Ethical Problem-Solving Methodology

PRESENTED BY

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§00. Preface.

I reprise (and adapt) my preface to a similar seminar I taught years ago that began with an adaptation of a famous quotation of the great everyman philosopher, Yogi Berra. Being more cognizant today that I was then about my Geezerhood, I realize that many non-Geezer lawyers may ask: “Who is Yogi Berra?” Suitably, there is a museum about Yogi Berra,¹ a self-educated catcher for the New York Yankees in the glory days of baseball from 1946 to the 1965. (He played in 14 World Series.) He became famous not only for his skills as a great baseball player but also as the coiner of malapropisms that nevertheless conveyed an essential truth. (“This is like deja vu all over again” and many more -- click here² and then scroll-down to “Yogi-Isms” in the right-hand column.) One of his most famous quotations is “Baseball is 90% mental; the other half is mental.”³ I adapt it to Legal Ethics: “Ninety percent of being an ethical lawyer is mental; the other half is common sense”

Without any intent to disparage those among us who serve on committees appointed to render opinions on ethics issues, it’s my opinion that too often the very act of “role playing” as an “authority” on “ethics” can lead lawyers serving in such roles to become blind to conclusions that exemplify common sense within the boundaries of ethical standards. I sincerely include myself when I say all of us sometimes fall prey to our own intellectual prowess when we undertake to thoroughly analyze and reach ethically appropriate solutions for ethics problems. Recognizing this led me to formulate a methodology for solving such problems in ways that can counter such tendencies or at least temper them with common sense.

¹ [http://www.yogiberramuseum.org/](http://www.yogiberramuseum.org/)
² [http://www.yogiberramuseum.org/about_biography.php](http://www.yogiberramuseum.org/about_biography.php)
³ [http://www.yogiberraclassic.org/quotes/](http://www.yogiberraclassic.org/quotes/)
Practicing the application of the mind of a lawyer to solving ethics problems in common-sense ways within the boundaries of ethical standards is what I call an “Ethics Workout” designed to serve as “Mental Aerobics for Solving Ethics Problems.”

§01. Fundamental Principles We Know as Lawyers but Sometimes Fail to Keep in Proper Perspective.

As lawyers we intellectually understand a number of fundamental principles about our profession. We know our legal profession evolved in English Common law with the attorney-client relationship evolving from principles governing the principal-and-agent relationship and by virtue of the inherent judicial power of courts to define the scope of such relationship and well as the role of lawyers as "officers of the courts" specially recognized by the courts to perform the role of attorneys but subject to rules and standards imposed upon them by the courts. We know that our profession is so vital to the rule of law and the principles of liberty that it’s the only profession recognized in the United States Constitution. We know our profession is an integral part of the judicial branch of government.

§01A. Why is it the "Attorney-Client Relationship" rather than "Client-Attorney" Relationship?

With respect the common-law evolution of the "principal and agent" relationship, the "principal" comes first in that phrase, but the terminology for the "attorney-client" relationship reverses that order. Why is that so? It’s because the attorney’s duties as an "officer of the court" make it obligatory on the attorney (as the "agent" in attorney-client relationship) to impose rule-of-law limitations on the scope of the undertaking on behalf of the client (as the "principal") than were/are the duties an ordinary "agent" in an ordinary "principal and agent" relationship.
§01B. Duty of Loyalty Within the Rule of Law.

We know that the attorney-client relationship obliges the attorney to place the interests of the client above all other interests (subject to such rule-of-law limitations and requirements) and that such obligations a fortiori impose duties upon an attorney undertaking to handle a matter for a particular client to prevent his own interests or those of another or former client from adversely affecting his exercise of independent, lawful judgment on behalf of such particular client. More on the duty of loyalty-- See §01C04-B, infra.

§01C. Duty of Competence-- Legal Knowledge, Skill & Care-- Legal-Malpractice Standards.

Although the following material focuses mainly on Virginia law, it’s reasonably illustrative of the stages of the evolution of the duty-of-competence in the civil standard of care.

§01C01. Colonial-Period Standards.

Civil-law/common-law duties to clients evolved from common law duties of agents to principals. During the colonial period, Pitt v. Yalden, 4 Burr 2060, 98 Eng.Rep. 74 (K.B. 1767), held that an attorney ought to be liable for “gross negligence” but not an “honest mistake.” Thus, Pitt constituted a nascent recognition of a two-fold aspect of a lawyer’s duty to a client: a duty of competence deemed violated by “gross negligence” and a duty of loyalty deemed violated by a lack of honesty.

§01C02. Early-American-Period Standards (1791 through 19th Century).

The earliest reported legal-malpractice case in the United States, Stephens v. White, 2Wash. 203, 2 Va. 203 (1796) held that a lawyer’s liability for malpractice for work undertaken was not dependent upon the lawyer having received consideration for such engagement.
In Stephens, the court held: “Though a man is not bound to do an act for another without a reward, yet, if he will voluntarily engage and enter upon the performance of it, he is liable for the consequences of his improper management, and cannot allege a want of consideration for his engagement.” (Emphasis added.)

Yet in 1807, courts viewed a debt due from an attorney to his client for money collected on a judgment as “only a debt by simple contract.” Gaitright v. Marshall, 1 Hen. & M. 427, 11 Va. 427 (1807). Worse, although Rootes v. Stone, 2 Leigh 650, 29 Va. 650 (1831), held an attorney negligently losing debts he was employed to collect liable to the client for the principal, Rootes ruled the attorney not liable for interest on the lost principal.

However, by 1850, courts began applying more stringent definitions of the dual standards of care and loyalty: Pennington's Ex'rs v. Yell, 11 Ark. (6 Eng.) 212, 52 Am.Dec. 262 (1850) articulated “reasonable skill and diligence” as the standard of care defining a lawyer’s duty of competence. Stockton v. Ford, 52 U.S. (11 How.) 232, 13 L.Ed. 676 (1850) became a leading case applying stringent standards defining a lawyer’s duty of loyalty to exalt the client’s interests over his own as well as the interests of others. As late as 1890, Thomas v. Turner's Adm'r, 87 Va. 1, 12 S.E. 149 (1890), identified Stockton as a leading authority for such fiduciary aspects of a lawyer’s duties to a client.

§01C03. Early-20th Century Standards.

Malpractice case-law continued evolving broader and deeper duties deemed owed by lawyers to clients. For example, even though Stein v. Morris, 91 S.E. 177, 120 Va. 390 (1917), rejected a claim by a client against his lawyer for successfully establishing a bank in his own interest in the wake of the failure of a bank which the client had employed the lawyer to establish, it contemplated the issue of whether the lawyer’s bank succeeded by utilizing information gained by the lawyer in the confidential relationship of his engagement by the client in what became an unsuccessful attempt to establish a bank for the client and not for the lawyer.
§01C04. Mid-20th Century Standards.

Malpractice case-law continued evolving broader and deeper duties deemed owed by lawyers to clients. Although most jurisdictions construed legal-malpractice claims as breach-of-contract claims, others construed them as tort claims, but even those treating them as breach-of-contract claims did not preclude the possibility of tort claims arising against lawyers for tortious breaches of the attorney-client relationship.\(^4\) Such case-law also evolved a variety of theories on the circumstances under which lawyers may be deemed liable to, or immune from liability to, third parties or adversaries on breach-of-contract and/or tort-liability theories.\(^5\)

By the mid-Twentieth Century, courts typically defined the two-fold competence/loyalty nature of the standard of care owed by lawyer to client as obliging the lawyer to furnish a reasonable degree of legal knowledge, skill and diligence exercised with utmost loyalty (with the law, of course) to the best interests of the client. Several Virginia cases illustrate standards had become accepted on a widespread basis:

§01C04-A. Competence element of civil-liability standard.

