

PROFESSIONAL RESPONSIBILITY

Commonly tested areas:

- Regulating lawyers
- What does it mean to practice law?
- Establishing your practice and getting clients
- The lawyer-client relationship
- Conflicts of interest
- Handling money
- Being professionally responsible

1) Regulating lawyers

- a) Rules governing conduct of NY attorneys are found in:
 - i) NY Rules of Professional Conduct; and
 - ii) Aligned to but modified version of the ABA Model Rules
- b) NY is one of the few states where you can discipline the law firm itself.
- c) **Complaints** involving NY attorney conduct
 - i) Are investigated by
 - (1) Departmental Disciplinary Committee, or
 - (2) Any department of the Appellate Division.
 - ii) Filing a complaint is privileged communication.
- d) **Discipline** imposed on a NY attorney
 - i) Types
 - (1) Letter of admonishment from the disciplinary committee
 - (a) This is private but remains in your file.
 - (2) Public, or private, censure by the courts.
 - (a) It is made public by being published in the NY Bar Journal.
 - (3) Suspension
 - (a) When you cannot practice law for a finite period of time.
 - (b) Your name can stay on the firm's letterhead.
 - (4) Disbarment
 - (a) License is taken away.
 - (b) Name must be taken off the letterhead.
 - ii) Attorneys are also subject to malpractice claims by their clients.
 - (1) But this does not automatically equal discipline.

- e) **Admission** into the profession
 - i) USSC says state requirements for admission to the bar must be rationally related to the practice of law.
 - (1) Rational is graduation from an ABA-accredited law school.
 - (a) In NY, admission may be granted to an applicant who has
 - (i) Completed 1 year of law school, and
 - (ii) Studied under the supervision of a NY attorney for 3 additional years.
 - ii) NY Bar admission requirements
 - (1) Pass written bar exam and MPRE.
 - (2) To be considered without examination, applicant must have:
 - (a) Graduated from an ABA-accredited law school, and
 - (b) Been admitted to practice in another state and that state would admit a NY lawyer without examination (reciprocity); and
 - (c) Practiced law for at least 5 out of 7 years preceding application for admission.
 - iii) Attorney's requirements when applying to the bar
 - (1) Truth and full disclosure
 - (a) Applicant must show good moral character.
 - (2) Duty to fully cooperate
 - iv) Requirements regarding other applicants
 - (1) Good applicants – your input is aspirational (you should)
 - (2) Bad applicants – your duty is to report on moral turpitude.
 - (a) Conduct that is contrary to justice, honesty, modesty or good morals.
 - (b) Ex – perjury, bribery, theft.
 - (c) Ex – single arrest for pot possession does not rise to this level.
 - (3) Example: D and M, recent law school grads and co-owners of a bar, have applied for admission in NY. M noticed D has purposefully misstated the net income for their bar located in PA on the tax return. Must M report this to the NY Board of Law Examiners?
 - (a) Yes. Filing a false tax return is a crime of moral turpitude.
- f) **Regulation** after admission
 - i) Regulated by highest state court (and its agencies)
 - (1) NY Court of Appeals and its agencies.
 - ii) Self regulation
 - (1) There is a 2-prong duty when you know (actual knowledge) of a violation
 - (a) Report what you know, unless it is protected as confidential information.
 - (b) Be available to testify against a lawyer.
 - (i) So you cannot report anonymously.

(2) Example: D represents J in a personal injury action. D settles the case but never gives J his share of funds. J seeks legal assistance from A who warns D that if he doesn't pay up, A will be forced to report D to the disciplinary authority. D pays J the fee and much more to avoid any disciplinary problems. J is a happy client. Result?

(a) Both D and A are subject to discipline. D may be disbarred for keeping client's money. A may be suspended for violating her duty to report when she had actual knowledge. Instead, she tried to negotiate her way out of a duty to report.

iii) When atty learns of bad conduct of another atty through representation of that atty as a client, the duty of confidentiality will trump the duty to report misconduct to the bar.

(1) But that atty may not recommend the atty for admission to another state.

g) **Multi-jurisdictional practice** – atty licensed in more than 1 state

i) Discipline in 1 state does not mean that there will be discipline in another.

(1) Other states make an independent determination of whether the conduct complained of violates that state's ethical rules.

(2) But most other states will give some effect to another state's determination on the basis of full faith and credit or comity.

ii) Unauthorized practice – you are not allowed to do it where you are not admitted.

iii) Permissible, temporary multi-jurisdictional practice:

(1) Associate with an active local atty

(2) Get special permission called pro hac vice (for this matter only)

(3) Mediation or arbitration out of home-state practice

(4) Anything reasonably related to atty's home-state practice

(5) Multi-state firms:

(a) Atty only practices where admitted and the firm letterhead indicates the states of admission.

iv) Choice of law in multi-jurisdictional matters

(1) If licensed in NY only, then NY laws and rules of prof conduct apply.

(2) If admitted to NY and another state, rules of the state in which lawyer principally practices will apply unless the conduct's key effect is in another state, then those other state's rules will apply.

(a) Example: Atty J is licensed in NY and IL. With his primary residence and practice being located in NY, J likes to take frequent vacations and is arrested for DUI in Las Vegas. The investigation of J's conduct will occur in NY and IL and the rules by which his conduct will be judged is NY are those of NY because that is where he principally practices.

(b) Example: same facts, except that while J is drinking by the pool, a client in IL has his case dismissed because J is too drunk to remember to show up for a motion to dismiss with prejudice filed by the adverse

party. Jerry's conduct may be investigated in NY and IL and the rules of IL will apply in NY because the primary impact of what he has done is in IL.

