PROFESSIONAL RESPONSIBILITY OUTLINE

§1: INTRODUCTORY MATERIAL

I. Overview

A. **Definition:** Professional Responsibility is a broad term denoting the rules and regulations governing lawyers in their capacity as professionals and dealing with ethical issues that may arise in the course of practice.

B. **Sources Governing Lawyer Conduct:** there are three sources you have to evaluate when deciding how a lawyer should have behaved, or how a lawyer needs to behave:

1. The ABA Model Rules;
    a. The ABA Model Rules are *not* binding on any jurisdiction and represent the ABA's opinion on legal issues surrounding lawyer's ethics; however, the Rules are very influential and some aspects of the Rules have been adopted by 43-States.
2. The State Code of Professional Conduct;
    a. Every state has adopted a code of professional conduct;
    b. Some states have their own code; whereas, other states have adopted significant portions of the Model Rules, but have changed certain provisions.
    c. Each state then has a disciplinary code, and agency, to enforce the Rules of Professional Conduct.
        i. The agency, usually a "Board of Professional Responsibility" will process grievances and may have the power to investigate an attorney's alleged misconduct.
        ii. The Board will then make recommendations to the State Supreme Court, who actually enforces and promulgates the Rules.
3. United States Constitution, State Constitutions, other statutes regulating conduct, and the common law.
    a. The First and Sixth Amendments to the US Constitution, and their state equivalents are very important in Professional Responsibility.
        i. The Sixth Amend guarantees the right to effective assistance of counsel;
        ii. The First Amend guarantees freedom of speech, association, and press.
    b. Other statutes may impose affirmative obligations on lawyers which are in conflict with the Rules of Professional Conduct, and separate duties may arise, these conflicts need to be addressed.
    c. Common Law: may impose obligations, such as the duty to warn and other torts which bear directly on lawyer's conduct.

C. **Malpractice and Other Legal Obligations:** if the lawyer fails to meet his professional legal obligations, his malfeasance may be actionable in a court malpractice action, in addition, to disciplinary hearings and procedures conducted by the Board.

1. Lawyer's are held to the standard of a reasonable lawyer in the jurisdiction.
2. Morality may also be a factor in the lawyer's conduct, however, the lawyer must resolve conflicts that arise between his morals and the morals of his client.

D. **Agency Law:** as the preamble ¶¶'s 15, 16 indicate, the rules do not define every relationship between the lawyer and client, the substantive law of the jurisdiction governs a lot of conduct.

1. The law of agency applies because the lawyer is the agent of the client, the principle. This can bring up issues of the scope and authority of the lawyer to conduct the affairs of the client.

E. **Sanctions:** when the Board sanctions a lawyer, it takes into account three factors:

1. the degree of culpability of the lawyer (i.e. intentional conduct versus negligent conduct);
2. the harm that was incurred by the misconduct;
3. how the lawyer responds when he is called before the Board to explain his acts (i.e. remorse, indifference, animosity, etc…).

F. **Grievances:** are proceedings instituted by an individual, usually the client but it does not have to be, against the lawyer alleging that he engaged in misconduct.

1. Areas of practice in which grievances are filed the most:
    a. Family law;
    b. Criminal law;
    c. Property law--Real Estate transactions
2. There are several things that can lead to a sanction being filed against an attorney, among the most common are:
    a. Lack of communication with the client (i.e. returning phone calls and the like);
    b. Lack of diligence (i.e. excessive procrastination but not necessarily missing the statute of limitations);
    c. Incompetence;
    d. Fraud;
    e. Creating high expectations in the client and then letting them down (i.e. telling a client they have a million dollar case).
    **Most of these can be controlled by the lawyer's conduct.

§1.1: LAWYERS AND THE LEGAL PROFESSION

I. ABA Preamble, Scope, and Terminology

A. **Preamble:** A Lawyer's Responsibilities:

1. A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

2. A lawyer performs various functions:
    a. *Advisor:* provides client with informed understanding of the client's legal rights and obligations and explains other practical implications.
    b. *Advocate:* a lawyer zealously asserts the clients position under the rules of the adversary system.
    c. *Negotiator:* a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.

3. In all professional functions a lawyer should be competent, prompt, and diligent.

4. A lawyer's conduct should conform to the requirements of law, both in professional service to clients and in the lawyer's business and personal affairs.

5. As a public citizen the lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession.
    a. He should devote professional time and civic influence for individuals who cannot afford adequate legal assistance, and should aid the legal profession in pursuing these objectives.

6. Many of the lawyer's professional responsibilities are prescribed by the Rules of Professional conduct, as well as substantive and procedural law.

7. A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious.

a. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

8. The Rules of Professional Conduct prescribe terms for resolving conflicts that arise involving ethical problems arising from the lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a living.

9. The legal profession is self-governing.

10. To the extent that lawyers meet the obligations of their professional calling, the occasion for governmental regulation is obviated.

11. The legal profession's relative autonomy carry with it special responsibilities of self-government.

a. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers.

12. Lawyers play a special role in the preservation of society and the Rules of Professional Conduct serve to define the relationship between lawyers and the legal system.

B. **Scope:**

13. The Rules of Professional Conduct are Rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.

a. The Rules are partly obligatory and disciplinary and partly constitutive and descriptive in that define the lawyer's profession role.

b. The comments to the Rules do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

14. The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.

15. For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists.

a. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.

16. Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. The Rules do not abrogate such authority.

17. Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.

18. Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.

a. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.

b. The Rules are *not* designed to be a basis for civil liability.

19. The Rules are *not* intended to govern or affect judicial application of either the attorney-client or work product privilege.

a. In reliance on the attorney client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure.

b. The attorney-client privilege is that *of the client* and *not* the lawyer.

20. The lawyer's exercise of discretion not to disclosure information under Rule 1.6 should not be subject to reexamination.

21. The comment accompanying each rule explains and illustrates the meaning and purpose of the Rule. The comments are intended to as guides to interpretation, but the text of each rule is authoritative.

C. **Terminology**:

1. *Belief, Believes:* denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

a. This is a subjective standard.

2. *Consult, Consultation:* denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

a. This is an objective standard.

3. *Firm, Law Firm:* denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.

4. *Fraud, Fraudulent:* denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

5. *Knowingly, Known, Knows:* denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

6. *Reasonable, Reasonably*: when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

a. This is an objective standard.

7. *Reasonable Belief, Reasonably Believes:* when in used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

a. This is an objective/subjective standard.

8. *Reasonably Should Know:* when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

a. This is an objective standard.

9. *Substantial*: when used in reference to degree or extent denotes a material matter of clear and weighty importance.

10. *Partner:* denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

C(1). **Other Terminology:** [not defined in the Model Rules]

1. *Ethics:* are the external set of standards which regulate how lawyers must behave.

a. Ethics are imposed by the profession itself and some ethical duties are permissive while others are mandatory.

2. *Misconduct:* is a violation of the an ethical duty or rule.

3. *Grievance:* is a procedure instituted by an individual against a lawyer alleging that he has engaged in misconduct.

a. Grievances are handled by the Board of PR, which investigates the grievance.

b. The Board is then required by law [disciplinary code] to investigate, have a hearing if necessary, and then make a recommendation either for a sanction or against a sanction to the state Supreme Court.

4. *Morality:* is the set of ethical standards the lawyer imposes on himself.

5. *Malpractice:* is the failure to satisfy the legal obligations of the profession, which if found liable, can result in the imposition of civil liability.

6. *Sanction:* the penalty the Board imposes for a violation of the Rules of PR; the penalty for misconduct.

a. The Board has the power to privately or publicly sanction a lawyer.

b. The range of penalties range from private reprimand (the least severe) to disbarment (the most severe).

§1.2: DEFINING THE PRACTICE OF LAW

I. The Practice of Law: Rules and Definitions

A. **Generally:** the practice of law must be defined because if it is done by a non-lawyer it is a violation of the law, *see* W.S. §33-5-117.

1. The Model Rules do not define the practice of law, however, they do state that "the definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons [Rule 5.5 cmt. 1].

2. The regulation of lawyers has remained largely state regulated with each state defining the practice of law for its jurisdiction.

B. **G/R:** Practicing Law: a lawyer may only practice law in the jurisdiction where he is admitted to the bar, *see* Rule 11(b).

1. Caveat: a lawyer from another jurisdiction can proceed *pro hac vice*; that is, a person can be admitted, with the presence of local counsel, to argue a single case in another state, *see* Rule 11(b)(1).

C. **W.S. §33-5-117:** Unauthorized Practice: it shall be unlawful, and punishable as contempt of court, for any person not a member of the Wyoming State bar to hold himself out or advertise by whatsoever means as an attorney or counselor-at-law.

C(1). **ABA Rule 5.5:** Unauthorized Practice of Law: a lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Official Comment:

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

a. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work [Rule 5.3];

b. Likewise, it does not prohibit lawyers from providing their professional advice and instruction to nonlawyers whose employment requires knowledge of the law.

c. A lawyer may also counsel nonlawyers who wish to proceed pro se.

D. **Rule 101:** Appearances: [Uniform Rules for the District Courts of the State of Wyoming]:

(a) Any person may appear, prosecute, or defend any action pro se. Partnerships and sole proprietorships may appear through the owners.

(b) Corporations and unincorporated associations (other than partnerships and individual proprietorships) may appear only through an attorney licensed to practice in Wyoming.

E. **Rule 11:** Attorney's Right to Practice Law: [Rules of Wyo. S.Ct.]:

(a) "Practice of law" means *advising* others and taking action for them in matters connected with the law. It includes preparation of legal instruments and acting or proceeding for another before judges, courts, tribunals, commissioners, boards or other governmental agencies.

(b) Only active members of the Wyoming State Bar shall engage in the practice of law within this State, except that:

(1) Members of the bar of any other state, district or territory of the US may be admitted to practice with reference to a specific case, but they shall not be permitted to enter their appearance…unless they have associated with them in such action or proceeding an active member of the Wyoming State Bar….

(2) Any person may act pro se in a matter in which that person is a party.

E(1). **G/R:** Elements of the Practice of Law: there are three elements in Rule 11(a) that assist in defining the practice of law:

1. *Advising Others:* means giving legal advice to a person.

a. A lawyer is held to the standard of a reasonable lawyer any time he renders legal advice, and this applies in formal and informal settings: the lawyer if he gives legal advice he is held to the standard of a reasonable lawyer, 24-hours a day.

b. *Legal Advice:* the court will consider three factors in determining whether a lawyer has rendered legal advice:

i. the *risk* of erroneous advice;

ii. the *likelihood* that the advice will be wrong;

iii. how *specific* was the advice that was given to the individual; and

iv. the *severity* of erroneous advice.

*In trying to define the practice of law, the courts will look at these three factors, if all three are present, then it is the practice of law, but if it is only one or two factors, then the case will depend on the circumstances.

Whenever the court is evaluating whether a person has engaged in the practice of law, it will always begin with the **reasonable expectations of the recipient of the advice because that is the nature of "legal advice." In other words, the court will always look at whether the client believed he was receiving legal advice.

2. *Taking Action for Them in Matters Connected with Law:* this means entering an appearance for the person, under Rule 101, in any proceeding before a judge or another tribunal.

a. Appearing basically means that the lawyer goes to court and says they are proceeding on behalf of the client.

3. *Preparation of Legal Instruments:* this means preparing ANY kind of legal document for the individual.

a. Exception: [scrivener exception] being a secretary and filling in a document for an attorney (and hence the client) has been held *not* to be the practice of law.

b. Courts' draw the line by looking at:

i. whether legal advice has been given in relation to the document; and

ii. whether a separate charge has been levied for the filling out of the document.

**These are factors the courts take into consideration but they are not dispositive.

II. Law Firms and Associations: ABA Rules

A. **Rule 5.7:** Responsibilities Regarding Law Related Services:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

A(1). Official Comment:

[1] When a lawyer performs law related services or controls an organization that does so, there exists potential for ethical problems:

a. Principal among these is the possibility that the person for whom the law related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship.

[2] Rule 5.7 applies to the provision of law related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law related services are performed.

[4] Law related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services.

a. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship *do not apply*.

[5] When a client lawyer relationship exists with a person who is referred by a lawyer to a separate law related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8 (conflict of interest—prohibited transactions).

[6] In taking reasonable measures referred to in paragraph (a)(2) the lawyer should communicate with that person receiving the law related services that the relationship of the person to the business entity will not be a lawyer client relationship.

a. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding.

[9] Examples of law related services include:

a. providing title insurance (which used to be defined as the practice of law, but is not anymore);
b. financial planning;
c. accounting;
d. trust services;

e. real estate counseling;
f. legislative lobbying;
g. economic analysis;
h. social work;
i. psychological counseling;
j. tax preparation; and
k. patent, medical, or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the attorney-client relationship, the lawyer must take special care to heed to the Rules addressing conflict of interest (Rule 1.7 through 1.11, *especially* Rules 1.7(b) and 1.8(a), (b), and (f), and to *scrupulously adhere* to the Requirements of Rule 1.6 relating to the disclosure of confidential information.

A(3). Other Rules Pertaining to Rule 5.7:

1. Rule 5.7 deals with protecting a client's expectation when they go to see a lawyer and protecting their expectations of confidence and confidentiality.
   a. The rule protects the client's expectations by requiring the lawyer to adhere to the Rules of Professional Conduct if they provide law related services.
2. **G/R:** if the lawyer is providing law related services, and does *not* make clear that there is NO attorney-client relationship, then the Rules of Professional Responsibility are applicable and apply.
3. **G/R:** the burden is always on the lawyer to show that a reasonable effort was made to clarify that existence of the relationship with the law related service provider (i.e. no attorney-client relationship) and to clarify that relationship.
4. The Rule demonstrates the *primary policy of the Rules:*
   a. Protecting the client's reasonable expectation; and
   b. placing the burden on the lawyer.

**Wyoming has NOT adopted Rule 5.7.

B. **Rule 5.1:** Responsibilities of a Partner or Supervisory Lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
(c) A lawyer shall be responsible for another lawyer's violation of the rules of Professional Conduct if:
   (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
   (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

B(1). Official Comment:

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes:
   a. members of a partnership and the shareholders in a law firm organized as a professional corporation;
   b. lawyers having supervisory authority in the law department of an enterprise or government agency; and
   c. lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice:

a. *Small Firms:* informal supervision and occasional admonition ordinarily might be sufficient;
b. *Large Firms:* more elaborate procedures may be necessary; such as, confidential referral of ethical problems to a senior partner or special committees.

[3] Paragraph (c)(1) expresses the general principle of responsibility for actions of another. *See also* Rule 8.4.

[4] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work of another.

a. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact.

[6] Apart from this Rule, and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate.

a. Whether a lawyer may be civilly or criminally liable for another lawyer's conduct is a question of law beyond the scope of the Rules.

B(2). Other Rules Pertaining to Rule 5.1:

1. **Definitions:**

a. "Partner" as defined in the terminology as a member of a partnership and a shareholder in a law firm organized as a professional corporation.
b. "Firm" denotes a lawyer or lawyers in a private firm, legal department of a corporation, or other organization and lawyers employed in a legal services organization.
c. "Reasonable" is an objective standard denoting conduct of the reasonably prudent lawyer.
*Must use these terms to interpret this rule.

2. **G/R:** Partner's Duty: a partner has the responsibility to make sure the firm comports with the Rules of Professional Conduct.

a. The partner has to take responsibility for not just for himself, but must have in place reasonable measures to assure that all other lawyer's comport with the Rules. Such measures may include, but are not limited to:

i. informal supervision;
ii. occasional admonition;
iii. in larger firms more stringent mechanisms such as ethical committees;
iv. conflict of interest files; and
v. other methods to comport and ensure compliance with the Rules.

3. **G/R:** Supervisory Authority: [the term is not defined so look at its plain meaning] any lawyer having supervisory authority (such as an associate assigned as the lead attorney on a case) shall take reasonable efforts to make sure the persons she has authority over are comporting the Rules.

4. **G/R:** Liability: a lawyer [not just partner] is responsible for another lawyer's violations of the Rules if:

a. orders or ratifies the prohibited conduct; or
b. the lawyer is a partner and knows (has actual knowledge) of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable (objective standard) remedial action.

C. **Rule 5.2:** Responsibilities of a Subordinate Lawyer:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of a professional duty.

C(1). Official Comment:

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact maybe relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment.

C(2). **G/R:** a subordinate lawyer cannot avoid being sanctioned because he was ordered to do something.

1. *Caveat:* paragraph (b) contains a slight exceptions but the situation must be an arguable question of professional duty.

D. **Rule 5.3:** Responsibilities Regarding Nonlawyer Assistants: with regard to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional conduct if engaged in by a lawyer if:

(1) the lawyer orders, or with the knowledge of specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

D(1). Official Comment:

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals.

a. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.

b. A lawyer should give such assistants appropriate instruction and supervision regarding the ethical aspects of their employment, particularly regarding the obligation not to disclose information relation to representation of the client, and should be responsible for their work product.

D(2) **G/R:** Staff Training: lawyer's have a duty to take responsibility for training their support staff on the issues and duties of confidentiality to ensure that the keep hold in confidence any secrets of the client that might be imparted to them.

1. The confidentiality of the client is one of the most important Rules; hence, the lawyer must take all reasonable measures to ensure that support staff are aware of the legal obligations to the client.

E. **Rule 5.4:** Professional Independence of a Lawyer:

(a) A lawyer shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.7, pay to the estate or other representative of that lawyer the agreed upon purchase price; and
(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
(d) A lawyer shall not practice with or in the from of a professional corporation or association authorized to practice law for profit, if:
(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

E(1). Official Comment:
[1] This Rule expresses the traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.
a. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client.

§1.3: ADMISSION TO THE BAR

I. Overview

A. **G/R:** the practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character.
1. It is generally accepted that a State can set high standards of qualification and, to this end, may investigate an applicant's character and fitness to practice law.
2. It is equally clear that all states have set qualifications of moral character as preconditions for admission to the practice of law, with the burden of demonstrating good character borne on the applicant.
*[*Clark v. Virginia Bd. of Bar Examiners*].

B. **G/R:** to be admitted to the bar in most states the applicant must demonstrate that he:
1. is competent to practice law; and
2. has good moral character.

II. Competence

A. **Rule 1.1:** Competence: a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

A(1). Official Comment:

Skill and Legal Knowledge:

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include:

a. the relative complexity and specialized nature of the matter;
b. the lawyer's general experience;
c. the lawyer's training and experience in the field in question;
d. the preparation and study the lawyer is able to give the matter; and
e. whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[2]. A lawyer need not necessarily have special training or prior experience to hand legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.

Thoroughness and Preparation:

[5] competent handing of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

a. It also includes adequate preparation.

Maintaining Competence:

[6] to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and legal education.

B. **G/R:** Duty of Competence: a person has to be competent to practice law. There are five elements to competent representation:

1. *Knowledge:* a reasonable lawyer must know how to acquire the information they need, they are not expected to know everything;
2. *Skill:* the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any specialized knowledge. Other types of important skills are:
   a. analysis of precedent;
   b. evaluation of evidence; and
   c. legal drafting.
3. *Thoroughness:* is essentially attention to detail and completing all required work.
4. *Preparation:* preparation is required for every case and cannot be overlooked.
5. *Reasonably Necessary for the Representation:* this means the lawyer must provide the knowledge and skills that any reasonably prudent lawyer would find necessary for adequate representation.

C. **G/R:** Acquiring Competence: there are three main ways a lawyer acquires competence:

1. by studying;
2. by preparing; and
3. by associating with others are competent.

*[Cmts. 2, 4].

**Thus, if a case comes into an inexperienced lawyer's firm, he does not have to turn it away because he is not competent, he just must associate himself with someone who is competent (i.e. if necessary, obtain co-counsel).

D. **G/R:** Relation to Bar Exam: if lawyer handles a case incompetently, it is grounds for a malpractice action and is a violation of Rule 1.1; thus, every State requires (subject to limited exceptions) lawyers to pass a bar exam because the profession is trying to ensure the competence of lawyers.

E. **G/R:** State Requirements For Competency: the states, through various methods have attempted to impose competency requirements:

1. *Geographical Exclusions:* the Supreme Court has held that geographical exclusions in an attempt to ensure competency for the "location/jurisdiction" are unconstitutional because there is no rational relationship between geographic exclusions and competency.
2. *Education:* most states require that a person graduate from an ABA approved law school before being admitted to the bar; if the person goes to a non-ABA-approved law school they are not even allowed to take the bar in most jurisdictions.
    a. Most non-approved law schools are in California, where the person only has to attend a state approved law school.
    b. **W.S. §33-5-105:** Wyoming requires a lawyer to have studied at an ABA approved law school; however, Wyoming also provides an exception to the education requirement, and some lawyers do not even have to go to school to become a lawyer.
    c. States are free to establish their own educational standards.
3. *Bar Exams:* the bar examination has been upheld in nearly every case as indicator of competence.
    a. States are free to establish their own standards for the bar exam, and they very greatly from jurisdiction to jurisdiction.

III. Good Moral Character

A. **Good Moral Character:** most states require a person to be of good moral character, in addition to being competent, to practice law and gain admission to the bar.

B. **W.S. §33-5-104:** Applications for Admission to the Bar; generally: ….If the court shall then find the applicant to be qualified to discharge the duties of an attorney and *to be of good moral character*, and worthy to be admitted, an order shall be entered admitting him to practice in all the courts of this state.

C. **W.S. §33-5-105:** Applications for Admission to the Bar; Qualifications of Applicants: No one shall be admitted to the bar of this state who shall not be an adult citizen of the United States and a person of good moral character. . . . .

D. **G/R:** Constitutional Limits on Requirements of Good Moral Character: the First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs.

1. Similarly, where a State attempts to make inquires about a person's beliefs or associations [such as on a bar application] its power is limited by the First Amendment.
2. Broad and sweeping State inquiries into those protected areas discourages citizens from exercising their rights protected by the Constitution.
3. *Strict Scrutiny:* where a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon the State to show that the inquiry is necessary to protect a legitimate State interest. *[*Baird v. State Bar of Arizona*].

4. **Holding:** in *Baird* the Court held that the Bar Examiner's searching inquiry into the plaintiff's beliefs violated the First Amendment, as applied to the States through the Fourteenth Amendment because political views and beliefs are immune from bar association inquisitions designed to lay a foundation barring an applicant from the practice of law.

5. Caveat: The First Amendment embraces two concepts—the freedom to act and the freedom to believe. The second is absolute, but in the nature of things, the first cannot be. Conduct remains subject to regulation for the protection of society.

a. Thus, once a belief crosses over into an action, the State can begin to regulate it; hence, the Bar can begin to ask questions and regulate.

E. **G/R:** Statutory Limits on Requirements of Good Moral Character (and Competency): Title II of the ADA prohibits discrimination against disabled persons by public entities.

1. It also provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits, services, programs, or activities of a pubic entity or be subject to discrimination by such entity.

2. Thus, a State Board of Bar Examiners cannot discriminate, or impose additional burdens, in its requirements for persons applying to the bar, this applies equally to other federal statutes as well.

*[*Clark v. Virginia Bd. of Bar Examiners*].

F. **G/R:** Test for Constitutional/Statutorily Permissible Questions: because the State cannot impose additional requirements on individuals with emotional or mental problems, the questions on bar applications must be narrowly tailored to characteristics lawyer's should not possess.

1. There are several questions (that are quite) broad that Bar Examiners can ask about, such as:

a. capacity to be a lawyer, both mentally and physically; and

b. does the individual have inclination for *fraud, deceit*, or *dishonesty*.

2. Thus, the standard is whether the applicant has the propensity to be deceptive or dishonest.

a. This standard can be tied to competency and good moral character because a lawyer is not competent to practice law if his mental faculties give him the capacity to be dishonest and deceptive to a client, which reflects on his moral character.

b. In other words, if the applicant does not pose a direct threat to the health and safety of others, the imposition of question unrelated to a condition of behavior is not necessary to the Board's performance of its licensing function.

3. **G/R:** blanket questions that do not tie a condition of behavior (mental and physical capacity) to a standard of conduct (propensity for fraud, deceit, or dishonesty) are usually held violative of either a statutory or constitutional standard.

a. Thus, the Board is generally not allowed to use-bright line tests, and should make individualized determinations based on a list of factors, such as Wyoming Rules 401-402.

*[*Clark v. Virginia Bd. of Bar Examiners*].

G. **Rule 401:** Character and Fitness: [Wyo. Court Rules]:

(a) …The [bar] applicant shall have the burden of proving that the applicant is possessed of good moral character and is fit to practice law. The primary purposes of character and fitness screening before admission to the Wyoming State Bar are to assure the protection of the public and safeguard the justice system….

(b) Every applicant must also be physically and mentally able to engage in the active and continuous practice of law.

(c) The revelation or discovery of any of the following may be treated by the Board as *cause for further inquiry* before the board decides whether the applicant possesses the character and fitness to practice law…

(1) unlawful conduct;

(2) academic misconduct;
(3) making or procuring any false or misleading statement…
(4) misconduct in employment;
(5) acts involving dishonesty, fraud, deceit or misrepresentation;
(6) abuse of the legal process;
(7) neglect of financial responsibilities;
(8) neglect of professional obligations;
(9) violation of an order of the court;
(10) evidence of mental or emotional instability;
(11) evidence of drug or alcohol dependency;
(12) denial of admission to the bar in another jurisdiction on character and fitness grounds;
(13) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction; and
(14) *any other conduct* which reflects adversely upon the character and fitness of the applicant.

**These questions are not overbroad because they only give rise to "further inquiry." Rule 402 then defines what the Board inquires into.

D. **Rule 402:** Investigation of Applicants:

(d) In making a determination on character and fitness of each applicant, the following factors should be considered in assigning weight and significance to prior conduct of the applicant:
(1) the applicant's age at the time of the conduct;
(2) the recency of the conduct;
(3) the reliability of the information;
(4) the seriousness of the conduct;
(5) the factors underlying the conduct;
(6) the cumulative effect of the conduct or information;
(7) the evidence of rehabilitation;
(8) the applicant's positive social contributions since the conduct;
(9) the applicant's candor in the admissions process;
(10) the materiality of any omissions or misrepresentations.

E. **Rule 8.1:** Bar Admission and Disciplinary Matters: an applicant for admission to the bar, or a lawyer in connection with a bar admission application, or in connection with a disciplinary matter, *shall not:*

(a) knowingly make a false statement of material fact; or
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rules does not require disclosure of information otherwise protected by Rule 1.6.

E(1). Official Comment:

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis of subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application.
[2] This rule is subject to the provisions of the Fifth Amendment of the US constitution and corresponding provisions of state constitutions.
[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

E(2). **G/R:** Rule 8.1 requires a distinction between *affirmative misstatements* (which never can be made) and omissions (which can occur under very limited circumstances).

1. This Rule also imposes an obligation to correct misinformation (8.1(b)).
2. If the admission process goes to a hearing, and the applicant hires a lawyer, the information disclosed by the applicant to the lawyer is governed by Rule 1.6, duty of confidentiality.

§1.4: ATTORNEY DISCIPLINE

I. Misconduct and Disciplinary Authority

A. **Rule 8.4:** Misconduct: it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

A(1). Official Comment:

[1] Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for those offenses that indicate a lack of those characteristics relevant to the practice of law.

a. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.
b. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.

[3] Lawyers holding public office assume legal responsibilities going beyond those of other citizens.

A(2). **G/R:** in analyzing whether an individual has engaged in misconduct, Rule 8.4 should be the first step in the analysis because it is misconduct for any person to violate a Rule of Professional Conduct.

A(3). **G/R:** Vicarious Liability: Rule 8.4(a) makes a lawyer vicariously liable if he violates the a Rule of Professional Conduct through the acts of another.

1. This brings into the analysis every Rule of Professional Conduct.
   a. Subsection (b) then indicates that criminal acts that reflect adversely on lawyers are also professional misconduct; however, the Rule establishes priorities with respect to criminal laws; such as:
      i. crimes that involve moral turpitude which do not have any specific connection to the practice of law (like adultery and other crimes of a like nature) and crimes that do have an adverse affect on the legal profession (like fraud or failure to file taxes).
   b. Subsection (c) is the catchall and indicates that it is misconduct for a lawyer to engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation.

i. "Fraud" is defined in the terminology has conduct having the purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

ii. None of the other terms are defined.

c. Subsection (d) is also very broad, making it misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

B. **Rule 8.5:** Disciplinary Authority; Choice of law:

(a) *Disciplinary Authority:* a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) *Choice of Law:* in any exercise of the disciplinary authority of this jurisdiction the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice, (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction which the lawyer *principally practices*; provided, however that if particular conduct has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

B(1). Official Comment: *Choice of Law:*

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations.

