims that L failed to find out if there were any eyewitnesses.] This isn't really due diligence—not enough fact investigation.
d. [C claims that L failed to discover a pertinent regulation.] This also isn't really due diligence—not enough legal research.

Problem 6.5 (p143)
- [C offers to pay L $125K, period, for handling a matter. C dictates to L exactly what it wants him to do, and L is to pay his costs from the $125K, keeping only whatever remains. Can L represent C on these terms?] The key question here

is whether L's professional judgment will be too severely abridged by the terms of representation. Some courts have said, yes, it would. (This is a "zero-sum" fee agreement, Burnett says.)

Problem 6.6 (p144)

a. [A nonlawyer assistant at a firm. Can she help her brother and sister buy an investment property by doing basic legal work, if a firm lawyer looks it over?] No —never.

b. [Can the firm pay her a bonus of 10% of fees from a C she brought in?] No—never.

c. [Can she participate in the firm retirement program, even if it's funded in part by fees earned by the Ls?] Yes.

Monday, February 28

Confidentiality

- Attorney-client privilege versus RPC confidentiality
  - ACP:
    - Applies in a proceeding
    - Covers communicatiosn between L and C
    - (Note also work-product rule; but there's no bright-line rule protecting work-product, as there is with ACP.)
  - RPC:
    - Applies in all aspects of L's conduct.
    - Covers all information "relating to the representation."

Olwell (Washington) (p166)

- The court here finds a compromise—L has to produce the knife but doesn't have to testify about where it came from. This satisfies the legal system's needs while not affecting the ACP (or, at least the policies underlying it).

Meredith (California) (p170)

- If L has *moved*, or *changed*, an object, then L may have to provide testimony about that movement or change.

So, from *Olwell* and *Meredith*, we learn that the ACP protects objects, generally, but it may not protect movement of or changes to an object.

Note also the distinction, apparent in *Olwell*, e.g., between:

- Past crimes (within ACP)
- Ongoing crimes (not protected by ACP)
- Future crimes (not protected by ACP)

- RPC 1.6 ("Confidentiality of information")
  - Note how it starts with "shall not." So, if you're going to get out from under it, you'll have to find an exception...
  - Exceptions: there are 8 of them.
    1. Informed consent by C (1.6(a))
    2. Implied authorization by C (1.6(a))
    3. - 8. Public policy exceptions (1.6(b)(1)–(6)). These operate despite that C may not want disclosure.
       - Note the subtle difference between 1.6(b)(2) and (3).
  - N.b. also MRPC 3.3 ("Candor toward the tribunal").

Tuesday, March 1

Problem 7.1 (p164)

a. [At a PTA potluck, L gossips about why L's client wants a divorce.] ACP doesn't apply because it's not a proceeding. But 1.6 does apply.
b. [L finds out from a bartender that C stops in for several drinks every night.] ACP doesn't apply because it's not a communication between L and C. However, this is work-product. And, 1.6 applies.
c. [C tells L that he wants to buy a property. L tells her agent to buy it, in hopes of selling it immediately to C.] ACP doesn't apply, nor does 1.6. However, 1.8(b) does. MRPC 1.8(b) is the "other" confidentiality provision ("L shall not use information relating to the representation of a client to the disadvantage of the client"); it's not about disclosure—it's about *use* of confidential infomration. There is a disadvantage to the client here, in the form of opportunity loss.

Problem 7.2 (p165)

- [C, awaiting trial for murder of young girl, tells L that he killed to others, too, and tells the hiding places, which L confirms. The parents and police are still searching for the two others.] No 1.6 exception applies—L may not disclose this information.

Problem 7.5 (p166)

- [A long-standing C tells you that he has faked leases to get loans.] Is there any 1.6 exception that would permit disclosure? L has two options:
  1. MRPC 1.6(b)(3): prevention of harm that hasn't happened yet.
  2. L could tell C that he'd only continue his representation of C if C makes reparations to the defrauded parties.

  L is at risk of civil liability from defrauded parties and third-parties, here.

- ACP: once it attaches, it lasts until something affirmatively ends it.

- The end of the L-C relationship does *not* end it.
- The death of C (or L) does *not* end it.
- C can waive it.