- 2) What does it mean to practice law?
 - a) You are a lawyer 24/7, whether performing personal or professional obligations. (Spaceships and cruise ships will apply.)
 - b) Who is empowered to make which decisions in legal matters?
 - i) Client's decisions
 - (1) Those of substantive legal import
 - (a) Whether to sue, appeal, settle, have a jury or bench trial.
 - (i) The atty can suggest but the client decides.
 - (b) Whether to testify in a criminal case.
 - (i) Defendant has no right to testify if it is a civil case.
 - ii) Atty's decisions
 - (1) Strategy, procedure, and tactic
 - (a) Depositions or discovery decisions
 - (i) Though client can veto as to cost.
 - (b) Granting continuances.
 - iii) Example: You represent T who as injured in the crash of a private plane and is suing CTU, the mfg. He tells you at the outset of the case that he wants his day in court and will not settle under any circumstances. Counsel for CTU calls and offers \$100mil to settle, an amount that you believe to be more than a jury would award. What should you do?
 - (1) Client decides. Tell T and see what he says.
 - iv) Example: same facts but CTU's offer is \$1.73. What should you do?
 - (1) Client decides. Tell T and do what he says, even if you want to reject it. Atty must abide by client's wishes unless doing so would be illegal, unethical, or immoral.
 - v) Example: For the last year, all atty at CTU have devoted their efforts to a big slip-and-fall case. Yesterday the jury came back and said plaintiff gets nothing. After trial, atty C met a juror in the hall who said "I sure am glad your client came out OK. The defense atty met with the jury late last night and told us the case had settled and to prove it be paid each juror \$10k to vote for the defendant. Here's video of him paying me." Atty C runs to her client who says "go away, I don't want to be in the courthouse anymore." What should C do?
 - (1) Nothing except report the defendant's atty. It is the client's decision whether to appeal or not. But there is a duty to report when you have actual knowledge – which is the videotape.

- vi) If client loses ability to make a clear decision, or is a minor, atty must get a guardian appointed.
 - (1) In NY, an atty can take protective action and seek substitute judgment for a client if:
 - (a) Client has diminished capacity, and
 - (b) Client is at risk of substantial physical, financial, or other harm, and
 - (c) Client cannot adequately act in their own interest.
- c) Attys have a general freedom to reject cases, although they should take cases involving the oppressed or defenseless and should do their fair share of pro bono work.
 - i) When **must** an atty seek to **withdraw from representation**? (court decided whether to allow it)
 - (1) When atty knows or it is obvious that the **client's position is frivolous or is to harass or maliciously injure** another.
 - (2) If **atty becomes impaired**, mentally or physically.
 - (3) A **rule of prof conduct would be violated** by representation. (conflict arises)
 - (4) Client **fires** atty.
 - ii) When **may** an atty withdraw from representation?
 - (1) Client's claim or defense is frivolous.
 - (2) Client persists in a course of action involving atty's services that the atty reasonably believes is criminal or fraudulent.
 - (3) Client deliberately disregards an agreement or obligation to the atty as to fees or expenses.
 - (4) Client uses atty's services to perpetuate a crime or fraud.
 - (5) Atty's continued employment is likely to result in a violation of the rules of prof conduct.
 - (6) Atty's inability to work with co-counsel indicates that the best interests of the client are served by withdrawal.
 - iii) Atty should take only those cases he is **competent** to handle, or encourage client to seek other counsel.
 - (1) Competence includes:
 - (a) Being physically and mentally able
 - (b) Being substantively competent
 - (c) Have time to devote to the case
 - (2) You can **overcome a lack of competence** with "ALE":
 - (a) Associate with another atty
 - (b) Learn it in time
 - (c) Emergency situation

- d) Do not help others engage in the **unauthorized practice of law**
 - i) Practice of law – everything that requires a law license
 - (1) Appearances in depositions and judicial hearings
 - (2) Drafting substantive legal documents
 - (3) Settling cases with clients
 - ii) Example: Atty H has an important court appearance but cannot make it because he fell deathly ill with the bird flu. Instead, he sends his legal secretary to make a simple appearance before the judge. Result?
 - (1) H gets in trouble. You need a law license to appear before a judge.
 - iii) Example: Atty L broke her hand playing tennis. As a result she must dictate a memo to her secretary. Secretary types the memo and mails it to the court.
 - (1) This is permissible. Secretary is not creating the contents of the doc, simply typing it up.
 - e) **Hindering** atty's future right to practice
 - i) Atty may not enter into a non-compete agreement or provision with his current partners or associates, except:
 - (1) Retirement – reasonable non-compete clauses are ok.
 - (2) Withdrawal from the firm – reasonable non-compete clauses are ok.
- 3) Establishing your practice and getting clients
- a) **Firm name** must be appropriate
 - i) Example: you cannot name your firm the “Aaaabest Law Firm” to be first in the phone book.
 - (1) Trade names are not permitted – NY distinction
 - ii) Example: you cannot name your firm Aaaabest Legal Clinic or the Law Firm of NY.
 - (1) This would be misleading to the unwary – not state-sanctioned.
 - iii) Example: To establish credibility for his new firm, F, a recent law school grad, names his firm Cardozo, Holmes, Lincoln, and F. Any problems?
 - (1) Yes. He is making it up.
 - (a) Dead people can be used in the name, but they must have once been a part of the firm.
 - iv) Example: not to be deterred by above, F searches the NY atty directory and convinces Bob Cardozo, Eugene Holmes, and Adolph Lincoln to form a partnership with him. After 3 months of practicing with him, Holmes become ambassador to Bosnia, Cardozo is disbarred, and Lincoln is suspended for misconduct. What action, if any, should the firm take re: its name?
 - (1) Holmes, appointed ambassador, is a permanent position, so his name has to come out of the title.
 - (2) Cardozo is disbarred, which is permanent, so his name must come out.
 - (3) Lincoln is suspended, which is temporary, so his name can stay in the title.