[3] Paragraph (b) seeks to resolve such potential conflicts. It premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession. Accordingly it takes the approach of:

a. Providing that any particular conduct of the lawyer shall be subject to only one set of rules of professional conduct; and

b. Making the determination of which set of rules applies to particular conduct as straight forward as possible.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court.

a. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) **principally practices**.

i. *Exception:* if particular conduct clearly has its **predominant effect** in another admitting jurisdiction, then only the rules of that jurisdiction shall apply.

B(2). **G/R:** Choice of Law: if a lawyer is licensed to practice law in more than one state, and the lawyer engages in misconduct then:

1. He will subject to the disciplinary rules of the where he *principally practices* UNLESS the particular conduct has the predominant effect in the other jurisdiction, and then he will be subject to that State's rules.

C. **Rule 8.3:** Reporting Professional Misconduct:

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a *substantial* question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of tan approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

C(1). Official Comment:

[1] Self-regulation of the legal profession requires members of the profession initiate disciplinary investigations when they know of a violation of the Rules.

[2] This Rule does not apply when disclosure would be a violation of Rule 1.6.

[3] The Rule limits the reporting obligation to those offenses that a self-regulating profession must endeavor to prevent.

a. A measure of judgment is therefore required in complying with the provisions of this Rule.
b. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence which the lawyer is aware.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question.

C(2). **G/R:** Obligation to Report: under certain circumstances, a lawyer has the professional obligation to report misconduct or it is misconduct on that lawyer's part.

1. A lawyer has a duty to report when he *knows* (has actual knowledge of the fact in question) that lawyer has violated the Rules that raises a substantial (the seriousness of the possible offense) question about the lawyer's fitness to practice law.
2. This probably the most violated Rule of Professional Conduct.
3. There are only a couple of cases where a person has been sanctioned for violating this rule.

II. Standards For Imposing Lawyer Sanctions:

A. **Definitions:**

1. *Injury:* is harm to a client, the public, the legal system, or the profession which results form a lawyer's misconduct.
2. *Intent:* is the conscious objective or purpose to accomplish a particular result.
3. *Knowledge:* is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

4. *Negligence:* is the failure of the lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation form the standard of care that a reasonable lawyer would exercise in his situation.

5. *Potential Injury:* is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

B. **G/R:** Purpose of Lawyer Discipline Proceedings: the purpose of lawyer discipline proceedings is to *protect the public* and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, or the legal profession.

C. **G/R:** Scope and Types of Sanctions: a disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct. There are several types of sanctions, listed from most severe to least severe:

1. Disbarment, which terminates the individual's status as a lawyer;
    a. With disbarment, a lawyer can typically reapply after 5-years.
2. Suspension, which is a removal of the lawyer from practice for a specified period of time;
    a. With suspension, a lawyer is usually reinstated automatically after X number of years;
3. Reprimand, also known as censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice;
4. Admonition, also know as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice;
    a. This is an important sanction because if the lawyer engages in misconduct, it is considered an aggravating circumstance.
5. Probation, is a sanction that allows the lawyer to practice under specified conditions. It can be imposed alone or in conjunction with other penalties.

D. **G/R:** Factors to Consider in Imposing Sanctions: when determining whether a lawyer engaged in misconduct and should be disciplined, a court (or board in making a recommendation) should consider the following factors:

1. the duty violated;
    a. The duties which can be violated are categorized as follows:
        i. *Violations of Duties Owed to Clients:*
            (A) Failure to Preserve the Client's Property;
            (B) Failure to Preserve the Client's Confidences;
            (C) Failure to Avoid Conflicts of Interest;
            (D) Lack of Diligence;
            (E) Lack of Candor; and
            (F) Lack of Competence.
        ii. *Violations of Duties Owed to the Public:*
            (A) Failure to Maintain Personal Integrity; and
            (B) Failure to Maintain Public Trust;
        iii. *Violations of Duties Owed to the Legal System:*
            (A) False Statements, Fraud and Misrepresentation;
            (B) Abuse of the Legal Process; and
            (C) Improper Communications with Individuals in the Legal System.
        iv. *Violations of Duties Owed to the Profession*.
2. the lawyer's state of mind;

a. There are three relevant degrees of culpability, as defined above, listed from least to most severe:

i. negligence;
ii. knowledge; and
iii. intent.

3. the potential or actual injury (defined above) caused by the lawyer's misconduct; and
4. the existence of aggravating or mitigating factors.

a. *Aggravating Factors:* are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Aggravating factors include:

i. prior disciplinary offenses;
ii. dishonest or selfish motive;
iii. a pattern of misconduct;
iv. multiple offenses;
v. bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
vi. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
vii. refusal to acknowledge the wrongful nature of conduct;
viii. vulnerability of victim;
ix. substantial experience in the practice of law;
x. indifference to making restitution; and
xi. illegal conduct, including that involving the use of controlled substances.

b. *Mitigating Factors:* are any considerations or factors that amy justify a reduction in the degree of discipline to be imposed. Mitigating factors include:

i. absence of a prior disciplinary record;
ii. absence of dishonest or selfish motive;
iii. personal or emotional problems;
iv. timely good faith effort to make restitution or to rectify consequences of misconduct;
v. full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
vi. inexperience in the practice of law;
vii. character or reputation;
viii. physical disability;
ix. mental disability or chemical dependency including alcoholism or drug abuse,
x. delay in disciplinary hearings;
xi. interim rehabilitation;
xii. imposition of other penalties or sanctions;
xiii. remorse;
xiv. remoteness of prior offenses.

E. **G/R:** Distinguish: malpractice remedies, which are designed primarily to compensate victims (with a deterrence and punishment effect) with sanctions which are designed to protect the public by punishing victims.

1. The same conduct can give rise to sanctions and a malpractice claim, however, the two are analytically distinct and should not be confused.
2. The Model Rules are not designed to deal with malpractice.

F. **G/R:** Disciplinary Codes: every jurisdiction has a set of procedural rules, sometimes called the disciplinary code (as in Wyoming), which are a set of rights guaranteeing the rights of an attorney in a disciplinary hearing, and the right to be heard.

1. Attorney's generally get all the rights of criminal defendants, absent a judge and jury (it is an administrative proceeding before the Board of Professional Responsibility).
2. These rules are established in every jurisdiction because a license is a property right which cannot be taken away without due process of law.

§2: DUTIES TO CLIENT

§2.1: FORMING THE ATTORNEY-CLIENT RELATIONSHIP

I. Overview: Forming the Attorney-Client Relationship

A. **Scope ¶ 15:** for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to the Model Rules determine whether an attorney-client relationship exists.

1. Most of the duties flowing from the attorney-client relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.
2. Under Rule 1.6, the duty of confidentiality arises when the lawyer *considers to represent* someone, most other duties arise after the formation of the attorney-client relationship.

B. **G/R:** Elements of the Attorney-Client Relationship: [Burman Elements]: there are four elements to the formation of the attorney-client relationship:

1. *Consultation:* the individual is or sought to become a client;
2. *With a Lawyer:* the person whom the communication was made:
    a. is a member of the bar; and
    b. in connection with this communication is acting as a lawyer.
3. *Seeking Legal Advice:* the communication relates to a fact of which the attorney was informed by his client or prospective client:
    a. for the purpose for securing primarily either:
        i. an opinion on law;
        ii. legal services; or
        iii. assistance in some legal proceeding
    b. and the lawyer undertakes to give legal advice; or
    c. fails to clarify whether he is giving legal advice.
4. *Reliance on the Legal Advice by the Client.*

*The only elements the lawyer can really control are (3) and (4).
**Reliance is important in malpractice cases.
***The only Rule that applies before the formation of the relationship is Rule 1.6.

B(1). **Rst. (3) Law Governing Lawyers §26:** Formation of Attorney-Client Relationship: [ABA Formal Op. 95-390]: A relationship of a lawyer and client arises when:

(1) A person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; *and*

(2)

(a) the lawyer manifests to the person consent to do so; or
(b) fails to manifest lack of consent to do so, when the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
(c) a tribunal with the power to do so appoints the lawyer to provide the services.

C. **G/R:** Nature of the Relationship: the attorney-client relationship is contractual in nature and can arise either expressly or impliedly by the conduct of the lawyer.

II. Lawyer's Duties After Formation of the Attorney-Client Relationship

A. **Rule 1.4:** Communication:

(a) A lawyer shall keep a client *reasonably* informed about the status of a matter and promptly comply with *reasonable* requests for information.

(b) A lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to **make informed decisions** regarding the representation.

A(1). Official Comment:

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

a. A lawyer who receives from opposing counsel an offer for civil settlement or for a criminal plea bargain should promptly inform his client of its substance unless prior discussions with the client have made it clear that the proposal will be unacceptable [*see* **Rule 1.2(a)**].

[2] Adequacy of communication depends in part on the kind of advice or assistance involved.

a. The *guiding principle* is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and reasonable adult.

a. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability [*see* **Rule 1.14**].

b. When the client is an organization, or a group, the lawyer should ordinarily only address communications to the appropriate officials of the organization [*see* **Rule 1.13**].

[4] *Withholding Information:* In some circumstances, a lawyer may be justified in delaying transmission of information when the client would likely react imprudently to an immediate communication.

a. A lawyer cannot withhold information forever, he may only "temporally" withhold the information until he has decided how to proceed in the best interests of his client.

A(2). **G/R:** [Rule 1.4 is the heart of the attorney-client relationship]: the two subsections of this rule define different duties the lawyer owes the client:

1. Reporting Obligations*:* subsection (a) imposes the duty on the lawyer to keep the client *reasonably* informed of a "matter" and to respond to *reasonable* requests for information.

a. Both theses obligations are objective and based on the reasonable lawyer standard.

*b. **G/R:** If the lawyer violates Rule 1.4(a) there is a good chance that the lawyer has also violated Rule 1.2(a).

2. Informed Consent and Decisions: subsection (b) requires the lawyer to explain matters as would a reasonably competent and prudent lawyer to allow the client to make informed decisions.

3. Formation of Attorney-Client Relationship: this is relevant to the formation of the attorney-client relationship because the lawyer has to give the client *enough information to make are informed decision about the representation*; thus, the client must have enough information to decide whether the hire the lawyer. The client or prospective client needs at least this much information:

a. *fees:* how much the lawyer will charge for his services and the method of charging;

b. *costs:* how much money will be advanced by the lawyer for the client for:

i. court costs,

ii. overhead;

iii. experts; and
iv. deposition costs.

*[Remember fees and costs are distinct, and you must keep them that way].

III. Declining or Terminating Representation

A. **Rule 1.16:** Declining or Terminating Representation:

(a) Except as stated in paragraph (c), a lawyer ***shall not*** **represent** a client or, where representation has commenced, **shall withdraw** from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer ***may*** **withdraw** from representing a client if withdraw can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonable believes is criminal or fraudulent;
(2) the client has used the lawyer's services to perpetrate a crime or fraud;
(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and ahs been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonable difficult by the client; or
(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer **shall continue representation** notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

A(1). Official Comment:

[1] a lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] a lawyer ordinarily must decline or withdraw from representation if the client demands that the engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.

Discharge

[4] A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment of the lawyer's services.

a. Whether a client can discharge appointed counsel may depend on applicable law.
b. If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests.

Optional Withdrawal

[7] a lawyer may withdraw from representation in some circumstances.

a. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests.

b. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it.

[8] The lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

B. **G/R:** Declining Representation: Rule 1.16 is the most important rule for declining representation; and hence, prohibiting the formation of the attorney-client relationship.

1. A lawyer should decline or withdraw from representation if:
   a. Under subsection (a):
      i. The representation would result in violation of the Rules or other law; this means if there is conflict of interest (see **Rules 1.7, 1.8, 1.9**) the lawyer should not accept or withdraw because he is in violation of the Rules [**Rule 8.4(a)** says this is misconduct].
      ii. the client wants to persists in taking an action that is a crime or fraud [*see* **Rule 1.2(d)**];
      iii. if the lawyer is incompetent or ill;
      iv. if the client fires the lawyer: the client can fire a lawyer at any time, with or without cause, but he must pay the reasonable value of the services rendered.
      **Conflicts of Interest are the big ones.
   b. Under subsection (b) *permissive withdrawal* is permitted if the lawyer believes withdrawal will NOT have a material adverse affect on the client and:
      i. the lawyer believes his services will be used to commit a crime or fraud or if the client's objectives are repugnant;
      ii. the fees are burdensome on either party.
2. Exception: subsection (c) says that if the lawyer has been appointed by the court as counsel, he may not withdraw even if good cause for withdraw exists.

C. **Rule 102**: Appearance and Withdrawal of Counsel: [Wyo. Court Rules] is a major qualification on Rule 1.16, it provides that if a party had entered an appearance (defined as attending a proceeding as counsel for any party or by written appearance such a filing a document or putting your name on a document) then:

(d) Counsel will *not be permitted* to withdraw form a case except upon court order.

*****This means the attorney in the case until the court lets him out, thus, the attorney needs to take care of his financial situation with the client before entering an appearance.

*****Generally, the close it gets to trial, the more disinclined the court will be to let the attorney withdraw because of the adverse affects on the client.

D. **G/R:** Motion to Withdraw: Rule 1.16(d) and comment, it suggests that the lawyer should file a motion to withdraw. The lawyer needs to put in the motion that "I withdraw for personal reasons or considerations" and he should never say "I am filing a motion to withdraw because…[reason stated]. The latter method is wrong because the information is confidential under Rule 1.6 and Rule 1.16(d) says that the lawyer has a duty to protect the client's interest.

E. **G/R:** Client Discharging Lawyer: a client can fire his lawyer at any time, with or without cause because the discharge of an attorney is implied in their relationship.

1. The discharge of an attorney by his client does not constitute a breach of contract because it is term of such contract, implied from the particular relationship which the contract calls into existence.
    a. Thus, if the client terminates the relationship, he cannot be held liable in damages for doing that which under the contract he has a right to do.
    b. *Caveat:* the lawyer, however, has the right to the reasonable value of his services which he has rendered.

*[*Enos v. Keating*].

IV. Prospective Clients and Conflicts of Interest

A. **G/R:** Protection of Information Imparted by Prospective Client: information imparted to a lawyer by a would be client seeking legal representation is protected from revelation or use under Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client.

1. If the lawyer takes **adequate measures to limit the information initially imparted** by the would be-client, in most situations the lawyer may continue to represent or to undertake representation of another client in the same or a related matter.
2. Caveat: When the information imparted by the would-be client *is critical* to the representation of an existing or new client in the same or related matter, however, the lawyer must withdraw or decline representation unless a waiver of confidentiality has been obtained from the would be client.

*[ABA Formal Op. 90-358].

B. **G/R:** Adequate Measures to Limit Information Initially Imparted by the Prospective Client: there are several things a lawyer or firm can do to limit those situations in which, as a result of information revealed by a would-be client, a lawyer or firm must withdraw from or decline representation of another client:

1. Identify the conflict of interest before undertaking representation in any matter [**Rule 1.7 cmt.**];
2. Limit the information from a would-be client to that which is necessary to check for other conflicts;
    a. This means get the name and bear minimum of information and then tell them to stop talking and wait until the check is over;
    b. Then you must check that name against all other clients of the *firm* (no matter how large or small) [**Rule 1.10**]
        i. **g/r:** ordinarily when information relating to the representation is known to one client in the firm, it is considered to be known by all lawyers in the firm.
    c. The conflict of interest check should also include a check of married names, unmarried names, surnames, changed names, etc…
    d. If a conflict is discovered, the lawyer should not tell the would be client because it is a confidential information of his or the firm's client.
3. When practicable obtain waivers of confidentiality; and
4. As soon as a conflict of interest is identified, or the would-be client's representation is not undertaken for another reason, screen the lawyer with information relating tot the proposed representation from disclosing it within the law firm.

C. **G/R:** if a lawyer or firm takes adequate measures and reasonable steps to identify conflicts early and does not rely on arbitrary methods for conflict of interest checks; and hence, have a policy in effect at the office the firm or lawyer probably will not be disqualified.

1. However, the Court will make and resolve presumptions in favor of the client.
2. The policy is: HAVE A POLICY IN PLACE.

V. Fees

A. **Rule 1.5:** Fees:

(a) A lawyer's fee *shall be reasonable*. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal services properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation.

(c) A fee may be **contingent** on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph [d] or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of determination.

(d) A lawyer *shall not enter into an agreement for*, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee fro representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

A(1). Official Comment:

Basis or Rate of Fee:

[1] In a new client-lawyer relationship, an understanding of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation.

a. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.

b. A **written statement** concerning the fee reduces the possibility of misunderstanding.

Terms of Payment:

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion (SEE **Rule 1.16(d)**).

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.

a. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases fro the fee and explain their implications.

Division of Fee:

[4] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter win which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

Disputes over Fees:

[5] If a procedure has been established for resolution of fee disputes, such as arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it.

B. **G/R:** Inherent Conflict: an inherent conflict of interest exists between the lawyer and client regarding fees; however, the conflict is *de minimus* and can be resolved by:

1. Disclosing the fee (so the client can make an informed decision about representation pursuant to **Rule 1.4(a)**)
2. *before* the commencement of representation;
3. IN WRITING, i.e. an engagement letter
    a. the Rule does not require the fee amount to be in writing, it only says "preferably" so it is not an ethical violation not to put the amount of the fee in writing, however, it is a protective measure if a dispute should arise.

*In most fee disputes, the situation arises because the lawyer did not comply with these three simple things.

C. **G/R:** Contingent Fees: the contingent fee MUST be in writing and state the method of by which the fee is to be computed, including the lawyers percentage of the share.

1. Contingent fees cannot be done in:
    a. divorces;
    b. criminal cases; or
    c. when attorney's fees are set by law, such as, in worker compensation cases or probate proceedings.
2. **G/R:** it is ethical to charge contingent fees as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of alternative billing arrangements.
    a. The fact that a client can afford to compensate the lawyer on another basis does not render a contingent fee arrangement for such a client unethical.
    b. Nor is it unethical to charge a contingent fee when liability is clear and some recover is anticipated.
    c. If the lawyer and client so contract, the lawyer is entitled to a full contingent fee on the total recovery that was the subject of an early settlement offer that was rejected by the client.
    d. If the lawyer and client agree, it is ethical for the lawyer to charge a different contingent fee at different stages of the matter, and to increase the percentage taken as a fee as the amount of the recovery or savings to the client increases.
    *[ABA Formal Op. 94-389].

C(1). **Wyo. Court Rules Governing Contingent Fees:**

1. **Rule 1:** Definition: the term "contingent fee" means an agreement, express or implied, for legal services of an attorney under which compensation is contingent upon the successful accomplishment or disposition of the subject matter of the agreement, which is fixed or to be determined under a formula.
2. **Rule 3:** Exemptions: no contingent fee arrangement shall be made for:
    (a) divorce cases;
    (b) criminal cases; or
    (c) where attorney's fees are expressly provided by statute or administrative regulations.
3. **Rule 4:** Procedure: each contingent fee shall be in writing in duplicate and kept for three years after disposition of the matter.
4. **Rule 5(e):** a copy of rules relating to contingent fees shall be furnished and fully explained to the client at the time of entering into a contingent fee contract.
    1. Rule 5 also defines what is presumptively reasonable, the Rule does not, however, supercede freedom of contract.

D. **G/R:** Division of Fees: a division of fees between lawyer who *are not in the same firm* may be made only if:
1. The division is proportionate to the services the lawyer rendered, with each lawyer being jointly responsible (the lawyers if they both enter an appearance under **Rule 102(b)** are already jointly responsible); OR
2. The client is advised of the division, and does not object (this is different from consent); AND
3. The fee is reasonable (this is the requirement for every case).
4. In Wyoming, under **Rule 1.5(e)**, if there is a division of fees between lawyers who are not in the same firm, then:
    a. the divisions is in proporation to the *contribution* of each lawyer; AND
    b. the client *consents* to the participation of all lawyers involved; AND
    c. the total fee is reasonable.
    *In addition, Wyoming Rule 1.5(f) says a lawyer cannot get a referral fee; whereas, the model rule does not have that provision.

E. **G/R:** Client Letters: in every case a lawyer should always send at least two letters to the client:
1. First, the lawyer should send either:
    a. *Engagement Letter:* which sets for the terms and conditions of representation:
        a. telling the client that the lawyer will obtain their informed consent on all matters;
        b. the fees and costs that will be charged;
        c. acknowledgement of any retainer;
        d. when payment is due;
        e. who is the primary attorney, and if other attorney's will be working on the case;
        f. whether you will send them copies of every letter or pleading generated on their behalf, or if they prefer summaries;
        g. have the client sign the letter so they know the terms; and
        h. define the scope of representation and that a responsive pleading will be filed within a certain amount of time.
    b. *Non-Engagement Letter:* if the lawyer declines representation the letter:
        a. should be sent by certified mail so the lawyer knows they received it;
        b. should not give an opinion of the case on the merits;
            a. if the lawyer gives an opinion of the case on the merits, it is legal advice and he may incur legal liability
        c. inform them to get another attorney; and
        d. tell them there is a statute of limitations, but do NOT disclose what the statute of limitations is;
        e. that you have not investigated the matter and the may have a potential claim.

2. *Closing Letter:* at the end of representation, the closing letter:
    1. restate the resolution of the matter (win, lose, or settlement);
    2. enclose the original documents and tell the client you are retaining a copy (cannot charge the client for copies because it is their property);
    3. how long their file will be retained (tens years is usually sufficient); and
    4. that the lawyer NO LONGER REPRESENTS them anymore.

F. **G/R:** Fees and Costs: fees are what the lawyer charges per hour; costs are everything else. There are three main types of costs:

1. *Disbursements:* a disbursement occurs when the lawyer makes an out of pocket payment on behalf of the client, such as, hiring an expert or paying filing fees.
    a. Generally, there are no problems with billing the client for disbursements.
    b. *Caveat:* a lawyer cannot add a surcharge for disbursements *unless*:
        i. the lawyer discloses to the client that he is adding a surcharge;
        ii. the client gives informed consent; and
        iii. the surcharge is reasonable.
2. *In House Services:* are services provided by every lawyer, such as, photocopying, paper, lexis, or Westlaw.
    a. Lawyers can bill for in house services by either one of two ways:
        i. by billing at some set amount; or
        ii. by billing back in proportion to the cost actually incurred, which is more difficult.
3. *Overhead:* are costs that are associated with keeping the firm open, such as, a library or rent.
    a. This is included in the lawyers fee.

G. **G/R:** Informed Consent: a lawyer must disclose to a client the basis on which the client is to be billed for both professional time (fees) and any other charges (costs) [ABA Formal Op. 93-379].

H. **G/R:** Permissible Charges: a lawyer may not charge a client for overhead expenses generally associated with properly maintaining, staffing, and equipping the office; however, the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house, such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services, so long as the charge reasonably reflects the lawyer's actual cost for the services rendered [ABA Formal Op. 93-379].

I. **G/R:** Disclosure of the Basis of the Amounts to be Charged: at the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client. This is a two-fold duty, including not only an explanation at the beginning of the engagement of the basis on which the fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges to a client is actually being billed [**Rule 1.5**].

1. *Model* ***Rule 1.4(b)*****:** a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation.
2. The obligation of disclosure is also supported by **Rule 1.7**, which provides that a lawyer should not make a false or misleading communication about the lawyer's services.

*[ABA Formal Op. 93-379]

J. **G/R:** Professional Obligations Regarding the Reasonableness of Fees: the client should only be charged a reasonable fee for the legal services performed [**Rule 1.5**].

1. The determination of a proper fee requires consideration of the interests of both the client and the lawyer.

a. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights.
b. Further, an excessive charge abuses the professional relationship between the lawyer and client.
c. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

2. Only through attention to detail is the lawyer able to manage a client's case properly. An unreasonable limitation on the hours a lawyer may spend on a client should be avoided as a threat to the lawyer's ability to fulfill her obligation under **Rule 1.1** to provide competent representation.
3. **g/r:** A lawyer who has agreed to bill solely on the basis of time spent is obliged to pass any economies (such as past work product, time saved by scheduling, or work done while traveling) on to the client. The practice of billing several clients for the same time, or work product, is contrary to the mandate of **Rule 1.5** because it results in the earnings of an unreasonable fee.
4. **g/r:** A lawyer who has undertaken to bill hourly, is never justified in charging a client for hours not actually expended.
* [ABA Formal Op. 93-379]

K. **G/R:** Overhead: when a client has engaged a lawyer to provide professional services for a fee, the client would be justifiably disturbed if the lawyer submitted a bill to the client which included, beyond the professional fee, additional charges for general office overhead. The cost of overhead should be subsumed within the charges the lawyer is making for professional services [ABA Formal Op. 93-379].

L. **G/R:** Disbursements: the lawyer may only charge, in the absence of an agreement to the contrary, for the actual costs of disbursements and cannot charge over and above the amount actually incurred unless the lawyer actually additional expenses beyond the actual cost of the disbursement item [ABA Formal Op. 93-379].

M. **G/R:** In-House Provision of Services: lawyers may pass on the reasonable charges for in house services (e.g. photocopying, messenger services, postage…). Absent a specific agreement to the contrary, the lawyer is obliged to charge the client no more than the direct cost associated with the provision of the services [ABA Formal Op. 93-379].

N. **G/R:** Bills: there are several ways by which a lawyer may bill a client:

1. Among the most common types of billing are:
   a. by the hour;
   b. through a flat fee;
   c. retainer;
   d. contingent fees;
   e. blended rates; and
   f. several other methods.
2. The ethical duty is to clarify:
   a. how and when (every week, month, at the end, etc…) the lawyer is billing;
   b. to provide readable and understandable bills;
      i. Bills are governed by Rule 1.4(b); that is, the lawyer must give the client enough information to make informed decisions about the representation;
      ii. The bills should include when, what, and the time expended on each activity;
      iii. The bill has to have enough information so the client can make an informed decision about whether to pay the bill.

VI. Client Under Disability and Guardian Ad Litems:

A. **Rule 1.14:** Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately action in the client's own interest.

A(1). Official Comment:

[1] The normal attorney-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.

[3] If a legal representative has already been appointed for the client the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appoint where it would serve the client's best interests.

a. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative.

Disclosure of Client's Condition

[5] Rules of procedure in litigation generally provide that minors or person suffering from mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests.

A(2). **G/R:** when the client cannot make a reasonably informed decision:

1. Then the lawyer must:
    a. Maintain a normal client/lawyer relationship with the client who cannot make "adequately informed decisions;"
        i. The Rule requires the lawyer to maintain a "normal" relationship because the law recognizes varying degrees of competency;
        ii. In addition, the lawyer must look at the legal services the client desires him to perform, if they are outlandish, the lawyer may have to take protective measures for the client;
            (A) EX: a lady wants to leave a million dollars in trust to her cat, which send tell the lawyer that she may not possess all her mental faculties.
        iii. If the client is a child, comment 1 says that they may have opinions by age 6 and certainly by age 12, which should be accorded weight in a legal proceeding concerning their custody.
2. The standard for when a lawyer should take protective action pursuant to subsection (b) is an objective/subjective standard,
    a. Thus, the lawyer must objectively think the client cannot make an adequately informed decision, and this belief must reasonable, *then* the lawyer can seek protective action.
3. *Confidentiality:* because the lawyer must maintain a "normal" relationship with the client, the duty of confidentiality applies; hence, if the lawyer is seeking protective action he may have consult with family members or health care professionals, but he should try not to disclose any confidential information.
4. *De Facto Guardians:* comment 2 says the lawyer may have to act as a de facto guardian (which means without a court ordered guardianship) and this changes the nature of the attorney/client relationship because:

a. a guardian acts in the best interests of the client; whereas, a lawyer normally acts at the behest and according to the wishes of the client.

B. **G/R:** Protective Action on Behalf of Client: a lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of the client, including petitioning for the appointment of a guardian.