Glenn v. Haynes, 192 Va. 574, 581, 66 S.E.2d 509, 513 (1951), provided an excellent articulation of that part of the standard of care focusing on competence:

By expressly or impliedly\(^6\) undertaking to handle a legal matter for another, a lawyer warrants that he\(^7\) possesses, or will acquire, sufficient legal skill to serve adequately the interests of the client and will exercise a reasonable degree of legal care, skill and diligence in doing so.

\(^6\) Regarding attorney-client relationships impliedly, though unintentionally or unwittingly, undertaken by a lawyer, see CROSS-REFERENCE.
\(^7\) I prefer to use male pronouns with gender-neutral intent rather than “he/she,” “him/her,” etc.
§01C04-B. Loyalty element of civil-liability standard.

Although Norman v. Insurance Company, 218 Va. 718 (1978) found no evidence of any breach of the duty of loyalty in that case (involving a policyholder’s claim that counsel employed by the insurer was representing conflicting interests), it contains an excellent recitation of the duty of loyalty:

No one questions the fact that the standards of the legal profession require undeviating fidelity of a lawyer to his client, and no exceptions can be tolerated. A client may presume that his attorney has no interest which will interfere with his devotion to the cause confided in him. Norman, at 727.

Furthermore, when the potential for adverse influence upon a lawyer’s fidelity to the best interest of the client derive from the self-interests of the lawyer, evidence of such self interest creates a presumption of constructive fraud in favor of the client against the lawyer:

All dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence. The rule is founded in public policy, and operates independently of any ingredient of actual fraud, or of the age or capacity of the client, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise. (Emphasis added.) Thomas v. Turner, 87 Va.1, 12 S.E. 149, 668 (1890).

The lesson of these two cases about the duty of loyalty is that evidence of the existence of interests of others than a client as a source for influencing the attorney’s duty to exercise his legal judgment in the best interests of the client shifts to the attorney the burden to prove the judgment he exercised was in the best interests of the client rather than a product of the influence of such other interests.
§01C05. Mid-20th Century to the Present.

The continuing case-law evolution of civil-liability standards for legal malpractice in all states and territories has yielded, and will continue to yield, a diminution of uniformity among such jurisdictions, yet the fundamental principles remain relatively intact with the major differences involving the extent to which courts shift the interpretations of such principles toward greater favor for the clients.

§01D. Ethics Problems-- Duties to Recognize and Appropriately Solve Them.

But sometimes when we perceive ourselves as being confronted by an ethics problem, our egos, our emotional anxiety or our subconscious perceptions of our own self-interests may impair our abilities to adequately perceive all issues pertaining to such problems and as well as our abilities to objectively analyze them in order to discern ethically appropriate solutions.

There's no "magic bullet" methodology for doing so successfully, but there are ways to significantly minimize the risks of failure. It's not uncommon for there to be more than one ethically appropriate solution to an ethics problem, but even in such cases it's rare for such multiple solutions to be incapable of relative classification as "good," "better" or "best."

Two sets of standards control how we may/should/must/must-not solve such problems:

§01D01. Civil Standards.

See the materials in §01C, supra.

§01D02. Ethical Standards -- Generally

See §02C03, infra. Regarding regulatory enforcement of standards governing the conduct and/or status of lawyers, see §01E, infra.
§01E. Regulatory Enforcement of Standards Governing Lawyers.

By virtue of the U.S. Constitution's incorporation of English common law in 1791, our American system vested all courts in all U.S. states and territories with the inherent judicial power to regulate the conduct and status of lawyers subject to their jurisdiction. Since then, the exercise of such power has evolved (mainly, but not exclusively via common-law powers of courts) from a fragmented system in which virtually all such regulation occurred in the context of court-by-court rule-making and case-law adjudication into comprehensive systems in all U.S. states and territories. The most dramatic of such evolutionary changes occurred in the last half of the 20th Century.

§01E01. Contempt-of-Court and Sanctionability Standards.

American jurisprudence has long recognized the inherent power of a court to regulate a lawyer’s conduct within, or subject to, its jurisdiction. As recently as 2007, the Virginia Supreme Court's decision [see Nusbaum v. Berlin, 273 Va. 385 - 641 S.E.2d 49 (2007)] on the scope of a court’s power of contempt over such conduct by a lawyer quoted long-standing recognition of such power by the United States Supreme Court in Link v. Wabash R. Co., 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962):

Nearly two centuries ago, in Anderson v. Dunn, 6 Wheat. 204, 19 U.S. 204, 5 L.Ed. 242 (1821), the Supreme Court of the United States stated, “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.” Id. at 228. These "inherent powers" are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” Link v. Wabash R. Co., 370 U.S. 626, 630- 31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).
Such powers continue to exist independent of Rules of Court promulgated by the highest courts of the various states and territories of the United States establishing administrative agencies within their judicial branches for the regulation and discipline of lawyers generally and likewise independent of other legislative and/or rule-of-court provisions for specific types of sanctions in particular contexts (e.g., FRCP Rule 11 sanctions and state/territorial court’s comparable rules).

§01E02. Formalized/Comprehensive Disciplinary/Regulatory Systems

§01E02-A. U.S. Supreme Court:

In 1961 in Lathrop v. Donahue, 367 U.S. 820, 81 S.Ct. 1826 (1961), the United States Supreme Court reaffirmed federal recognition of the inherent power of the judiciary to regulate the conduct of lawyers within its jurisdiction. Lathrop upheld the power of the judiciary to make the organized bar an administrative agency of the judiciary for the purpose of conditioning licensure of lawyers upon membership in good standing and empowering the bar to discipline lawyers as an administrative agency of the judiciary.

However, through the 1960’s, states in which the judiciary had made the bar associations their administrative agencies for purposes of disciplining lawyers were the exceptions rather than the rule. In most states, voluntary bar associations maintained procedures by which they voluntarily enforced ethical standards by bringing civil actions as parties litigant against lawyers when their voluntary investigations had found grounds for seeking disciplinary action.

§01E02-B. ABA Clark Committee Study/Report

In the mid-1960’s, the ABA established a "Special Committee on Evaluation of Disciplinary Enforcement." That committee became popularly known as the "Clark Committee" because then U.S. Supreme Court Justice Tom Clark served as its chairman).
— By 1970, the Clark Committee issued a report (the Clark Committee Report\textsuperscript{8}), which the ABA adopted, recommending nationwide, state-by-state adoption of a comprehensive system broadening and deepening the function and power of organized bars to discipline lawyers as administrative agencies of the state judiciaries. Key elements of these voluminous, far-reaching recommendations included:

1. Creating a state-wide bar organization to serve as an administrative agency of the judiciary (or conferring such status upon an existing, voluntary bar association) for regulating the practice of law;

2. Vesting such organization with subpoena power;

3. Vesting such organization with the duties and powers to discipline lawyers and/or to initiate proceedings in appropriate courts to seek such discipline;

4. Appointment of professional, full-time prosecutors rather than relying solely upon voluntary service in such capacity by lawyers in private practice; and

5. Funding such system by dues imposed upon lawyers to be within the control of the judicial branch (as was the case in Lathrop, supra) rather than by taxes from revenue subject to control of the legislative branch.

By the mid-1970’s, the judiciaries of a majority of states had promulgated rules (with legislative approval in some states) establishing disciplinary systems bearing substantial similarity to the system recommended by the Clark Committee Report.

\textsuperscript{8} Although the Clark Committee Report has long been out of print, copies may still be available from ABA headquarters.
§01E02-C. Functional characteristics of modern enforcement systems.

§01E02-C01. Prosecutorial/adjudicative functions.