- b) Do not hold yourself out as a **specialist** unless you are certified as a specialist, or practice patent, trademark, or admiralty or fit into this example:
 - i) Example: J goes to law school in NY, graduates and chooses to practice only sports law. After 20 years of practice in only sports law, J starts to advertise that he specializes in sports law. Can he do this?
 - (1) No, unless:
 - (a) He has been certified by a private organization approved to certify by ABA or NY; and
 - (b) The certifying organization is identified in the ad; and
 - (c) Atty states that certifying organization is not affiliated with any governmental authority, certification is not required to practice law in NY, and certification does not indicate greater competence of the lawyer over other non-certified but experienced lawyers in the area.
 - ii) This also applies for certification as a specialist in a particular area of the law by another state.
 - iii) Example: What if, instead, J decided that it's too much work to become a specialist. What can he do to let people know he practice primarily in sports law?
 - (1) "My practice is limited to..." or "is primarily in the area of..."
- c) **Advertising**
 - i) Defined – any public or private communication made by or on behalf of a lawyer or law firm about law firm or services, the primary purpose of which is to retain the lawyer or law firm.
 - (1) Exception: communications to existing clients or other lawyers.
 - ii) Computer-accessed communication includes any communication disseminated through the use of a computer/electronic device, which includes (but not limited to): websites, blogs, search engines, email, pop-up ads, chatrooms, listservs, IMs.
 - iii) Ad **must** include:
 - (1) Name, principal law office address, and telephone number of the atty or law firm whose services are being offered.
 - (a) Telephone number may contain a domain name, nickname, moniker, or motto that does not otherwise violate the rules of prof conduct.
 - (2) Any words or statements required by the rules must be clearly legible and capable of being read by the average person (i.e. an idiot) and understood if spoken aloud.
 - (3) The label: "attorney advertising" on the first page.

- iv) Ads **may** also include, assuming such information is true and not misleading:
- (1) Educational background and degrees
 - (2) Dates of admission to the bar and areas of practice
 - (3) Public offices and teaching positions held
 - (4) Memberships in bar assoc. and other prof. organizations
 - (5) Foreign language ability, but
 - (a) you must be fluent
 - (6) Names of regularly represented clients, if
 - (a) clients consent in writing
 - (7) Acceptable credit arrangements and participation in group or prepaid legal services programs
 - (8) Legal fees, contingent fees, range of fees for services (and if done, the firm shall not charge more than the advertised fee) hourly rates and fixed fees for specific services.
 - (a) If fees are advertised, rate cannot be changed until after a reasonable period of time.
 - (9) Bona fide professional ratings
 - (10) Assuming the ad is otherwise in accord with the rules of prof conduct and can be factually supported by the atty as of the date on which the ad is published.
- v) Ads **may** also contain:
- (1) Statements that are reasonably likely to create an expectation about results the atty can achieve or which describe or characterize the quality of the atty/firm's services.
 - (a) This is different than the MPRE
 - (2) Statements that compare atty's services with those of other attys.
 - (a) This is different than the MPRE
 - (3) Testimonials or endorsements of clients otherwise not prohibited
 - (a) No client from pending matter.
 - (4) Testimonials or endorsements from former clients
 - (5) Must contain the disclaimer: Prior results do not guarantee a similar outcome.
 - (6) Example: Atty places the following ad in a NY newspaper: "Atty Ad: Law Offices of Atty & Assoc, 99 Main Street, Flourville, NY 11791. Hablamos Espanol. Guaranteed to get the results you want!" Atty only knows a couple of phrases in Spanish. Is this permissible?
 - (a) No. These things are impermissible:
 - (i) Need a phone number. Not fluent in Spanish. Need to factually support the results guarantee.

vi) Ads **may not** include:

- (1) Paid endorsement or testimonial about atty without disclosing that the person is being compensated.
- (2) Using actors to portray the atty, firm members, clients, or events without disclosure.
- (3) Example: Atty airs a TV ad with David Schwimmer highlighting his firm's expertise and knowledge in environmental litigation. Midway through the ad, Ryan Seacrest comes on camera and awkwardly gives a thumbs-up. There is no mention that actors are being compensated. Can this ad get atty in trouble?
 - (a) Yes. Need to disclose that they are being compensated and the fact that they are actors.

vii) **Domain names**

- (1) You can use a domain name that does not include the name of the lawyer/law firm provided that:
 - (a) All pages clearly and conspicuously include the actual name of the lawyer/law firm.
 - (b) Lawyer/law firm in no way attempts to engage in the practice of law using the domain name.
 - (c) The domain name does not imply an ability to obtain results in a matter.
 - (i) This is different from statements creating an expectation that can be factually supported.

viii) What IS misleading?

- (1) Promised outcomes or the ability to achieve results from improper influence or that you have clout.
- (2) Cannot advertise that you will advance costs of litigation because almost all lawyers do this, so it is misleading.
- (3) Example: to get more clients for his new administrative law practice, Bill Clinton reminds people of his connections with many agency administrators. Any problems?
 - (a) Yes. You cannot promise results from improper influence or clout.

ix) TV and radio ads must be approved by the lawyer, including the name, address, telephone number of the lawyer/firm and kept for at least 3 years following initial dissemination.

- (1) Ads contained in a computer-accessed communication shall be retained for not less than 1 year.

- d) Contingency Fee advertising
 - i) Atty must clearly state the terms and basis of the fee.
 - ii) It must be clear in any advertising that refers to contingent fees whether the client will be responsible for any costs and that they are not permitted in all types of cases.

- e) **Soliciting clients**
 - i) All solicitations are advertisements, so are subject to all rules and restrictions of advertisements plus additional rules.

 - ii) **Rule:**
 - (1) Lawyers shall not engage in solicitation
 - (a) (meaning any advertisement initiated by or on behalf of a lawyer/firm that is directed to or targeted at a specific person, or their family or legal representatives, the primary purpose of which is the retention of the lawyer/firm, and with a significant motive of pecuniary gain (money))
 - (2) By in-person or telephone contact, real-time or interactive computer accessed communication
 - (a) These computer communications refer to conversational communications, including IM and chatrooms.
 - (b) These computer communications do not include:
 - (i) Ordinary email, websites, or pop-up advertisements.
 - (3) Unless the recipient is:
 - (a) A close friend or relative
 - (b) A former client
 - (c) An existing client
 - (d) A pro bono client

 - iii) Exception to rule:
 - (1) No solicitation in any form of communication whatsoever is permitted if the recipient has made known a desire not to be solicited by the lawyer.