- MRPC 1.6: this rule is broader than ACP.

- MRPC 1.8(b): the "other" confidentiality rule.

Monday, March 7

Technology and ethics

[Special presentation by Lee Dillion]

- Clients, especially IP-intensive clients, may require heightened security. That expectation will be backed-up by MRPC 1.6.

- MRPC 4.4 ("Respect for rights of third persons")
  - (b): if L receives an inadvertantly sent document, he should promptly *notify* the sender. The rule doesn't say L has to return it, or that L can't read it. Those are legal questions "beyond the scope" of the MRPC, the rules say.
    - In Idaho, the decision whether to return the document is a matter of professional judgment and is left to the L (the IRPC comments tell us this).
    - Another issue beyond the Rules' scope is whether inadvertantly sending a confidential document waives the ACP (see 51 ALR5th 603).
    - Note that the L who inadvertantly sent the document must tell his C.

- Email, wireless, etc.
  - It's settled that email comes with an expectation of privacy, for PR purposes. Even unencrypted email.
  - Misaddressed email
    - A good standard practice, though one that's not yet required, is to have a confidentiality notice in confidential emails. It's better to have it at the *top* of the email. It's even better still to just put all confidential information into attachments.

- Metadata
  - There are software solutions available.
  - The simple solution is just to print to a PDF.
  - New York has published decisions on this already:
    - L may not use software to find metadata or to trace email.
    - Sending out documents with metadata is an ethical violation (!!!!).

- Cell phones
    - Analog—no privacy expectation. Minnesota, in fact, says using an analog cell phone is an ethical violation.
    - Digital is okay.
        - However, digital doesn't matter if you're speaking loudly in public. (There are a lot of attorneys in airports who are violating MRPC 1.6.)

- Laptops: they need to have firewalls (or, they *should*, at least).

Tuesday, March 8

Candor in litigation

- MRPC 3.3

Nix (1986) (p193x)
    - The implied holding here is that there's no constitutional right to give false testimony. Pragmatically, this means that the courts have to figure out some way to allow criminal defendants to present their (albeit false) side of the story.

- Possible solutions
    - Narrative testimony
        - This testimony is under oath (that is, there's no free pass on perjury).
        - L asks no questions.
        - L doesn't mention this testimony in his closing arguments.
        - Problems?
            - The jury might be tipped off by this odd method (to this, *Nix* basically says, "so what?").
            - The state has a hard time formulating objections.

            Thus, this is an imperfect device.
        - N.b. the interaction of narrative testimony and MRPC 3.3.

- MRPC 3.3
    - What about *impending* false testimony? (That is, there's no lying to remediate, yet.)
        - Try to persuade C not to falsely testify.
        - L *can* withdraw.
    - If L becomes aware of false testimony (that's actually been made), then L *must* remediate.

Problem 8.1 (p186)

a. [You're in S.D.N.Y., sitting in diversity, applying New York law, in a veterinary malpractice case, and you find an unfavorable case about veterinary malpractice from the N.Y. Ct. App.] You must disclose the case; no matter what.
b. [What if it's an Ariz. Sup. Ct. case?] You don't have to disclose, but you might want to so that you can directly rebut or distinguish the case.
c. [What if it's an N.Y. Ct. App. case about legal malpractice?] You don't have to disclose, although there may be some tactical reasons for disclosing.

Problem 8.2 (p187)

- [You know of an unfavorable eyewitness that your opponent apparently doesn't know about.] *Cf.* MRPC 3.4(f).

Problem 8.3 (p187)

- [Your opponent is searching, in discovery, for a smoking gun that exists, but isn't in the documents precisely requested by the discovery requests.] This is not an easy question, Burnett says.
    - Many courts adhere to the "piano" theory—you only get what results from the key you press, and nothig else. But courts are beginning to head away from this theory.
    - N.b. 3.4(c).
    - If you don't adequately respond to discovery requests, you can be sanctioned.
    - Thus, maybe you're not strictly *obligated* to provide the files with the smoking gun, but it might strategically be in your best interest to disclose.