Most modern disciplinary systems confer a mixture of investigative, prosecutorial and adjudicative functions upon judicial-branch administrative agencies charged with enforcing the standards of ethics for lawyers. Although fear of public distrust of “plea bargaining” initially made many jurisdictions reluctant to countenance imposition of discipline by consent, “agreed dispositions” or similar consensual resolutions of grievances are now commonplace.

§01E02-C02. Advisory/legislative functions.

Most modern systems (as well as most in the minority of states that created judicial-branch enforcement agencies early in the Twentieth Century, such as Virginia) provide advisory services to lawyers and perform limited legislative functions within the judicial branch to serve the larger purpose of enforcing the ethical standards for lawyers. However, performance of such advisory functions sometimes led to unexpected problems—See §1.02 Historical Speed-Bump, in Appendix B.

§01E02-C03. Prophylactic functions.

Most modern systems impose prophylactic requirements deemed likely to increase compliance with ethical standards. Two examples are mandatory continuing-legal-education requirements and expansion of the authority of enforcement agencies to audit trust accounts without being required to establish specific cause for doing so.

§01E02-C04. Remedial functions.

Most modern systems include remedial functions such as

i. disability proceedings involving mental-competence issues—See “Mental-Competence Standards in §-1E03, infra

ii. client security funds to recompense clients whose funds were lost through mishandling by their lawyers and

iii. procedures to arbitrate fee disputes.
§01E02-C05. Disciplinary Standards Generally

Are we (should we?) be subject to discipline for selecting a solution that is merely “good” or “better” but not “best”? In my experience, disciplinary tribunals are loathe to view as “misconduct” a lawyer’s good-faith failure to perceive and implement what the tribunal considers the “best” solution when the lawyer’s conduct evinces a good-faith effort to discern and implement an ethically appropriate solution. And even in cases in which tribunals deem a manifestly good-faith effort to arrive at an appropriate solution to be less than “good,” they’re likely to view the good-faith effort sufficient to militate against imposition of severe disciplinary sanctions if not against any sanction at all.

Of course, such tribunals comprised of fallible human beings sometimes fail to justly credit good faith as outweighing what they may perceive as the ethical deficiency of a particular solution. Nevertheless, my experience in the field convinced me that the risks of such types of injustice are very low.

§01E03. Mental-Competence Standards

A major achievement of the Clark Committee recommendations [see §01E02-B, supra.] was the inclusion of a separate “disability” track for bar investigations indicating a lawyer is, or may be, suffering from a disability (including mental problems, dementia, alcoholism, drug addiction, etc.) to provide a potentially fast-track way to protect the public from lawyers with such problems rather than being required to treat them the same as cases involving misconduct by lawyers not suffering from any such disability. Soon after those recommendations, virtually all states incorporated into their disciplinary systems a disability track substantially conforming to what the Clark Committee recommended.
Another major achievement of the Clark Committee recommendations [see §01E02-B, supra] was the establishment of a streamlined process for discipline lawyers on the basis of criminal convictions of a number of specified, serious crimes by proof of conviction without the necessity for the disciplinary agency to prove guilt. This type of streamlined procedure had become adopted in virtually all jurisdictions by the mid-1970s.

§02. Methodology for seeking ethically appropriate solutions to ethics problems.

How can we minimize the risks that our analysis of, and solutions for, ethics problems would be deemed so deficient as to constitute "misconduct"? I think there is a methodology for minimizing such risks, but it's not a "silver bullet" and can't "guarantee" that any particular tribunal would deem its fruits to be the "right" solution. What is the methodology? I use the acronym "MORALS" to denote the first letters of key concepts in applying the methodology:

• Moral Analysis (not religious morality but rather civic morality)
• Objectivity — Other Lawyer’s Advice
• Rules of Ethics
• Authorities — Case law, Statutes & Constitutional Law
• Lucubration
• Strategy — Select Sensible Strategy

What do I mean by these terms, and what is the significance of the order in which I've listed them?

§02A. Moral Analysis.

To minimize the risks of failing to perceive all potentially relevant issues, one must begin the analysis of a problem with the widest possible field of vision.
A common mistake made by lawyers making good-faith efforts to properly analyze and solve ethics problems is to commence analysis of the perceived problem by focusing upon whatever Rule of Ethics that may seem most applicable to the most salient aspect of the problem. The problem is not that such approach cannot yield an ethically appropriate solution-- indeed, it can; rather, the problem is that such approach doesn't minimize the risks of selecting an inappropriate solution.

Why and how? In the same way that a crime-scene investigator focusing on the particular aspects of the circumstances may thereby overlook important clues vital to solving the crime.

Lawyers attempting to correctly diagnose and appropriately solve ethics problems can minimize the risks of making a comparable mistake by first analyzing the problem within the context of moral standards-- not religious standards, but rather the civic standards of morality we all share. (Even though we don't all have identical perceptions of such standards, most differences are around the margins with the result being that the areas of common agreement are vast compared to the areas of disagreement.) Lawyers should conduct such analysis as though they were simply good citizens rather than lawyers.

What does this accomplish? It broadens our field of vision. It may enable us to perceive issues that our training as lawyers and/or familiarity with the Rules of Ethics might prevent us from recognizing. Two different scenarios serve to illustrate what I mean:

§02A01. Scenario 01: A man commits murder.

§02A01-A: Murderer confides to a friend that he committed a murder. Friend is a good citizen, so he informs the police.

§02A01-B: Murderer engages lawyer out of fear that he may become a suspect in, and charged with, the murder. Murderer confesses to the lawyer that he committed the murder. After the initial consultation, Murderer decides to hire another attorney. Lawyer knows attorney-client privilege prohibits him from divulging such confession.
§02A02. Scenario 02: Con Man operates a pyramid scheme

A con man operates a pyramid scheme in the guise of an "investment management service" under which he uses funds "invested" with him by new investors to pay "interest" or "dividends" to older investors. He requires each investor to fully disclose the entirety of the investor’s financial condition. To maximize his ability to keep the pyramid scheme going, he limits the amount he will accept from any particular "investor" to an amount small enough relative to the investor’s assets that his fraudulent scheme could not significantly damage the investor’s overall financial condition. To maintain sufficient a cash-in/cash-out balance, he periodically reduces his cash-out needs by telling older investors that their investments failed.

§02A02-A: Con Man confides the nature of his scheme to a friend whom he believes would be interested in joining him in his "investment" business. He explains to his friend that he's not really hurting the "investors" because they’re financially well-off and what they will ultimately "lose" when he tells them their investments "failed" is too small to seriously damage them financially. However, the friend he expected to be eager to join him in his "RobinHood" enterprise is instead a good citizen, who notifies police.

§02A02-B: Con Man consults a lawyer. Hearing a news report about the exposure and prosecution of a similar scheme elsewhere in the same state, he begins worrying that the same might happen to his scheme, so he consults a lawyer fearing he may need one. In the consultation he fully describes the nature of his operation and explains that the reason he’d never really feared exposure is that he’s always limited the "investment" he would accept from any particular "investor" to an amount that would be clearly insignificant relative to such investor’s financial assets. He explains that this approach protected him because whenever it was necessary for him to tell an older investor that the investment had "failed," the loss would never be a significant enough injury to motivate the investor to investigate the matter further. When the lawyer tells Con Man he must immediately terminate the scheme, Con Mantells the lawyer he’s decided he doesn’t need to continue their relationship.
Now consider two different ways the lawyer may analyze the situation:

§02A02-B01: Afterward, lawyer begins his analysis by studying the ABA Rule 1.6 on confidentiality (adopted in the lawyer’s state):

Rule 1.6.

a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;