 - iv) Example: Jack Bauer, a named partner at CTU spends time at the coffee shop each morning trying to get new clients for his partner, Tony. Is Jack's conduct proper?
 - (1) No. Even though it is not personal contact by Tony himself, what you are not allowed to do, your partners or associates cannot do for you.
 - (a) Rule of imputation

 - v) Example: Bill, who is not an attorney, works as an investigator for CTU. May Bill cruise the streets of LA looking for car accident victims to refer to CTU?
 - (1) No. He is not a lawyer, but you cannot pay someone else to do what you or your partners cannot do.

f) **Targeted mail**

- i) You may send direct mail to groups of people likely to need legal services.
 - (1) Ex: everyone arrested for drunk driving in Buffalo last week.
- ii) For self-mailing brochures or postcards, the words “attorney advertising” shall appear on it.
 - (1) Electronic mail shall have “attorney advertising” in the subject matter line.
- iii) If a retainer agreement is included with the solicitation, the words “do not sign” shall appear on the client signature line.
- iv) These provisions apply to lawyers not admitted in NY who solicit retention by NY residents.
- v) Solicitations directed at predetermined recipients must disclose how the attorney learned the recipients’ identity and need for legal services.
 - (1) A list of the names and addresses of the recipients must be kept for 3 years.
- vi) No solicitation for personal injury or wrongful death by the lawyer or any agent/representative before the 30th day after the incident, unless a filing is required in less than 30 days, in which case no unsolicited communication before the 15th day after the incident.
 - (1) Example: Plane crashes in the Hudson River and you want to mail letters advertising your services to each of the families of the “victims” [likely to all need legal services] providing information about your firm. Any problems?
 - (a) No, but be careful.
 - (i) Copy of ad in English must be filed with the attorney disciplinary committee and ad must not refer to the fact that it has been filed.
 - (ii) Transcript of TV or radio ad must also be filed with disciplinary committee.
- vii) NY lawyer must not solicit professional employment from someone by written or recorded communication if:
 - (1) The communication is false, deceptive, or misleading
 - (2) The recipient has made known to lawyer a desire not to be solicited
 - (3) Solicitation involves coercion, duress, or harassment
 - (4) Lawyer reasonably should know that the age or physical, emotional, or mental state of the person makes it unlikely that he will be able to exercise reasonable judgment in retaining a lawyer
 - (5) Written communication is sent by a method that requires the recipient to travel to a location to receive the mailing other than their usual mail stop

- g) If you give in-person, unsolicited advice, do **not** accept employment resulting from such advice.
 - i) Example: As you are walking down the street, you see a pedestrian run down by a large black Mercedes driven by a CEO. Recognizing a good case and set of deep pockets, you run to the victim who is lying in the street and say “you have a great case against one of the richest men in NY. You better sue him and do it fast.” Can you represent the victim?
 - (1) No. You cannot solicit him directly, you cannot take his case.
 - ii) Example: same facts, but instead of you running to the victim, he staggers to the curb where you are and asks you “do you think I have a case against the rich guy in the Mercedes?” Can you represent the victim?
 - (1) Yes. He asked you, he approached you.
 - (2) ??????

4) **The Lawyer/Client Relationship**

- a) **Maintain confidences** of prospective, current, and former clients and keep client secrets as well.
 - i) Client secret: anything derogatory, embarrassing, or hurtful regarding your client, no matter what the source.
 - (1) This duty is broader than the a-c privilege, which addresses communications between atty and client, and the duty survives the death of the client.
 - ii) If you terminate a client relationship, do so in a manner that does not prejudice the client.
 - (1) Give the client notice, return the case file and return any unearned portion of the retainer.
 - iii) Example: client tells you about 3 murders that he committed 2 years ago but he has that out of his system now. He tells you where the bodies are buried. What do you do?
 - (1) Nothing. It is a past crime. It is a secret and remains a secret. It may not be revealed.
 - iv) Example: Client says “I can’t take my boss anymore. I am going to get drunk, drive my car to the office, steal the bag of 1,000 BarBri pens from the safe and then drive to my boss’ house and beat him with the bag of pens until he dies.” What do you do?
 - (1) An atty can reveal the client’s intention to commit a crime and information required to prevent the crime.
 - (a) This is not a “must.”

- (2) Example: during trial on charges of assault, your client testifies falsely regarding his whereabouts at the time of the crime. You know his testimony is a lie since your client told you in strict confidence before trial that he was at the scene of the crime. What should you do?
- (a) Urge client to correct or recant.
 - (b) If he refuses, disclose to the court even if protected by the confidentiality rule.

b) Exceptions to confidentiality

- i) When required by law or court order to disclose, then you may disclose.
- ii) To obtain legal or ethical advice for atty.
 - (1) Use of hypotheticals with colleague is ok if discrete to protect identity of client.
- iii) To prevent client from committing a crime.
- iv) To prevent reasonably certain death or substantial bodily harm.
 - (1) This allows atty to disclose client confidences to protect vulnerable children from serious risk of harm in extraordinary circumstances.
- v) To rectify a fraud on a tribunal committed by atty's own client.
- vi) When expressly authorized to advance the best interests of the client.

vii) Example: Client tells you in confidence that she is planning to kidnap the host of a news program. Can you disclose this to the police?

- (1) Yes, to prevent the crime or substantial bodily injury.

viii) Example: On the eve of trial, Judge demands that you turn over all of your notes on strategy and reveal any discussions you have had with your client. Must you turn over the requested information?