1. Withdraw is appropriate only if can be accomplished without prejudice to the client.
2. The protective action should be **the least restrictive under the circumstances**.

a. The appointment of a guardian is a serious deprivation of the client's rights and should not be undertaken if other, less drastic, solutions are available.

3. With proper disclosure to the court of the lawyer's self interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian, even if the lawyer anticipates that the recommended guardian will hire the lawyer to hand the legal matters of the guardianship estate.

a. *Caveat:* the lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client.

*[ABA Formal Op. 96-404]

C. **G/R:** Protecting the Client's Interests: when a client is unable to act adequately in his own interest, a lawyer may take appropriate protective action including seeking the appointment of a guardian.

1. The lawyer may consult with diagnosticians and others about the appropriate protective action.
2. The action taken **should be the least restrictive** of the client's autonomy that will yet adequately protect the client in connection with representation.
3. *Withdrawal* from representation of a client who becomes incompetent is disfavored, even if ethically permissible under the circumstances.
4. The lawyer may recommend or support the appointment of a particular person or other entity as guardian, even if the person or entity will likely hire the lawyer to represent it in the guardianship, provided the lawyer has made reasonable inquiry as to the suggested guardian's fitness, discloses the self-interest in the matter and obtains the court's permission to proceed.
5. In all aspects of the proceeding, the lawyer's duty of candor t the court requires disclosure of pertinent facts, including the client's view of the proceedings.

**[ABA Formal Op. 96-404]

D. **G/R:** Guardian Ad Litems: (GAL) a guardian ad litem is court appointed person (usually a lawyer) who represents the best interest of a person with a disability, or who cannot represent themselves.

1. A GAL has a client who is impaired, usually a child but it could also be a disabled person. When a lawyer becomes a GAL, his duty shifts, and he works on behalf and not at the behest of the client. Thus, the GAL's duty changes and his functions are:

a. to work for the best interest of the client (child or disabled person); and
b. work as an agent for the court, investigating and making recommendations to the court.
c. Rule 4.2 is not violated if the GAL contacts the parents or other persons directly, but they should probably give notice to the parent's attorney's first.

2. The appointment of GAL are very common in divorce actions because the child often needs someone to look out for his best interest.

a. Representing a client, and working as an arm of the court looking out for the client's (child's) best interest are distinct functions. What may be in the person's best interest may not necessarily be what they want.

E. **G/R:** Role of Guardian Ad Litems: the GAL is an investigator, monitor, and champion for the child.

1. The traditional role of a GAL in custody proceedings is to function as an agent of the court, to which it owes its principle duty of allegiance, and not strictly as legal counsel for the child client.
2. In essence, the GAL's role fills a void inherent in the procedures required the adjudication of custody disputes.
3. Absent assistance of a GAL, the trial court, charged with rendering a decision in the "best interests of the child" has no practical or effective means to assure itself that all of the requisite information bearing on the question will be brought before it untainted by parochial interests of the parents.
4. Thus, the obligations of the GAL necessarily impose a higher degree of objectivity on a GAL than is imposed on an attorney for the adult.
*[*Clark v. Alexander*].

F. **G/R:** Role of the Attorney: the traditional role of the attorney is that of advisor, advocate, negotiator and intermediary.

1. The role of the attorney is that of advisor, advocate, negotiator, and intermediary.
2. Counsel appointed to represent a child must, as far as reasonably possible, maintain a normal client attorney relationship with the child and abide by the child's a client's decisions concerning the objective's of representation [**Rule 1.14 cmt. 1**].
*[*Clark v. Alexander*].

G. **G/R:** Role of GAL/Attorney: an attorney who acts as a GAL is acting in a hybrid nature which necessitates a modified application of the Rules of Professional Conduct.

1. An attorney/GAL is not bound by the client's expressed preferences but by the client's interests.
    a. If he determines the child's expressed preference is not in the best interests of the child, both the child's wishes and the basis for the GAL's disagreement must be presented to the court.
2. *Limited Duty of Confidentiality:* In the same light, the confidentiality normally required in the attorney client relationship must be modified to the extent that relevant information provided by the child may be brought to the court's attention.
    a. While it is always best to seek consent prior to divulging otherwise confidential information, an attorney/GAL, is NOT prohibited from disclosure of client communications absent the child's consent.
3. As legal counsel to the child, the attorney/GAL, is charged with protecting the child's best interest and that information may be provided to the court which would otherwise be protected by the attorney-client relationship.
4. *Conflicts of Interest:* there is always an inherent conflict under Rule 1.7(b) with attorney/GAL; however, the court gives the attorney/GAL a lot of leeway because he is proceeding in the best interest of the client.
5. Thus, when one becomes a GAL his duties and responsibilities under the Model Rules change.
*[*Clark v. Alexander*].

H. **G/R:** Prohibitions on Attorney/GAL Conduct: recommendations by an attorney/guardian ad litem, can be made through to the court through closing argument based on the evidence received, and through written reports submitted to the parties; however the GAL/attorney can NEVER be a witness of fact at a custody hearing.

§2.2: DUTY OF COMMUNICATION AND FIDUCIARY DUTY

I. Fiduciary Duty: Safekeeping Client's Property

A. **G/R:** Fiduciary Duty: the lawyer, or law firm, owes a fiduciary duty to the client because they hold the client's property in trust and keep the client's confidences.

1. The client's interest must come before the interests of the lawyer or firm;

2. The fiduciary can be a partnership, corporation, bank, or single lawyer;
3. Fiduciary is used in two senses with lawyers:
    a. The duty of loyalty owed to the client; and
    b. safeguarding the client's money and holding it in trust.

B. **Rule 1.15:** Safekeeping Property:

(a) A lawyer shall hold property of his clients or third persons that is in a lawyer's possession in connection with a representation *separate* from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the termination of representation.
(b) Upon receiving funs or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person….A lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer unlit there is an accounting and severance of the interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

B(1). Official Comment:

[1] A lawyer should hold the property of others with the care required of a professional fiduciary. Securities should be kept in a safety deposit box. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention.

[3] Third parties, such as the client's creditors, may have just claims against funds or other property in the lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services.

B(3). **G/R:** Client's Property: a lawyer owes a fiduciary duty to the client whenever he holds any of the client's property.

1. There are several forms of property that a lawyer can come into possession of:
    a. money;
    b. tangible goods;
    c. documents; and
    d. information.
2. If the lawyer is holding property for a client, he MUST maintain separate accounts:
    1. operational accounts where the lawyer's money is kept; and
    2. trust accounts where the client's money is kept.

3. Thus, under Rule 1.15, the lawyer must:
    1. keep the property separate from his own;
    2. by using a trust account; and
    3. if there is ever a dispute about the amount of funds, the money cannot be distributed out of the trust account until the dispute is resolved.

4. Bottom Line: the lawyer is a professional fiduciary, thus, the money must be kept separate form the lawyers because it his not his money, and it must stay there if there a dispute.

C. **W.R.P.C. 1.15:** Wyoming's Rule 1.15, like all states, is much more detailed than the Model Rule; however, the basic premise is the same: all money must be segregated and accounted for.

1. A lawyer has to keep and trust account and report funding in the trust account each year the lawyer's license is renewed.
2. The trust must be maintained in a FDCA insured bank, no credit unions.
3. The lawyer must make an agreement with the client with what to do with the interest earned on his trust account, or the bank will keep the interest.
4. When funds are in dispute, leave the money in the trust account.

D. **G/R:** Co-mingling Funds: the lawyer co-mingles funds, or takes money from a trust account, it almost always results in disbarment.

E. **G/R:** Conversion: The elements of converting client the client's funds, which if proven will carry heavy sanctions are:

1.an intentional taking
    a. it does not matter if it is $5 or a million dollars.
2. of the client's money;
3. which harm's the client; and
4. the existence of mitigating or aggravating circumstances.

*Thus, if there is ever a shortage in a trust account, the lawyer should immediately replace the money with his own.

§2.3: DIVISION OF RESPONSIBILITY BETWEEN CLIENT AND LAWYER

I. Scope of Representation

A. **Rule 1.2:** Scope of Representation:

(a) A lawyer shall abide by the client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by the client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with a lawyer, as to a plea to be entered, whether the waive jury trial and whether the client will testify.
(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(c) A lawyer may limit the objectives of representation if the client consents after consultation.
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, and meaning or application of law.
(e) When a lawyer knows that a client expects to assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

A(1). Official Comment:

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has the *ultimate authority* to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursing those objectives.

a. The lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Independence from Client's Views or Activities

[3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval.

Services Limited in Objectives or Means

[4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.

a. The terms upon which representation is undertaken may exclude specific objectives or means.

i. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, a client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

[6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from client's conduct. The fact that a client uses a devise or course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action.

a. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a *critical distinction between* presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted reveal the client's wrongdoing, except where permitted by Rule 1.6.

a. However the lawyer is required to avoid furthering the purpose.

b. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent.

c. Withdrawal from the representation therefore may be required.

[9] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction.

B. **G/R:** Objectives of Representation: the lawyer has a duty to abide by the client's decisions regarding the representation. Thus, the lawyer must find out the objectives of representation, and then pursue those objectives through the appropriate *means*.

1. The lawyer shall consult (communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question) with the client about the means used to obtain the objectives [**Rule 1.4(b)** and **Scope ¶ 2** also require this].

a. Thus, the lawyer must consult with the client about:

i. the legal consequences of the proposed action;

ii. the non-legal consequences [**Rule 2.1 cmt. 2**];

iii. the cost and benefit of the means (i.e. how many depositions, the cost of the litigation, etc…).

2. After consultation, pursuant to 1.2(c) and comment 4, the lawyer can exercise control over the means of representation.

1. In questions regarding the means of obtaining the objective, the lawyer should assume responsibility for technical and tactical issues, but should refer to the client regarding such questions as the expense to be incurred and concern for third parties who might be adversely affected.

a. EX: putting a kid on the stand in a divorce case.

C. **G/R:** Settlements: an offer for settlement, and whether to accept it, *must* be disclosed to the client and the decision of whether the accept or reject the offer is SOLELY up to the client [**Rule 1.2(a)**].

D. **G/R:** Criminal Cases: in criminal cases, the lawyer *shall* abide by the client's decision, after consultation, as to:

1. a plea to be entered;
2. whether to waive a jury trial; and
3. whether the client will testify.

*These are reserved to the client unconditionally by **Rule 1.2(a)** although they could be "means" of representation.

E. **G/R:** Disagreements with Clients: if the client's means or objectives are illegal, the lawyer cannot act in furtherance of them.

1. The issue that arises is when the objectives or means are not illegal, but the lawyer disagrees with them. To protect himself from later suit, the lawyer should document all things in writing with the client's signature.
2. **Rule 1.2(d)** should be read in light of **Rule 8.4(a)** and **(c)**. Thus, the lawyer:
   1. cannot assist, or counsel, the client to engage in conduct he *knows* is criminal or fraudulent;
   2. may discuss the consequences of the proposed action; and
   3. may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

§2.4: DUTY OF CONFIDENTIALITY

I. Overview

A. **Generally:** the principle of confidentiality entails three distinct concepts:

1. *Duty of Confidentiality:* governed by the Rules of Professional Conduct and is the ethical duty not to disclose confidence imparted by the client in the course of the attorney client relationship or obtained from prospective clients.
   a. The duty of confidentiality applies in all situations other than those where evidence is sought by compulsion of law.
   b. The duty of confidentiality applies to all matters *relating to the representation*, whatever their source.
2. *Attorney-Client Privilege:* governed by the law of evidence and applies in judicial and other proceedings in which the lawyer may be called as a witness or otherwise required to produce evidence concerning the client.

3. *Work Product Doctrine:* governed by the rules of civil procedure and prevents disclosure of information obtained in anticipation of litigation.

B. **Scope ¶ 19:** the Model Rules are not intended to govern or affect judicial application of either the attorney-client privilege or the work product doctrine.

1. Those privileges where developed to promote compliance with the law and fairness in litigation.
2. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure.
3. The attorney-client privilege is that of the client and not the lawyer.
4. The fact that in exceptional circumstances the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

A. **Scope ¶ 20:** the lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject of reexamination.

1. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

II. Duty of Confidentiality

A. **Rule 1.6:** Confidentiality of Information:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client form committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to criminal charge or civil claim against he lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyers representation of the client.

A(1). Official Comment:

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate *fully and frankly* with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law:

a. the attorney client privilege and the work product doctrine in the law of evidence; and
b. the rule of confidentiality established in professional ethics.
c. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of the law. The *confidentiality rule applies not*

merely to matter communicated in confident by the client but also to all information relating to the representation, ***whatever is source.***

Authorized Disclosure

[7] A lawyer is implied authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority.

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that the particular information be confined to specified lawyers.

Disclosure Adverse to a Client

[9] The confidentiality rule is subject to limited exceptions:

a. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts, which would enable the lawyer to counsel against a wrongful course of action.

i. The public is better protected if full and open communication by the client is encouraged rather than if it is inhibited.

[11] The lawyer *may not* counsel or assist a client in conduct that is criminal or fraudulent [see **Rule 1.2(d)**]

[13] If the lawyer learns that the client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm, as stated in Rule 1.6(b)(1), the lawyer has the *professional discretion* to reveal information in order to prevent such consequences. The lawyer *may* make a disclosure in order to prevent homicide or serious bodily injury, which the lawyer reasonably believes, is intended by a client.

[14] The lawyer's exercise of discretion requires consideration of such factors as:

a. the nature of the lawyer's relationship with the client and with those who might be injured by the client;

b. the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question.

i. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should BE NO GREATER THATN THE LAWYER REASONABLY BELIEVES NECESSARY TO THE PURPOSE.

ii. A lawyer's decision not to take preventative action permitted by paragraph (b)(1) does NOT violate this Rule.

Withdrawal

[15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

Dispute Concerning a Lawyer's Conduct

[18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.

[19] If the lawyer is charged with a wrongdoing in which the client's conduct is implicated the rule of confidentiality should not prevent the lawyer defending against the charge.

a. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person.

Disclosures Otherwise Required or Authorized

[20] The attorney-client privilege is differently defined in various jurisdiction. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) REQUIRES the lawyer to invoke the privilege when it is applicable.

a. The lawyer must comply with the final orders of the court requiring the lawyer to give information about the client.

Former Client

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

C. **G/R:** Client's Privilege: the duty of confidentiality is the lawyer's obligation, but the client is the beneficiary of the privilege; hence, the privilege is his and his alone—he can waive it or give his lawyer permission to disclose information.

B. **G/R:** Prospective Clients: unlike most other rules, the existence an attorney-client relationship need not be established for the duty of confidentiality to attach; hence, information obtained from prospective clients is protected by Rule 1.6.

1. Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation under Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client.

a. If the lawyer takes adequate measures to limit the information initially imparted by the would-be client, in most situations the lawyer many continue to represent or to undertake representation of another client in the same or a related matter.

b. When the information imparted by the would-be client is critical to the representation of an existing or new client in the same or related matter, however, the lawyer must withdraw or decline representation unless a waiver of confidentiality has been obtained from the would-be client.

2. Under some circumstances, the provisions of the Rules prohibit the lawyer from revealing the identity of the would-be client and the nature of the matter for which representation is sought.

a. The limitations the Rules of PR place on the lawyer's representation of an existing client may be so severe as to require the lawyer to withdraw form the representation as a result.

*[ABA Formal Op. 90-358].

**[Scope ¶ 15]

C. **G/R:** Scope of the Duty of Confidentiality: the duty of confidentiality provides a protection wider than that afforded by the attorney-client privilege and extends general protection to all information *relating to the representation*, no matter how or when obtained.

1. Information disclosed to legal staff and paraprofessionals is also covered by the duty, and the lawyer has the duty to train them not to disclose the information [**Rule 5.3**].

2. *Policy:* the main purpose of the rule affording protection of client confidences is to encourage clients to communicate **fully and frankly** with the lawyer even as to embarrassing or legally damaging subject matter, in order to develop all facts essential to the proper legal representation.

*[ABA Formal Op. 90-358; Rule 1.6 cmts. 2, 4].

C(1). **G/R:** Limits on the Duty of Confidentiality: the only real limitation on the duty of confidentiality is that it must relate to matters of representation; hence, things that do not relate to matters of representation are not covered by the duty of confidentiality.

C(2). **G/R:** Exceptions to the Duty of Confidentiality: Rule 1.6(b) provides two limited exceptions to the duty of confidentiality, a lawyer many reveal such information that he *reasonably believes* (subjective/objective standard) necessary to prevent the client from committing a criminal act that he *believes* (subjective standard) is likely to result in imminent death or substantial bodily harm.

1. However, a lawyer NEVER has duty to disclose any information under the Model Rules, even if he believes the client's conduct will result in death or serious bodily harm and this decision of nondisclosure shall not be reexamined [Scope ¶ 20].

C(3). **G/R:** Illegal Conduct: Rule 1.6 makes clear that if the client has or is engaged in criminal conduct, then:

1. *Past Conduct*: may never be disclosed;
2. *Contemporaneous Conduct:* if the criminal conduct is on-going, the lawyer has an obligation to inform the client that he cannot assist in furtherance of the criminal conduct, Rule 1.2(d), and that the client should stop engaging in the illegal activity.
3. *Prospective Conduct:* the lawyer may not reveal prospective conduct unless the requirements of Rule 1.6(b)(1) are met, and even then, he has no obligation to do so.

D. **G/R:** Duration of the Duty of Confidentiality: the duty of confidentiality continues *forever*, after the termination of the attorney-client relationship and after the client's death [Rule 1.6 cmt. 22; *Swidler & Berlin v. US*].

E. **G/R:** Legal Basis for Duty of Confidentiality: the legal basis for a lawyer's duty of confidentiality is derived from the law of agency and the law of evidence.

1. Under the law of agency, the agent ordinarily is prohibited from disclosing or using information revealed by the principal in confidence in connection with the agency relationship. The obligation continues after the agency relationship has concluded [Rst. (2) Agency §§395,396].
2. The attorney-client privilege ordinarily attaches to communications when made to the lawyer by a prospective client for the purpose of securing legal advice or assistance even though the representation subsequently is declined.

*[ABA Formal Op. 90-358].

F. **G/R:** Rule 1.6 in Relation to Other Rules:

1. **Rule 1.8(b):** prohibits the use of information relating to the representation to disadvantage of a current client.
2. **Rule 1.9(c):** prohibits the use of information relating to the representation to the disadvantage of a former client except when the information has become generally known.
3. **Rule 1.7(b):** prohibits a lawyer from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person…*unless* (a) the lawyer reasonably believes the representation will not be materially adversely affected; and (2) the client consents after consultation.
4. **Rule 1.2(d):** prohibits a lawyer from assisting or engaging in criminal or fraudulent conduct which client wishes to pursue, thus, if the lawyer informs the client that he cannot help the client in furtherance of his criminal activity, and the client insists on taking the action anyhow, the lawyer many not reveal the information unless it falls under Rule 1.6(b)(1).

G. **W.R.P.C. 1.6(b)(1):** Wyoming, like many other states, has changed the wording in Rule 1.6(b) to allow an attorney to disclose information when he knows his client is going to engage in a "criminal act."

1. This is much broader than Model Rule 1.6 and allows disclosure of any prospective criminal conduct.

III. Attorney-Client Privilege:

A. **W.R.E. 501:** General Rule: Except as otherwise required by constitution or statute or other rules promulgated by the Supreme Court of Wyoming, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of common law as they may interpreted by the courts of the State of Wyoming in light of reason and experience.

A(1). **F.R.E. 501:** General Rule: Except as otherwise required by the Constitution of the United States or provided by Act of Congress…the privilege of a witness…shall be governed by the principles of common law as they by interpreted in the courts of the United States in light of reason and experience….

1. There are no federal statutes governing evidentiary privileges, and all privileges are recognized judicially.
2. The federal courts recognize the attorney-client privilege [*Swidler & Berlin v. U.S.*].

B. **W.S. §1-12-101:** Privileged Communications and Acts:

(a) The following persons shall not testify in certain respects:

(i) An attorney…concerning a communication made to him by his client…in that relation, or his advice to his client….The attorney…may testify by express consent of the client, and if the client…voluntarily testifies the attorney…may be compelled to testify on the same subject.

C. **G/R:** Elements of the Attorney Client Privilege: [Burman Elements]:

1. *Communication:* to the client, or from the client;
2. *Relating to the Representation*;
3. *Between the Attorney and Client* (which also covers support staff).

C(1). **G/R:** Elements of the Attorney-Client Privilege: the privilege applies only if:

1. the asserted holder of the privilege is or sought to become a client;
2. the person to whom the communication was made:
    a. is a member of the bar of a court, or his subordinate; and
    b. in connection with this communication is acting as a lawyer;
3. the communications relate to a fact of which his attorney was informed:
    a. by his client;
    b. without the presence of strangers;
    c. for the purpose of securing primarily either:
        i. an opinion on law;
        ii. legal services; or
        iii. assistance in some legal proceeding; and *not*
        iv. for the purpose of committing a crime or tort;
4. the privilege has been:
    a. claimed; and *not*
    b. waived by the client.

D. **G/R:** Scope of the Attorney-Client Privilege: the attorney-client privilege attaches after the formation of the attorney-client relationship and it relates to matters imparted in confidence relating to the representation between the attorney and client.

1. The attorney-client privilege covers "communications" [see "communication" element above] thus, under the Wyoming statute, the privilege covers speech, oral or written, to or from the client.

2. *Non-Verbal Acts:* the general rule is that non-verbal acts are covered if the evidence a communicative intent (like pointing to a gun, or showing the lawyer a wound).

a. If the case is a close between communicative intent, the lawyer in asserting the privilege should fall back on the policy behind the rule, namely, to promote full and frank disclosure of information from the client to the attorney.

3. *Logistics:* names, trial dates, and the consultation itself are usually not (majority) covered by the attorney-client privilege because they are held not to be communications between the client and attorney imparted in confidence.

a. *Last Link Exception:* is a limited and sparse exception, which holds that names are privileged if they are the last link in the case to connect the person to the crime.

E. **G/R:** Holder of Privilege: the client is sole holder of the privilege and he can waive it, or tell his attorney to waive it.

F. **G/R:** Duration of the Privilege: the attorney-client privilege is one of the oldest recognized privileges of confidential information. The vast majority of cases to expressly address the issue expressly hold that the attorney-client privilege extends beyond the death of the client, even in the criminal context.

1. The Supreme Court held that the attorney-client privilege survives the death of the client because of the reasons that counsel in favor of posthumous application; namely, knowing that communications will remain confidential after death encourages the client to communicate fully and frankly with counsel.
2. This case is only applicable to the federal courts because the Supreme Court was interpreting the federal rules of evidence; thus, it is not controlling on any state. Nonetheless, it will be highly persuasive authority, and as the Supreme Court noted, many state courts have expressly held that the privilege extends beyond death.

*[*Swindler & Berlin v. U.S.*].

H. **G/R:** Crime/Fraud Exception: society cannot afford to protect the confidentiality of conversations with counsel which look toward commissions of crime or frauds; to extend the privilege so far would be to make it cost too much.

1. Thus, an important exception is made, and one which is encountered with increasingly frequency in practice.
2. The exception comes into play when the client knowingly seeks to **further a criminal or fraudulent** endeavor through consultation with counsel. It is the client's knowledge, alone which counts; the exception may apply, and the privilege by denied, regardless of the attorney's understanding.

a. If fact, since the client hold the privilege, the attorney's understanding or intent should be immaterial.

b. This exception is broader than the crime exception to the duty of confidentiality as evidenced by the words "knowingly seeks to further a criminal or fraudulent" endeavor.

3. The crime/fraud exception applies only to FUTURE CRIMES AND FRAUDS; a lawyer ***never*** has to disclose past crimes or frauds, so the exception is rather narrow.

*DON'T Get tricked on an exam by the that.

**[*Hopkins v. State*].

I. **G/R:** Ethical Duties with Attorney-Client Privilege: while the attorney-client privilege only applies in judicial proceedings where the evidence is sought to be compelled, the lawyer, even in the absence of his client, has a duty under Rule 1.6 to assert the privilege if he is called as a witness [**Rule 1.6 cmt. 20**].

J. **G/R:** Attorney-Client Privilege in Criminal Cases: Attorney Client Privilege: the client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.

1. Under that attorney client privilege statute, the one seeks to assert the privilege must establish that confidential communication occurred during the course of the attorney client relationship.
2. The fundamental purpose of the attorney client privilege is, of course, to encourage full and open communication between client and attorney.
3. In the criminal context, these policies assume particular significance.
4. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following a disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.
5. Thus, if an accursed is to derive benefits from the right to counsel, he must have the assurance of confidentiality and privacy of communication with his attorney.
6. The implementation of these important polices may require that the privilege extend not only to the initial communication between the client and attorney, but also to any information which the attorney or his investigator may subsequently acquire as a direct result of that communication.

*[*People v. Meredith*].

IV. Work Product Doctrine

A. **Generally:** the duty of confidentiality [Rule 1.6] does not give rise to a basis to refuse to produce evidence in discovery which can lead to admissible evidence; in other words, the duty of confidentiality does not protect a party from the discovery mechanisms.

1. Thus, in order to not produce evidence in discovery, there must be an evidentiary privilege.
2. **FRE 501** (and WRE 501) both provide that "Except as otherwise required by Constitution or Statute…."
3. Both the federal and state courts have adopted the work product evidentiary privilege in Rule 26(b)(3) of their respective Rules of Civil Procedure.

B. **FRCP 26(b):** Discovery Scope and Limits: unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved…if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(3) *Trial Preparation: Materials.* This subsection deals with two types of materials:

1. Trail preparation materials in general; and
    a. to obtain discovery of general trial preparation materials the moving party must demonstrate:
        i. a substantial need; and
        ii. that they are unable to obtain the information without undue hardship.
2. Trial preparation materials that have mental impressions, conclusions, opinions, or legal theories.
    a. in ordering discovery of trial preparation materials when such as showing has been made (substantial need and undue hardship) the court **shall protect against disclosure** of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning litigation.
    b. This is an ***absolute privilege*** evidenced by the language "this court shall protect."
        i. If any issue arises, it will be whether the information sought to be discovered falls into this category.

(4) *Trial Preparation. Experts.*

(A) *Testifying Experts:* the lawyer may depose any expert who is testifying, although he must be paid for his time.

(B) *Non-Testifying Experts:* the lawyer can only depose them in "exceptional circumstances" which means that there is only one expert in the field.

(5) *Claims of Privilege or Protection of Trial Preparation Material.* The party making a claim of privilege in discovery must assert the claim EXPRESSLY and if he fails to do so, the privilege is considered waived.

1. The party must also describe with particularity the privileged documents and materials. Thus, the lawyers duty is:

a. expressly state that he is withholding information because they are privileged by the work product doctrine, including giving the documents date, and what it is.

**Then if the matter goes to trial, and there is questioning the on the subject the lawyer can assert the attorney-client privilege.

C. **FRCP 37:** Motions to Compel: if a lawyer believes the other party has wrongly withheld information from discovery by asserting the work doctrine privilege, the adverse party may file a motion to compel discovery and then the judge will make a ruling on whether the information is privileged.

1. A party can also file for a protective order if they believe discovery is too broad or there is potential detriment to the client.

D. **F.R. Crim. Pro. 16(a)(2) and (b)(2):** is the work product doctrine/privilege in criminal cases.

E. **G/R:** Work Product Doctrine: the proper preparation of a client's case demands that the lawyer assemble information, sift what he considers to be relevant from irrelevant facts, prepare his legal theories and plan his strategy without needles interference.

1. This work is reflected in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal briefs, and countless other tanbile and intangible ways—through the work product of the lawyer.

a. *Note:* the attorney-client privilege would not protect a lot of this information because:

i. there is no "communication" with the client; and

ii. in some instances there is no client yet (such as in *Hickman* where the lawyer was interviewing in anticipation of litigtion).

2. Such materials are ***not*** open to opposing counsel because such material is privileged.

3. *Policy:* if such material where open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.

a. An attorney's thoughts would not be his own and inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

4. *Caveat:* where relevant and non-privileged **facts** remain hidden in an attorney's files, and where production of those facts is essential in the preparation of one's case, discovery may be had.