2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

Concluding that the very nature and structure of the pyramid scheme prevented the financial injury to any new or former “investor” from being “substantial,” and that his services as a lawyer had never been “used” by the Con Man in furtherance of the scheme, the lawyer further concludes that Rule 1.6 prohibits him from disclosing the pyramid scheme to anyone. (Obviously, this lawyer is interpreting the term "substantial" in a relativistic manner -- i.e., what may be “substantial” to a person of modest means may be insubstantial to a person of wealth, but he’s also still stuck with the fact that the client never "used [this lawyer’s] services [in furtherance of the crime]."
Afterward, lawyer wrestles with the moral question of what he should do. He knows that a good citizen would report the ongoing criminal scheme to the authorities. He knows the importance of attorney-client privilege, but his gut instinct makes him feel that keeping silent would be morally tantamount to becoming an accessory in some form or another. He briefly researches case-law on accessories, whereupon he stumbles upon a decision holding that a client’s disclosure of prospective criminal intent to a lawyer is one to which the attorney-client privilege cannot attach. Believing this case-law to be controlling, he proceeds to the next step in the MORALS method by engaging another lawyer with a reputation of ethical integrity as well as knowledge of criminal law to advise him on these issues.
§02B. Objectivity — Other Lawyer’s Advice

Most of us as lawyers have larger than average egos, which can become our own worst enemies. Egotism can rob us of objectivity just as surely as self-interests, differing interests among multiple clients or between a current and former client, etc. Thus, whenever we’re confronted by what we perceive as a serious ethics problem (i.e., a problem to which the solution is not a “no-brainer”), the smartest thing we can do is to engage the objectivity of another lawyer whose judgment and reputation on matters of ethics we respect. As a matter of law, our status as lawyers authorizes us to impart confidential information to another lawyer in order to secure legal advice on the nature and extent of our ethical responsibilities relative to such matter. (What do I mean by a “no-brainer”? Scenario A-2, supra, is an example.)

There are three potential sources for such advice: Private counsel, "hot-line" advice provided by a bar or disciplinary agency and "hot-line" advice provided by a malpractice insurance company.

§02B01. Other Lawyer in Private Practice.

Does reliance on advice of another lawyer establish a "defense" to a charge of misconduct in the event the course of action recommended by such other lawyer were to ultimately be found by a disciplinary tribunal to have constituted “misconduct”? No. Such reliance on advice of counsel does not establish a matter-of-law defense.

However, my experience in the real world of prosecuting disciplinary matters early in my career and later in advising and/or representing attorneys or judges on professional-responsibility matters or in disciplinary proceedings taught me that in the vast, vast majority of cases disciplinary tribunals accord great weight to a lawyer’s good faith reliance on good faith advice in determining whether, or how severe or lenient, disciplinary action is warranted.
Two examples illustrate what I mean by "good faith": Suppose a lawyer who by mere human error innocently overpaid a client in disbursing a settlement from his trust account was then confronted with the client refusing to agree it was an overpayment and therefore refusing to return it. The lawyer then seeks advice of another lawyer on what to do about the resulting deficient balance in his trust account pending resolution of such dispute:

§02B01-A. Suppose the advising lawyer were to tell him not to worry as long as the overall balance of all funds in his trust account were to be sufficient to "make good" any disbursement for any other client that may be necessary at any given time. No disciplinary tribunal would deem such advice or course of action to have been in "good faith."

§02B01-B. Suppose the advising lawyer were to tell him to immediately arrange a line of credit sufficient to unconditionally enable him to immediately rectify the overall trust-balance deficiency when and if any other disbursement were to become due before resolution of this dispute. A disciplinary tribunal might accord "good faith" status to such plainly deficient solution by either imposing a less severe disciplinary action or none at all. Generally, even when such tribunals find the conduct at issue to have been "misconduct" they’re also empowered to determine in a particular case that the particular misconduct would not warrant imposition of a disciplinary penalty in light of the good-faith action by the lawyer in following a deficient course of action recommended by a competent lawyer whose advice he sought.

9 The "when and if" standard would be insufficient to satisfy the lawyer’s fiduciary duties to other clients, for whom availability of funds due to be disbursed to them (or to third parties on their behalf) must not be subject to any such "when and if" contingency. The lawyer must promptly rectify the deficient balance.

10 The "when and if" standard would be insufficient to satisfy the lawyer’s fiduciary duties to other clients, for whom availability of funds due to be disbursed to them (or to third parties on their behalf) must not be subject to any such "when and if" contingency. The lawyer must promptly rectify the deficient balance.
§02B01-C. Suppose the advising lawyer were to tell him to promptly arrange a line of credit sufficient to rectify the overall trust balance and to then immediately deposit such amount into the trust account as an advance by the lawyer for that client as replacement for human-error overpayment to the client with such amount to remain in trust until such time as the lawyer is able to obtain from that client a refund of the erroneous overpayment. This would be an ethically acceptable solution to the problem pending efforts by the lawyer through negotiation (or litigation if necessary) to seek to recover the funds he overpaid to the client.

Even though seeking and relying upon advice of private counsel is no “silver bullet,” it dramatically reduces the risks of selecting a course of action that would be deemed misconduct while simultaneously increasing the likelihood that a disciplinary tribunal would find “good faith” as grounds for leniency even if the tribunal were to deem the course of action deficient.

A reliable source for identifying and hiring a lawyer experienced in the field of advising and/or representing lawyers and/or judges on professional-ethics issues is the Association of Professional Responsibility Lawyers at http://www.aprl.net/.

§02B02. “Hot-Line” Advice from Bar or Disciplinary Agency

What about seeking advice from an ethics “hot-line” service provided by the bar or disciplinary agency in your jurisdiction? This is a good choice, but it’s not the best choice for several reasons. I say this not to disparage the honorable and conscientious manner in which lawyers employed by bar or disciplinary organizations attempt to provide the best advice possible. Rather, I say this on the basis of experience and recognition of how a fundamental aspect of human nature affects lawyers’ analyses of issues:
§02B02-A. Personal Experience — If I had a Hammer.

Having rendered what was in essence an informal, unofficial version of "hot line" advice decades ago in my capacity as disciplinary counsel when lawyers needing urgent advice on "ethics" problems sought my advice, I'm sure that despite my conscientious efforts to provide the most ethically appropriate recommendations possible I sometimes provided less than the best recommendations because the disciplinary-counsel role I occupied tended to skew how I would apply my professional judgment in evaluating such issues. My decades in private practice afterward led me to conclude that a lawyer in private practice who's knowledgeable in ethics issues is less susceptible to a role-based bias or prejudice in analyzing such problems. It's not a problem unique to the legal profession--Surgeons tend to be more likely to perceive surgery as the solution for a medical problem; internists may be more likely to perceive medication or some other form of therapy as the solution. Think of the adage, "To a man with a hammer, every problem is a nail."

§02B02-B. Hot-Line Defense — Maybe "Yes"; Maybe "No"

Some lawyers may assume that reliance upon advice from such "hot-line" advice from a bar disciplinary agency is, or ought to be, a complete defense to charges of misconduct. My own experience (on both sides of the disciplinary process) taught me several reasons why such assumption is not correct. (I'm not saying that such reliance would be irrelevant--indeed, there's a strong likelihood that most disciplinary tribunals would treat good-faith reliance on such advice as a de facto defense if not a de jure defense.) Among the potential pitfalls in reliance on such "hot-line" advice is that a disciplinary counsel may be less likely to perceive additional issues or raise additional questions that might elicit material information than a lawyer in private practice with an intrinsically broader perspective. We all know that with respect to assertions of "advice of counsel" as a defense, the person asserting the defense must show that he furnished to the lawyer all information relevant and material to an effective analysis of the issues.
A lawyer in private practice with a broader experience (and especially when such experience is in the same field out of which the ethics question has arisen) is, in my opinion, more likely to perceive other potential issues. Thus, such lawyer would be more likely to ask a broader range of questions and/or investigate and/or perform research into a broader range of issues than the "hot-line" lawyer. Consequently, with respect to the law and facts, such lawyer would be more likely to acquire a sufficiently comprehensive to encompass all relevant issues and thereby render advice based on a demonstrably solid foundation. It’s similar to opinion evidence of experts in that the opinion is worthless unless it’s shown to be based on the controlling facts. Otherwise, it may be garbage in; garbage out.