- (1) Yes, if it is required by a court order.

c) Safeguard client property

- i) Example: as a result of effectively representing his client in a contentious divorce, Atty got the now ex-husband's Porsche on a Friday afternoon. Atty is supposed to deliver it to his client on Monday. To make sure nothing happens to the car, he decides to drive it all weekend long and keep it in his garage at home. Is this proper?

- (1) No. Atty must protect a client's property in a bonded warehouse.

- d) **Trial publicity** (restraints on public statements regarding trials)
- i) No statement may be made by atty that a reasonable (“idiot”) person would expect to be disseminated if atty knows or reasonably should know it will be prejudicial to the case re:
 - (1) Character, reputation, or criminal record of party
 - (2) Identification of witness or expected testimony
 - (3) Possibility of a guilty plea, existence of a confession, and opinion as to guilt or innocence of defendant or suspect
 - (4) Information atty knows or reasonably should know will be inadmissible as evidence
 - (5) Fact that defendant is charged with crime unless stating it as merely an accusation and that the defendant is presumed innocent
 - ii) Atty may state:
 - (1) Dry facts about the case
 - (2) Warning of danger here there is a reason to believe of a likelihood of substantial harm to a person or public interest
 - (3) In a criminal case, information necessary to aid in the apprehension of accused
 - (4) Right of reply: atty may make a statement to the extent necessary to protect a client from substantial prejudicial effect of recent publicity not initiated by the atty or client
 - (a) If 1 atty crosses the line in a way that prejudices the case, the other side can come out to make a statement to negate the damage
 - iii) Example: DA holds a press conference regarding an upcoming murder trial. She tells the press that a murder took place, that the defendant is most likely guilty and that he will probably plead so this week. The defendant’s atty in response issues a statement that the defendant is innocent until proven guilty and that the defendant is an upstanding member of the community. Which statements are allowed? Which are not?
 - (1) DA:
 - (a) Murder statement is allowed.
 - (b) Guilty opinion is not allowed.
 - (c) Plea statement is not allowed.
 - (2) Atty:
 - (a) Innocent until proven guilty is allowed.
 - (b) Upstanding member of community is allowed as a right of reply.

- 5) **Conflicts of interest** (heavily tested)
- a) **Basic rule: avoid conflicts and exercise independent professional judgment.**
 - i) **In light of conflict, refuse representation or withdraw from representation.**
 - b) Accept a case with a conflict only if all clients have given their informed consent.
 - i) Steps you must take:
 - (1) Client must agree, after
 - (2) Attorney explains the material risks and reasonable alternatives
 - (3) Client agrees in writing (can be electronic)
 - ii) After these steps, you must then decide if a reasonably prudent attorney would take the case
 - (1) On the bar, a reasonably prudent lawyer almost *always rejects the case* even with informed consent.
 - iii) Example: H wants to sue his former music partner O for breach of contract for not “making his dreams come true” as required by their 1980 agreement. H approaches his lawyer, who also represented the music partnership, to initiate the lawsuit. The lawyer has represented O separately on several small claims issues not involving H. Should the lawyer accept the case?
 - (1) No. He should walk away. A reasonably prudent lawyer almost always rejects the case, even after going through the steps to get informed consent.
 - c) Attys do **NOT testify** on behalf of their clients unless:
 - i) It is an uncontested matter or a matter of familiarity
 - ii) Fees are involved – atty can testify to fees when it involves a statutory award of fees
 - iii) Substantial hardship for client if atty withdraws
 - d) Situations ripe for testing:
 - i) Atty cannot represent adverse interests of client or prospective client unless atty fully explains risks and alternatives (informed consent) and client agrees in writing.
 - ii) A person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not a prospective client.

- iii) **Interests in publication rights related to case subject matter are prohibited.**
 - (1) Generally a lawyer cannot take a mortgage on a client's property to secure a fee.
 - (2) Exception: In NY, in domestic relations matters, a lawyer may take a lien on real property or obtain a security interest (SI) to secure his fee if:
 - (a) The retainer agreement provides that a SI may be sought, and
 - (b) The notice of application for the SI is given to the other spouse, and
 - (c) The court grants approval of the SI after submission for counsel fee.
 - (3) But an atty shall not foreclose on a mortgage placed on a marital residence while the spouse who consents to the mortgage remains the titleholder, and it is the primary residence.
- iv) Example: E robs a convenience store and is arrested. As you spend some time with E at jail, you realize that he is the once popular actor. Recognizing that this story is bigger than any fee you could collect in this case, you offer to take the case for free in exchange for half of the tv, movie, and book rights flowing from the story of E's descent into petty theft. Any problems?
 - (1) Yes. You cannot accept in lieu of a fee the publication or movie rights regarding the subject matter of the litigation.
 - (a) But if E wanted to assign future rights to the Mighty Ducks, it is ok.
 - (2) It is ok after the case is concluded and E is out of jail, because the taint of undue influence is removed.
- v) Example: S hires atty to represent her in a civil suit for conversion of alcoholic beverages. Atty agrees to take the case but requires 35% of all profits from any literary or media proceeds relating to the incident. Is this agreement permissible?
 - (1) No. You can't take interest in the subject matter of the litigation. You can only take an interest after the case is over, appeals and all.
- vi) Example: S divorces T but now refuses to pay her atty. Atty explains to S that the retainer agreement she signed explicitly allows him to take a security interest in any real property she owns. The court approved the security interest after the atty submitted his fees. Is the atty's security interest permissible?
 - (1) No. The notice for the application for the security interest was not given to the other spouse.
- e) **Lending money to clients**
 - i) Example: J, who you represent in a personal injury case, comes to you asking to borrow \$5 to buy food for his small child who has not eaten in 3 days. Should you?
 - (1) No loans to clients.
 - (2) But, you can advance client costs and expenses in litigation, the repayment of which can be contingent on the outcome of the case.
 - ii) Exception: NY allows you to loan money to indigent and pro bono clients.
 - (1) But remember, you cannot advertise that you advance costs and expenses.