- Trial publicity
    - MRPC 3.6 ("Trial publicity")
        - (a): statement of the constitutional standard
        - (b): safe harbor
        - (c): exception
    - *Gentile* (1991) (p222x): establishes the constitutional framework, here.
    - Note "cue planting."

Problem 9.2 (p213)

a. [While you're doing a trial, you're in an elevator to the courtroom and a juror turns to you and says, "Good morning, counselor! Have you got some red-hot testimony for us today?"] You can't respond. See MRPC 3.6 (you'd be impermissibly prejudicing the proceding) and 3.5 and 3.3(d) (the elevator is not an *authorized* ex parte proceeding).
b. [What if the juror just says "what did you think of that lousy ball game on TV last night?"] You could respond as long as it didn't solicit favoritism. Maybe say, "I can't talk about that now, because of my professional responsibilities. Maybe we can talk about it later."

Monday, March 21

- Review: candor in litigation
    - Candor versus confidentiality
        - *Nix* (p193x)
        - MRPC 3.3 ("Candor toward the tribunal"): note the relationship between 3.3 and 1.6.
            - 1.6 analysis:
                1. Is there an exception within 1.6?
                2. If not, is there any rule that trumps 1.6 in this situation?
                3. If not, is withdrawal required? (If so, is noisy withdrawal permitted?)
        - MRPC 4.1 ("Truthfulness in statements to others"): this rule doesn't trump 1.6, ever.
            - Note that there is a limited exception to this rule that's reconized in federal courts (and some state courts): Ls can be involved in deceit as part of a law enforcement sting operation.
        - Falsehoods by clients
            - How long does the duty to remediate last? Until the conclusion of the case. (Note though, that 1.6 dutis continue *past* the end of the case.)
        - Ex parte proceedings: see MRPC 3.3(d).
    - Standards for Civility
        - These haven't been universally popular.
        - Are these within the courts' authority to promulgate?
            - Arguments that say they are summon the interest of the courts in maintaining judicial independence, enhancing access to the courts, efficiency, and big-picture effectiveness.
    - Preparation of witnesses
        - Types of laypersons who can get lawyers into trouble when they're being prepared as witnesses:
            - Manipulative people
            - Impressionable people
        - Techniques to avoid trouble:
            - Admonish witnesses about honesty
            - Avoid leading questions during prep
            - Ask questions in "positive," not "negative" frames of reference (e.g., "was there...," rather than "wasn't there...").
    - Communications with others: see MRPC 3.5 ("Impartiality and decorum of the tribunal").
    - Dealings with nonclients: see MRPC 4.2 (you can't talk to another L's clients) and 4.3 (governing dealings with third parties).
    - Dealings with represented organizations: see MRPC 4.2 cmt. 7 (which is almost as important as the blackletter 4.2 rule itself). This sets out three

categories of organizational constituents.

Tuesday, March 22

Problem 9.4 (p213)

a. [After a verdict, on your way out of the courtroom, can you stop and chat with a juror about how you presented evidence and about your closing argument?] Yes, but you can't insist that the juror talk to you. Once a juror has said no, that's it.

b. [The day after the verdict, you find out that the jury got an transcript of an entire deposition when only a part of the depo was in evidence. Can you interview some jurors to find out if this is true?] You can ask about this, but once a juror has said no, then that's it.

Problem 9.5 (p214)

- [Can you interview an opponent's prospective witness without consulting with your opponent?] No.

Problem 9.6 (p214)

- [Can you contact former employees of the opposing party?] Former employees are okay to contact (MRCP 4.2 cmt. 7 expressly allows this). As far as current employees, 4.2 cmt. 7 sets out three groups: two status-based groups and one group based on an employees nexus to the litigation.

Problem 9.8 (p214)

- [You find out the your opponent counsel told the xerox operator to "make the copies hard to read" during discovery.] This is possibly a 3.4(d) violation. But, what do you do about it, practically?
  - Call opposing counsel.
  - Move the court for a discovery compliance order; plus, maybe ask for discovery sanctions (attorney fees and costs; deeming certain things as admitted).
  - Report to the bar? See 8.3—this could be something to report, especially if it's a pattern.