§2.5: WAIVER OF CONFIDENTIAL INFORMATION

I. Waiver in General

A. **Generally:** waiver is applicable to all three privileges of confidentiality: duty of confidentiality, attorney-client privilege, and work product privilege. The client is the holder of the privilege, and can waive it at any time. The lawyer, as an agent of the client, can waive the privilege for the client if the has the express or apparent authority to do so.

1. *Duty of Confidentiality:* since it applies outside the judicial process, can be waived by the client by disclosing the information to third persons or instructing the lawyer to do so.

2. *Attorney-Client Privilege:* is deemed waived when not asserted in trail or the information has become pubic through disclosure to third persons, or if the privileged information is testified to at trail.

3. *Work Product Privilege:* is deemed waived if it is not expressly asserted in the deposition requests for production pursuant to FRCP 26(b)(5).

B. **G/R:** Waiver by Altering Evidence: An observation by defense counsel or his investigator, which is the product of a privileged communication, may not be admitted *unless* the defense by alerting or removing physical evidence has precluded the prosecution from making that same observation [*People v. Meredith*].

C. **G/R:** the attorney client privilege is not strictly limited to communications, but extends to protect observations made as consequence of protected communications.

1. *Exception:* the courts have created an exception to the protection extended by the attorney client privilege in cases in which counsel has removed or altered evidence and whenever the defense removes or alters evidence, the statutory privilege does not bar revelation of the original location or condition of the evidence in question.
*[*People v. Meredith*].

D. **G/R:** a disclosure, which is reasonably necessary to accomplish the purpose for which the attorney has been consulted, does not constitute a waiver of the privilege [*People v. Meredith*].

II. Inadvertent Disclosure of Information

A. **Preamble ¶ 8:** states that many difficult issues of professional discretion must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. The Rules do not exhaust the moral the ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.

B. **G/R:** Legal Obligations Upon Receiving Confidential Information: if a lawyer comes into possession of materials that appear on their fact to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer, the receiving lawyer, as a matter of ethical conduct contemplated by the precepts underlying the model rules:

1. should not examine the materials once the inadvertence is discovered;
2. should notify the sending lawyer of their receipt; and
3. should abide by the sending lawyer's instructions as to their disposition.
*[ABA Formal Op. 92-368].

C. **G/R:** Inadvertent Disclosure: the issue when a lawyer inadvertently receives confidential information (such as by an inadvertent fax which comes to his office) is whether a mistake by a lawyer should constitute a waiver of the confidential information. There are five factors the court considers in determining whether a document has lost is privilege:

1. the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;
2. the number of inadvertent disclosures;
3. the extent of the disclosure;
4. any delay and measures taken to rectify the disclosures; and
5. whether the overriding interests of justice would be served by relieving a party of its error.

*The law is somewhat lenient because it does not want to penalize a client for a clerical error on behalf of his attorney.
**[ABA Formal Op. 92-368].

D. **G/R:** Intent: the general rule in a majority of states is that intent is an element of waiver and thus there must be intent to waive the privilege as to the confidential information or have the intent to keep the information confidential.

1. Lawyers are the agents of their clients, thus, when they make a clerical mistake and inadvertently disclose information, they may not possess the authority to legally waive the privilege.
2. The waiver of confidential information must be accompanied by the intent to disclose, or at least an intent to keep the information confidential; and the five factors listed above go to demonstrating the intent of the lawyer.

III. Protecting Confidential Information

A. **G/R:** New Technological Modes of Communication: the lawyer has an obligation to *take reasonable* steps to make sure that confidential information is not disclosed.

1. When the lawyer uses new technology, he has an obligation to take into account the client's reasonable expectations.
    a. With all modes of communication, the client has reasonable expectation of privacy.
2. Another reasonable step the lawyer must take is to train his staff so they can competently use new technology without inadvertently disclosing confidential information [**Rule 5.3**].
3. The lawyer must inform the client about the information and technology that is going to be used, and then allow the client to make an informed decision about whether he wants to use the communication [**Rule 4.2(b)**].
4. Then the lawyer must take reasonable steps in using the technology to make sure confidential information is not disclosed [**Rule 1.6**].

B. **G/R:** Cordless Phones and E-Mail: based on current technology, and law, a lawyer sending confidential client information by e-mail or cordless phone does not violate **Rule 1.6(a)** in choosing that mode to communicate.

1. This does not diminish the lawyer's obligation to consider with his client the sensitivity of the communication, the costs of its disclosure, and the relative security of the contemplated medium of communication.
2. Particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters.
    a. Those measures might include the avoidance of e-mail, just as they would warrant he avoidance of the telephone, fax, and e-mail [**Rules 1.1 and 1.4(b)**].
3. The lawyer must, of course, abide by the client's wishes regarding the means of transmitting client information [**Rule 1.2(a)**].

*[ABA Formal Op. 99-413].

C. **G/R:** Lawyer's Duties: the lawyer has a professional obligation, pursuant to the Rules, to protect and preserve the confidences of a client. This professional obligation extends to the use of communications technology.

1. *Caveat:* this obligation does not require that a lawyer use only infallibly secure methods of communication.

*[ABA Formal Op. 99-413].

D. **G/R:** Risk of Interception: a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via cellular or cordless phone.

1. The lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication.
2. If the lawyer knows, or has reason to believe, that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality lost.

*[ABA Formal Op. 99-413].

E. **G/R:** Internet and Unencrypted E-Mail: a lawyer may transmit information relating to representation of a client by unencrypted e-mail sent over the Internet without violating the Rules of PC because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint.

1. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail.
2. A lawyer should consult wit the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation.

*[ABA Formal Op. 99-413].

F. **G/R:** Reasonable Precautions: the prohibition in Rule 1.6(a) against revealing confidential client information absent client consent after consultation imposes a duty on a lawyer to take reasonable steps in the circumstances to protect such information against unauthorized use or disclosure.

1. Reasonable steps include choosing a means of communication in which the lawyer has a reasonable expectation of privacy.

F(1). **G/R:** Test for Reasonableness: the reasonableness of a lawyer's use of any medium to communicate with or about client's depends both on the objective level of security it affords and the existence of laws intended to protect the privacy of the information communicated.

*[ABA Formal Op. 99-413].

G. **G/R:** Expectation of Privacy: lawyers and clients have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure.

1. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to the client's representation.
2. When the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted.
3. The lawyer must follow the client's instructions as to the mode of transmission.

*[ABA Formal Op. 99-413].

§2.6: DUTY TO WARN

I. Affirmative Duties to Disclose Confidential Information

A. **Generally:** in the Model Rules, it is often noted that a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 (or any other Rule) is a matter of interpretation beyond the scope of the Rules, but a presumption should exist against disclosure [**Rule 1.6 (cmt. 21)**; **Rule 2.3 (cmt. 4)**].

1. However, there are statutes which are common in every jurisdiction, which require a lawyer to disclose confidential information in certain situations; most court have held this duty overrides the ethical obligation not to disclose.

B. **W.S. § 14-3-205:** Child Abuse or Neglect; Persons Required to Report:

(a) Any person who knows or has reasonable cause to believe or suspect that child has been abused or neglected…*shall* immediately report it to the child protective agency or law enforcement agency….

C. **W.S. § 35-20-103:** Reports of Abuse, Neglect, or Exploitation of Disabled Adult:

(a) Any person who knows or has reasonable cause to believe that a disabled adult is abused, neglected, exploited or abandoned *shall* report the facts to…the local police department….

D. **W.S. § 14-3-209:** Immunity From Liability: Any person…participating in *good faith* in any act require[ing an affirmative disclosure] is immune from any civil or criminal liability….

1. The Wyoming Supreme Court has held that it takes more than negligence to indicate a lack of good faith; therefore, a person would, in effect, have to act in bad faith to be liable for a lack of good faith.

E. **G/R:** Lawyer's Duty: because a lawyer may have a duty to disclose confidential information, he must tell his client that he has a duty to disclose child or elder abuse information if he becomes privy to it to be in compliance with **Rule 1.4(b)**.

1. Thus, when a client enters the lawyer's office he should say: "Everything you tell me is confidential unless you know that you are going to commit a future crime that is likely to result in serious bodily harm, or imminent death, or if you have committed elder or child abuse."
2. The issue comes up a lot in divorces, when one spouse accuses the other of child abuse.

II. Tort Duty to Warn

A. **Generally:** in some jurisdictions, courts have imposed an affirmative duty to warn on individuals or professionals when they are aware that an individual is going to harm a specifically identifiable victim.

B. **G/R:** Tort Duty to Warn: [in Wyoming]: attorney's have a general tort duty to warn, even if conflicts with the attorney-client privilege:

1. In Wyoming, disclosure of a client's intent to commit a future crime is permissible under Rule 1.6, which is discretionary, so Rule 1.6 is immaterial;
2. The attorney-client privilege does not apply because of the crime/fraud exception.
3. ***Elements:*** to give rise to a tort duty to warn, three elements must be satisfied:
    1. Reasonably credible threat of causing death or serious bodily harm;
    2. to a specifically identifiable victim,
    3. who would *foreseeably* be harmed if the person carried out his threat.
4. Thus, the foreseeability of harm gives rise to the tort duty to warn.
5. If it can be shown that there was a specifically identifiable victim and reasonable prospect that the harm will be carried, at the very least the person has a duty to warn.

*[based on *Tarasoff* case out of California].

C. **G/R:** Threats to the Judiciary: attorneys, as officers of the court, have an affirmative duty to warn of true threats to harm members of the judiciary communicated to them by clients or third parties, when the attorney has a reasonable belief that such threats are true [*State v. Hansen*].

D. **G/R:** an attorney client relationship is deemed to exist if the conduct between an individual and attorney is such that the individual subjectively believes such a relationship exists.

1. However, the belief of the client will control only if it is reasonably formed based on the attending circumstances, including the attorney's words and actions.
2. The attorney client privilege is not applicable to a client's remarks regarding the furtherance of a crime, fraud, or to conversations regarding the contemplation of future crime.
3. Under the Professional Responsibility Rules, in Washington, an attorney is permitted to reveal information concerning a client's intent to commit a crime.

*[*State v. Hansen*].

III. Ethical Obligation to Warn

A. **Generally:** some states, like Florida, have imposed an ethical obligation on lawyers to disclose confidential information and warn of an impending crime or harm.

B. **Florida Rule Professional Conduct 4-1.6:** Confidential Information:

(b) *When a Lawyer MUST Reveal Information:* a lawyer shall reveal information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

§2.7: REPRESENTING ENTITIES

I. Organizations as Clients

A. **Rule 101**: Appearances: [Wyo. Rules of Court]:

(b) Corporations and unincorporated associations (other than partnerships and individual proprietorships) may appear *only* through an attorney licensed to practice in Wyoming.

B. **Organization Definition:** an organization is any corporation, unincorporated association, partnership, or any other legal entity, including the government, other than an individual person or sole proprietorship.

C. **Rule 1.13:** Organization as Client:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is

--engaged in action, intends to act or refuses to act

--in a matter *related to representation*

--that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and

--likely to result in substantial injury to the organization,

--the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

In determining how to proceed, the lawyer shall give due consideration to

--the seriousness of the violation and its consequences,

--the scope and nature of the lawyer's representation,

--the responsibility in the organization, and

--the apparent motivation of the person involved,

--the policies of the organization concerning such matters, and

--any other relevant considerations.

Any measure taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is *CLEARLY* a violation of law and

is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer *shall* explain the identity of the client when it is apparent that the organization's interest are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [conflicts of interest]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

C(1). Official Comment:

The Entity as the Client:

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

a. *Constituents:* officers, directors, employees and shareholders are the constituents of the corporate organizational client.

b. The duties defined in this comment apply equally to unincorporated associations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6.

a. This does not means, however, that constituents of an organizational client are the clients of the lawyer.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.

Relation to Other Rules

[5] The authority and responsibility provided in paragraph (b) are concurrent with authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under:

a. Rule 1.6, 1.8, 1.16, 3.3, 4.1, or 1.2(d).

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.

D. **G/R:** Apparent and Actual Authority: the lawyer always has to look at the articles of incorporation and bylaws to find out who is a duly authorized constituent with the authority to act for the corporation because corporations, through its board of directors, can (and must) delegate the authority to act for the corporation.

1. The president or CEO of the corporation usually have apparent authority to act for the corporation; however, the first question which always must be asked is who is the duly authorized constituent of the governing body of the organization.

E. **G/R:** Whistle-Blowing Obligation: pursuant to Rule 1.13(b), if the lawyer of an organization *knows* (subjective) that a constituent of the organization is engaged in an action, or intends to act, or refuses to act in a *matter related to the representation* that is a violation of the law or the legal obligations of the corporation; then the lawyer **shall:**

1. proceed in the best interest of the client;

2. ask for reconsideration of the matter;
3. advise that a separate legal opinion on the matter be sought for presentation to the appropriate authority in the organization; and if all that fails,
4. refer the matter to higher authority in the organization.

E(1). **G/R:** if the lawyer finds someone in the organization [a middle or lower level employee] is engaged in conduct that is harmful to the corporation the lawyer's obligation under Rule 1.13(b) is:

1. to ask that person to cease engaging in the criminal action;
2. advise him to obtain independent legal advice;
3. if he fails to cease engaging in the action, then:
    a. notify his immediate supervisor;
    b. if the action continues, then paragraph (c) comes into play…
4. Rule 1.13(c) then states that if the action is ***CLEARLY*** a violation of the law, then the lawyer may resign in accordance with Rule 1.16.
    a. The word clearly limits when this subsection becomes operative.
    b. If the there is clearly a violation of the law, then the lawyer then:
        i. The lawyer has to look at **Rule 1.2(d)** and **(e)** and determine if his services are being used to further the criminal conduct; however, if the lawyer has adequately informed the constituent that his conduct is a violation of the law, then there is no violation of Rule 1.2(d).
        ii. **Rule 1.16(b)(1)** instructs that if the client persists in a course of action involving the lawyer's services, that the lawyer reasonably believes is criminal or fraudulent, then he may withdraw.
    c. If the lawyer withdraws, however, he is bound not disclose the information under **Rule 1.6** unless he believes the criminal conduct will likely lead to imminent death or serious bodily harm (Rule 1.6(b)(1)).

F. **G/R:** Lawyer's Obligations and Duties: the lawyer's obligations and duties lie primarily with the organization as the client because it is the entity which he represents and the only time the lawyer is allowed to disclose any material about the organization is when the exceptions to Rule 1.6 come into existence.

II. Attorney-Client Privilege and Organizational Clients

A. **Generally:** the lawyer represents the organization, thus, all his obligations and duties arising in the course of representation with constituents who have the authority to bind the organization are covered by the attorney-client privilege.

1. The federal courts and states courts have different approaches as to the existence of the attorney-client privilege.
2. Wyoming has not adopted either view as of yet.

B. **G/R:** Corporate Privilege in Federal Practice: **FRE 501** provides that "the privilege of a witness…shall be governed by the principles of common law as they may interpreted by the courts of the United States in light of reason and experience."

1. The attorney-client privilege is the oldest of the privileges for confidential information and communications known to the common law.
2. Its purpose is to encourage *full and frank* communications between attorney's and their clients and thereby promote broader public interests in the observance of law and administration of justice.
3. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice depends upon the lawyer's being fully informed by their clients.

4. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.
5. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.
*[*Upjohn Co. v. U.S.*].

B(1). **G/R:** Existence of Privilege: the Supreme Court assumes the attorney-client privilege applies when the client is a corporation; notwithstanding the fact that complications may arise in its application because a corporation is an artificial creature of law *[*Upjohn Co. v. U.S.*].

B(2). **G/R:** Subject Matter Test: the Supreme Court, applying federal common law, rejected the control group test (see below) and impliedly adopted a subject matter test for determining the scope of the corporate attorney-client privilege:

1. In the corporate context, the attorney client privilege extends to any employees, officers, or agents (including middle and lower level employees) of the corporation, frequently beyond the control group, who can by actions within the scope of their employment, embroil the corporation in serious legal difficulties regarding the subject matter of the representation.
    a. *Caveat:* The privilege only protects disclosure of communications, it does not protect disclosure of underlying facts by those who communicated with the attorney.
        i. The protection of the privilege extents only to communications and not facts.
            (A) A fact is one thing, and a communication concerning the fact is an entirely different thing.
        ii. Courts have noted that a party cannot conceal a fact by merely revealing it to his lawyer. Considerations of convenience do not overcome the policies served by the attorney-client privilege.
2. In other words, if the subject matter of the conversation relates to the representation, and the person is an employee of the organization, then the conversation is protected.
3. **Assertion of Privilege:** the lawyer needs to inform lower level employees who disclose information to him, even if relating to the representation, that only the higher level employees with the authority to assert the privilege, such as the board of directors, are *per se* protected, in other words, upper level employees can waive the attorney-client privilege for communications disclosed by lower levels employees to corporate counsel.
    a. If the lawyer fails to do this, he is violation of **Rule 1.4(b)**.
*[*Upjohn Co. v. U.S.*].

B(3). **G/R:** Work Product Doctrine: the Supreme Court has rejected attempts, without purported necessity of justification, to secure written statements, private memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties [*Hickman v. Taylor*].

1. It is essential that lawyers work with certain degrees of privacy; thus, an attorney's thoughts, legal theories, and written memoranda are protected from discovery.
2. This privilege applies to corporate counsel as well.
*[*Upjohn Co. v. U.S.*].

C. **G/R:** Corporate Privilege in State Practice: *Upjohn* is not binding on any of the states because it was interpreted as a matter of federal common law; however, many states have adopted the test and followed its reasoning. Nonetheless, many State courts have rejected it for being to amorphous and difficult to apply, and have continued to adhere to the control group test.

1. **Control Group Test:** the attorney-client privilege, in the corporate context, applies only to senior management, guiding, and integrating the several operations of the corporation because they possess an identity analogous to the corporation as a whole.

a. If the employee, officer, or director making the communication, whatever his rank may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of an attorney, then in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.
b. Thus, the availability of the privilege extends only to those who play a *substantial role* in deciding and directing a corporation's legal response.

III. Conflicts that Arise When Representing (or Forming) Organizational Clients

A. **G/R:** Intra-Corporate Conflicts: [**Rule 1.13(d)**]: when the organization's interests are adverse to those of the corporate constituents with whom the lawyer is dealing, the lawyer *shall* explain the identity of the client.

1. Thus, when a lawyer for an organization encounters a potential conflict of interest between the constituents interest and the corporation's interest, he needs to explain to the constituent that he is the lawyer for the organization, and not the constituent; hence, if the attorney-client privilege is going to attach with the constituent it may still be waived by directors or officers with the authority to do so.
    a. This means that in an *Upjohn* situation, the Board of Directors can waive the attorney-client privilege, so for a constituent to make an informed decision about imparting the communications to the lawyer in compliance with Rule 1.4(b) they must know that someone else can waive the privilege.
2. **Rule 1.13(e)** states that the conflict of interest provisions apply to organizational clients.

B. **G/R:** Determining When a Partnership's Lawyer has an Attorney-Client Relationship with an Individual Partner: whether an attorney-client relationship has been created will almost always depend on an analysis of the specific facts involved. The analysis may include such factors as:

1. whether the lawyer affirmatively assumed a duty of representation to the individual partner;
2. whether the partner was separately represented by other counsel when the partnership was created or in connection with its affairs;
3. whether the lawyer had represented an individual partner before undertaking to represent the partnership; and
4. whether there was evidence of reliance by the individual partner on the lawyer as his separate counsel, or of the partner's expectation of personnel representation.

*[*Meyer v. Mulligan*].

C. **G/R:** Entity Rule: an attorney who represents a corporation does not, because that corporate representation, also represent the individual stockholders, officers, or directors.

1. Thus, the duty of the corporate attorney his to his client—the corporate entity.

*[*Meyer v. Mulligan*].

D. **G/R:** Attorney's Hired to Form a Corporation and the Attorney-Client Relationship: preparation of the articles of incorporation and bylaws of a corporation may be a routine task, but the lawyer-client relationship in the course of organizing a corporation is complex:

1. The appealing realty is that a lawyer who is organizing a corporation represents all of the incorporators.
    a. Hence, absent an actual conflict of interest or patent unfairness to a member of the group of incorporators, the same ethical rules that apply to representing the corporate entity should apply to the group of incorporators.
    b. In setting up a corporation, an attorney would represent the incorporators, not the person who might later buy shares in the corporation.
2. When an attorney is asked to represent prospective shareholders (if more than one) in organizing a close corporation, or when the attorney is later asked to represent all the shareholders in preparing a

shareholder's agreement or any document affecting corporate control or the transfer of shares, he should *discuss* with them the possible conflicts of interest and let each participant decide if he wants the attorney to serve as counsel.
*[*Meyer v. Mulligan*].

D(1). **G/R:** Protective Measures by the Attorney: thus, in a situation where the lawyer is presented with representing a group of incorporators, the attorney should:

1. Identify the party (or entity) which is hiring him;
2. advise the group of incorporators (if more than one) that he can represent them if their interests are all congruent, or after giving them informed advice about the conflicts of interest, and informing them that they have the ability to waive the conflict, he can represent them all; however, before undertaking this action he should advise them to seek independent legal advice before they all undertake to be represented by him.
3. Mail an engagement letter, outlining the parties and persons who are represented, and the scope of that representation, and what happens after incorporation.

E. **G/R:** Co-Clients: the general rule for co-clients is that communications imparted to the attorney on their behalf is not privileged as between them; however, the privilege still extends to all third parties.

1. The lawyer should put all this information in the engagement letter;
2. He must also state whether he is going to represent the corporation after it is formed, and this should be done in writing, and
3. remember the number one duty is to protect the reasonable expectations of the client.

IV. Communications with Persons Represented by Counsel in the Corporate Context: Employees, Officers, and Former Employees:

A. **Rule 4.2:** Communication with Person Represented by Counsel: 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 to do so.

B(1). Official Comment:

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of such person, concerning matters outside the representation.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities.

[3] This Rule also applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relations.

[4] In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with person having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes or civil or criminal liability or whose statement may constitute an admission on the party of the organization.

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be

discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.

C. **Generally:** the primary focus of Rule 4.2 is to identify limitations for a litigant's contact with corporate employees. When a corporation is a "party" in a lawsuit, the question arises as to whether current and/or former employees of the corporation qualify as "represented parties" under Rule 4.2 [*see* **cmt. 4**].

1. The last clause of Rule 4.2 provides "unless otherwise authorized by law to do so." Thus, an attorney can always depose any employee or former employee of an organization, however, when cost a factor and there are several employees/former employees the lawyer may want to informally interview them, this is where the situation arises.
2. The lawyer should always try and contact opposing counsel before engaging in ex parte contacts with any employee/former employee of an organization.
3. The first step in the analysis is always to determine whether the lawyer is seeking to interview a current employee or a former employee, then apply the tests (listed below).

C(1). **G/R:** Standard for Current Employees: there are three tests which the different jurisdictions apply to assist in determining who is a "party" for purposes of Rule 4.2 within the corporate context:

1. **Balancing Approach:** several federal courts have adopted a case-by-case balancing approach to determine whether good cause exists for entry of a protective order prohibiting opposing counsel from communicating with the corporate party's employees.
    a. Under the balancing approach, courts look to the degree to which ex parte communications are needed to unearth relevant information, the danger of generating evidentiary admissions against the corporation under FRE 801(d)(2)(D), and the degree to which effective representation of counsel requires that the corporations' counsel be present at interviews.
2. **Control Group Test:** a small number of courts have employed the control group test.
    a. The control group approach essentially bans ex parte communications with only the most highly placed agents in the organization; the control group is defined as those top management persons who had the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those person's advice or opinions in fact from the basis of any final decision.
3. **Alter Ego Test:** [Test Wyoming Adopted]: other courts have adopted the alter ego or binding admissions test.
    a. Under the alter ego test, a party is defined to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation for purposes of its liability, or employees implementing the advice of counsel.
    b. All other employees may be interviewed informally.

C(2). **G/R:** Standard for Former Employees: courts have struggled with the question of whether Rule 4.2 applies to former corporate employees; however, it is clear that the overwhelming recent trend has been for courts to find that Rule 4.2 does not generally bar ex parte contracts with former employees of the organization.

a. Rule 4.2 permits ex parte contacts but proscribes inquiry by opposing counsel in matters subject to the attorney-client privilege.
b. The qualification on the "contact rule" allows opposing counsel to investigate the underlying facts leading up to the disputed matter.
c. At the same time, counsel may forego inquiry into attorney-client communications during the contact.

D. **G/R:** Contract with Represented Parties: under Rule 4.2, if a client who is represented by another attorney contacts the opposing parties lawyer, the lawyer's duty is to inform them that they cannot confer with them, and then call or write the other attorney and tell them about the conversation and the course of action taken.

E. **G/R:** Suing the Government: when a lawyer represents a party who is suing the government, he may contact the government without the consent of the government's lawyer (because every person has a First Amendment Right to petition the government for redress), however, he is subject to two restrictions:

1. written notice is given to the government in advance of the ex parte contacts;
2. the communication is:
    a. not covered by the attorney-client privilege;
    b. with a government official who has the authority to make decisions; and
    c. to change a governmental policy and not merely to gather information.

F. **G/R:** Investigations: prosecutors are generally allowed to have investigators do sting operations on persons represented by counsel (like organized crime members) because the courts hold that it is "otherwise permitted by law."

1. However, this is very controversial and can be argued either way.

G. **G/R:** Second Opinions: a client may call up another lawyer to obtain a second opinion on the matter he is considering with his current lawyer. The second lawyer does not need to obtain consent from the first lawyer to confer with the client because the law does not want to discourage persons from obtaining second opinions.

1. The law is not clear, but the generally accepted principle is that a lawyer may give a second opinion without violating any ethical rules.

§2.8: DUTY OF COMPETENCE

I. Duty of Competence and Diligence

A. **Rule 1.1:** Competence: a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

A(1). Official Comment:

Skill and Legal Knowledge:

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include:

a. the relative complexity and specialized nature of the matter;
b. the lawyer's general experience;
c. the lawyer's training and experience in the field in question;
d. the preparation and study the lawyer is able to give the matter; and
e. whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

[2] A lawyer need not necessarily have special training or prior experience to hand legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.

Thoroughness and Preparation

[5] Competent handing of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.

a. It also includes adequate preparation.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and legal education.

B. **Rule 1.3:** Diligence: a lawyer shall act with reasonable diligence and promptness in representing a client.

B(1). Official Comment:

[1] A lawyer should pursue a matter of behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures required to vindicate a client's cause or endeavor.

a. A lawyer should act with commitment and dedication to the interests of a client and with *zeal in advocacy* upon the client's behalf.

i. *caveat:* a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

[2] Procrastination is widely resented and a professional shortcoming. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed.

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry though to conclusion all matters undertaken for a client.

a. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

C. **G/R:** Experts: the duty of competence is very much like a tort standard, if the lawyer holds himself out to the public to be an expert in a particular field, he will be held to the standard of an expert.

D. **G/R:** Zealous Advocacy: the lawyer has an ethical obligation to act with zeal on behalf of the client; however, this does not mean the lawyer must pursue every means just because they are legally and ethically permissible. However, if the lawyer is not going to press for every advantage because of his own morals, he must inform the client about which means he will not pursue to be in compliance with **Rule 1.4(b)**.

E. **G/R:** Closing Letters: comment #3 states that until the relationship is terminated with the client, the lawyer must carry out all work on behalf of the client; hence, when the objectives of the representation have been reached, the lawyer must write a closing letter because the client will believe that once they have hired the lawyer that he is their lawyer for the rest of their life.

1. Doubt about whether the attorney-client relationship has been terminated should be resolved by the lawyer in writing.

§2.9: DUTY OF COMPETENCE: MALPRACTICE

I. Malpractice

A. **Scope ¶ 18:** Violation of the Model Rules should not give rise to a cause of action nor should it create a presumption that a legal duty has been breached. The Rules are not designed to be a basis for civil liability.

Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

1. Thus, the Rules are not designed to deal with legal malpractice actions.
2. Malpractice actions are very different for disciplinary proceedings for violating the Rules because a malpractice action is basically a tort proceeding in a civil action for damages (e.g. money to compensate the person wronged by the lawyer's negligent conduct).
3. The same conduct, however, may lead to both disciplinary proceedings and a legal malpractice action.