- f) Fee payment by a third party
 - i) Example: After years of marriage, H and W are getting a divorce. H's mom comes to your office and says that she will pay H's legal expenses and instructs you to do everything possible to make sure that no good daughter-in-law gets nothing. The next week, H comes to you and says that he and W have reconciled and asks you to file a motion to dismiss the divorce action. What do you do?
 - (1) Do what your client tells you to do. The client is H. The privilege goes with H, so you can't tell mom why it was dismissed.
- g) Atty cannot demand sex as a condition of representation.
 - i) Cannot coerce a client into a sexual relationship or enter into a sexual relationship in a domestic relations matter during the representation.
 - ii) Pre-existing sex is ok.
 - iii) No rule of imputation. (???)
- h) **Doing business with clients**
 - i) Atty is generally prohibited from doing business with clients, unless the transaction is fair to the client. In such cases, the client should be:
 - (1) Advised to get independent legal advice
 - (2) Get informed consent in writing.
 - ii) Example: G, an experienced atty, wants to start a pineapple-themed restaurant with his best friend S, who is also a current client. G will provide the business and legal knowledge while S will supply his culinary expertise. G recommends S consult another atty on this deal. G and S enter into a partnership agreement but S never has the agreement reviewed by an independent atty. Is the partnership agreement binding?
 - (1) Yes, as long as the terms are fair to and G gets informed consent in writing.
 - iii) Exception: Standard commercial or other ordinary transactions (i.e. banking or brokerage services) are ok.
- i) Lawsuits between current and former clients
 - i) You may represent a current client in an action against a former client except:
 - (1) When your current client wants to sue your former client involving a matter or transaction in which you represented the former client, or
 - (2) When during the representation of the former client you learned confidential information that is now relevant to the action by the current client.

- (3) Example: 5 years ago, Atty helped Dr. adopt a baby. While the adoption was pending, Dr. told atty that he kept \$10mil in a secret Swiss bank account and that any of his money could be transferred to the Dr.'s personal bank account in NY if the adoption authorities needed his to look more financially secure. Now Tony wants Atty to represent him in a medical malpractice action against Dr. Can Atty represent Tony?
- (a) No. The analysis passes the first test – an unrelated matter. But the 2nd test of confidential information fails. Tony will want to know about this money for his malpractice suit.
- (b) Note:
- (i) If the information is no longer confidential or if the client consents in writing, Atty may represent Tony.
- ii) Don't get tricked!
- (1) It is ALWAYS a conflict to represent a current client against a current client in a current matter. You cannot undertake such representation, even with client consent.
- (2) Example: T is on a boat when his nautical-themed scarf goes missing. Witnesses claim they saw A steal it from the coat check. Atty currently represents T and A in their record deal negotiations, but T is a much more lucrative client. Atty obtains A's written consent to represent T against A in the conversion matter. Can Atty proceed?
- (a) No. Even with informed consent, you cannot represent a current client against a current client in a current matter.
- (3) Example: CS is tired of her husband's infidelities and tells T she wants a divorce. T, in response, consults all the top matrimonial attys in NJ in order to disqualify them from taking her case. CS finally finds an atty who is willing to take her case except the atty represented T's sanitation company on a parking ticket 5 years ago. Can the atty take the case? What must he do?
- (a) Yes, he can take the case. He must inform T that he no longer represents him. T is the prospective client trying to DQ all attorneys. (??)

- j) Representing a corporation or partnership
 - i) As the lawyer for a corporation or partnership, you represent the entity, not any individual.
 - ii) Duty to proceed as is reasonably necessary to protect the best interests of the organization and report violations to a higher authority within the organization.
 - iii) Duty to report securities violations up the chain of command to CLO (chief legal officer).
 - (1) If you don't get the appropriate response, you must report to board of directors and may report to outside authority (to protect the best interests of the client).
 - iv) May reveal confidential information to the extent necessary to protect client (which is the corporation) and lawyer has discretion in this regard.
 - v) Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing confidential information to persons outside the organization.
 - vi) Example: as corporate counsel for Ford, you meet with Ford's president and CEO, Bill. Bill tells you that he's tired of the car business and is about to take off for Rio with the \$50mil he has embezzled. Bill also tells you that since you are his lawyer, he expects you to keep all of this confidential. What do you do?
 - (1) Ford is the client, not Bill. You must report this up the chain of command and you may report this to outside authorities if necessary to protect the best interests of the corporation.
 - k) Representing the **insured**
 - i) Atty represents the insured, not the insurance company paying the bills.
 - (1) A letter of engagement must be sent to both the insurance company and the insured.
 - (2) Confidential information of the insured is kept from the insurance company.
- 6) **Handling money**
- a) Lawyer has the duty to explain fully the reasons for the fee.
 - i) Keep fee reasonable and note that state bars cannot set either minimum or maximum fee schedules.
 - ii) Exception: lawyer can enter into a retainer agreement with a client that has a minimum fee, if it sets forth how such a fee will be incurred and calculated.

b) **Ratifying** a fee agreement

- i) A client may ratify an atty's fee agreement during a period of continuous representation even if atty misconduct occurs during that period, so long as the client's ratification is not procured as a result of the misconduct.

(1) Example: M hires T to represent her in a personal injury action against M1 for injuries sustained when M1 struck her with his car. At their initial meeting, T explains that the case will be handled on a contingency basis, with him receiving 1/3 of any recovery. The fee arrangement is not reduced to writing. During the course of the lawsuit, T makes several misrepresentations regarding the severity of M's injuries. Several months into the lawsuit, T reduces the fee arrangement to writing and M signs it without any protest. Can T still collect his fee?

(a) Yes, because ratification is not a result of the misconduct.

- ii) A fully-informed client who knowingly and voluntarily affirms an existing fee arrangement that might otherwise be considered voidable, can ratify, so long as:

(1) The client has full understanding of the facts and has knowledge of their rights as a client.

c) When you **cannot charge contingency fees**:

- i) In a criminal case.