§02B02-C. Root Canal. In private practice, I’ve had to defend a lawyer on charges of misconduct even though the course of action alleged to have been misconduct was what a disciplinary-agency "hot-line" lawyer had recommended. It wasn’t that the "hot-line" lawyer gave overtly bad advice; rather, it was that all potentially material questions didn’t occur to the "hot-line" lawyer, who thereby didn’t elicit all the material facts arguably needed for thorough analysis. (In that case, however, after my client endured a two-year root-canal in the form of a grievance investigation and hearing, the investigating committee correctly concluded that he had not engaged in misconduct-- but the mere fact that he had in good faith sought and relied upon "hot-line" advice did not create a de-jure legal defense rendering further investigation unwarranted.) We also need to remember that generally throughout the country, estoppel does not apply against a governmental function, and now in virtually all jurisdictions, the organizations responsible for disciplining lawyers are governmental organizations within the judicial branch of government.
§02B03. "Hot-Line" Advice From Malpractice Insurer

What about seeking advice from a “hot-line” provided by a malpractice insurance company? This is a bad choice. Advice from such “hot-lines” is likely to be skewed far in the opposite direction from that in which disciplinary-counsel “hot-line” advice may be skewed. This is not to say a lawyer confronted with an ethics problem with potential malpractice implications should not timely notify his insurer; rather, it’s merely to say he shouldn't look to his carrier for advice on ethics.

Also, this is not to say the lawyer should ignore "claims-repair" recommendations from such "hot-line" service, which often may coincide with sound ethics advice, and which sometimes may even be more onerous upon the lawyer than the standard sufficient to avoid findings of "misconduct." (This latter observation is particularly apt in contexts involving matters such as conflicts of interests, in reference to which the civil standard of fiduciary loyalty is higher than the standard necessary to avoid being subject to disbarment, suspension or reprimand because in the civil-liability contexts, there are presumptions and burden-shifting principles that make it easier to prove civil liability than to prove misconduct, and the standards for misconduct comprise a "floor" rather than a "ceiling.")

§02C. Rules of Ethics.

Hereafter, unless otherwise stated or made self-evident by the context, “lawyer” includes both the lawyer confronted with the ethics problem and the attorney(s) advising such lawyer pursuant to one (or a combination of two or more) of the three choices identified in §02B, supra.

After first determining what would be the morally appropriate course of action if the lawyer were a non-lawyer good citizen, the lawyer should tentatively view such course of action as the proper course of action. Then the lawyer should study all arguably applicable Rules of Ethics to determine whether any of them would require a different course of action, in which case the lawyer must follow such different course of action unless further analysis in the following step were to dictate or warrant a different conclusion.
Hereafter, "Rule" means a Rule in the ABA Model Rules of Professional Conduct.

§02C01. How to Identify Potentially Applicable Rules.

As researchers, we often start with a subject-matter index. That may suffice in many (perhaps even most) circumstances, but a better approach is the following: Start at the beginning of the Rules and evaluate the subject of every provision in the Rules in numerical order all the way to the end. (It won't be as time-consuming as you think.) List as a potentially applicable Rule every Rule unless it's a rule that patently could even arguably be deemed potentially relevant or applicable. Using this method will almost certainly yield a list of more Rules potentially applicable than the index method. Why? Because indices are imperfect manifestations of someone else's thinking.

Next, consider each Rule listed to determine whether, and if so how, it might be applicable to any particular aspect of the circumstances or legal issues. After determining the applicability or inapplicability of each listed Rule, apply a common-sense interpretation of such rule to the facts. Then revise, accordingly, whatever tentative conclusion you may have reached in the step-one "Moral" analysis. This includes determining whether any particular case-law and/or legislation you may have uncovered in the "Moral" analysis phase may override, or may be overridden by a Rule.

§02C02. How to Put a Rule into Proper Perspective.

Sometimes an understanding of the historical antecedent for a particular Rule may shed light on how to properly interpret such Rule. Formalized Rules of Ethics have existed in three formats, and the completion of nationwide transition (state by state) from each to the next spanned a number of years: First, the Canons of Ethics (from the beginning of the 20th Century until the late-1960's/early-1970s; Second, the Code of Professional Responsibility (from the late-1960’s/early-1970s) to the early-to-late 1990s); Third, the Rules of Professional Conduct (from the early-to-late 1990’s to the present).
Typically, you can find the content and citation for each set of Rules (or Canons) in your particular jurisdiction in whatever volume or publication normally publishes the official decisions and/or rules of the Supreme Court in your jurisdiction.

§02C03. Consider also the Broader Historical Evolution of the Canons/Rules of Ethics Generally:

As is the case with using legislative history as an aid in interpreting legislative intent, understanding the evolutionary history of the development of formalized rules of ethics for lawyers can often provide insights into common-sense ways to interpret rules currently in effect. Appendix B includes a representative summary of the historical evolution of formalized rules of ethics for lawyers, a brief summary of which is below:

Formalization of ethical standards for attorneys first occurred in the United States in the form of a Code of Ethics promulgated by the Alabama Bar Association in 1887.\(^{11}\) Proposals for state-by-state adoption of ethical standards first occurred in 1908 when the American Bar Association (ABA) adopted thirty-two Canons on Professional Ethics.\(^{12}\)

In the early 20th Century revisions produced a set of forty-seven Canons of Ethics. A salient feature of such Canons is that they tended to describe ethical duties of lawyers in aspirational rather than mandatory terms.

Those cannons remained in effect without significant change until 1968 when the ABA, under the leadership of the then President Lewis Powell, adopted a Code of Professional Responsibility, which for the first time articulated mandatory standards supplemented by aspirational axioms and explanations identified as “Ethical Considerations.”

\(^{11}\) Legal Malpractice, Third Edition, by Ronald E. Mallen and Jeffrey M. Smith, §15.7.
\(^{12}\) See the Preface to the 1969 ABA Code of Professional Responsibility.
— By the mid-1970’s virtually every jurisdiction had adopted the Code of Professional Responsibility (with few modifications) to replace the Canons of Ethics.

The Code of Professional Responsibility remained nearly universally applicable until the late 1980’s when the ABA recommended that the Code be replaced with the Model Rules of Professional Conduct with which we’re all familiar today.

Unlike the transition from the Canons to the Code, the transition from the Code to the Model Rules of Professional Conduct occurred over a much longer time period and many states adopting the Model Rules modified them extensively to retain many of the substantive aspects of the Code. Consequently, there is much less uniformity today than was the case when the Code was virtually universally applicable.

§02C04. Consider also the Historical Evolution of the Systems for Disciplining Lawyers, which can provide insights into a better understanding of how the current Rules of Professional Conduct fit into the legal system.

The main stages in the evolution of today’s disciplinary enforcement system were

A. the court's exercising "inherent power" to regulate the conduct of lawyers on a case-by-case basis,

B. the development of formalize rules of ethics to guide lawyers and courts in such matters,

C. voluntary bar organizations establishing procedures to discipline their own members and to provide pro-bono assistance to courts in proceedings to enforce such standards, and

D. establishment of governmental agencies as part of the judicial branch of government to exercise governmental power over the professional conduct of attorneys.
This latter development did not occur in most states until the latter third of the 20th Century but by the mid-1970’s governmental enforcement systems as a part of the judiciary had become virtually universal. Paradoxically, the establishment of this law-enforcement form of regulating the conduct of lawyers led to the legal profession being on the losing end of landmark litigation subjecting not only the legal profession but also such disciplinary enforcement governmental agencies to potential liability under federal Anti-Trust laws. The landmark case in that area was Goldfarb v. The Virginia State Bar. (See §01.02 Historical Speed-Bump — Regulation of Legal Fees in Appendix B.)