B. **G/R:** Elements of a Legal Malpractice in a Civil Action: four elements must be satisfied in order to maintain a legal malpractice action:

1. that the attorney-client relationship existed;
2. that the defendant acted negligently or in breach of contract;
    a. Under a negligence approach, it must be shown that the defendant rendered legal advice (not necessarily at someone's request) under circumstances which made it reasonably foreseeable to the attorney that if such advice was rendered negligently, the individual receiving the advice might be injured thereby.
    b. *Tort Theory:* under a tort theory, an attorney client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice.
    c. *Contract Theory:* a contract analysis requires render of legal advice pursuant to another's request and the reliance factor, if not paid for, must be shown by promissory estoppel.
    d. This element incorporates the four elements of the tort of negligence (duty, breach, causation, harm).
3. that such acts were the proximate (legal) cause of the plaintiff's damages; and
4. but for the defendant's conduct the plaintiff would have been successful in the prosecution of their first action.
    a. This is the *causation element*, the plaintiff has to prove two things to be successful in proving causation:
        i. that the lawyer committed malpractice; and
        ii. *but for* the lawyer's malpractice, the client would have been able to recover in the first action (this is the case within the case).
            (A) EX: if the P asserts the lawyer was negligent in a medical malpractice case, he has to demonstrate the malpractice and that he would have been successful on the merits of the medical malpractice claim. In other words, he has prove there was medical malpractice, and then prove that because the lawyer's negligence, he did not recover.

*[*Togstad v. Versely, Otto, Miller & Keefe*].

B(1). **G/R:** Malpractice and Existence of Attorney-Client Relationship (Element #1): in most claims of legal malpractice it essential to establish an attorney-client relationship.

1. The attorney-client relationship is necessary because it creates a professional duty on the part of the attorney.
2. In very limited situations, some have imposed a professional duty on attorney's even though there was no attorney-client relationship.
3. Determining the existence of the attorney-client relationship depends on the facts and circumstances of each case and may be implied from the conduct of the parties, such as
    a. the giving of advice or assistance, or
    b. failing to negate the relationship when the advice or assistance is sought if the attorney is aware of the reliance on the relationship.

4. The determination of whether there is an attorney-client relationship is one of fact and typically is for the trier of fact and cannot be resolved on summary judgment.
*[*Meyer v. Mulligan*].

C. **G/R:** Error of Judgment: if an attorney is guilty of an error of judgment, that standing alone is insufficient to rise to legal malpractice [*Togstad v. Versely, Otto, Miller & Keefe*].

D. **G/R:** Matters of Judgment: the court makes a distinction between objective matters and subjective matters of judgment of the lawyer, which are in his discretion, because the standards are different for each.

1. Matters of judgment in the lawyer's discretion are judged by the *legal standard of care*.

D(1). **G/R:** Legal Standard of Care: a lawyer is held to that degree of skill, care, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in that jurisdiction.

1. To establish the legal standard of a care, and breach thereof, the party seeking to prove it must usually call expert testimony.
2. The locality rule does not apply, hence, the standard of legal care is that of a reasonable lawyer in the jurisdiction (like Wyoming—statewide jurisdiction).

E. **G/R:** Test for Legal Malpractice in a Civil Action: the plaintiff in a legal malpractice claim has the obligation to establish:

1. the accepted standard of legal care or practice;
    a. The required degree of care is a matter of applying the "reasonable person" test to attorneys.
    b. Thus, a lawyer is held to that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in the jurisdiction.
    c. *Locality Rule:* the locality rule is rejected for the statewide standard of reasonable care because negligence cannot be excused on the grounds that other practice the same kind of negligence.
        i. Thus, an attorney's required level of skill and availability is not defined by the individual locality in which he practices; the state is the more logical and generally accepted territorial limitation on the standard of care.
2. the lawyer's conduct departed from that standard of care; and
3. his conduct as the legal or proximate cause of the injuries suffered.
    a. A party trying to establish the standard adhered to by a reasonable, careful, and prudent lawyer must typically use expert testimony.
        i. Expert testimony is necessary because most lay people are not competent to pass judgment on legal questions;
        ii. Exception: an exception exists, however, when a lay person's common sense and experience are sufficient to establish the standard of care.
            (A) EX: missing the statute of limitations, not showing up for court, etc…
    b. **Legal Cause:** the elements of legal causation are:
        i. the conduct was a substantial factor in causing the harm; and
        ii. there are no other rules eliminating liability.

*[*Moore v. Lubnau*].

F. **G/R:** Elements for Legal Malpractice in a Criminal Action: the criminal defendant must establish three elements to succeed on a civil legal malpractice based on a criminal case:

1. the existence of an attorney-client relationship (usually given);
2. the defendant-attorney acted negligent;
3. legal causation; and

4. the criminal defendant (the plaintiff in a malpractice action) was innocent or has a colorable claim of innocence.
*[*Carmel v. Lunney*].

F(1). **G/R:** to state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, the plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense; for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie [*Carmel v. Lunney*].
.

F(2). **G/R:** Test for Legal Malpractice in a Criminal Proceeding: the test, in a criminal proceeding for legal malpractice, is whether a proper defense would have altered the result in the prior criminal action.

1. When the defendant cannot assert his innocence, public policy prevents maintenance of a malpractice action against his attorney.
*[*Carmel v. Lunney*].

§2.10: DUTIES OF LOYALTY: CONCURRENT CONFLICTS OF INTEREST

I. Overview

A. **Generally:** conflicts of interest are important because of the duty of confidentiality and the duty of loyalty. If there is a conflict of interest between either of those two duties, or something impairs one of those two duties, then there is usually an impermissible conflict of interest.

B. **G/R:** Sources of Conflicts: conflicts emerge from at least three different sources:

1. *Client-Client Conflicts:* the interests of clients, whether former, current, or prospective diverge.
2. *Third Party-Client Conflicts:* the interests of a non-client third party may conflict with those of a client (such as insurance companies and other third party payers); and
3. *Client-Lawyer Conflicts:* the lawyers own interests, or those of a lawyer's employee may be inconsistent with those of a client or prospective client.

C. **G/R:** Timing of Conflicts: conflicts may arise at any time the client's confidentiality or loyalty to the client is threatened.

1. *Concurrent Conflicts:* concurrent conflicts arise when the interests of current clients, a current and a potential client, or two potential clients are in conflict. A concurrent conflict may also involve a conflict between the interests of a third party and a client or potential client.
2. *Successive Conflicts:* successive conflicts arise when the interests of a former client or former prospective client conflict with the interests of a current client or a potential client (see below).

D. **G/R:** Classification of Conflicts: the Model Rules classify conflicts of interest into three categories of severity, from most severe to least, they are:

1. *Directly Adverse Conflicts:* clients and prospective clients with interests which are "directly adverse" to each other;
    a. These conflicts cannot be waived;
2. *Materially Limits Conflicts:* conflicts which "materially limit" the lawyers representation of a client or a prospective client;
    a. These conflicts can be waived, however, the lawyer must:
        i. tell the client what conflicts of interest are;
        ii. what the specific conflicts are in the case; and

iii. obtain a waiver, after consultation, in writing (the Rules do not require the lawyer to obtain the waiver in writing, however, he is stupid if he does not).

3. *De Minimus Conflicts:* conflicts that always exist (such as about fees) but which do not limit or affect the representation.

E. **Rule 1.7:** Conflict of Interest: General Rule:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, *unless*:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; *and*

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, *unless*:

(1) the lawyer reasonably believes the representation will not be adversely affected; *and*

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

E(1). Official Comment:

Loyalty to a Client

[1] Loyalty is an essential an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertake, in which event the representation should be declined.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from representation [Rule 1.16].

[3] G/R: As a general proposition, loyalty to the client prohibits undertaking representation *directly adverse* to that client without the client's consent. Paragraph (a) expresses this general rule.

a. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations.

a. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

b. Consideration should be given to whether the client wishes to accommodate the other interests involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict.

a. However, with respect to representation directly adverse to a client, and with respect to material limitations representation of a client, when a **disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.**

b. When more than one client is involved, the question of conflict must be resolved as to each client.

c. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent.

Lawyer's Interests

[6] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b).

a. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

b. Such conflicts can arise in criminal cases as well as civil.

i. The potential for conflict of interests in representing multiple defendants in criminal cases is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.

Interest of Person Paying for a Lawyer's service

[10] A lawyer may be paid from a source other than the client, if the client is informed of the fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.

a. Ex: insured and insurer, corporations and its directors.

Other Conflict Situations

[11] Conflicts of interests in contexts other than litigation sometimes may be difficult to assess.

a. Relevant factors in determining whether there is a potential for adverse effect include:

i. the duration and intimacy of the lawyer's relationship with the client or clients involved;

ii. the functions being performed by the lawyer;

iii. the likelihood that actual conflict will arise; and

iv. the likely prejudice to the client from the conflict if it does arise.

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected responsibility.

a. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question; however, such an object should be viewed with caution because it can be misused as a technique of harassment.

F. **G/R:** Conflict of Interest Checks: the lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest, *before the lawyer has undertaken representation* [**cmt. 1**].

1. To do this properly, the lawyer must limit the information they initially receive from prospective clients to that which is necessary to determine if there is a conflict of interest.

G. **G/R:** Raising the Issue of Conflicts: resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation; however, in litigation the court or opposing party may raise the issue of conflicts of interest.

H. **G/R:** Impermissible Conflicts of Interest: a conflict of interest can be the basis for:

a. Disciplinary action for violation of the Rules of Professional Conduct;

i. Often, if a party has an impermissible conflict of interest, he will violate the following Rules:

a. Rule 1.7 [Conflicts of Interest], Rule 1.8 [Conflicts of Interest, Prohibited Transactions], Rule 1.6 [duty of confidentiality], Rule 1.4(b) [informed consent], Rule 2.1 [independent professional judgment], and Rule 8.4(a) [misconduct].

b. a motion to withdraw as counsel; and

c. malpractice actions.

II. "Directly Adverse" Conflicts of Interest

A. **Generally:** the potentially most severe conflicts are those in which the interest of one client are "directly adverse" to the interests of another or potential client.

1. EX: such conflicts arise, when for example, a married couple seeks joint representation in a divorce or two parties in a real estate transaction contact one lawyer to prepare documents to implement the transaction.

2. These conflicts are governed by Rule 1.7(a).

B. **Rule 1.7(a)**: where the interests of clients and/or potential clients, are directly adverse, a lawyer SHALL NOT represent a client or potential client ***unless:***

1. the lawyer *reasonably believes* the representation will not be adversely affected; AND

2. the client consents after consultation.

B(1). **G/R:** the exception to the Rule divides directly adverse conflicts into two categories: (a) those that may be waived, and (b) those that may not be waived. Thus, after determining the existence of an actual or potential conflict, the lawyer then must determine whether it can be waived:

1. *Waivable Conflicts:* a conflict may be waived if the lawyer *reasonably believes* (subjective/objective standard) the representation of each client will not be adversely affected in spite of the conflict and the client consents after consultation.

a. In other words, the lawyer must subjectively believe that the conflict will not adversely affect the representation, and the belief must be objectively reasonable based on the reasonable lawyer standard.

i. Representation is objectively reasonable if a **disinterested lawyer** would conclude that the client the may agree to the representation [**cmt. 5]**.

ii. While it is not required by the rule, the only safe path is for the lawyer or the potential client to consult a truly disinterested lawyer to determine if the representation will be adversely affect, and that recommendation should be in writing.

b. If the conflict is one that will not adversely affect the representation (based on the disinterested lawyer standard) then the client must consent to the waiver after *consultation*.

i. Consultation is defined in the Terminology as to mean that the lawyer has communicated information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

ii. This is really just a restatement of the INFOMRED CONSENT rule [**Rule 1.4(b)**].

iii. Consent, although not required by the Rule, should be in writing.

2. *Non-Waivable Conflicts:* conflicts are not waivable if, under Rule 1.7(a)(1), a disinterested lawyer would conclude (objectively) that the client should not agree to a waiver.

a. Thus, if a lawyer cannot even ask for a waiver if a reasonable lawyer would conclude that the representation is inappropriate because of the conflict.

B(2). **G/R:** Waiver: if the lawyer concludes that waiver is appropriate, and it is objectively reasonable, the lawyer should obtain the waiver in writing. The waiver should include:

1. a description of the conflict;
2. an explanation of the consequences and possible consequences of the conflict;
3. an explanation of the consequences and possible consequences of agreeing to waive the conflict; and
4. an affirmative recommendation that the individual consult another lawyer before agreeing to waive the conflict.

III. "Materially Limited" Conflicts

A. **Generally:** conflicts arise when the interests of two clients or potential clients are *not* directly adverse and these conflicts are governed by Rule 1.7(b).

1. EX: insurance company hires lawyer to defend an insured; parent hirs a lawyer to represent her minor child; an adult hires a lawyer to prepare an estate plan for his mother, co-defendants in civil or criminal actions hire the same lawyer to defend, a person who is charged with child abuse contacts a lawyer who was himself abused as child, etc…
2. In these situations, the lawyer's loyalty to the client may be compromised by either external or internal pressures.

B. **Rule 1.7(b)**: covers any conflict of interest, whatever its source, which may materially limit a lawyer's representation of a client. A lawyer SHALL NOT represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests, ***unless:***

1. the lawyer *reasonably believes* the representation will not be adversely affected; and
2. the client consents after consultation. When the representation of multiple clients in a matter is undertaken, the consultation shall include explanations of the implications of the common representation and the advantages and risks involved.

B(1). **Test for "Materially Limited":** a lawyer's representation is materially limited, based on a functional analysis, when the lawyer's other responsibilities or interests potentially interfere with the lawyer's independent professional judgment [**Rule 2.1**], and there is a potential disclosure of confidential information [**Rule 1.6**].

B(2). **G/R:** Waiver: the standard for waiver of the conflict of interest is the same as when the conflict is "directly adverse"; that is, would a *disinterested lawyer* agree that the client should consent.

IV. De Minimus Conflicts

A. **Generally:** there is some conflict present in virtually every attorney-client relationship.

1. EX: a client has an interest in obtaining the lowest fee possible, while the attorney has an interest in maximizing the fee.
2. The Rules do no require the disclosure of such conflicts.

B. **G/R:** Determining which Conflicts are De Minimus: although the consequences of a de minimus conflict are immaterial, an important question is what conflicts then are de minimus and need not be disclosed?

1. The safest rule is to use the standard for determining whether a conflict may be waived, the disinterested lawyer standard; thus, the standard becomes whether a disinterested lawyer would find the conflict de minimus.
2. The answer will usually be that if the lawyer finds himself asking the question, the conflict is probably not de minimus.
3. Even if the conflict is de minimus, disclosure is still the safest route.

V. Conflicts of Interest in the Non-Litigation Context

A. **G/R:** Estate Planning: conflict of interest issues are common in estate planning. In estate planning the identity of the client may be unclear under the particular law of the jurisdiction. Under one view a client is the fiduciary, under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved in an engagement letter [**Rule 1.7, cmt. 13].**

1. EX: married couple comes in to make a will (or an adult brings his mother in to make a will); the lawyer can represent them after he checks for conflicts and obtains informed consent.
    a. These situations will be governed by Rule 1.7(b).
    b. The conflicts may not be clear if the couple is married and have only their own kids, however, when they have been divorced and re-married, conflicts arise as to which kids will take. In addition, even if there is no kids, each spouse may not want the other's family to take.
    c. Thus, the lawyer will have to determine if the interests are conflicting or concurrent through consultation. If the lawyer determines there are too many conflicting interests, he should not represent both parties, and probably should not represent either, because he will have confidential information from both spouses.
2. Also remember that if an elderly person is making an estate plan, and it is bizarre, she may be impaired and **Rule 1.14** could come into play.

B. **G/R:** Corporate Directorship: the lawyer for a corporation who also serves on the board of directors that corporation should determine whether the responsibilities of the two roles conflict. These situations are governed by Rule 1.7(b).

1. The lawyer may be called on to advice the corporation in matters involving actions of the directors. Considerations should be given to:
    a. the frequency with which such situations may arise,
    b. the potential intensity of the conflict,
    c. the effect of the lawyer's resignation from the board, and
    d. the possibility of the corporations' obtaining legal advice from another lawyer in such situations.
2. If there is a material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as director.

***[Rule 1.7 cmt. 14].**

3. *Conflict:* the conflict is between Rule 2.1 (duty to render independent advice) and his duty as director to act in the best interests of the corporation.
4. As a general rule, the lawyer *should never* serve as a corporate director of a corporation that he represents because if the directors get sued, he will be liable and the firm may also be liable.
    a. The firm will be vicariously liable if the court finds that serving on the board was part of the lawyer's duties as a member of the firm.
    b. However, the Rules do not prohibit the action.
4. The lawyer should also not take shares in corporation as a form of payment because it is essentially a business transaction with a client [**Rule 1.8(a)**].
5. If a lawyer serves as a director of a corporation he is representing, he potentially violates the following Rules:

1. **Rule 1.7, Rule 2.1** [duty render independent judgment and candid advice], **Rule 1.4(b)** [informed consent].

VI. Imputed Disqualification

A. **Generally:** if one lawyer in a "firm" may not represent a client because of a conflict of interest, neither may any of the other lawyers in the firm.

1. After determining who is in a "firm" the rule means that a lawyer must be able to determine the identity of all the lawyers in the firm's former and current clients, as well as former prospective clients from whom the firm has received confidential information.

B. **Rule 1.10:** Imputed Disqualification: General Rule:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of the client represented by the formally associated lawyer and not currently represented by the firm, *unless:*

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; *and*

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

B(1). Official Comment:

Definition of Firm

[1] The term firm includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization.

--This definition clearly applies to lawyers associated in a partnership, personal corporation, LLC, as well as in house counsel. But it may cover more (see below) test for determining "firm."

Principles of Imputed Disqualification

[6] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm.

a. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that **each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated**.

[7] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm.

C. **G/R:** Test for Determining when Lawyers are Associated in a Firm: the label that lawyers give to their association is not dispositive and the court will take a functional approach to determining who is associated in a firm. The definition of a firm clearly involves parnterhships, corporations, LLCs, and other business organizations. The issues arise in office sharing arrangements and other informal arrangements.

1. Whether lawyers are in a firm depends on:

a. whether the lawyers in question have take steps to ensure their independence; and

i. Such steps include who has keys to the office and file cabinets, or passwords to the computer system, and whether the system is networked, etc…

b. whether the lawyers have ***mutual access to confidential information*.**

2. **Test:** whether the physical organization and actual operation of the office space is such that the confidential client information of each lawyer is secure from the other.

3. In other words, a lawyer cannot represent any client or prospective client, if in the same firm they share common mutual access concerning the clients they serve.

a. *Potential Problem:* if lawyers in an office sharing arrangement come up with a conflict of interest file possible confidentiality issues arise because they are then sharing a list of clients to see if there is a conflict, which is confidential information.

b. There can be waiver by the client pursuant to Rule 1.7(b), under the disinterested lawyer standard.

VII. Prohibited Transactions

A. **Rule 1.8:** Conflict of Interest: Prohibited Transactions:

(a) A lawyer *shall not* enter into a business transaction with a client or knowingly acquire ownership, possessory, security or other pecuniary interest adverse to a client *unless*:

(1) the transactions and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted *in writing* to the client in a manner, which can be reasonably understood, by the client;

(2) the client is given a reasonably opportunity to seek the advice of independent counsel in the transaction; *and*

(3) the client consents *in writing* thereto.

(b) A lawyer shall not use information *relating to the representation* of a client to the disadvantage of the client *unless* the client consents after consultation, except as permitted or required by Rule 1.6 or 3.3.

(c) A lawyer *shall not* prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any *substantial gift* from a client, including a testamentary gift, EXCEPT where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer *shall not* provide financial assistance to a client in connection with pending or contemplated litigation, EXCEPT that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer *shall not* accept compensation for representing a client from one other than the client, *unless:*

(1) the client consents after consultation;

(2) there is not interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; *and*

(3) information relating to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients *shall not* participate in making an aggregate settlement of claims of or against the clients, or in a criminal cases an aggregated agreements as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice *unless* permitted by law AND the client is independently represented in making the

agreement, or settle a claim for such liability with an un-represented client or former client without first advising that person *in writing* that independent representation is appropriate in connection therewith.
(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation *directly adverse* to a person whom the lawyer knows is represented by the other lawyer EXCEPT upon consent by the client after consultation regarding the relationship.
(j) A lawyer *shall not* acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client, EXCEPT that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

A(1). Official Comment:

Transactions Between Client and Lawyer
[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable.

a. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness.

i. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advise that another lawyer can provide.

ii. exception: paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Person Paying for Lawyer's Services
[4] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also comply with Rule 1.6 and Rule 1.7.
Limiting Liability
[5] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Family Relationships Between Lawyers
[6] Paragraph (i) applies to related lawyers who are in different firms.

a. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

b. The disqualification stated in paragraph (i) is *personal and not imputed to members of firms with whom the lawyers are associated.*

Acquisition of Interests in Litigation
[7] Paragraph (j) states the traditional general rule that lawyers are prohibited form acquiring proprietary interest in litigation.

a. There is an exception for reasonable contingent fees.

B. **G/R:** Business Transactions with Clients: the Rules strongly discourage, but do not prohibit, business transactions with clients. If there is such a relationship, the Rules regulate it more strictly than any other type of conflict. Business transactions with clients are not only subject to Rule 1.8(a), but also the general requirements of Rule 1.7(b). Thus, the analysis for determining whether the transaction was ethical is as follows:

1. whether there is an attorney-client relationship;

a. A lawyer often learns of business opportunities from a former or current client, rather than from a person they have not represented.

b. When a lawyer learns of a business opportunity from a former or current client the *threshold inquiry* is whether there is a current lawyer-client relationship with the other party to the potential business deal, or only a former client relationship.

i. If there is no current lawyer-client relationship, then the former client provisions of **Rule 1.9** apply and the business relationship is unlikely to be improper.
ii. If the lawyer is currently working on matters for the client, the attorney-client relationship should be obvious and **Rule 1.8(a)** applies.
iii. The gray area arises where the lawyer has completed work for the client and no new matters are pending (this will not be an issue if the lawyer sent out a closing letter).
iv. *Remember:* the burden of establishing the existence or non-existence of the relationship is on the lawyer.

c. If there is a an attorney client relationship, go to Rule 1.7(b).

2. **Rule 1.7(b):** a lawyer who enters into a business transaction with the client obviously has his own interests (the business interests) in question; thus, if those interests *materially limit* the lawyer's representation, Rule 1.7(b) prohibits continued representation in the absence of an appropriate waiver (based on the disinterested lawyer standard, which will makes some conflicts un-waivable).

a. If Rule 1.7(b) is satisfied, go to Rule 1.8(a).

3. **Rule 1.8(a):** contains both substantive and procedural requirements, the transaction MUST:

a. be fair and reasonable to the client;

i. Comment [1], says that in determining whether the terms of deal are fair and reasonable to the client, the client should (and some courts hold must) seek advice from outside counsel.

b. then the terms of the proposed business transaction must be transmitted to the client in *terms which can be reasonably understood by the client*.

i. This standard may vary with the sophistication of the client.

c. Then the client should seek advice from outside counsel;

i. The lawyer should affirmatively recommend that the client seek advise from outside counsel and should put in the disclosure letter along with a description of the conflicts of interest.

d. The lawyer **must consent in writing.**

i. This is the only requirement in all the Rules that something must be put in writing.

B(1). Types of Business Transactions: lawyer's business transactions with clients take many forms; common examples include:

1. loans to or from clients;
2. a lawyer taking an interest in a business venture as the lawyer's fee;
3. a lawyer investing money or services in a business venture; and
4. many other types.

B(2). Prohibited Business Transactions: if the client is impaired, **Rule 1.14** governs and the lawyer cannot enter into a business transaction with the client because they do not have the mental faculties to make an informed decision in violation of **Rule 1.4(b)** regarding the transaction [*Bd. of Professional Responsibility v. Williams*].

B(3). Vicarious Liability Imputed on the Firm: law partners are jointly and severally liable for the actions or inactions of the lawyers partners and/or associates if they relate to the course of the partnership business.

1. Adopting another form of organization, such as a professional corporation or LLC will not eliminate liability.
2. A firm is vicariously liable in a malpractice suit if one the attorneys who practices in the firm cause the loss or injury by actionable conduct of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership.
3. When a lawyer enters into a business transaction with a client, the question becomes whether the lawyer's partners or firm are liable for injuries arising out of the lawyer's business transaction with the client.

a. Courts today usually hold yes, especially if the lawyer was acting within his scope of employment and any of the firm's things (letterhead, paper, time, etc…) were used in procuring the transaction.

C. **G/R:** Using Client Information: **Rule 1.8(b)** states that a lawyer should not **use** information relating to the representation to the disadvantage of a client unless the client consents after consultation.

1. This is different from the standard in Rule 1.6, which says that a lawyer should not *reveal* information relating to the representation.
2. This situation often comes up when the lawyer learns of some information that he can use to his advantage, for example, learning that his client is going to sell stock which he knows will decrease the value of his stock, and then selling his stock before his client does so.
3. Rule 1.8(b) only applies to current clients, if the client is a former client then **Rule 1.9(c)(1)** governs.

D. **G/R:** Providing Financial Assistance: a lawyer under **Rule 1.8(e)** shall not provide financial assistance to a client in connection with pending or contemplated litigation, *EXCEPT:*

1. A lawyer may advance court costs and expense of litigation, the repayment of which may be contingent on the outcome of the matter;
    a. Court costs include filing fees, other out of pocket expenses relating directly to the representation, and expenses of litigation such as expert witness, telephone calls, paper, travel expenses, and the like.

E. **G/R:** Limiting Malpractice Liability: a lawyer shall not enter into an agreement that limits malpractice liability [**Rule 1.8(h)**].

VIII. Prohibited Transactions: Third Party Payers

A. **G/R:** Third Party Payers: lawyers frequently represent clients with the understanding that someone else will pay for the lawyer's services. Often, a lawyer agrees to only represent a client because someone with the means to pay for the lawyer's services has agreed to do so. While such a relationship is permissible, a third party payer relationship creates potential conflicts of interests.

1. There are numerous examples of third party payers:
    a. Civil defense attorney's are often paid by insurance companies or by a litigant's employer;
    b. Criminal defense attorneys, which are paid by the state, often represent indigent defendants;
    c. An employer may pay for legal services on behalf of an employee charged with a wrong;
    d. Parents often pay for the representation of their children;
    e. in estate planning someone other than the beneficiary may for the plan, and
    f. there are numerous other examples.

B. **Rule 1.8(f):** A lawyer shall *not* accept compensation for representing a client from one other than the client ***unless:***

1. the client consents after consultation;
2. there is no interference with the lawyer's independence of professional judgment; *and*
3. information relating to the representation of the client is protected as required by Rule 1.6.

C. **Analysis:** When there is an issue involving a third party payer, the analysis should be as follows:

1. Whether the was an attorney-client relationship, more specifically, who is the client;
    a. As with many conflict of interest problems, the threshold question is who is the client. This question is important because most of the lawyer's ethical duties arise upon the formation of the relationship.

b. Once the identity of the client is clarified (which is not easy, see insurance defense problems below) then go to Rule 1.7(b).

2. **Rule 1.7(b):** A lawyer shall not represent a client if the repsresenation of that client is materially limited by the *lawyer's responsibilities to a third person* or by the lawyer's own interests.

a. A third party payer relationship creates the potential for material limitation because of the interest of the third party payer and the lawyer.

i. The third party payer has an interest in minimizing attorney's fees and its own potential liability.

ii. The lawyer's interest may also affect the representation because he may wish to continue the relationship with the third party payer, such as an insurance company.

b. If the payers payer's and the lawyer's interest materially limit the lawyer's representation, Rule 1.7(b) prohibits the continued representation in the absence of an appropriate waiver.

c. If Rule 1.7(b) is satisfied, go to Rule 1.8(f).

3. **Rule 1.8(f):** the rule contains substantive and procedural limitations that must be satisfied every time there is a third party payer:

a. First, the client must consent after consultation,

i. Because **Rule 1.8 cmt. 4** requires the agreement to conform to Rule 1.7, concerning the conflict of interest, the standard for client consent is that a lawyer may only request consent to a third party payer when a disinterested lawyer would think it was reasonable to do so.

ii. The client can only consent after consultation (defined); thus, the lawyer must inform the client how having a third party payer will affect the representation.

b. Second, there can be no interference with the lawyer's duty to render independent professional judgment [**Rule 2.1, 5.4**];

c. Third, the lawyer must protect information protected by Rule 1.6.

d. Even all these are satisfied, go to Rule 5.4.