Problem 9.9 (p215)

- [The court is currently in recess to make a decision, and you find an evidence case directly on point and favorable to you.] You can and should notify the court, probably in a memo—but you can't do this in an ex parte way, at all. You can and should do the same thing even if it's an *unfavorable* case.

Problem 9.10 (p215)

- [A day of trial, where no media is allowed inside the courtroom, end with the

direct exam by your opponent of their witness—a witness whose credibility you gravely doubt. What do you say to reporters as you leave the buildling?] See 3.6, and 3.4(e) (which may be activated even when 3.6 isn't).

- Trial publicity and prosecutors—MRPC 3.8: 3.8(f) goes beyond 3.6 in some situations.
  - Note also the ABA standards on the special function of the prosecutor (and criminal defense attorney).

Monday, March 28

- Review: fairness in litigation
  - Lawyer as truth-seeker
    - Jerome Frank's *critique* of the adversarial system—that it encourages lawye to create false impressions (e.g., witness coaching).
    - Geoffrey Hazard's *defense* of the adversarial system—that it produces more benefits than deteriments, in the long run.

    The MRPC has increasingly been siding with Frank.
  - Witness coaching: techniques for keeping out of trouble:
    - Use "recall before recognition" questioning.
    - Use neutral questioning.
    - Sequence questions to match the witness's sequence of perception and memory storage.
  - L's testifying
    - Generally, L's involved in the case can't testify. They are allowed only if:
      - It's about an unconstested issue, OR
      - The issue related to legal services, OR
      - Disqualification (because L must testify) would work a substantial harship on the client.
  - Prosecutors' special duties: see MRPC 3.8 (compare, e.g., 3.8(g) and 3.6 (on trial publicity)).
  - Truthfulness outside litigation: MRPC 4.1
    - 4.1 is not a 1.6 trump (unlike 3.3 (re: false statements to the tribunal)).
    - L can't make false statements, period.
    - L has *some* duty to remedy false statements by a C.

Bias

In re . . . File 98-26 (Minnesota) (p238)

- N.b. how there's no name in the caption—this *was* a private admonition. After this remand, however, it's going to be public (and thus a teaching point and

deterrent for the entire bar).

In re Plaza Hotel Corporation (E.D. Cal.) (p240): L is kicked off of this bankruptcy case (and will be subject to civil liability from the C).

In re Vincenti (New Jersey) (p240): see 8.4(d) and cmt. 3, along with am1.

Problem 10.1 (p235)

- [C says it would be more comfortable with a male L for depositions.] L must cede to C's wishes—this is a client sovereignty issue. However, recall that Ls are not public utilities.

Problem 10.3 (p236)

- [The deputy D.A., referring to Mexican-Americans, argues for proceeding with a shaky indictment, saying "those people always have an alibi—they stick together."] To determine whether this shows bias or not, you must get beneath the stereotype—are there facts supporting the deputy's conclusion?

Conflicts of interest

- MRPC 1.7 ("Conflict of interest: current clients"): the general rule
  - Note that it begins with a "shall not."
  - Types of conflicts:
    - Direct adversity (1.7(a)(1))
    - Limitation conflicts (1.7(a)(2))
      - Limitation by responsibilities to another client
      - Limitation by resopnsibilities to a former client
      - Limitation by responsibilities to a third party
        - E.g., third-party payers (like a parent, or an employer)
      - Limitation by personal interests of the lawyer

Tuesday, March 29

- [MRPC 1.7] The "two faces in the mirror" test: look in the mirror and determine whether:
  1. You see a conflict.
  2. Another attorney, or a judge, would see a conflict in hindsight.

  This, 1.7, is an important rule for Idaho practitioners—the IRPC 1.7 is no different than the MRPC, but because of the close-knit legal community iin Idaho, conflicts are easily bred.

Beckwith Machinery Co. (W.D. Penn.) (p257)

- Who's the client? It's the *insured*—the insurance company is merely a third-party payer.
    - (This is the rule in most states.)
- The court says that if the insurance claim is *plausibly* covered by the policy's subject matter, then the insurance company has a duty to defend. However, the insurance company can make a reservation o rights, if it wants (itc., though, the company did not make one).