With the approaching expansion of multi-national regulation of the practice of law via free-trade treaties, one of the irreducible risks the legal profession will face will be the "unfair trade" equivalent of vulnerability to law-enforcement schemes often incompatible with what the legal profession has traditionally considered to be within the ambit of regulation in the form of rules of ethics as was the case under Anti-Trust law in the Goldfarb case. It’s likely to be a "Brave New World" facing the legal profession in the coming decades.

§02D. Authorities-- Case law, Statutes & Constitutional Principles

After determining whether, and, if so the extent to which, the Rules of Ethics would require a different course of action as described above, the lawyer should research relevant topics incase law, statutes and constitutional law. Since many, if not most, provisions of the Rules of Ethics contain "[otherwise provided or permitted by law]" exceptions, the lawyer should resolve in favor of controlling case law, legislation or constitutional provisions requiring or warranting a different course of action than that formulated under step 03 above. This is where, when and how ultimately determining the proper course of action can become tricky and sometimes subject to reasonably opposing theories.

§02D01. Disciplinary criteria.

Understanding the evolution of the system for disciplining lawyers [see §02C04 in the preceding section above] can also be helpful in this phase of the analysis.
§02D02. Civil standards and their relationship to disciplinary standards.

This phase should also include analysis of civil standards pertaining to the practice of law. In this phase, it's useful to remember that in many contexts, the civil standard applicable to the problem at issue may well impose higher, more onerous burdens upon the lawyer facing the problem than the Rules of Professional Conduct. That's because there are contexts in which those Rules merely define the floor rather than the ceiling-- i.e., they prescribe minimum standards lawyers must satisfy in order to avoid being subject to discipline in the form of disbarment, suspension, reprimand, admonition, etc.

In most jurisdictions, courts classified actions for legal "malpractice" as "breach of contract" actions rather than as "tort" actions, yet most jurisdictions classified medical malpractice actions as "tort" actions rather than breach-of-contract actions. However, other than obvious differences pertaining to the types of damages (expectation damages versus pain and suffering) more commonly associated with the two types of causes of actions, the evolution of the liability aspect of both kinds of malpractice cases closely paralleled each other -- i.e., both kinds of cases typically require often-expensive expert-opinion evidence to define the standard of care in order to prove a breach of duty giving rise to liability for damages.

In legal malpractice cases, standards pertaining to lawyers’ fiduciary duties of loyalty to clients remain less well understood than the standards pertaining to knowledge, skill, diligence and competence. Contributing significantly to such lesser understanding has been the widespread adoption by many states of the Model Rules of Professional Conduct recommended by the A.B.A. in the late-20th Century/Early-21st-Century to supersede the Code of Professional Responsibility, which had comprised a virtually universal standard from the late 1960’s into the last decade of the 20th Century.
— Although there are many ways in which the Model Rules are superior to the Code of Professional Responsibility (broadening their articulation of standards pertaining to the non-litigation, counseling aspect of practicing law and to serving as mediators or arbitrators, for examples) there are important ways in which the Model Rules are inferior to their counterparts in the Code of Professional Responsibility.

An example of one such area of inferiority is the treatment of what we commonly describe as “conflicts of interests” issues and standards. However, because the civil standards pertaining to such issues (i.e., pertaining to the “loyalty” aspect of lawyers' duties to clients) remain essentially the same, and because rules of ethics do not a fortiori constitute the applicable standards for adjudication of such issues in civil cases, and because the Model Rules lowered ethical standards applicable to such issues, the latter have created traps for the wary in recognizing, and properly handling, situations involving such issues.

There are at least two reasons for this. First, many lawyers fail to understand that formalized rules of ethics represent not the applicable “standard of care” but rather the minimum standard a lawyer is obliged to satisfy without being subject to disciplinary action such as disbarment, suspension or reprimand. Second, the Code of Professional Responsibility— unlike the "Canons of Ethics" that preceded it or the Model Rules that superseded it— established ethical standards pertaining to potentially conflicting interests that were very close to, rather than substantially below, the higher civil standard.

Consider the following:

In some contexts, the civil standard of care applicable to a particular set of circumstances is higher than the ethical standard because the ethical standard represents, in essence, the “minimum” standard such that conduct falling below it may serve as grounds for disciplinary action.
— Consider, for example, a circumstance involving differing interest between current clients in light of Model Rule 1.7:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.
Contrast the standards in Model Rule 1.7 above to those in DR 5-105(C) of the former Code of Professional Responsibility, which provided that

"... a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.” (Emphasis added.)

Ethical Consideration 5-14 in the former Code explicating DR 5-105 stated the following:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant. (Emphasis added.)

Which of those two Rules (Model Rule 1.7 or DR 5-105 as explicated by EC 5-14) sets a higher standard for concurrent representation of multiple clients lacking identical legal interests? Which of those two rules articulates a standard closer to what would be applicable in a civil action for malpractice by a client "consenting" within the meaning of such rules? What is the likely burden of proof in such a malpractice case in which the existence of divergent interests is manifest? By what evidentiary standard is such proof likely to be measured?

§02E. Lucubration.

Engage in "laborious work, study, [and] thought" to the interrelationships among the fundamental principles applicable to the circumstances under each of the four preceding elements of the methodology: Moral analysis, Objectivity, Rules of Ethics, and Authorities (i.e., case-law, statutes & constitutional law).
— The purpose of this phase of the methodology is to enable the lawyer to step-back from the entire “picture” in order to see it better and in order to more effectively judge the sensibility of the analysis thus far in order to proceed to the next step. A purpose of this phase is to blend "micro" analysis with "macro" analysis—i.e., attempting to prevent focusing on details preventing common-sense perception of the "larger picture." At this stage, when there maybe reasonably conflicting interpretations on how to appropriately resolve any apparent "conflict" between what would be "moral" and what would be "ethical," it’s not inappropriate to ask oneself which solution would be the one most suitable for one's epitaph.

§02F. Strategy-- Select the Most Sensible Strategy.

At this stage what's most important is to select a strategy that's sensible and avoid one involving attenuated intellectual sophistry or tortured reasoning. An intellectually and ethically sound solution is not likely to defy common sense. There's no formula for this, but the lawyer facing the problem having obtained advice and assistance from competent counsel dramatically reduces the risks of the power of rationalization that might otherwise lead such lawyer to make such mistake.

§03. Hypothetical Scenarios

§03A. House Counsel — Who’s on Foist?