4. **Rule 5.4(c):** a lawyer shall not permit a person who pays the lawyer to render legal services of another to direct or regulate the lawyer's professional judgment in rendering such legal services.

1. Thus, the importance of independent judgment is more important than who is actually paying the clients bill.

D. **G/R:** Special Considerations for Insurance Defense: the typical tripartite relationship in an insurance defense case with the insurance carrier (the payer), the insured (the represented), and the lawyer raise several conflict of interest issues.

1. Who is the client? Most courts, and the Model Rules seem to indicate, that the lawyer represents the insured [**Rule 1.2 cmt. 4** "When the lawyer has been retained by an insurer to represent an insured."]. It is clear that the lawyer represents the insured, but whether the lawyer also represents the insurance company as co-client (or in any other capcity or relationship is less clear).

a. However, the insurer's interest should be limited by the insured's because the lawyer owes his undivided loyalty to the insured, and hence the insurer's interest should be secondary and should not affect his independent judgment.

2. Some courts hold, such as the one in *Cumis*, that the insurance company has a duty to hire independent counsel for the insured to avoid conflicts of interest.

D(1). **G/R:** Tripartite Relationship: in the usual tripartite relationship existing between the insurer, insured and counsel, there is a single common interest shared among them. Dual representation by counsel is beneficial since the shared goal of minimizing or eliminating liability to the third party is the same.

1. A different situation is presented, however, when some or all of the allegations in the complaint do not fall within the scope of coverage under the policy. In such a case, the standard practice of an insurer

is to defend under a reservation of rights where the insurer promises to defend but states it may not indemnify the insured if liability is found. In this situation, there may be little commonality of interest.

a. Opposing poles of interest are represented:

i. on the one hand, in the insurer's desire to establish in the third party suit the insured's liability rested on intentional conduct, and thus, no coverage under the policy, and

ii. on the other hand, in the insured's desire to obtain a ruling such liability emanated from the non-intentional conduct within his insurance coverage.

b. Although issues of coverage under the policy are not actually litigated in the third party suit, this does not detract from the force of these opposing interests as they operate on the attorney selected by the insurer, who has a dual agency status.

c. Conflicts thus come up at trial, before trial, and in discovery.

*[*San Diego FCU v. Cumis Ins. Society*].

D(2). **G/R:** Lawyer's Judgment: the professional judgment of a lawyer should be exercised, within the bounds of new law, solely for the benefit of his client and free of compromising influences and loyalties.

1. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

*[*San Diego FCU v. Cumis Ins. Society*].

D(3). **G/R:** Conflicts of Interest: if a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues employment.

1. He should resolve all doubts against the propriety of the representation.

2. A lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

3. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on clients; and for this reason it is preferable that he refuse the employment initially.

*[*San Diego FCU v. Cumis Ins. Society*].

D(4) **G/R:** Insurer and Insured Conflicts: in actions in which the insurer and insured have conflicting interests, the insurer may not compel the insured to surrender control of the litigation.

1. Thus, if the insurer must pay for the cost of defense, when a conflict exists, the insured may have control of the defense if he wishes, then the insurer must pay for such defense conducted by independent counsel.

2. Counsel representing the insurer and insured owes both a high duty of care and unswerving allegiance:

a. When two clients have diverging interests, counsel must disclose all facts and circumstances to both clients to enable them to make intelligent decisions regarding continuing representation.

b. Before a lawyer may represent multiple clients he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients' consent.

*[*San Diego FCU v. Cumis Ins. Society*].

IX. Prohibited Relations: Sex with Clients

A. **Generally:** sexual relations with clients is governed by Rule 1.7(b), because it may affect the lawyer's ability to render independent judgment and may cause the disclosure of confidential information.

1. Because Rule 1.7(b) governs, the disinterested lawyer standard applies; however, attorneys engaging in sexual relations with a client hardly ever tell the client to call up a third party lawyer and consult about whether the sexual relationship because the lawyer knows a disinterested lawyer would advise against the relationship; hence, when a lawyer engages in a sexual relationship with a client, there is almost always an impermissible conflict of interest.

B. **G/R:** a sexual relationship between a lawyer and a client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, and therefore may violate the Model Code [*ABA Formal Op. 92-364*].

C. **G/R:** there are several provisions of the Model Rules that may be implicated by a sexual relationship, particularly one that arises after the formation of the attorney client relationship:

1. because of the dependence that so often characterizes the attorney client relationship, there is a significant possibility that the sexual relationship will have resulted from exploitation of the lawyer's dominant position and influence, and thus breached the lawyer's fiduciary obligation to the client.
2. the sexual relationship with the client may affect the independence of the lawyer's judgment;
3. the lawyer's engaging in a sexual relationship with the client may create a prohibited conflict between the interests of the lawyer and those of the client; and
4. a non-professional, yet emotionally charged, relationship between an attorney and client may result in confidences being imparted in circumstances where the attorney-client privilege is not available, yet would have been, absence the personal relationship.

*[*ABA Formal Op. 92-364*].

D. **G/R:** Fiduciary Relationship: the fiduciary relationship imposes the highest standards of ethical conduct on the lawyer. The lawyer's position of trust places the burden on the lawyer to ensure that all attorney-client dealings are fair and reasonable [**Rule 1.8** cmt. "as a general principle, all transactions between client and lawyer should be reasonable and fair to the client"] and not interfere with competent representation [**Rule 1.1**].

1. The lawyer's role is heightened if the client is emotionally vulnerable in a way that affects the client's ability to make reasoned judgments about the future [**Rule 1.14**].
    a. Similarly, the ABA standards [§9.22(h)] relating to disciplinary sanctions assert that any special vulnerability of the victim should be considered an aggravating circumstance when imposing attorney discipline.
    b. Thus, the more vulnerable a client, the heavier the obligation of the lawyer to avoid engaging in any relationship other than that of attorney-client.
2. **Rule 1.8(b):** the fundamental principle of fiduciary obligation is recognized in the Model Rules. Rule 1.8(b) provides that a lawyer may not use client confidences to the disadvantage of the client.
3. **Rule 1.7(b):** prohibits a lawyer from representing a client when the representation may be limited by the lawyer's own interests.
4. These rules reflect the fundamental obligation of a lawyer not to exploit a client's trust for the lawyer's benefit.
    a. The same principle that underlies the rules that seek to ensure that lawyers not take financial advantage of their clients. Business transactions concurrent with the attorney client relationship are inherently suspect.
    b. The same principles imply that a lawyer should not abuse the client's trust by taking sexual or emotional advantage of a client.

*[*ABA Formal Op. 92-364*]

E. **G/R:** Competency of Representation: the existence of a sexual relationship between lawyer and client may make it impossible for the attorney to provide the competent representation of the client that is ethically required because:

1. a sexual relationship may deprive the lawyer of independent judgment;
    a. **Rule 2.1:** when representing a client, a lawyer shall exercise independent professional judgment and render candid advice.
2. a sexual relationship creates risks that the lawyer will subject to a conflict of interest;
    a. One of the hallmarks of the legal profession is the obligation of a lawyer to exercise professional judgment solely on behalf of the client; a sexual relationship may hinder the attorney's ability to meet this obligation.
    b. **Rule 1.7(b):** states that a lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's own interests.
    c. In the corporate context, the issue may also arise, for the lawyer's client is the corporation and not any individual [**Rule 1.13(a)**]. A potential conflict of interest arises if the lawyer, engaging in a sexual relationship with a corporate client's representative, learns information which may redound to the detriment of the sexual partner but should be reported to higher authority.
3. a sexual relationship may risk unwarranted expectations regarding the preservation of confidences and related dangers.
    a. A sexual relationship may blur the contours of the attorney client privilege: client confidences are protected by the privilege only when they are imparted in the context of the attorney client relationship. The courts will not protect confidences given as part of a personal relationship; except for that of husband and wife, there is no privilege for lovers.

*[*ABA Formal Op. 92-364*]

E. **Minn. Rule Professional Conduct 1.8(k):** Conflicts of Interests: Prohibited Transactions: a lawyer shall not have sexual relations with a current client unless a consensual sexual relationship exited between them when the lawyer-client relationship commenced.

1. As evidenced by this rule, some states have gone further than the Model Code and have prohibited sex with clients because of the vulnerability of many clients when they visit an attorney, especially in the domestic relations situations.
2. This analogous to the prohibition doctors and patients have in engaging in sexual relationships.

F. **G/R:** Legal Ramifications of Sex with Client: because of an attorney's fiduciary relationship with a client, an unsolicited sexual advance by a lawyer debases the essence of the attorney-client relationship. Additionally, because of a client's dependence on the attorney's professional judgment, a sexual relationship may well result from the lawyer's exploitation of the lawyer's dominant position.

1. **G/R:** violations of the Rules of Professional Conduct does not give rise to a cause of action, they do not create any presumption that a legal duty was breached, nor are they designed to serve as the basis for civil liability.
    a. The Rules do, however, define the attorney's professional role and in so doing provide guidance for practicing a compliance with the Rules and provide a structure for regulating conduct.
    b. The preamble to the Rules state: a lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.
    c. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.
    d. These premises establish the standard of care that an attorney owes his client, the profession, and the legal system under his fiduciary duties.

*[*Courtney v. Pretty*].

X. Admissibility of a Violation of Professional Conduct Rules in a Legal Malpractice Action

A. **G/R:** a violation of the Rules of Professional Conduct does not give rise to a malpractice action, however, courts disagree as to the role of ethical standards in malpractice cases; consequently, although almost all courts allow the admission of ethical rules, four different standards have evolved:

1. A small minority of courts have held that ethical standards are not admissible;
2. several courts admit ethical standards, but with significant restrictions, i.e., an expert is needed to establish the standard of conduct and the relationship between the legal standard and ethical rules;
3. more courts admit ethical standards with fewer restrictions (i.e. it is illogical to say that ethical standards to do not play a party in establishing the legal standard of conduct); and
4. one jurisdiction a violation of the Rules creates a rebuttable presumption that the lawyer's standard falls below the legal standard of conduct.

§2.11 CONFLICTS OF INTEREST IN THE CRIMINAL CONTEXT

I. Federal Law

A. **U.S. Const. Amend. 6:** In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

1. This right has been applied to the States through the 14th Amendment
2. The US Supreme Court has interpreted this right to include the right of effective assistance of counsel [*Cuyler v. Sullivan*].
3. Assistance may be ineffective because an attorney's performance is compromised by a conflict of interest.

B. **G/R:** Federal Court Analysis of Conflicts of Interest in Criminal Trials: The federal precedent in this area employs a two-fold analysis:

1. *Defendant Objects:* First, the reviewing court examines the record to determine if the defendant or his attorney made timely objection to multiple representation at the trial level.
    a. If an objection was presented, the trial court is charged with the affirmative duty of appointing separate counsel or taking adequate measures to determine that the possibility of a conflict is too remote to warrant appointment of separate counsel.
    b. If the trial court fails to pursue those requirements, prejudice is presumed upon appeal and reversal is automatic.
2. *Defendant Fails to Object:* Second, in those instances in which neither the defendant nor his attorney made any objection to multiple representation at the trial level, reversible prejudice is not automatically presumed. In such an instance, the defendant is required to demonstrate on appeal that actual, rather than apparent, conflicts of interest adversely affected the performance of his attorney.
    a. In the application of this standard, the defendant is entitled to a limited presumption of prejudice.
    b. He is required to show only that the performance of the attorney was less effective than it might have been absent the conflict of interest. In aid of the defendant's position, the reviewing court is charged with a duty to search the record for an actual conflict and any corresponding adverse impact.

*[*Cuyler v. Sullivan*].

B(1) **G/R:** 6th Amend Rule for Conflicts of Interest:

1. *No Objection:* if there is no objection at trial to the joint representation, the defendant must show that:
    a. counsel's performance was deficient (i.e. not within the scope of reasonableness); and
    b. the deficient performance prejudiced the defense (i.e. the errors were so serious as to deprive the defendants of a fair trial.

2. *Objection at Trial:* a defendant who objects to the join representation **must** be given an opportunity to show that the conflict impermissibly will impair his ability to get a fair trial (i.e. prejudice will be presumed if there is no such opportunity).

a. After such an objection, continued joint representation will be a violation of the 6th Amendment unless the trial court determines that the potential for conflict is too remote.

*[*Cuyler v. Sullivan*].

C. **G/R:** Trial Courts Duty: a lawyer forced to represent co-defendants whose interests conflict cannot provide the adequate legal assistance required by the 6th Amendment.

1. This rule requires state trial courts to investigate timely objections to multiple representation.
2. However, absent special circumstances, when no objection is lodged, trial courts may assume either that multiple representation entails no conflict or the lawyer and his client's knowingly accept such risk of conflict as may exist.

a. An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trail.

b. Unless the trail court knows or reasonably should know that a particular conflict exits, the court need not initiate inquiry.

*[*Cuyler v. Sullivan*].

D. **G/R:** Conflicts of Interest in Criminal Trials: multiple representation does not violate the 6th Amendment unless it gives rise to a conflict.

1. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show potential conflicts impermissibly imperil his right to a fair trial.
2. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in effective assistance of counsel.
3. In order to establish a violation of the 6th Amendment, a defendant who raised no objection at trial must demonstrate that an ***actual conflict of interest adversely affected his lawyer's performance.***
4. Unconstitutional multiple representation is never harmless error.

a. Thus, a defendant that shows that a conflict of interest actually affected the adequacy of his representation need *not* demonstrate prejudice in order to obtain relief.

*[*Cuyler v. Sullivan*].

E. **Fed. R. Crim. Pro. 44(c):** Joint Representation: when there is joint representation "the court shall promptly inquire with respect to joint representation and shall personally advise each defendant of the right the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

II. Wyoming Law

A. **Wyo. Const. Art. I, §10:** In all criminal prosecutions the accused shall have the right to defend in person and by counsel.

B. **G/R:** Wyoming's Analysis of Conflicts of Interest in Criminal Trials: Wyoming no longer follows the federal analysis and instead opts to more firmly protect the defendant's right to representation by an attorney who is free from any conflict of interest.

1. The potential for a conflict of interest not only can be visualized but, actually inheres in almost every instance of multiple representation.

2. Therefore the **general rule** is that prejudice will be presumed in *all* instances of multiple representation of criminal defendants and, in the absence of an appropriate waiver, multiple representation will constitute reversible error.
*Thus, in Wyoming the only way a lawyer can represent two co-defendants in a criminal action is to have an effective waiver on the record.
*[*Shongutsie v. State*].

B(1). Policy: there are three main policy reasons from deviating from the federal standard:

1. it discourages attorneys from accepting the role as dual advocate and thereby compromising their fundamental duty of loyalty to the individual client;
2. the rule promotes effective administration of justice by ensuring that judges guard defendant's rights; and
3. the rule ensures that all defendants be aware of their right to be represented by an attorney free from conflicts.

C. **G/R:** Right to Counsel: the right to counsel is guaranteed by the 6th Amendment of the Constitution and is applicable to the states by virtue of the 14th Amendment.

1. In addition, in Article I, §10, of the Wyoming constitution provides that "In all criminal prosecutions the accused shall have the right to defend in person and by counsel…"
*[*Shongutsie v. State*].

D. **G/R:** Right to Effective and Competent Counsel: This right to counsel includes a guarantee that the assistance of counsel by effective.

1. The right to effective counsel encompasses the correlative rights that counsel by reasonably competent and that counsel be free from conflicts of interest.
2. It is essential to differentiate between claims of ineffectiveness that are based upon lawyer incompetency and those that are based on conflicts of interest.
    a. *Incompetency:* if the claim is based on incompetency, competency is presumed and the defendant must accept the burden of affirmatively demonstrating deficient performance by counsel and prejudice to his rights.
    b. *Conflicts:* with respect to claims based upon a conflict of interest arising from multiple representation, prejudice is often presumed.
    *[*Shongutsie v. State*].

E. **G/R:** Conflicts of Interest in Criminal Trials: the purpose of the constitutional right to effective assistance of counsel has been said to be to insure that criminal defendants receive a fair trial.

1. The Supreme Court has emphasized that the denial of the assistance of counsel who free from conflicts of interest can never by harmless error.
*[*Shongutsie v. State*].

F. **Wyo. R. Crim. Pro. 44(c):** Joint Representation: whenever two or more defendants have been charged with offenses arising from the same or related transactions and are represented by the same retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, ***the court shall order separate representation*.**

III. Ethical Standards:

A. **Generally:** ethical standards in the criminal context are usually discussed only in relation to the defendant's constitutional rights to effective assistance to counsel.

1. The Model Rules state that the potential for conflicts of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant [**Rule 1.7 cmt. 7**].
2. Nonetheless, if representation is undertaken, it would fall under **Rule 1.7(b)** and the same analysis applies.

B. **ABA Standards for Criminal Justice:** state that the potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily defense counsel should decline to act for more than one of several co-defendants except in unusual situations.

1. If the defendant's desire joint representation, they must give "informed consent," [**Rule 1.4(b)**] and that consent should be on the record.

§2.13: DUTY OF CONFIDENTIALITY AND LOYALTY: SUCCESSIVE CONFLICTS OF INTEREST

I. Successive Conflicts of Interest: Overview

A. **G/R:** Successive Conflicts: successive conflicts of interest arise when the interests of a former client or former prospective client conflict with the interests of a current client or a potential client. Successive conflicts of interest usually come up in three main situations:

1. With information about former clients;
2. When a lawyer switches firms; and
3. When a lawyer uses information that he has learned from a former client.

B. A. **Rule 1.9:** Conflict of Interest: Former Client:

(a) A lawyer who has *formerly represented a client* in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client *unless* the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests were materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use *information relating to the representation* to the disadvantage of the former client except as Rule 1.6 or 3.3 would permit or require with respect to a client, or when the information has become generally known; *or*

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

A(1). Official Comment:

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles of Rule 1.7 determine whether the interests of the present and former client are adverse.

[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree.

a. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests is clearly prohibited.
b. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

Lawyers Moving Between Firms
[3] When lawyer have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations:

a. the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised;
b. the rule should not be so broadly case as to preclude other persons form having reasonable choice of legal counsel;
c. the rule should not unreasonably hamper lawyers from forming new associations and undertaking new clients after having left a previous association.

Confidentiality
[6] Preserving confidentiality is a question of *access to information*. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyer's work together.
[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry the burden of proof should rest upon the firm whose disqualification is sought.
[8] Application of paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b).

Adverse Positions
[10] The second part of the duty of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to former clients arising in substantially related matters.

a. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification.
b. Hence, this aspect of the problem is governed by Rule 1.9(a).
c. Information acquired by the lawyer in the course of representing a client may not subsequently by used or revealed by the lawyer to the disadvantage the client.
d. Disqualification from subsequent representation is for the protection of former clients and can be waived by them.

II. <u>Former Clients</u>

A. **G/R:** <u>Duties to Former Clients:</u> the lawyer's duties at the end of the attorney client relationship are:

1. Notify the client that the relationship is over in a closing letter (in writing) because it is the lawyer's duty to end the relationship when the objectives have been met and delineate the relationship's scope and communicate it to the client [**Rule 1.4**].
2. The duty of confidentiality continues forever, even after the relationship is over [**Rule 1.6**];
3. The lawyer's duty of loyalty continues, the lawyer cannot use information learned from or about one client to the disadvantage of a former client [**Rule 1.9(c)(1)**].

A(1). **G/R:** Using Information Obtained from the Client: the lawyer also has a duty not to use information relating to the representation to the disadvantage of a former client [**Rule 1.9(c)(1)**]. This duty if different from the standard in Rule 1.8(b) because the lawyer may use the information when *it becomes generally known*.

1. Remember, the lawyer can never **reveal** information relating to the representation, even of a former client, this Rule merely allows the lawyer to use the information when the matter is generally known to the public.

B. **Rule 1.9(a):** Lawyer Switching Sides: once a former client has been identified:

1. Rule 1.9(a) requires the lawyer to use a two step analysis when the lawyer represents, or is asked to represent, a client with interests which may conflict with those of a former client:

a. Is the new **matter** the *same or substantially related* to the matter involving the former client?

i. The scope of a "matter" depends on the facts and circumstances of the particular case or transaction.

ii. The critical question is the extent of the lawyer's involvement in the previous transaction:

(A) If the lawyer was "directly involved in a specific transaction" subsequent representation other clients with "material adverse" interests is *clearly prohibited*.

iii. A "substantially related matter" is one that arises out of the *same factual scenario* or has a an "overlap" of factual issues.

b. If there is such a relationship, are the interests of the current or prospective client "materially adverse" to the interests of the former client?

i. The principles of **Rule 1.7** determine whether the interests of the former client are material adverse; in other words, if a disinterested lawyer would conclude that the interests of the former and new client are materially adverse, representation is unethical unless the former client consents after consultation.

2. **If no**, to both these questions, then there is no conflict.

3. **If yes**, to both of these questions, then the Rules ***presume*** that the lawyer obtained confidential information from the former client and that he will use it in the new matter.

a. The presumption is **irrebutable—**it is irrelevant that the lawyer obtained no confidential information, forgot or has no record of that information, or that the lawyer will not use it in the new representation.

b. A conflict exists and the lawyer may not undertake the new representation unless the former client consents after *consultation* (defined).

*[*Carlson v. Langdon*].

C. **G/R:** Attorney-Client Relationship: Payment may be an important consideration, but is not essential to the existence of the attorney-client relationship, especially for purposes of Rule 1.9.

1. Formality is not an essential element of employment of an attorney; although the attorney-client relationship ordinarily rests on contract, the contract need not be an express one. It may be implied from the conduct of the parties, such as the giving of advice or assistance, or such as failing to negate the relationship when the advice or assistance is sought if the attorney is aware of the reliance on the relationship.

2. The general rules of agency apply to the establishment of the relationship and whether the relationship exists depends on the facts and circumstances of each case.

a. The attorney-client relationship does not require the payment of fees or formal retainer but may be implied from the conduct of the parties.

*[*Carlson v. Langdon*].

D. **G/R:** Purpose of Rule 1.9: the purpose served by Rule 1.9 is the protection of confidentiality. In that context, an attorney-client relationship is of particular importance, but it is inappropriate in applying this Rule to place emphasis on the existence of a formal contractual relationship.

1. The contention that a formal contractual relationship is required assumes that the client will not disclose confidential information to an attorney, with whom he is consulting, until a formal contract ahs been prepared or until he agrees to a specified fee for the services.
2. The burden of proof to show that it was unreasonable for a client to believe that an attorney-client relationship existed and that the information disclosed will be kept in confidence and not sued against him later has to rest with an attorney.
3. The absence of evidence of payment for services does not permit the court to ignore the provisions of Rule 1.9.

*[*Carlson v. Langdon*].

E. **G/R:** Irrebutable Presumption: Rule 1.9, and the cases out of which evolved, do not require any showing of disclosure of confidential information. The correct interpretation is that the communication of confidential information is presumed once a showing is made that the matter in which an attorney formerly provided representation is substantially related to matters in the pending action.

1. The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented the former client.
2. The court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation, and the court will not inquire into their nature or extent.
    a. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.
3. The majority rule is that the presumption of disclosure is not rebuttable when the interest of the previous client are adverse to a client whom the attorney is now representing.
    a. The irrebuttable presumption with respect to the individual attorney offers greater assurance that confidential information will be protected and assists in avoiding any appearance of impropriety.
    b. It also protects the former client from disclosing the very confidential information he seeks to protect in order to establish justification for disqualification in the later proceeding.
    *[*Carlson v. Langdon*].

F. **G/R:** Substantially Related Matters: it is consistent with the application of an irrebuttable presumption to focus in the inquiry, pursuant to Rule 1.9, not on whether confidential information was disclosed, but instead on whether the matters are related in some substantial way.

1. The true purpose of the rule is to protect confidential information; for this reason, the rule as couched encompasses merely a requirement that the matters be related in some substantial way.
2. In determining the question of a substantial relationship, the court will determine whether in the factual context the matters involving the two clients are related in some substantial way; that is, if the two matters have common facts, the attorney is in a position to receive confidential information which possibly could be used to the detriment of a former client in the later proceeding.

*[*Carlson v. Langdon*].

III. Lawyer Switching Firms

A. **Generally:** when a lawyer switches firm the conflicts that may arise thereafter are governed by Rule 1.9(b).

1. A lawyer who joins a new firm brings potential conflicts to that firm, regardless of whether the lawyer brings new clients.
2. **Rule 1.9(a)**, the former client conflict of interest rules means that the new lawyer may be disqualified from representing a current client of the new firm.
3. **Rule 1.10**, the rule of imputed disqualification may disqualify the entire firm.
4. Therefore, a firm who hires a new lawyer must check all of his potential conflicts.
5. The standard used when deciding whether to disqualify a firm is more lenient than with former clients and is ultimately a functional analysis designed to preserve confidentiality and avoid positions adverse to a client.

B. **Rule 1.9(b):** there are three questions that must be asked when a lawyer switches firms to determine if there is an impermissible conflict of interest with a former client that may disqualify the lawyer or the entire firm:

1. Does the new firm represent a client in a matter which is *substantially related* to a matter in which the former firm represented a different client?
    a. "Matter" and "substantially related matter" are defined they are in Rule 1.9(a) analysis.
    b. If the answer is yes, go to question #2

2. Are the positions of the former firm's client and the new firm's client *materially adverse*?
    a. Rule 1.7(b) disinterested lawyer standard applies.
    b. If yes, then a third question must be answered (which was not available in Rule 1.9(a) analysis).

3. Did the lawyer switching firms acquire confidential information which is material to the matter?
    a. There is a presumption that the lawyer who switched firms has knowledge (actual knowledge) of all former clients at the former firm.
        i. This presumption is *rebuttable* by showing that the lawyer did not have any information about the former client at the firm (i.e. he did not work on the case, was not in the same office, usually has to be a large firm to demonstrate this).
    b. If the presumption is not rebutted, then the new firm cannot represent the client who has a conflict with the lawyer's former client because a second presumption arises that the lawyer will convey his knowledge about the former clients to the new firm, and this presumption is *irrebuttable*.
        i. Exception: *Motions to Disqualify:* some courts, on motions to disqualify, allow the new firm to show that screens or "Chinese walls" were set up around the lawyer and that he did not convey confidential information.
            (A) Screens really on work with large firms (40 or more lawyers) where they can demonstrate that the lawyer did not have *mutual access to confidential information*, if the firm is networked, however, this is very difficult to show) [**Rule 1.9 cmt. 6**].
            (B) Most courts put the burden on the firm that is not moving to disqualify (which is critical because the firm seeking to disqualify does not have the confidential information and cannot prove it was disclosed) and impose a clear and convincing standard.

C. **G/R:** Protocol for Switching Firms: the question when a lawyer switches firms, is who represents the client. The clients that the lawyer has dealt with directly may have the expectation that he is their lawyer, and not the firm, but both the firm and the lawyer have obligations.

1. Thus, the lawyer and his former firm must, in writing, send a letter to each client giving them three choices:
    a. to have former lawyer (the one that is moving) represent them, and move to the new firm;

b. continue being a client of the firm, notwithstanding the lawyer's move; or
c. the option to hire new counsel.

2. If the lawyer has entered an appearance for the client in court (then the firm has also) the lawyer and the firm must notify the court and either the firm or the lawyer (depending on the client's choice) must file a motion to withdraw clarifying who is still in the case.

D. **G/R:** Client's Files: the client's files are his property, hence, when the lawyer switches firms, a copy of the file will have to be made to be retained at the former firm. This *cannot* be charged to the client, it must be done at the lawyer's or firm's expense.

1. The key is to have a clearly defined POLICY on the procedures for handling the disposition of a client's property (i.e. files) when he moves.
2. The lawyer and firm must use engagement, non-engagement, and closing letters to avoid disputes if another firm files a motion to disqualify.
3. The burden will always be on the lawyer or firm to prove that existence or non-existence of an attorney client relationship, and with whom.

E. **G/R:** Support Staff Conflicts: when a support staff member (law students, paralegals, secretaries) switch firms, the ABA has allowed slightly more flexibility; however, the same standards should apply to support staff personnel as lawyers.