(1) Example: Dr. has been accused of having extraordinarily bad bedside manner. As a NY physician, he can lose his license to practice medicine if he is found guilty as charged by the medical licensing board. Can you charge Dr. a contingency fee for representing him in this matter?

(a) No. This is a quasi-criminal problem in NY.

- ii) In a domestic relations case.

(1) Example: CS, a wealthy divorcee, wants you to sue her ex-husband for \$75k in past due alimony and child support. May you take the case on a contingent fee basis?

(a) No, not in NY. Past due alimony and child support are not exceptions in NY.

- iii) In NY, after representation is over, the lawyer must provide client with a written closing statement that states the outcome of the matter and computing the fee. It must be filed with the Appellate Division.

d) **Written letter of engagement**

- i) If fees are projected to be greater than \$3k, the fee agreement must be in writing.
 - (1) Client does not have to sign it.
- ii) Does not apply if services are of the same general kind previously provided to client or if services involve a domestic relations matter.
- iii) In this situation, the retainer agreement/letter of engagement must include:
 - (1) Scope of legal services to be provided
 - (2) Explanation of atty's fees to be charged
 - (3) Expenses and billing practices
 - (4) Notice of client's right to arbitrate a fee dispute.
- iv) If not in writing, atty can recover fees in quantum meruit, but the Bar will discipline atty.
- v) Exceptions to when it must be in writing:
 - (1) Where fee is expected to be less than \$3k.
 - (2) Where services rendered are similar to those rendered to client in the past.
 - (3) Where atty has no office in NY or no material portion of services are rendered in NY.
 - (4) Domestic relations matter – a specific letter is required.
- vi) Note: in a recent case, Court of Appeals noted that in exceptions 1, 2, and 3, the letter of engagement must be communicated to the client, even though it is not required to be in writing.

e) **Domestic relations matters** = representing a client in any action involving divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony. Includes preliminary hearings, enforcement or judgment-modification hearings, and appeals.

- i) Fee agreement must be in writing, signed by atty and client.
- ii) Atty must provide prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.
- iii) No non-refundable fees in domestic relations matters.
- iv) Cannot use contingency fee to collect unpaid alimony or child support.
- v) Fee disputes in domestic relations matters must be resolved by arbitration at the election of the client.
- vi) Periodic billing must be sent out every 60 days and at conclusion of case, atty must send back any unused portion of the retainer.

- f) **Relationship with the non-lawyer**
 - i) Lawyer cannot be a partner with a non-lawyer if any part of the partnership involves the practice of law.
 - ii) Never divide a legal fee with a non-lawyer.
 - (1) Example: Bill, a lawyer, is also a real estate broker and he goes into the real estate business with another local broker. Can Bill, as a member of the NY Bar, split real estate fees with the other broker?
 - (a) Yes. These are not legal fees. Nothing suggests that Bill is practicing law.
 - (2) Exceptions:
 - (a) Salaries, retirement plans, bonuses, profit sharing.
 - (i) I.e., non-lawyer employees in the firm.
 - (b) Spouses of deceased partners to pay fees earned by deceased partner.
 - iii) But an atty and non-atty can share office space, so long as the space is physically separate in fact and appears so to the public.
 - (1) Precautions must ensure that the non-lawyer's clients are not coerced to use the lawyer for legal matters.
- g) **Referral fees**
 - i) Be careful when dividing fees with an atty in another firm. PURE referral fees are unethical.
 - (1) Reciprocal referral agreement (with doctor or accountant) that is not exclusive is ok.
 - ii) Example: T has retained you to represent him in a slip-and-fall action against the local shopping mall. Just after you win a multi-million dollar judgment against the mall, the mall's owners declare bankruptcy. As an ethical personal injury atty, you realize that you do not know anything about bankruptcy and seek to bring in expert counsel. May you do so?
 - (1) Yes, but only if:
 - (a) The division of fees are in proportion to the work performed, and
 - (b) Client gives informed consent in writing, and
 - (c) The total fee is reasonable.
- h) **Retainer**
 - i) Types:
 - (1) Advance on fees
 - (a) Belongs to the client and goes into the client's trust account.
 - (2) Availability retainer
 - (a) Belongs to the atty and goes into the atty's account
 - ii) There are no non-refundable availability retainers in NY.

- i) Proper accounts for atty
 - i) Every lawyer **must** have:
 - (1) Operating account
 - (a) This is the law firm's account. Atty's money goes here.
 - (2) Client trust account
 - (a) This is the client's money.
 - (b) It is ok for atty to cover bank fees
 - (i) This is the only amount atty can put in – if more, then it is commingling.
 - ii) **General rule for client trust accounts**
 - (1) Have one, use it, keep records of its use, and don't mix up your client trust account with your operating account.
 - iii) **NY specific rules of client trust accounts**
 - (1) Must be in NY
 - (a) If elsewhere, it must be with client's written informed consent.
 - (2) Bank service charges are the only lawyer funds that can be put in a client trust account.
 - (3) For small sums accumulating, the interest is swept out and sent to NY IOLA fund (interest on lawyer's account).
 - (4) Dishonored check reporting
 - (a) Client funds that must be maintained in a bank that provides a dishonored check report when a check is dishonored due to insufficient funds.
 - (b) A copy of the report is mailed to the lawyer and after 10 days, the report is sent to the Disciplinary Committee to take action. A lawyer cannot go and deposit additional sums in the account.
- j) Common client trust account problems
 - i) Example: D, finding himself \$100 short to pay office rent and salaries at the end of the month, borrows \$100 from client trust account after executing a promissory note, which will pay 3x the going rate of interest. Problems?
 - (1) Yes. This is conversion. There is no good reason to withdraw.
 - ii) Example: After getting through the tough time, D gets a new client who gives him a \$100k retainer, which he properly places in the client trust account. D begins work on the client's file and bills \$2k the first week. Should he transfer the \$2k from his client trust account to his operating account and if so, when?
 - (1) Immediately, or else leaving it in there is commingling. As it is earned, transfer it out.