During discussions between a senior counsel for corporation G and counsel for corporation O regarding a dispute over whether G's design and function of a smartphone infringed upon O's patents, counsel met with G's general counsel and a key engineer/employee of G about formulating a response to O's infringement claims. A few days later the engineer sent to a VP of G and to another engineer/employee of G with a copy to G's senior counsel an email captioned "Attorney Work Product" and "Confidential" at the top of the email. The email discussed technical aspects of the dispute and possible engineering changes to eliminate the dispute.
— Soon thereafter, O filed an infringement suit, in the course of which a dispute arose over whether O was entitled to assert the attorney work-product privilege over such document. Because:

(1) O had not yet threatened or instituted litigation against G over such dispute,

(2) the content of the email focused on an engineering analysis of whether an engineering alternative might be available for G that would eliminate objections expressed by O’s counsel to G’s counsel and enable G’s counsel to be so-informed about same for purposes of further “negotiations,” and

(3) did not seek legal advice from G’s counsel regarding the legal effect or status of any engineering alternative,

the federal court ruled that G had failed to carry it’s burden that the email was entitled to attorney work-product protection as being in contemplation of litigation rather than in contemplation of further negotiation notwithstanding (a) it’s “Attorney Work Product” caption and (b) the fact that before the engineer authored and sent the email (with a copy to G’s senior counsel, who had met with that engineer a few days earlier for the purpose of “formulat[ing] a strategy” for responding O’s claims in further discussions expected to occur between G’s counsel and O’s counsel. Do you agree or disagree with this ruling? Why?
ABA Model Rule 1.5 states (inter alia):

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. 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 questions involved, and the skill requisite to perform the legal service 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.
A general-practice solo-practitioner lawyer with an excellent (av) rating who has practiced more than a decade in a big city, has just moved his office into your small town because he’s come to hate the utter disappearance of collegiality in the big city and he’s sure he’s been able to set aside enough funds to enable him to develop a good practice in your town (which is one of the few locations in which there are not enough lawyers to serve the population) and also enjoy amore leisurely pace of practice, a lower cost of living and a more tranquil environment for himself and his wife to raise their children. Having been a good businessman in running his big-city practice and likewise being confident of his knowledge and skills as a lawyer, he set his hourly rate at $450 per hour, which was slightly lower than was his big-city rate of $500 per hour. Soon he began attracting well-to-do clients much to the dissatisfaction of some of the local lawyers who had always practiced in the town.

One particular client hired him to handle a bitter boundary dispute involving neighbors on three sides of his small-business property because all the other local lawyers were conflict-disqualified and he didn’t want to hire an out-of-town lawyer, but the client did not tell him so at that time. The client agreed to his hourly fee but in so doing said, “Since your fee is this high, I am, of course, expecting the best legal services I’ve ever had.” The lawyer misconstrued such comment as one meant by the client only as a way of teasing a successful lawyer.

The boundary dispute proved to be incredibly complex and time-consuming and ultimately concluded with a settlement (based on sound legal advice from the lawyer) on terms the client grudgingly accepted. A few months later, the lawyer received from the Bar a notice that the client had filed an excessive-fee complaint against him after the client had called the Bar and obtained a copy of the Rules of Professional Conduct.
— In the complaint in which the client accused the lawyer of having charged an "unreasonable" fee in violation of Rule 1.5(a)(3), the client (truthfully) asserted that through his own recent experience in hiring several other local lawyers on an hourly basis for other matters and through his knowledge of hourly fees of the rest of the lawyers through friends he knew who had recently hired them, none of those fees exceeded $225 per hour, and most were significantly less. Rule 1.5(a)(3) identifies the fee "customarily charged in the locality or similar legal services" as one of the "factors to be considered"(underscoring added) in determining whether a legal fee constituted an "unreasonable" fee in violation of Rule 1.5(a)(3).

The lawyer hires you to represent him in the grievance proceeding. You are one of the lawyers whose rate is $225 per hour, and you have never previously represented the complaining client. What is your best argument against the complaint that the lawyer violated Rule 1.5(a)(3)?

§03C. Conflicts of Interests or Interests in Conflicts.

Mike Mechanic and Eddie Engineer are 50/50 co-inventors/owners of a patent for a brand-new kitchen appliance (the “InstaCooler”) that can do for rapid cooling of food and/or liquids what a microwave oven can do for heating/cooking. InstaCooler produces cooling by producing ultra-low-energy waves that “absorb” energy at molecular level from the molecules of solids or liquids in relatively higher states of energy (i.e., at higher temperatures). As co-inventors/owners, they have licensed Quantum Leap Products (Quantum) to manufacture the InstaCooler with royalties to be paid to them 50/50.

Ten years ago, Mike and Eddie resigned as employees in the research division of Visionary Products (Visionary) after they spent five years assisting Visionary’s engineers in a project to create a super-fast cooler as a "reverse Microwave oven" for residential kitchens using a pumps- and-fans system to super-cool air by passing it through a screen-like grid of liquid nitrogen and then circulating the super-cooled air in a chamber containing the solid or liquid desired to be cooled.
That system proved to be not susceptible to non-industrial use such as a residential kitchen, so Visionary abandoned the project to design/produce a "kitchen" version.

Soon afterward, Mike and Eddie quit working for Visionary and began working together "50/50" on wholly unrelated projects, some of which were successful and some of which were failures. It was five years ago that Mike and Eddie envisioned the radically different molecular-level concept for "cooling" as the basis for inventing the "InstaCooler."

Visionary, having recently and lawfully learned about the "InstaCooler" project through publicly available information, has now filed suit against Quantum, Mike and Eddie for damages and/or injunctive relief based on non-disclosure/non-use clauses in Mike's and Eddie's employment contracts with Visionary. (Assume there is no statute-of-limitations defense for Quantum/Mike/Eddie.) One of Visionary's engineers (Buck Passeur) with whom Mike and Eddie worked claims that during the latter stages of the unsuccessful efforts at Visionary to develop a residential-kitchen version of a super-fast-cooler says he had told Mike and Eddie that "the only way to make this idea work would be to create a negative-energy field, which we all know would be impossible with today's technology." (Buck also says he explained a "negative-wave” theory in ways an engineer could understand."

Mike and Eddie jointly hired you as their counsel in this case. Assume that a thorough analysis of all reasonably discernible legal and factual issues made it entirely suitable for you to have undertaken to represent both of them. Both Mike and Eddie emphatically and credibly deny that Buck Passeur ever mentioned, let alone described in any coherent manner, any "negative energy” theory for making a super-fast cooler for use in residential kitchens.

However, during discovery deposition, a question to Eddie jogged his memory about a lunch-break conversation among Mike, Buck and himself (when they were working together at Visionary) about a "Star Trek" episode Mike and Buck had enjoyed.
— (Mike was never a Star Trek fan.) In the deposition, Eddie truthfully admits the question jogged his memory, but that the only thing he remembers about the conversation was that Buck had made an off-hand comment to the effect that “to make this super-fast-cooler idea work, we’d need some kind of negative-force field like the force field “shield” that protects the Starship Enterprise in Star Trek.” Mike, who always “tuned out” whenever Eddie and Buck talked about “Star Trek,” adamantly insists that Buck never made any such suggestion.

Visionary has now tendered an offer to dismiss the lawsuit (defense of which would be extremely expensive given the hyper-technical nature of the types of expert-opinion evidence that would be required to enable a fact-finder to grasp the invalidity of Visionary’s claim) in exchange for a 10% share of the royalties that would otherwise be due to Mike and Eddie.

Eddie adamantly wants to accept the offer. Mike equally adamantly refuses. Mike says, “The only way I would even consider agreeing would be if Eddie were to agree that such 10% be paid entirely from Eddie’s share of the royalties. Eddie says, “No way. This is a BS claim by Visionary and Buck, and we will win, and further more, the revenue we’ll earn from the royalties will make the costs of defending this case seem like peanuts.” Engineering experts you’ve consulted agree with Eddie that the claims by Visionary and Buck are BS but they concede the risks that Visionary’s experts might be able to persuade a scientifically unsophisticated fact-finder that the claim is valid.

What should you do?

§03D. Are there Sexual Ethics for Ethical Sex?

A very attractive young woman, Emma Nachaught, who is a Nurse Practitioner, received a traffic ticket for traveling 53 mph in a 45 mph zone. There is no evidence whatsoever of impaired driving. Remembering a television ad for a handsome young lawyer who handles traffic cases, she hires him to represent her. She’s also pleasantly surprised that his law office is only a short walk from the medical office in which she works.
The lawyer, Will B. Shaier, has a scheduling conflict for the initial trial date, so he arranges a continuance to a later date suitable to the arresting officer, to him and to Emma. Feeling strongly attracted to Will, Emma persuades him to meet her for lunch on a work-day to “talk about the case.” Both enjoy the lunch and Will feels as attracted to her as she seems to be attracted to him. A few days before the re-scheduled trial date, Emma informs Will that she needs to attend the funeral of a close family member on the scheduled trial date, so he arranges yet another continuance.