1. Thus, the courts and board will look at *access to information*.

IV. Successive Government or Private Employment

A. **Generally:** conflicts of interest arise when a lawyer moves from government employment to private practice, these situations are governed by Rule 1.11, which allows screening and is more lenient than the other conflict of interest Rules.

1. Again, the main issue is whether the attorney had *access to confidential information*.

B. **Rule 1.11:** Successive Government and Private Employment:

(a) Except as the law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, *unless* the appropriate government agency consents after consultation. NO lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter *unless*:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, *and*

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be sued to the material disadvantage of a person….

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall *not:*

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice…

(2) negotiate for private employment with any person who is involved as a party or as a lawyer for a part in matter in which the lawyer is participating personally and substantially…

******[subsections (d) and (e) define "matter" and "confidential government information" respectively].

B(1). Official Comment:

[1] This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is the counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.
[2] Where the successive clients are a public agency and a private client, the risk exists that the power or discretion vested in public authority might be used for the special benefits of a private client.

C. **G/R:** the Rules of Professional Conduct generally prohibit attorney's from representing clients whether there is a potential conflict of interest [Rules 1.7, 1.9, 1.10, 1.11, 1.12]. Nevertheless, the rules recognize that attorneys change employment and, consequently, include a number of safeguards to protect clients' interests under such circumstances.

1. When government employees (such as prosecutors and criminal defense attorneys) switch sides, screens are permissible and they are probably permissible when government employees move to private practice.
*[*Blumhagen v. State*].

§2.14: DUTY AS COUNSELOR

A. **Rule 2.1:** Advisor: in **representing a client**, a lawyer shall exercise **independent professional judgment** and **render candid advice**. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

A(1). Official Comment:

Scope of Advice
[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.
a. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advices in as acceptable form as honesty permits.
b. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
[2] It is proper for the lawyer to refer to relevant moral and ethical considerations in giving advice.
[4] Matters that go beyond strictly legal questions may also be in the domain of another profession, such as psychology or social work. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.
Offering Advice
[5] In general, a lawyer is not expected to give advice until asked by the client; however, when a lawyer knows the client proposes a course of action that is likely to result is substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation.

B. **Preamble ¶ 2:** As a representative of clients, a lawyer performs various functions. As advisor [counselor], a lawyer provides a client with an informed understanding of the client's legal rights and obligations and *explains their practical implications*.

C. **G/R:** Duty as Counselor/Advisor: there are three elements to Rule 2.1 which have a significant bearing on providing ethical advising under this Rule:

1. *In Representing a Client:* which means that there is the existence of the attorney-client relationship;
2. *Independent Professional Judgment:* for the lawyer to render independent professional judgment, it means that the lawyer will not have an conflicts of interest which could affect his ability to render the best advise to the client. The importance of this element is demonstrated by the fact that it is mentioned in two other Rules:
a. **Rule 5.4** (Profession Independence of the lawyer, prohibition on fee sharing.

b. **Rule 1.8(f)(2):** prohibition on accepting compensation from another if there is an impairment of the lawyer's independent professional judgment.

3. *Render Candid Advice:* candid advice is advice which is **honest:** whether it be good, bad, or indifferent.

D. **G/R:** Impaired Client: to render candid advice to an impaired client, the lawyer first has to go to **Rule 1.14** which mandates that the lawyer treat the client as a normal client, and seek protective action. If protective action is required, **comment 4** to Rule 2.1 says the lawyer can make a referral to another professional.

1. *Making Referrals:* the lawyer's duty in making referrals, is to know how to make one properly; thus, the lawyer must know who is available in the community, community service organizations, and the like.

a. The lawyer should provide the client with a list of choices (i.e. more than two psychologists or other professions or community services) and let the client choose.

i. If the lawyer only refers or recommends one individual, and it later turns out to be negative or have a negative impact on the client or harm her, then the lawyer may be liable.

E. **G/R:** Informed Consent: the lawyer has to give the client, when advising her, enough information so that she can make an informed decision pursuant to **Rule 1.4(b)**. This necessarily entails:

1. Informing the client of the non-legal consequences of her actions by referring to political, economic, or other consequences of the proposed action (it may be malpractice if the lawyer does not inform of the non-legal consequences); and

2. Take reasonable steps to satisfy the reasonable expectations of the client.

a. EX: in a divorce case, a lawyer may have a duty to ask a women who has no job and wants their 10-kids how she plans on supporting them when her husband is a doctor.

F. **G/R:** On-Going Relationship with Client: the lawyer ordinarily does not have a duty to give advice until asked for it by the client; however, if the lawyer has an on-going relationship with the client he may have a duty to inform the client of changes in the law which may affect the representation.

1. This duty arises frequently in business and estate planning.

G. **G/R:** Affirmative Duty to Counsel: a lawyer, under Rule 2.1, has an affirmative duty to be a counselor to his client and this duty and this affirmative duty is to represent the client in the most effective way, including mitigating damages before going to court.

1. The lawyer has an affirmative duty be a counselor to his client. [Rule 2.1]. (a) In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

*[*Friedman v. Comm'r of Public Safety*].

H. **G/R:** Right to Counsel: the purpose of the right to counsel is to protect the layperson who lacks "both the skill and knowledge" to defend herself.

1. The expansion of the right to counsel is necessary when new contexts appear presenting the same dangers that gave birth initially to the right itself.

2. ***TEST****:* the test for whether a defendant needed assistance of counsel is whether the accused required aid in coping with legal problems or assistance in meeting her adversary.

*[*Friedman v. Comm'r of Public Safety*].

§2.15: DUTY AS EVALUATOR

A. **Preamble ¶ 2:** As a representative of clients, a lawyer performs various functions….A lawyer acts as an evaluator by examining a client's legal affairs and reporting about them to the client or to others.

B. **Rule 2.3:** Evaluation for Use by Third Persons:

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client *if:*

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

B(1). Official Comment:

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at behest of a vendor for the information of prospective purchaser.

[2] Lawyer's for the government may called upon to give formal opinions on the legality of contemplated governmental agency action.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have an attorney-client relationship.

a. The question is whether the lawyer is retained by the person whose affairs are being examined.

b. When the lawyer is retained by that person, the general rule concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else.

c. For this reason it is essential to identify the person by whom the lawyer is retained.

d. This should be made clear not only to the person under examination, but also to others whom the results are to be made available.

Duty to Third Person

[4] When the evaluation is intended for the information or sue of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of the Rule.

a. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client.

Access to and Disclosure of Information

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based.

Financial Auditor's Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession.

C. **G/R:** the important concepts in the Rule are:

1. the lawyer may not undertake an evaluation for a person *other than the client*. By doing that the lawyer is changing his attorney client relationship with the client.
2. the undertaking must be *compatible* with the interests of the client;
3. except as disclosure is required, the information is confidential; and

4. the duty to third person is beyond the scope of the Rules and this is determined by the substantive law of the state, usually negligent misrepresentation.

GET NOTES FROM MEGAN.

§2.15: DUTY AS NEGOTIATOR

A. **Preamble ¶ 2:** As a representative of clients, a lawyer performs various functions….As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.

1. The lawyer's duty to third person is at the bottom of the hierarchy that the Model Rules establish for a lawyer; namely, the lawyer's obligations and priorities in decreasing order of importance are:
    1. duty to the court;
    2. duty to the client; and
    3. duty to third persons.

B. **Rule 4.1:** Truthfulness in Statements to Others: 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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless* disclosure is prohibited by Rule 1.6.

B(1). Official Comment:

Misrepresentation:
[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has *no affirmative duty to inform* an opposing party of relevant facts. Misrepresentation can occur by:
    a. Incorporating or affirming a statement of another person that the lawyer knows to be false; or
    b. by failure to act.

Statement of Fact:
[2] Whether a statement is a fact will depend on the circumstances. Certain statements in negotiation are **exempt** from and should *not* be taken as material facts; those statements are:
    a. estimates of price or value placed on the subject of a transaction; and
    b. a party's intentions as to an acceptable settlement of a claim are in this category; and
    c. the existence of an undisclosed principle except where nondisclosure of the principle would constitute a fraud.

Fraud by Client
[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information certain information to avoid being deemed to have assisted the client's crime or fraud.

C. **G/R:** Active Misrepresentations: Rule 4.1(a) prohibits the lawyer from making active misrepresentations of ***fact or law*** to third persons.

1. A third person usually is other lawyers, real estate purchasers/sellers/brokers, and witness. This Rule does not deal with misrepresentations on a tribunal, which is covered by Rule 3.3].
2. When negotiating over the price of something, the lawyer does not have to disclose the client's intentions as to price or his intentions, these are exempt from the definition of material for practical purposes.

D. **G/R:** Passive Misrepresentations: Rule 4.1(b) prohibits the lawyer from making passive misrepresentations of ***fact*** to a third party when necessary.

1. Distinguish this from subsection (a), because a lawyer can passively take advantage of a third person's ignorance of the law.
2. In addition, the lawyer cannot omit a fact that would tend to assist the client in a criminal or fraudulent act, this is, in effect a restatement of **Rule 1.2(d)**, *unless the information is protected by Rule 1.6* [which means everything].

E. **Rule 4.2:** Communication with Person Represented by Counsel: 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 to do so. [*See supra* p. 54 for official comment].

1. This Rule is designed to protect lawyer's and clients in negotiation, among other things.
2. The Rule prohibits lawyers from negotiation with a person the lawyer knows to be represented by another lawyer.
2. If the contacted by another lawyer's client, the contacted lawyer should immediately tell the person that he cannot discuss the case with them, that they should contact their own lawyer, and then call and send a letter to the opposing counsel notifying him that he was contacted by their client and the course of action taken.
3. In some instances, in criminal investigations, prosecutors can through investigative agents, contact a client represented by another lawyer, but this is very controversial [**cmt. 2**].
4. If the other client is the government, the lawyer cannot directly contact the government without first taking some preliminary steps (notwithstanding the First Amendment Right to redress and petition the government), namely:
    1. written notice must be given in advance for ex parte contacts; and
    2. the communication is:
        a. not covered by the attorney-client privilege;
        b. with a governmental official who has authority to make decisions; and
        c. to change a governmental policy and not merely to gather information.

5. If the client is an organization, then the prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization purposes of civil or criminal liability or whose statement may constitute an admission on the party of the organization.

F. **Rule 4.3:** Dealing with Unrepresented Person: in dealing on behalf of a client with a person who is *not represented by counsel*, a lawyer **shall not** state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person *misunderstands* [objective standard] the lawyer's role in the matter, the lawyer **shall** make reasonable efforts to correct the misunderstanding.

F(1). Official Comment:

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.

a. During the course of a lawyer's representation of a client, the lawyer *should not* give advice to an unrepresented person, **other than the advice to obtain counsel**.

F(2). **G/R:** Dealing with Pro Se Adversaries: in dealing with a pro se adversary, in any matter (the lawsuit, selling a house, divorce, etc…), the lawyer five main duties to ensure that the client knows that his duty of loyalty is to the represented the client and not the pro se adversary:

1. When first communicating with any adversary on a matter, the first question a lawyer should ask is whether the person is represented, if so, **Rule 4.2** applies and the lawyer should immediately tell them that he cannot speak with them and for them to call their own attorney.
2. If the person informs the lawyer that he is defending (or bringing the claim, which is unlikely) pro se, the lawyer should immediately tell him that his legal rights may be affected (without describing how because that would be giving legal advice) and that they should **get an attorney** [cmt. 1].
3. In continued communication with a pro se defendant/plaintiff, tell them to hire an attorney.
4. In so communicating the person, the lawyer must take reasonable steps to make sure the pro se defendant understands the lawyer's role; namely, that his duty of loyalty attaches to his client and that he is working *solely* for that person because a lot of pro se defendants believe that the lawyer is their to help them also. The lawyer must make clear that the pro se defendant knows that he is representing the *opposing party*.
    a. EX: in a domestic relations case, the lawyer has a duty when he writes the pro se defendant to include a stipulation saying that he is not their lawyer, that this letter will affect their legal rights, and that he recommends they get a lawyer before signing any document, but if the wish they may sign.
5. The lawyer should **never** encourage a pro se defendant to call him because it could create the existence of an attorney client relationship, which would bring about a directly adverse conflict of interest under **Rule 1.7(a)**, which would require the lawyer to withdraw, and could lead to a malpractice action.
    a. EX: a lawyer tells a pro se defendant to sign a consent decree for adoption which was mailed to him, then the pro se defendant calls the lawyer and he tells the pro se defendant about the letter and that he should sign it because it is in the best interest of the child. This probably creates an attorney client relationship and is giving legal advice; hence, it could lead to a malpractice suit later on.

G. **Rule 4.4:** Respect for the Rights of Third Persons: in representing a client, a lawyer **shall not** use means that have no **substantial purpose** other than to *embarrass, delay, or burden a third person*, or use methods of *obtaining evidence* that **violate** the legal right of such a person.

G(1). Official Comment:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does *not* imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

G(2). **G/R:** Respect for Third Persons: a lawyer cannot use means that have no substantial (a matter of clear and weighty importance) purpose other than to embarrass, delay, burden, or violate the person's rights in obtaining evidence. This just means that the lawyer, in effect, must act as a reasonably lawyer and only comes into play in limited situations:

1. Where the lawyer is using threats of civil prosecution to gain an advantage in a criminal matter.
    a. This raises possible conflict of interest issues, because a prosecutor has complete discretion to file a charge or not, and hence, if the lawyer is trying to gain an advantage for his client by threatening to sue the government if it files charges under against his client, it will raise conflict of interest problems under **Rule 1.7(b)** for the prosecutor because his interests may be materially affected by extraneous policy considerations, such as whether the government wants to defend a civil case.
        i. This is probably a waivable conflict, and remember under 1.7(b) the standard is that of a disinterested lawyer.

ii. EX: a lawyer's client was arrested for DUI, then the cop uses excessive force. The lawyer then tells the prosecutor that he will not file civil charges for excessive force if the prosecutor drops the DUI charge.

G(3). **G/R:** Use of Threats of Prosecution in Connection with a Civil Matter: the model rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a private civil matter to gain relief for a client, *provided that:*

1. **Factual Nexus:** the criminal matter is related to the client's civil claim;
2. **Good Faith Basis:** the lawyer has a well founded belief that both the civil claim and the criminal charges are warranted by the law and facts; and
3. **No Improper Influence:** the lawyer does not attempt to exert or suggest improper influence over the criminal process [**Rule 8.4(e)**].
4. If these elements are met, and the lawyer complies with all other Rules of Professional Conduct, the threat of prosecution is not unethical. The other Rules which come into play in determining if the lawyer acted permissibly are:

a. **Rule 8.4(b):** it is professional misconduct for the lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

i. If the lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction it is a violation of Rule 8.4(b).

b. **Rule 8.4(d)** and **(e):** it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice and to state or imply an ability to improperly influence a governmental official or agency.

c. **Rule 4.4:** prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person (if the lawyer uses the threat of criminal prosecution merely to harass it is a violation of Rule 4.4).

d. **Rule 4.1:** imposes a duty on the lawyer to be truthful when dealing with others on behalf of the client. A lawyer who threatens criminal prosecution, without any actual intent to proceed violates Rule 4.1.

e. **Rule 3.3:** prohibits an advocate from asserting frivolous claims. A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1.

*[*ABA Formal Op.* 92-363].

G(4). **W.R.P.C. 4.4(b):** Respects for Rights of Third Persons:

(b) A lawyer shall not present, participate in presenting, or threaten to present criminal charges ***solely*** to obtain an advantage in a civil matter.

--Prohibits all of the conduct that the model rules (above) have sanctioned, however, Wyoming Rule 4.4 is just like the old Model Rule which the drafters deleted because it was redundant, hence the lawyer already could not threaten criminal chargers for the sole purpose of gaining advantage in a civil matter.

--The key phrase is "solely" which means that the lawyer only needs to find one more justification for the threat of criminal prosecution (i.e. to seek retribution for the wrong committed against his client) and then it not unethical.

§2.17: DUTY AS MEDIATOR

A. **Rule 2.2:** Intermediary:

(a) A lawyer may act as an intermediary between clients if:

--*Between Clients:* first the lawyer has to have to have joint clients, which means that there must be consent and waiver of conflicts of interest;

--*Reasonably believes*

--Consultation is for Common Representation;
--Clients interests are compatible;
--impartiality
--consult
--withdraw

*Those are the key terms, however, this Rule will probably never apply because it is not what is typically done today, because **comment 2** states that "The Rule does not apply to a lawyer acting as an arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with concurrence of the parties."
The inherent conflict of two parties with conflicting interests makes being represented by the same lawyer makes this Rule very uncommon and it has never been applied; hence, the most important thing to know is that it **does not apply to mediation, whether the lawyer is the mediator or in mediation when the lawyer is representing a client.

§2.18: DUTY AS ADVOCATE—ETHICS IN ADVOCACY

I. Obligations to the Court in Advocacy

A. **Rule 3.3:** Candor Toward the Tribunal:

(a) A lawyer shall not *knowingly*:

(1) make a false statement of *material fact or law* to a tribunal;

(2) fail to disclose a material fact to a tribunal when necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be *directly adverse to the position of the client* and *not* disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the **conclusion of the proceeding**, and apply EVEN IF compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) The lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

A(1). Official Comment:

[1] The lawyer's duty to present the client's case with persuasive force while maintaining the confidences of the client **is qualified by the advocate's duty of candor to the tribunal.** The court is still responsible for assessing the probative value of evidence submitted in a case.

Representations by a Lawyer

[2] There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

a. The lawyer's obligation not to assist the client in a criminal or fraudulent act continues in litigation [**Rule 1.2(d), Rule 8.4(b)**]

Misleading Legal Argument

[3] Legal argument based on a knowingly false representation of law constitutes dishonest toward the tribunal.

a. In addition, the lawyer has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party.

i. The underlying concept is that legal argument a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

[4] When evidence that the lawyer **knows** to be false is provided by a person who is not the client, the lawyer **must refuse** to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between a lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if has been offered, that its false character should immediately be disclosed.

a. If the persuasion is ineffective, the lawyer **must take reasonable remedial measures.**

[6] *Except in the defense of a criminal accused*, the rule generally recognized is that, if necessary to rectify the situation, an advocate **must** disclose the existence of the client's deception to the court or to the other party. This could result in grave consequences for the client, however, the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement [**Rule 1.2(d)**].

Perjury by a Criminal Defendant

[7]-[10] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated.

a. When the lawyer learns of the intent to perjurer before trial, the lawyer can ordinarly withdraw; however, if trial is immenent or began, then the lawyer has a duty to:

i. reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assitance of an advocate, a right to testify and a right of confidential communication with counsel.

ii. However, an accused does nto have a right to assistance of counsel in committing perjury.

iv. Furthermore, an advocate has an obligation, legal and ethical, to avoid implication in the commission of perjury or other falsification of evidence **[Rule 1.2(d)].**

Remedial Measures

[11] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate (protest) with the client confidentially.

a. If that fails the lawyer should seek immediate withdrawal if that will remedy the situation.

b. If withdrawal is not available the lawyer should make a disclosure to the court.

c. It is then for the court to determine what should be done.

Constitutional Requirements

[12] The **general rule**—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances.

a. *Caveat:* However the definition of the lawyer's ethical duty in such situation may be quailed by constitutional provisions for process and the right to counsel in criminal cases.

b. The obligation of an advocate under these Rules is subordinate to a constitutional requirement (such as some jurisdictions hold that the right to effective assistance of counsel requires the lawyer to permit the client to testify even if he knows he is going to commit perjury).

Duration of Obligation

[13] The conclusion of the proceeding is a reasonable definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

[14] Generally, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and the impair the lawyer's effectiveness as advocate.

Ex Parte Proceedings

[15] The object of an ex parte proceeding (such as application for a temporary restraining order) is to yield a substantially just result; hence, the lawyer has a duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary for the judge to make an informed decision (the judge has a duty to accord the absent party just consideration).

A(2). **G/R:** Important Considerations for Rule 3.3: there are several important parts of Rule 3.3:

1. The lawyer shall not knowingly (actual knowledge) make a false statement of fact or law to a tribunal.
    a. *Tribunal:* is any hearing, such as, courts, ALJs proceedings, PR Board hearings, etc…).
        i. A fact is material based on the facts and circumstances of the case [**Rule 4.1, cmt. 2**].
    b. The lawyer shall not make a false statement of material fact or law to the tribunal means that the **duty of confidentiality does not apply** in proceeding in a tribunal.
2. *Duty to Disclose Adverse Controlling Authority:* the obligation on the lawyer to disclose controlling authority adverse to the client to the tribunal should really be termed the duty to disclose *and distinguish*.
    a. Since the lawyer has a duty not to bring a frivolous action, **Rule 3.1**, and the case has already made it to trial the lawyer should be aware of any directly adverse authority and have an argument, memo, or brief distinguishing that authority and a counter-argument to the statute or case.
    b. This issue will come up the most when proceeding against a pro se defendant pursuant to **Rule 4.3.**
3. *Duty to Refrain from Offering Evidence Known to be False:* the issue that often arises under this duty is whether the lawyer has a duty to **investigate** his client's assertions, in other words, if he reasonably believes the assertion to be false, should he go out and figure it out.
    1. **Fed. R. Civ. Pro. 11(b)(3):** states that a lawyer can be sanctioned if the allegations and factual contentions in the pleadings to do not have evidentiary support after reasonably opportunity for *further investigation or discovery*.
    2. Thus, the lawyer should do a reasonable investigation into the facts and law and then:
        a. If the lawyer knows (actual knowledge)the evidence to false he *cannot* offer it under **Rule 3.3(a)(4)**; and
        b. If the lawyer reasonably believes (objective/subjective standard) it to be false, he *may* refuse to offer it, in other words, the lawyer should not offer it if he believes it to be false.
4. *Duration of the Obligation:* the obligation to the court continues to the end of the proceeding. The question then is when does the proceeding end?
    a. There are two arguments:
        i. The proceeding the ends when the "record" is submitted and that record can no longer be affected (after judgment is entered); or
        ii. After the final appeal, the complete end of the trial, this is the better reasoned view.
5. *Taking Reasonable Remedial Action*: after the client has disclosed that he is going to perjury himself the lawyer has a duty to:
    a. talk to the client and protest against committing perjury and inform him of the adverse legal consequences;

b. before the disclose of the information to the court the client must have enough information on how he wishes to proceed [**Rule 1.4(b)**], and

c. If he persists with the course of action, he has a duty to disclose to the tribunal.

B. **Rule 3.4:** Fairness to Opposing Counsel: a lawyer SHALL NOT:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal **a document** or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence,…

(c) knowingly disobey an obligation under the Rules of the tribunal….

(d) in pretrial procedure, make a frivolous discovery request or fail…to comply with a legally proper discovery request…

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,…

(f) request a person *other than a client* to refrain from voluntary giving relevant information to another party *unless*:

(1) the person is a relative or employee or agent of a client;

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

B(1). Official Comment:

[1] Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like.

[2] Documents and other evidence are often essential to the establishment of a claim or defense, hence, a party's rights (to discovery and fair trial) can be frustrated if the relevant material is altered, concealed or destroyed.

a. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

b. Falsifying evidence is generally a criminal offense.

[3] The common rule in most jurisdictions is that is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert on a contingent fee.

B(2). **G/R:** Document Discovery: the critical parts of the Rule 3.4(a) is:

1. *Document Discovery:* the lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal any document.

a. The critical distinction when representing a client who wants to destroy documents is when the client's conduct occurs.

i. The first thing, even before a client asks if he may destroy a document, particularly if the client is an organization, is to implement a document destruction plan or policy, in writing, stating the policy of when and what documents are destroyed.

ii. If the client, without having a document destruction policy, calls and asks if he can destroy a document, is to determine when the conduct is to occur.

a. If it is not during or leading up to, or in anticipation of litigation then the lawyer should advise the client that he will formulate a document destruction policy, and then, unless otherwise required by law, the document can be destroyed.

iii. The third question, is whether it is lawful to destroy the document. There are lots of statutes which apply to record keeping, such as, it is unlawful to destroy medical reports, oil and gas interests, etc…

a. If it lawful to destroy the document, the lawyer can so advise the client;

b. If it is unlawful to destroy the document the lawyer must advise the client.

iv. If the lawsuit has begun, then the rules change because if the other party gets to speculate, it will be worse than if the lawyer did not destroy them, in addition, there are federal laws which state that if evidence is destroyed which has been subpoenaed, it is a violation of the law.

v. Summary: destruction of documents:

a. If no lawsuit: can destroy and should implement policy;

b. Threat of lawsuit: gray area, but if destroy documents, it will probably be admitted at trial.

c. Lawsuit Pending and after Discovery: usually cannot destroy the documents.

*The key is to have a schedule, if there is not a document destruction schedule or policy it will look very bad if a document is destroyed in anticipation of litigation, maybe even worse then not destroying the document.

**This analysis applies the same to expert witness's and the their production of documents.

b. The **ABA Standards for Litigation Conduct** [lawyer's duty to other counsel #19-24] also describe conduct for depositions.

C. **Rule 3.5:** Impartiality and Decorum by the Tribunal: a lawyer SHALL NOT:

(a) seek to **influence** a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate *ex parte* which such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

C(1). Official Comment:

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants.

D. **Rule 3.7:** Lawyer as Witness:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness *except where*:

(1) the testimony relates to an *uncontested issue*;

(2) the testimony relates to *the nature* and *value* of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial which another lawyer in the lawyer's firm is likely to be called as a witness *unless* precluded from doing so by **Rule 1.7** or **Rule 1.9**.

D(1). Official Comment:

[1] Combining roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 and Rule 1.9. If there is an impermissible conflict, Rule 1.10 disqualifies the firm as well.

E. **W.S. §6-5-305:** Influencing, Intimidating or Impeding Jurors, Witnesses and Officers; obstructing or impeding justice; penalties:

(a) A person commits a felony punishable by imprisonment…fine…or both, if by force or threats, he attempts to influence, intimidate, or impede a juror, witness or officer in the discharge of his duty.
(b) A persons commits a misdemeanor punishable by imprisonment…fine…or both, if by threats or force, he obstructs or impedes the administration of justice in court.

F. **Local Rules of the US Dist. Court for Dist. of Wyo.:** Local Civil Rule 83.12.1:

(a) Standards of Litigation Conduct: the following standards of practice shall be observed by all attorneys appearing in civil and criminal actions in this District: Attorney's **shall**

(1) exercise candor, diligence, and utmost respect to the judiciary, litigants and other attorneys;
(2) extend opposing counsel cooperation and courteous behavior at all times;
(3) demonstrate personal dignity and professional integrity at all times;
(7) not use any form of discovery, or scheduling of discovery, as a means of harassing opposing counsel or counsel's client;
(10) not engage in obnoxious or antagonistic behavior;
(11) adhere to higher standing of conduct which…the public expects;
(12) an attorney should be patient, dignified and courteous in all court proceedings (cursing, sarcastic commentary, use of attorney's voice in loud, angry or hostile manner all violate this rule).

§2.19: SPECIAL DUTIES AS CRIMINAL DEFENSE LAWYER OR PROSECUTOR

I. Ethical Obligations

A. **Rule 3.1:** Meritorious Claims and Contentions: A lawyer shall ***not*** **bring or defend** a proceeding, or **assert or controvert** an issue therein, unless there is a basis for doing so that is **not frivolous**, which includes a **good faith** argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

A(1). Official Comment:

[1] The advocate has a duty to use legal procedure for the fullest benefits of the client's cause, but also a duty not to abuse legal procedure. In determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the fact have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.

a. Such action is not frivolous even though the lawyer believes the client will ultimately not prevail.
b. **G/R:** The action **is frivolous**, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a good faith argument on the merits of the action taken to support the action by a good faith argument for an extension, modification, or reversal of existing law.

A(3). **G/R:** Three Standards of Conduct under Rule 3.1: there are three standards of conduct under Rule 3.1 for different lawyers:

1. *Prosecutors:* have to have probable cause to bring an action;
2. *Civil Case Lawyers:* have to have a good faith basis to bring, or defend, an non-frivolous action; and
3. *Criminal Defense Lawyers:* can just defend and let prosecutor try and prove guilt beyond a reasonable doubt.