Phillips (Kansas) (p263)

- Note MRPC 8.4(c) (no dishonesty, fraud, or deceit—ever).
- L here breached his fiduciary obligation by entering into a financial transaction with a C, the court says, even though the financial transaction itself was maybe not negligent lawyering.
- Plus, the firm here is vicariously liable.

For situations like *Phillips*, the ABA has created preventive rule to keep Ls out of trouble—MRPC 1.8:

- Note how the L in *Phillips* would have failed all three parts of the 1.8(a) test.

Organizations as clients

- MRPC 1.13 ("Organization as client")
    - (b): this is a very carefully crafted rule, Burnett says.
        - The "must" here used to be a "may."
        - Note thow the dialog suggested here, between L and CEO, is a lot like the dialog suggested, under 3.3, for the C who wants to falsely testify.
        - External whistleblowing is permitted here, if the organization is corrupt up to the very top.

Monday, April 4

- [MRPC 1.13] N.b. Sarbanes-Oxley: mandatory whistleblowing was considered, but the SEC did not adopt it.
- *Every time* there's an entity involved, 1.13 comes into play—e.g., even with a family farm.
- Process:
    - Go up the chain of command...
    - ...but what if the highest authority gives no help?
        - *Duty* to withdraw (this is easy to say but hard to do—unless you are prepared for it).
        - Plus, L *may* disclose confidential information, because 1.13 trumps 1.6.

        - Why? Because the corporation itself is the client—not its agents and constituents individually.
    - What if you get fired?
        - Well, C isn't allowed to require that L commit or assist with an illegal act.
        - Still, though, there's client sovereignty.

Problem 11.1 (p250)

- [You do insurance defense. Π's complaint alleges $125K in damages, the policy has a limit of $100K, and then Π's L calls you offering to settle for $90K.] The insured is the client (in most jurisdictions—in others, the insured and the insurance company are "co-clients," but the results are the same). Thus, you must consult with the insured to decide what to do.

Problem 11.2 (p250)

- [See transcript of conversation between L and corporation president.] L should have gone to the board—about *this* particular matter (i.e., the means, not the end).
    - Would it work if C took L off of this particular case? Often it wouldn't, because this wouldn't be in the best interests of the corporation itself, which is the client (see 1.13(b)).
    - What about the president's request that L "raise every discovery request"? See 3.4(d).
    - What about when the president says that "Π's L will be well-compensated if he'll settle"? This could be an 8.4(c) (dishonesty, etc.) or 8.4(d) (prejudice to administration of justice) problem, because this is essentially bribing another L.

- N.b. the relevance limit to MRPC 1.13: the rule only applies to a "matter related to the representation." This takes L off the hook from having to *look* for things to be worried about.

Problem 11.4 (p254)

a. [L likes one of C's cottages. Can L have her brother bid for one at an auction, as an undisclosed principal?] This would be 8.4(c) deceit, plus a breach of loyalty, plus a use of confidential info (1.8(c)).

b. [Can L buy a cottage directly from C?] See 1.8(a): satisfy it and the transaction will be okay.

Problem 11.7 (p255)

a. [Can L suggest herself as an executor of C's estate?] There's no rule against this, and it could be okay if there's full disclosure and informed consent.

b. [Can L accept as thanks for her kindness to C a modest picture frame that she likes?] See Restmt. § 127—insubstantial gifts are okay.

Tuesday, April 5

- Review: conflicts of interest
  - What are the "interests" of C and L?
    - 1.2: C has an interest in:
      - The objectives of the representation
      - Consulting with L re: the means of representation
      - Loyalty
      - Independent professional judgment
      - L as an officer of the legal system
      - L as a public citizen
  - 1.13: organizational clients
    - *If*:
      - A legal duty is violated, AND
      - The entity will likely be substantially harmed
    - Then L *must* take the matter up the chain of command in the organization.
    - But *if* those steps are to no avail, AND the violation is fraud or crime involving L's services, then L *must* withdraw and *may* noisily withdraw (if not a fraud or crime, L *may* withdraw).
      - Plus, if the violation is clear and likely to cause substantial injury, then L *may* disclose confidential information in order to prevent injury.
  - 1.7
    - Are there...
      - Direct adverse interests against C?
      - Significant risks or coflict due to...
        - ...a former C?
        - ...a third party?