- iii) Example: D represents a different client pursuant to a 1/3 contingency fee agreement. The case settles for \$30k and when D receives the check, he properly deposits it in his client trust account and notifies his client of the check's arrival. Before D can transfer his \$10k fee from his client trust account to his operating account, the client calls and says, "I've been thinking about your fee and it seems that you did not do \$10k of work. I think you are only entitled to \$3k." What should D do?
 - (1) No question, client gets 2/3 and D gets \$3k. So pay client \$20k and transfer only \$3k to operating account. Work together to resolve the dispute re: the remaining \$7k. D can keep the money in the client trust account or return it to the client and sue them for it.
 - k) **Fee dispute resolution program**
 - i) In NY, in a civil matter, fee disputes between atty and client are subject to arbitration at the client's option.
 - (1) Client must be told about this option in the letter of engagement (where required) and when a fee dispute arises.
 - ii) Exceptions to this mandatory program:
 - (1) Fee disputes in criminal matters
 - (2) If amount in dispute is less than \$1k or more than \$50k
 - (3) If the claim involves atty malpractice
- 7) **Being professional responsible** – how far does it extend?
 - a) Make sure you and others follow the rules whether you are a subordinate lawyer, supervising lawyer, or partner.
 - i) Subordinate lawyer – you must abide by the rules and follow all provisions of the rules of prof. conduct.
 - (1) No violation if you follow supervisor's instructions on a close call.
 - (a) Arguable case = that you thought what you did as ok. (??)
 - ii) Supervising lawyer/partner – you must abide by the rules and must ensure all ordinary lawyers follow those rules.
 - (1) Supervisor can be held responsible for conduct of subordinates if they knew of the wrongful conduct and did not report it or if they told the subordinate to perform the act.
 - iii) Example: G is a first year assoc. J, his supervising atty, tells him that the firm's most important client, E, has a case coming up for trial. J forgot to obtain a notarized affidavit from E before she left the country on vacation. J tells G to sign E's name and notarize the affidavit himself. J and E are best friend and he tells G that he knows E wouldn't mind. What should G do?
 - (1) G should refuse to sign and should report such actions as violations of rules of prof. conduct and crime of perjury.

b) Conducting litigation fairly

i) Ex parte communications during trial:

(1) With jury:

- (a) Nothing outside the courtroom during the trial.
- (b) But after the trial is ok, unless:
 - (i) Prohibited by court order
 - (ii) Juror does not want to talk to you
 - (iii) Purpose is to harass the juror

(2) With judge:

- (a) Only de minimis, or
- (b) In case of an emergency, or
- (c) During a conference or caucus during a settlement.

(3) With adversarial party:

- (a) Only through his lawyer.

(4) With witnesses:

- (a) Ok, since there is no such thing as a plaintiff witness or defense witness.
- (b) But note, corporate supervisory position or whose testimony may lead to corporate liability, must go through corporate counsel.

(5) Example: during lunch recess at civil trial, P's atty, M, runs into a juror on the way to the restroom. M asks the juror whether she thought his opening statement was explosive enough. While defendant's atty is checking his messages, M is confronted by defendant who wants to settle the case before trial resumes. M quickly agrees and using a phone, asks the judge if he will accept the settlement. Judge agrees to the settlement so M tells the key witness she will not have to testify at trial. For which is M in trouble?

(a) Juror:

- (i) Yes – cannot communicate with juror during trial, outside courtroom.

(b) Defendant:

- (i) Yes – only can talk to adverse party through his lawyer.

(c) Judge:

- (i) Yes – judge did not ask permission to speak to each party ex parte.

(d) Witness:

- (i) No.

ii) **Adverse authority**

- (1) Atty has an affirmative duty to disclose contrary or adverse authority, which means cases and statutes from the controlling jurisdiction only.
 - (a) Duty does not extend to facts or witnesses.
- (2) Example: Atty stops at the local law library on his way to argue an MSJ. He comes across the Devon case, from the controlling jurisdiction that is directly on point and holds to the contrary of the position he is about to argue. In court, atty's opponent argues and fails to raise the Devon case. Judge seems clueless. Atty is aware of his affirmative duty but fears that disclosing the adverse case will cause him to lose. Atty must, or be subject to discipline:
 - (a) Disclose the NY case only and then distinguish it based on fact or law.

iii) In an **ex parte** proceeding

- (1) Atty shall inform the tribunal of all material facts known to atty that will make the tribunal make an informed decision, whether or not the facts are adverse.

Note: read Part VI and Part VIII in Conviser once before date of exam

- c) Special duties of the prosecutor
 - i) Proceed only on probable cause.
 - ii) Must disclose, in a timely manner, evidence tending to negate guilt or which could mitigate the degree of the offense or reduce punishment.
- d) Voluntary pro bono service
 - i) Attys are strongly encouraged to provide pro bono services to benefit poor persons and should aspire to:
 - (1) Provide 20 hours per year to indigents
 - (2) Contribute financially to organizations that provide legal service for indigents.
- e) Atty must uphold the integrity of the profession and its members by not making unfair or derogatory personal references to other attys and giving or lending any items of value to a judge or other public official except as permitted by the Code of Judicial Conduct.
 - i) Campaign contributions are ok.
- f) Every atty shall file a registration statement every 2 years when duly admitted to the NY bar.
 - i) This is a public record on submission of a written request and fee.

- g) **On NY essays where you see any atty/client potential problem**, add the following in the Rules segment after you have framed the issue:
- i) Civil:
 - (1) A lawyer should represent his client zealously, within the bounds of the law, and make only meritorious claims and contentions.
 - ii) Criminal:
 - (1) A lawyer should represent his client zealously, within the bounds of the law, but may defend a proceeding so as to require every element of the case to be established.