*Remember: the substantive law underlying the claim shifts the standard for ethical behavior; thus, the standards are different for criminal lawyers and civil lawyers. Within the criminal field, there are different standards for criminal defense attorneys and prosecutors because of the nature of the adversarial system and the different duties it places on the prosecution, in order to afford protections to the criminal accused.

B. **FRCP 11:** Representations to Court; Sanctions: [this Rule of Civil Procedure modifies a civil lawyer's duties under Rule 3.1]:

(a) *Signature:* Every pleading, written motion, and other paper *shall be* ***signed*** by at least one attorney for record…the pleadings need *not* be verified or accompanied by an affidavit.

(b) *Representations to the Court:* by presenting to the court (…by signing…) a pleading, written motion or other paper an attorney…is **certifying** that to the best of the person's knowledge, information, and belief, formed after an **inquiry reasonably under the circumstances**,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a **nonfrivolous** argument for extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other *factual contentions* have evidentiary support or, if specifically so identified, are likely to have **evidentiary support** after reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted….

*****This rule imposes a much higher standard on lawyers than Rule 3.1 and REQUIRES the lawyer to reasonably investigate the factual allegations of a complaint before it is filed.

(c) *Sanctions:* [the sanctions provide a 21-day safe harbor, wherein the charging party serves the motion on opposing counsel (the one alleged to have violated the Rule) then the party has 21-days to correct or withdraw the complaint. After the 21-days, the charging party then files a motion with the court for sanctions. The Court can also sanction a party on its own initiative. If the court determines sanctions are appropriate, the sanctions imposed shall be **limited to what is sufficient to deter repetition such conduct**.

C. **Rule 3.8:** Special Responsibilities as Prosecutor: [the criminal prosecutor has the highest ethical duty of all lawyers]. The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge he knows is not supported by **probable cause**;

(b) make reasonable efforts to assure **the accused has been advised of the right to, and the procedure for obtaining, counsel** and has been give reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as a right to a preliminary hearing;

(d) make timely **disclosure to defense of all evidence** known to the prosecutor that tends to negate the guilt of the accused [*see also* Fed. R. Civ. P. 26; Fed. R. Crim. P. 26] that tends to negate the guilt of the accused or mitigates the offense, and, in sentencing disclose to the defense and the to the tribunal all unprivileged mitigating information known to the prosecutor, ….;

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisted or associated with the prosecutor in a criminal case from making extra-judicial statements that the prosecutor would be *prohibited* from making **under Rule 3.6** [Trial Publicity];

(f) not subpoena a lawyer in a grand jury or other criminal proceeding….

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, **refrain** from making extra-judicial comments that a substantial likely hood of heightening public condemnation of the accused.

C(1). Official Comment:

[1] A prosecutor has the responsibility as a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far a prosecutor is required to go in this directions is a matter of debate and varies in different jurisdictions [*see* ABA standards of criminal justice Relating to prosecutor's function—below].

[2] Paragraph (c) does not apply to an accused appearing *pro se* with the approval of a tribunal; nor does it forbid the lawful questions of a suspect who has knowingly waived the rights to counsel and silence.

[5] Paragraph (g) supplements **Rule 3.6**, which prohibits extra-judicial statements that have a substantial likelihood of prejudicing an adjudicator proceeding. In the context of a criminal prosecution, a prosecutor's extra-judicial statement can create the additional problem of increasing public condemnation of the accused. Nothing in this comment is intended to restrict statements which a prosecutor may make which comply with **Rule 3.6(b)-(c)**.

D. **ABA Standards for Criminal Justice:** Prosecution Function Standards:

1. **Stnd. 3-1.2:** Function of the Prosecutor:

   (c) The duty of the prosecutor is to seek justice, not merely to convict.

2. **Stnd. 3-2.8:** Relations with the Court and Bar:

   (a) A prosecutor should not intentionally misrepresent matters of fact or law to the court.

   (e) …a prosecutor should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case or investigation to the prosecutor, the prosecutor will not offer the fact of such deliver by the defense counsel as evidence before the jury for purposes of establishing defense counsel's client's culpability.

3. **Stnd. 3-3.1:** Investigative Functions of the Prosecutor:

   (c) A prosecutor should not knowingly use illegal means to obtain evidence or employ or instruct or encourage others to use such means.

4. **Stnd. 3-3.2:** Relations with Victims and Prospective Witnesses:

   (b) A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires.

5. **Stnd. 3-3.9:** Charging Discretion:

   (a) A prosecutor should not institute …or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by **probable cause.** [*See* **Rule 3.8(a)**].

   (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

      (i) the prosecutor's reasonable doubt that the accused is in fact guilty;

      (ii) the extent of harm caused by the offense;

      (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

      (iv) possible improper motives of a complaint;

      (v) reluctance of the victim to testify;

      (vi) cooperation of the accused in the apprehension or conviction of others; and

      (vii) availability and likelihood of prosecution by another jurisdiction.

   (d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or a desire to enhance his record of convictions.

(f) The prosecutor should *not bring* or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.

E. **ABA Standards for Criminal Justice:** Defense Functions Standards:

1. **Stnd. 4-1.2:** Function of the Defense Counsel:

(b) The basic duty of defense counsel…is to serve as the accused's counselor and advocate with courage and devotion and to render, effective quality representation.

(c) …defense counsel in a capital case should respond …by making *extraordinary efforts* on behalf of the accused.

(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

2. **Stnd. 4-4.6:** Physical Evidence:

(a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct *should disclose the location of or should deliver that item to law enforcement authorities* **ONLY:** (1) if required by law or court order; or (2) as provided in paragraph (b).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) or (d). In returning the item to the source, defense counsel **should advise the source** of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his file, but *should not* give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel:

(1) intends to return it to the owner;

(2) reasonably fears that return of the item to the source will result in destruction of the item;

(3) reasonably fears that return of the item to the source will result in physical harm to anyone;

(4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or

(5) cannot return it to the source.

(d) If the item is contraband, i.e., an item possession of which is in and of itself a crime, such as narcotics, defense counsel may suggest that the client destroy it where there is not pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If destruction is not permitted by law…defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

3. **Stnd. 4-5.1:** Advising the Accused:

(a) After informing himself fully on the facts and law, defense counsel should advise the accused with **complete candor** [*see* **Rule 2.1**] concerning all aspects of the case, including candid estimate of probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or appearance of any other improper activity.

II. Constitutional Considerations

A. **G/R:** Right to Counsel and Fair Trial: the 6th Amendment right to counsel is needed in order to protect the fundamental right to a fair trail. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the 6th Amendment, including

the counsel clause: "In a criminal prosecutions, the accused shall enjoy the right…to have assistance of counsel for his defense."

1. Thus, a fair trial is one in which evidence subject to the adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.
    a. The right to counsel plays a crucial role in the adversarial system embodied in the 6th Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.

*[*Strickland v. Washington*].

B. **G/R:** Assistance of Counsel: a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained.

1. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.
2. The 6th Amend recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. A
3. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure the trial is fair.
4. **Presumption:** actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

*[*Strickland v. Washington*].

C. **G/R:** Effective Assistance of Counsel: the right to counsel is the right to effective assistance of counsel.

1. The government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.
2. Counsel, however, can also deprive the right of effective assistance, simply by failing to render *adequate legal assistance*.
3. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
    a. The same principle applies to a capital sentencing proceeding.

*[*Strickland v. Washington*].

D. **G/R:** Test for Ineffective Assistance of Counsel: a convicted defendant's claim that counsel's assistance was ineffective and so deficient to require a reversal requires the defendant to demonstrate two things:

1. The defendant must show that counsel's performance was **deficient**;
    a. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the 6th Amendment.
2. The defendant must show that the deficient performance **prejudiced the defense**.
    a. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results where unreliable.
        i. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.
        ii. *Test for Prejudice:* the defendant must show that there is a reasonable probability (a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

*Unless the defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the results unreliable.

**[*Strickland v. Washington*].

E. **G/R:** Standard for Attorney Performance: the proper standard for attorney performance is that of **reasonably effective assistance** and the advice was not in the range of competence demanded of attorneys in criminal cases.

1. The defendant must show that counsel's representation fell **below an objective standard of reasonableness.**
2. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.
    a. Prevailing norms of practice as reflected in the ABA standards are guides for determining what is reasonable—but they are only guides.
3. Representation of a criminal defendant entails certain basic duties; counsel's function is to assist the defendant and hence counsel owes the client:
    a. a duty of loyalty;
    b. a duty to avoid conflicts of interest;
        i. **Presumption:** prejudice is presumed when counsel is burdened by an actual conflict of interest.
    c. a duty to consult with the defendant on important decisions and to keep defendant informed of important developments in the course of prosecution;
    d. a duty to bring to bear such skill and knowledge as will render a reliable adversarial testing process.

*[*Strickland v. Washington*].

F. **G/R:** Judicial Review of Counsel's Performance: judicial scrutiny of counsel's performance must be *highly deferential*. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time.

1. **Presumption:** there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.
    a. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered might be considered sound trial strategy.
        i. Thus, a convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.
        ii. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professional competent assistance.

*[*Strickland v. Washington*].

§2.20: TRIAL PUBLICITY

A. **Rule 3.6:** Trial Publicity:

(a) A lawyer who **is participating or has participated** in the investigation of litigation of a matter shall not make an extra-judicial that a reasonable person would expect to be **disseminated** by means of public communication if the lawyer knows or reasonably should know that it will have a **substantial likelihood** of *materially prejudicing* an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer **may state:** [the following are safe harbor privileges which the lawyer can always state]:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved when there is a reason to believe that there exists the likelihood of substantial harm to an individual or public interest; and
(7) in a criminal case, in addition to paragraph (1)-(6):
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time, and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer **may make a statement** that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of a recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to *mitigate recent adverse publicity*.

--This is, in effect, the **rebuttal statement** rule which the Supreme Court sanctioned in *White v. General Motors Corp.*

A(1). Official Comment:

[3] The Rule sets forth the basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

a. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary power of a lawyer who is not involved in the proceeding is small, the rule **applies only to lawyers who are, or who have been involved in the investigation or litigation of the a case, and their associates**.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition in (a).
[6] A relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extra-judicial statements and civil trials may be less sensitive. Non-jury trials, hearings, and arbitrations may be even less affected.
[7] *Rebuttal:* extra-judicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client.

B. **G/R:** Lawyer's Duties: an attorney's duties do not begin inside the courtroom door; he cannot ignore the practical implications of a legal proceeding for the client. An attorney may take reasonable steps to defend the client's reputation and reduce adverse consequences [*Gentile v. State Bar of Nevada*].

C. **G/R:** Factors in Determining the Prejudice of a Pretrial Statement: there are two main factors in determining the prejudicial effect of an out of court statement:

1. The timing of the statement is a *crucial factor* in the assessment of possible prejudice and the Rule's application; and

a. For example a statement made the trial of is more prejudicial than a statement made 6-months from trial.

2. the extent to which the information has already been disseminated to the public is also a significant factor in determining prejudice.
3. **Material Prejudice Test:** whether the statement and accompanying publicity will cause the jurors or prospective jurors to form an opinion, one way or the other, about guilt.

*[*Gentile v. State Bar of Nevada*].

D. **WRPC 3.6:** Trial Publicity: there are two main differences (and the rest of the Rule is also different, but the main ones are) between the ABA Rule 3.6 and WRPC 3.6 is that:

1. Wyoming's Rule states that "A lawyer **shall not make an extra-judicial statement…**"
    a. This identical to the Nevada's Rule 3.6 which was held unconstitutional for void for vagueness in *Gentile*.
    b. Wyoming's Rule, is likewise, vague and overbroad. It applies to any statement a lawyer makes and not only to one in which he "is participating in or has participated in" as the ABA rule provides for.
        i. This is vague because, in effect, any lawyer cannot make any statement, concerning any case. Hence, if your dumbass ends up as a Court TV reporter in Buford, Wyoming, covering the trial of a crazed tow-truck driver, and you commented on it, you would be in violation of the Rules.
    c. Hence, a good argument exists that WRCP 3.6 is unconstitutional.
2. The other substantial difference is that Wyoming Rule 3.6 does not have the rebuttal provision found in ABA Rule 3.6(c), which allows some statements which may be questionable under the Rule to be made in rebuttal to other publicity.

§3: DUTIES TO THE COURT

§3.1: DUTY AS ADVOCATE—MERITORIOUS CLAIMS

A. **Rule 3.1:** Meritorious Claims and Contentions: A lawyer shall ***not*** **bring or defend** a proceeding, or **assert or controvert** an issue therein, unless there is a basis for doing so that is **not frivolous**, which includes a **good faith** argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

A(1). Official Comment:

[1] The advocate has a duty to use legal procedure for the fullest benefits of the client's cause, but also a duty not to abuse legal procedure. In determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the fact have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.

a. Such action is not frivolous even though the lawyer believes the client will ultimately not prevail.

b. **G/R:** The action **is frivolous**, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, if the lawyer is unable either to make a good faith argument on the merits of the action taken to support the action by a good faith argument for an extension, modification, or reversal of existing law.

****FRCP 11** also imposes a duty to investigate factual contentions and allegations before the action is brought (*see above*).

B. **Rule 3.2:** Expediting Litigation: A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

B(1). Official Comment:

[1] Delay should not be indulged merely for the convenience of advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar.

a. **TEST:** the question is whether a competent lawyer [*See* Rule 1.1] acting in good faith would regard the course of action as having some substantial purpose other than delay.

b. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

C. **Rule 3.4:** Fairness to Opposing Counsel: a lawyer SHALL NOT:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal **a document** or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence,…

(c) knowingly disobey an obligation under the Rules of the tribunal….

(d) in pretrial procedure, make a frivolous discovery request or fail…to comply with a legally proper discovery request…

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,…

(f) request a person *other than a client* to refrain from voluntary giving relevant information to another party *unless*:

(1) the person is a relative or employee or agent of a client;

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

B(1). Official Comment:

[1] Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure and the like.

[2] Documents and other evidence are often essential to the establishment of a claim or defense, hence, a party's rights (to discovery and fair trial) can be frustrated if the relevant material is altered, concealed or destroyed.

a. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

b. Falsifying evidence is generally a criminal offense.

[3] The common rule in most jurisdictions is that is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert on a contingent fee.

D. **Rule 3.9:** Advocate in Non-Adjudicative Proceedings: a lawyer representing a client before a legislative or administrative tribunal in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of **Rule 3.3(a)-(c)**, and **Rule 3.5**.

D(1). Official Comment:

[1] A lawyer appearing before a body, such as, legislatures, municipal councils, and executive and administrative agencies, should deal with the tribunal honestly and in conformity with applicable rules of procedure.

E. **G/R:** Sanctions for Bringing Non-Meritorious Claims: if a person has a motion for sanction filed against under FRCP 11, the court will impose sanctions if it finds:

1. **TEST:** an attorney's actions must be **objectively reasonable** in order to avoid Rule 11 sanctions.

a. A **good faith** belief in the merit or an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances.
b. It is NOT sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actual present a colorable claim.

2. The standard then, is ONE OF REASONABLENESS UNDER THE CIRCUMSTANCES.

*[*White v. General Motors Corp.*].

F. **G/R:** Duty to Investigate: failing to investigate the facts of a claim before filing a complaint is sanctionable under Rule 11[*White v. General Motors Corp.*].

G. **G/R:** Purposes of Rule 11: Rule 11 sanctions are meant to serve several purposes, including:

1. Deterring future litigation abuse;
2. punishing present litigation abuse;
3. compensating victims of litigation abuse; and
4. streamlining dockets and facilitating case management.

**Deterrence, however, is the primary goal of the Rule.

*[*White v. General Motors Corp.*].

H. **G/R:** Amount of Sanctions: the amount of sanctions is appropriate only when it is the minimum that will serve to adequately deter the undesirable behavior. Thus, the limit of any sanction should be the amount necessary to deter the wrongdoer.

1. Factors the Court will consider in imposing sanctions:
   a. the offender's ability to pay;
   b. the offending party's history;
   c. experience and ability;
   d. the severity of the violation;
   e. the degree to which malice or bad faith contributed to the violation;
   f. the risk of chilling the type of litigation involved; and
   g. other facts deemed appropriate in individual circumstances.

**[*White v. General Motors Corp.*].

I. **G/R:** Scienter Requirement: before the court can sanction a party, the court must have specific findings that the party was aware of the wrongdoing [*White v. General Motors Corp.*].

§3.2: DUTY OF CANDOR TO THE COURT

A. **Rule 3.3:** Candor Toward the Tribunal:

(a) A lawyer shall not *knowingly*:

(1) make a false statement of *material fact or law* to a tribunal;

(2) fail to disclose a material fact to a tribunal when necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be *directly adverse to the position of the client* and *not* disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the **conclusion of the proceeding**, and apply EVEN IF compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) The lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

A(1). Official Comment: [*See also* **supra p. 90**].

False Evidence

[4] When evidence that the lawyer **knows** to be false is provided by a person who is not the client, the lawyer **must refuse** to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between a lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if has been offered, that its false character should immediately be disclosed.

a. If the persuasion is ineffective, the lawyer **must take reasonable remedial measures.**

[6] *Except in the defense of a criminal accused*, the rule generally recognized is that, if necessary to rectify the situation, an advocate **must** disclose the existence of the client's deception to the court or to the other party. This could result in grave consequences for the client, however, the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement [**Rule 1.2(d)**].

Remedial Measures

[11] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate (protest) with the client confidentially.

a. If that fails the lawyer should seek immediate withdrawal if that will remedy the situation.
b. If withdrawal is not available the lawyer should make a disclosure to the court.
c. It is then for the court to determine what should be done.

B. **Rule 3.5:** Impartiality and Decorum of the Tribunal: a lawyer shall NOT:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate *ex parte* with such a person except as permitted by law; and
(c) engage in conduct intended to disrupt the tribunal.

B(1). Official Comment:

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous (noisy or unruly) conduct is a corollary of the advocates right to speck on behalf of litigants.

***SEE ALSO* **Rule 3.6**, which also has a bearing on the lawyer's duty of candor to the court.

C. **G/R:** Fraudulent Conduct in Depositions: A lawyer in a civil case who discovers that her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud, which may include disclosure to the court.

1. In this context, the normal duty of **Rule 1.6 is superceded** by the obligation of candor toward the tribunal under **Rule 3.3**.
2. The lawyer must first attempt to persuade the client to rectify the situation, or if that proves impossible, must herself take whatever steps are necessary to ensure that a fraud is not perpetrated on the tribunal.
3. In some cases, this may be accomplished by withdrawal from representation; in others it may be enough to disaffirm the work product; in still others may require direct disclosure to opposing counsel; finally, if all else fails, direct disclosure to the court may prove the only effective remedial measure for the client fraud most likely to be encountered in pretrial proceedings.

*[*ABA Form. Op.* 93-376].

In other words, the ABA has taken the position that Rule 3.3 applies very broadly, to all contexts of the **litigation process.

D. **G/R:** Client Perjury in Criminal Cases: an attorney's duty of loyalty, and his overreaching duty to advocate the defendant's cause has been recognized by the Supreme Court; however, this duty is limited to legitimate, lawful conduct compatible with the very nature of the trial as a search for the truth.

1. Rule 3.3(a)(4) and cmt. 11 thereto require and authorize disclosure of client perjury to the tribunal after the attorney has been confronted with a proposal for perjurious testimony and after the attorney has attempted to dissuade the client from the unlawful course of conduct.

a. This disclosure is a professional responsible and acceptable response to the conduct of a client who has actually given perjured testimony.

2. ***Held:*** the Supreme Court held, that under *Strickland*, the disclosure that a client is planning on committing perjury is an acceptable standard of conduct in a criminal case and **does not deprive the client of the right to effective counsel.**

*[*Nix v. Whiteside*].

3. **Note:** the United States Supreme Court may have not been the proper tribunal to make this decision, and States are not bound by it; because each State sets its own standards for lawyer conduct, it may find that disclosing a client's intent to commit perjury as unethical conduct.

§4: DUTIES TO THIRD PERSONS

A. **Generally:** there are several duties that a lawyer may have to third persons, which arise outside the attorney-client relationship.

1. The duty may arise from tort law, statutory duty, or ethical duties on behalf a lawyer.

a. *Tort Duty:* the lawyer may have a tort duty to warn a third person, if that person is an identifiable victim and it is **foreseeable** that the lawyer's client, prospective client, or former client is going to harm that person; failure to warn may result in civil liability.

b. *Statutory Duty:* all persons, including lawyers, have a statutory duty to inform authorities about elder and child abuse.

c. **Rule 2.3:** a lawyer also has a duty third persons under Rule 2.3 when he is making an evaluative report for their benefit.

B. **G/R:** Lawyer's Liability for Non-Clients: although most of the lawyer's duties stem from the attorney-client relationship; a lawyer be liable to non-clients nonetheless. This liability usually arises in **transactional cases** where there is an **intended beneficiary** of the lawyer's work.

1. In other words, when the lawyer undertakes to perform a task which is intended to benefit a third person the lawyer, in most jurisdictions can be held liable for a breach of duty to the client and the intended beneficiary.

a. EX: estate planning: in estate planning, there is (by definition) always an intended third party beneficiary to the transaction (beneficiary of a trust, taker from a will, etc…). Thus, if the lawyer fails to secure the beneficiaries rights, and they are unable to receive the gift because of his negligence, the lawyer may be liable to the beneficiary.

2. **Standard for Liability:** if the lawyer had a **FORESEEABLE duty** to a third person, and negligently fails to secure their rights, the lawyer may be held liable even though the beneficiary is not a client of the lawyer.

a. In other words, if the lawyer performs a task for a client wherein there is an intended beneficiary arising from the transaction, he owes the client and the *intended beneficiary* a duty if it is foreseeable that the beneficiary would be harmed by the lawyer's negligent conduct.

b. The lawyer is usually held liable for malpractice or negligent misrepresentation.

3. Caveat: the Wyoming Supreme Court had held that a lawyer does not have a duty to non-client intended beneficiaries.

a. The Court held that a prospective lessor could not maintain a negligence action against the lawyer because he was not a *per se* client of the attorney; that is, non-clients cannot maintain an action against a lawyer for malpractice.

i. Johnny B. thinks this case would not come out the same today because the composition of the court has changed and there is no longer the feeling of protecting the "good ol' boys."

*[*Brooks v. Zebre*].

C. **G/R:** ABA Rules as Standard of Conduct: a violation of the Rules of Professional Conduct does not give rise to civil liability [*see* **Scope ¶ 18**], however, courts disagree as to the role of ethical standards in malpractice cases; consequently, although almost all courts allow the admission of ethical rules, four different standards have evolved:

1. A small minority of courts have held that ethical standards are not admissible;
2. several courts admit ethical standards, but with significant restrictions, i.e., an expert is needed to establish the standard of conduct and the relationship between the legal standard and ethical rules;
3. more courts admit ethical standards with fewer restrictions (i.e. it is illogical to say that ethical standards to do not play a party in establishing the legal standard of conduct); and
4. one jurisdiction a violation of the Rules creates a rebuttable presumption that the lawyer's standard falls below the legal standard of conduct.

D. **G/R:** Lawyer's Duty to Client's and Non-Clients: attorney's have a duty of **zealously representing their clients** within the bounds of the law.

1. When their clients have opposing interests with third parties, attorney's are supposed to represent their clients' interests over the interests of others.
2. An attorney should **advise** the un-represented party to seek independent counsel before the attorney discusses the transaction with that party; it is not enough for the lawyer to tell the non-client that he not her attorney.
3. Thus, when discussing matters with non-clients, the lawyer has a duty to inform the non-client that:

a. he should seek independent legal advise; and

b. that his actions will **have an adverse effect** on his legal rights (nothing more than those two things because it could give rise to an attorney/client relationship).

*[*In Re Marriage of Foran*].

§5: DUTIES TO THE PUBLIC

§5.1: PUBLIC SERVICE

A. **Generally:** a lawyer should aspire to do pro bono work. **Rules 6.1 through 6.4** are the ABA guidelines for pro bono work and they generally recommend that a lawyer should do 50-hours of pro bono work per year. These Rules represent obligations on behalf of the lawyer, and not

§5.2: LAWYER ADVERTISING AND SOLICITATION

I. Lawyer Advertising

A. **Generally:** for many years (until 1977) the ABA strictly forbade *any time of lawyer advertising.* However, this was challenged by some lawyer's in Arizona, and the Supreme Court held that lawyer advertising is commercial speech and therefore protected by the First Amendment. The ABA changes its lawyer advertising

rules after a Supreme Court case interpreting the right more expansively; however, they only change the Rules to comply with the bear minimum required under the new constitutional standards. This usually results in a lawyer challenging the Rules, again, and if the Supreme Court expands lawyers rights, the ABA changes the Rule again, and this is the general cycle which has expanded a lawyer's right to advertise over the years.

B. **G/R:** Advertising as Commercial Speech: lawyer advertising is commercial speech; hence it is protected by the First Amendment, although not as stringently as political speech.

1. Lawyer advertising is protected from blanket suppression (i.e., a lawyer may not advertise at any time in any manner).
2. *Caveat:* advertising by lawyers, may however, be regulated in various. As with other varieties of speech, it follows that lawyer advertising may be regulated by reasonable restrictions on the time, manner, and place of advertising.

*[*Bates v. State Bar of Ariz.*].

C. **Rule 7.1:** Communications Concerning a Lawyer's Services: A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains *material misrepresentation of fact or law*; or omits a fact necessary to make the statement considered as a whole not materially misleading;
(b) is likely to *create an unjustified expectation* about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of PC or other law; or
(c) *compares the lawyer's services with other lawyers' services*, unless the comparison can be factually substantiated.

C(1). Official Comment:

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known the lawyer's services, statements about them should be truthful.

D. **Rule 7.2:** Lawyer Advertising:

(a) Subject to requirements of 7.1 and 7.3, a £ may advertise services though public media, such a telephone directory, newspaper, or other periodical, outdoor advertising, radio or television, or through written or recorded communication
(b) A copy or recording of an advertisement or communication shall be kept for 2 years after its last dissemination along with a record of when and where it was used
(c)A lawyer shall not give anything of value to a person for recommending the £'s services except that a £ may:

(1) pay the reasonable costs of advertisements or communications permitted by this rule
(2) pay the usual charges of a not-for-profit £ referral service or legal service organization
(3) pay for law practice in accordance with 1.17

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content

D(1). Official Comment:

[2] This Rule permits:

--public dissemination of information concerning a lawyer's name or firm;
--address and telephone number;
--the kinds of services the lawyer will undertake;
--the basis on which the lawyer's fees are determined, including specific prices for specific purposes and payment and credit arrangements;

--a lawyer's foreign language ability;
--names and references;
--names of clients regularly represented (if they consent); and
-*other information that might invite the attention of those seeking legal assistance*.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment.

D(2). **Wyoming Rule 7.2:** see attached statute.

D. **Rule 7.3:** Direct Contact with Prospective Clients:

(a) A lawyer shall not by **in person or live telephone** contact solicit professional employment from a prospective client with whom the £ has no family or prior professional relstiop0nship when a significant notice for the £'s doing so is the **£'s pecuniary gain**

(b) a lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by (a) if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the £

(2) the solicitation involves coercion, duress, or harassment

(c) Every **written or recorded communication** from a £ soliciting professional employment from a prospective client known to be in need of legal services in a particular matter and with whom the £ has not family or prior professional contact, shall include the words "Advertising Material" on the outside of the envelope and at the beginning and ending of any recorded communication

(d) Notwithstanding prohibitions of (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit membership or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

E. **Rule 7.4:** Communications of Fields of Practice: a £ may communicate the fact that the £ does or doesn't practice in particular field of law. A £ shall not state or imply that the £ has been recognized or certified in a particular field of law except as follows:

(a) Trademark / Patent Attorney

(b) Admiralty attorney

(c) for jurisdiction where there is a regulatory authority granting certification or approving organizations that grant certification, a £ may communicate the fact that the £ has been certified or as a specialist in the field of law but only if:

(1) the certification is granted by the appropriate regulatory authority and that authority has been approved for its organization

(2) if the authority has not been approved, it clearly states this on the certification and within the advertisement subject to 7.2

(c) if the £ is now in a jurisdiction where there isn't this certification crap, but has been certified in a jurisdiction where there do allow it, he may still advertise his specialty as long as he then states that this organization is not available in the jurisdiction