    If so, STOP! (Also, do the two-faces-in-the-mirror test.)
  - 1.8
    - (a) business transactions
    - (b) use of C's information
    - (c) gifts
    - (d) media rights
    - (e) financial assistance
    - (f) compensation from third parties
    - (g) aggregate settlements
    - (h) malpractice agreements
    - (i) property interests in causes of action
    - (j) sexual relations with Cs
    - (k) extension of this rule throughout the entire firm

- Disqualification
  - A DQ may be based on a conflict of interest under the RPC, or it may be based on conflicting roles at trial (L as laywer and witness, e.g.).
  - However, a court will consider the interests of justice when determining whether to DQ a laywer, and may not DQ even if there is a conflict of interest or other problem.
  - "Screening": to work, a screen must be both timely and adequate.

  K.A.W. (Florida) (p279)
    - Standing to ask for a DQ: the court here says that due to the economic interests involved in this insurance case, there's standing itc. for DQ puposes (however, there's probably *not* standing for disciplinary purposes).
    - What about C's consent to the conflicted representation? The court says that even with the consent there's still an uneven flow of information, due to the contrived adversity here. So, the consent doesn't matter—the court assumes that information is getting intermixed, and so L must back out.

  Haagen-Dazs (N.D. Cal.) (p284)
    - This is sort of the opposite situation from *K.A.W.*, Burnett notees.
    - MRPC 1.9: what's the test?
      1. Adversity
      2. Acquisition of 1.6 or 1.9(c) protected information
    - Screening problem? The court says the screen may have been adequate, but it wasn't timely—it came too late.

Monday, April 11

- Imputation of conflicts to firms: MRPC 1.10
  - If, under 1.10, there *is* a conflict, then you need to look at 1.7 to figure out what to do about it (plus, do the two-faces-in-the-mirror test).
  - If disqualification is a possibility, determine whether there is an administration of justice reason not to DQ (see, e.g., *K.A.W.* (p279) and *Haagen-Dazs* (p284).
    - Note also the possibility of screening.

Problem 12.1 (p277)
- [L drafted forms for a realtors' organization. Now, C wants L to represent him against a member of the organization, in a matter involving on of the forms L drafted.] There's probably a conflict here, under 1.7(a)(2): either a third-party or a personal interest (L's reputation) conflict.

Problem 12.2 (p278)

- [Can you represent the driver and the three passengers of a car involved in an accident?] Probably not—because there's a very likely potential conflict between the passengers and the driver, and even a potential conflict among the passengers.
    - Does the fact that you don't know what the actual probability of the conlict coming to pass is at the outset change anything? Well, you could (1) conduct a reasonable inquiry into the possibilities and (2) disclose the possibility of a conflict in the engagement letter (a written letter isn't required, but is very prudent).
    - If you go ahead with the representation and the interests later diverge, can you get out of the representation *partially*, or do you have to entirely back out? You can't back out partially if you have confidential information (see 1.9). You'd also want to include this possibility in the engagement letter.

Problem 12.3 (p278)

- [You represent the local hardware store in a civil action against V. Last week, V and a friend were arrested and charged with burglary—both are indigent. The PD has refused to represent both V and his friend on conflict of interest grounds, and the court has asked you to represent V.] Are these two (the civil and the criminal) actions related? Yes—there *is* potential adversity here. And it's rather forseeable.

Problem 12.4 (p278)

- [You represented W two years ago in setting up a close corporation, but you haven't represented him since then. Now, W's wife has asked you to represent her in divorce proceedings against W, where there is a sharp disagreement about property, child support, and alimony.] You know things about W, so there's a conflict (1.7(a)(2) third-party conflict; 1.9(c) former client conflict).

Problem 12.6 (p279)

- [L was an ALJ until ten months ago. As an ALJ, L considered and denied a motion for a cease and desist order. Now, the party who opposed the motion has asked L to represent in an appeal on the same matter.] Do the "personal and substantial participation" test, from 1.12(a). Here, we've got a close case, Burnett says—but it very probably crosses the threshold into impermissible.

- Moving between firms
    - MRPC 1.10: imputed conflicts are *imputed back* to the former firm.
        - See 1.9(a), which *presumes* that privileged information is at risk.
    - Screening
        - Courts invented screening—so it appears in the Restatement, but didn't appear in the MRPC in any form until recently.
        - Requirements of a valid screen:
            - The screen must be timely.

            - It must be adequate to prevent unauthorized communications.
            - The screened L must not have an identifiable interest in the fee for *this* matter.
            - The screen must be disclosed to all affected clients.
    - A government L can *not* go into private practice and handle a particular matter if L sustantially participated in the matter...
        - *Unless*:
            - Permitted by law, OR
            - Permitted by the government agency *in writing*.
        - Here, screening is expressly allowed in the MRPC themselves.

Tuesday, April 12

- Screening and 1.10: MRPC does not expressly allow screening.
    - Some states' 1.10s do, though.
    - And some courts do, by decisional law.

- Public- / private-practice interface
    - MRPC 1.11 ("Special conflicts of interest for former and current government officers and employees")
        - First, the rule says: STOP—don't make the transition.
        - *But*, then the rule sets out exceptions:
            - Consent
            - Screening—which is express here (1.11(b) and 1.12)
                - This is the same type of screening that the courts have adopted.
                - Why is screening express here? Well, because it provides for an easier flow of Ls between private and public practice, and this seems to serve the public interest (even though it may frustrate client sovereignty to some extent).
        - (c): L can't represent a C whose interests are adverse to anyone L has confidential information about.
        - (d): the rule for Ls who are going *from* public practice to private practice.
            - You can't look for a private job while in your public job.
    - MRPC 1.12 ("Former judge, arbirator, mediator or other third-party neutral")
        - This rule has basically the same message as 1.11, but this is specically targeted at judges, law clerks, and so on.
        - Again, screening is expressly allowed here.
        - Exceptions for law clerks: they can negotiate screening with prior disclosure.
        - N.b. also the "appearance of impropriety" notion embeded in the Code

of Judicial Conduct.

- Changes and trends in the practice of law
    - MJP
        - See MRPC 5.5 (expansion of practice across jurisdictions) and 8.5 (concomitant expansion of disciplinary authority across jurisdictions).
        - *Birbower* (handout, p4)
        - *Rapoport* (handout, p4)
        - (N.b. that MJP is not the same thing as MDP.)

Monday, April 18

Law firms and specialized practice

- No matter what the tack of representation, 1.7 is the general rule wrt. conflicts of interest.
- N.b. MRPC 2.4 ("Lawyer serving as third-party neutral") wrt. ADR.
- Leaving a firm: the ABA says that a communication to a client that merely says that L is leaving is *not* a solicitation under 7.3.
- Noncompete agreements are not allowed (MRPC 5.6).
- Ancillary businesses
    - This is an MDP issue.
    - MRPC 5.7 ("Responsibilities regarded law related services")
        - (Very few states have adopted this rule.)
        - There are four major concerns here:
            1. Conflict of interest
            2. Impairment of professional judgment
            3. Confidentiality
            4. Solicitation
- Law firm discipline
    - See 5.1 (supervisory Ls) and 5.2 (subordinate Ls).
    - It's *individuals* that are subject to discipline, not firms.
    - *General Dynamics* (California) (p305)
        - The court allows a suit by an L against his employer for wrongful termination, but the only remedy it will allow is an economic one—not reinstatement.

Tuesday, April 19

Judicial conduct

- Scalia's recusal motion decision (handout)

- Petitioner argued for recusal on two grounds:
    1. The closeness of Scalia's relationship with Dick Cheney, a named party.
    2. Gift
        - (What level of benefit to a judge is significant enough to trigger a problem, when it comes to gifts?)

- Trial judges
    - In Idaho, and other western states, you get one free, unsubstantiated removal (but, you can't use it frivolously).

Republican Party of Minnesota (2002) (p341x)
- Even if the impartiality of judges is a compelling state interest, the statute itc. wasn't narrowly tailored enough to achieve it, the Court says.
- O'Connor, concurring, is led to agree with the majority due to federalism concerns.

- The Code of Judicial Conduct