Approximately a week before the new trial date, she invites him to join her in attending a movie of the type commonly known as a “chic flick.” At the theatre, she insists on treating, so he lets her buy the tickets. After the movie, they go to a mini-brewery/restaurant for burgers and beer, but he insists on treating since she had bought the movie tickets and popcorn. Neither of them drinks more than one beer. Afterward, she invites him to her apartment. He says, “No thanks—I’m your lawyer” because he’s quite attracted to her and doesn’t want her to think otherwise. Correctly sensing that he really wants to accept her invitation, she says, “Don’t be so silly.” He explains that as a lawyer he’s prohibited from having romantic relations with a client. She says, “Then I hereby fire you as my lawyer. I’ll hire another lawyer first thing tomorrow so that you can come to my apartment tomorrow night.”

The next day, she calls Will and says, “I’ve hired a new lawyer, so now you can come over to my apartment tonight.” What should Will do?

§03E. Misconduct or Malpractice or Both?

In drafting a no-competition/proprietary-confidentiality employment contract between your manufacturing client, Visionary Products, as employer and an engineer, Buck Passeur, as employee, Visionary’s lawyer, Carl Lelsie, failed to include a standard clause for such employer to be deemed entitled to injunctive relief and/or to recover from such employee all royalties that may be earned by such employee utilizing proprietary information for his own private gain either during or after termination of his employment by him or by the employer with or without cause.
— Subsequently, Buck Passeur quit work for Visionary and thereafter utilized proprietary information to obtain for himself a patent for a device Visionary had hired him to "invent" for Visionary. Assume that due to other language in other parts of the Visionary/Buck-Passeur employment contract, the absence of the clause at issue has, as a matter of law, the effect of barring a breach-of-contract claim against Buck by Visionary. Carl Leslie filed suit on behalf of Visionary, but based on contract-law interpretation of the contract (an undisputed exhibit) the trial court granted summary judgment to Buck and granted Rule 11 sanctions against Visionary and Carl for having filed a case that was "as a matter of law without merit."

Visionary seeks your advice on two issues: First, whether it has a legal malpractice case against Carl Second, whether Visionary should file a grievance against Carl with the Bar "so that other clients won’t suffer the effects of his incompetence."

What would be your advice to Visionary?

§03F. Unethical Frivolousness or Ethical Zealotry?

You’re counsel for the plaintiff in a business breach-of-contract case which will turn on whether the defendant physically delivered a particular notice to your client on a particular day. Your client has adamantly insisted the delivery never occurred, and you’re satisfied he made a good-faith effort to find it. You’ve represented this client before and have always found him to be honest and truthful but who, like all of us, is sometimes "guilty" of mere memory failure. Both sides have completed discovery and the trial date is near.

Your client’s wife comes to your office with what appears to be the note the defendant claims to have delivered to your client. The wife says she found it in the pocket of an old sport-coat (which, she says, had become too large for him as a result of his having lost 150 pounds in a weight-loss program, and which she had put into a box to be donated to the Salvation Army.
— She assures you he had probably forgotten that he had worn that coat during the time-frame at issue. She says she showed him the note and told him to bring it to you, but he said, “That [expletive deleted] doesn’t deserve to win, so I’m not going to do it.” She then explains that despite what he said, he’s really a good person who’s just angry and that she’s bringing the note to you because she believes “it’s the right thing to do.”

What should you do?

§03G. Disclosing Secrets or Secreting Disclosures?

You’ve obtained a million-dollar jury verdict for your client, Emma Shapely, against a male co-worker, Jesse Doolittle, for groping her breasts at an office party for a retiring supervisor held at a mountain-resort hotel. The judgment is final and the appeal period has expired. You’re awaiting receipt of a check from the defendant’s general liability insurer for the amount of the judgment.

The trial of the case stimulated lots of news coverage. At the party, Emma, a single woman whom co-workers called “Super Model,” was wearing an elegantly sheer black dress designed for bra-less wear with the back and front split from the waist up with the front-straps and back-straps joined over each shoulder by dainty gold chains with hooks on each end.

Gist of the undisputed evidence: When the concierge told everyone on the hors d’oeuvres patio to go to the reception hall for speeches to be followed by dinner, everyone left except Emma and Jesse, each of whom had previously decided to skip the speeches because they knew dinner wouldn’t start until well after sunset. When the last caterer to leave after cleanup of the patio asked Emma and Jesse whether they had guest-keys to be able to get back into the hotel though the door the caterer was locking, both of them said, “Yes.” (Neither of them realized that a guest key was not needed to open the patio door from inside the hotel.) On the side of the patio rail opposite the now-locked door was a fish pond with small trees surrounding the pond and patio making it seem quite secluded. Emma and Jesse struck-up a conversation when she joined him leaning over the rail and throwing hors d’oeuvres crumbs to the fish.
Gist of Emma’s testimony: She realized she must have been leaning too far over when he said, "I hope I’m not too daring to say you’re a gorgeous gal in a beautiful dress and I surely can’t be the first guy to say you have unbelievably perfect breasts." He then pulled her close to his left side, reached into her dress and began fondling her left breast. Her left-hand bracelet snagging on the top of her dress when she immediately pushed his hand away broke her left-shoulder chain, which caused the left front and back of her dress to fall below her waist leaving her left side naked from the waist up as she turned toward him and slapped him on the face. At that same time a co-worker (followed by several friends) pushed-open the hotel door to search the patio for his cell phone. They all gasped at what they saw. While Jesse was stuttering something about a "wardrobe malfunction," a co-worker offered to go get a security guard, but Emma said "No" because she didn't want to "spoil the retirement party" and would "deal with the problem later," so all the co-workers quickly and sheepishly left. Emma and Jesse immediately went to their separate rooms, packed, checked-out of the hotel and went home. Emma decided against filing criminal charges because she didn’t want to send Jesse to jail, but she thought a civil suit would "teach him a lesson."

Gist of co-worker testimony: The first co-worker entering the patio had heard what sounded like a slap just as he entered but the first thing he observed was Emma standing with a bare breast facing Jesse facing her with his arms by his sides stuttering "wardrobe malfunction."

Gist of Jesse’s testimony: He made the "perfect breasts" remarks because he manner in which Emma kept leaning over the rail and throwing crumbs to the fish made him believe she was deliberately affording him glimpses of her bra-less breasts as a way of "flirting" with him. So he put his arm around her waist, pulled her close and began caressing her cheek, in response to which "toyed" with the chain across her left shoulder with her left hand until it came unhooked and fell down leaving her naked from the waist up on her left side. Perceiving her actions as an obvious invitation, he began caressing her left breast, and while she began toying with his belt with her left hand.
The sound of someone on the other side of the door saying "Come
help me search the patio for my phone," startled both of them, in
response to which she turned to face him directly and slapped him
across the face as a co-worker pushed the door open and entered the
patio followed by several friends.

After the incident, rumors circulated at work that Emma had tried to
seduce Jesse by exposing her breasts to him on the patio.

At the trial, Emma came across as a credible witness, but Jesse's
nervousness made him a terrible witness.

While you're still awaiting receipt of the check from the liability insurer, a
young woman makes an appointment to talk with you about this case.
When she arrives, she explains she was a guest in the hotel that night in a
room on the top floor of the far end of a section perpendicular to the
patio and that desiring to video-tape the spectacular "sunset" for which
the hotel was famous but having a meeting that afternoon that would
likely last past sunset, she put her video camera on a tripod with the lens
zoomed halfway at the place the concierge told her was where the sun
would "set."

When she rewound the video after the meeting to watch it, she was
distressed to realize she must not have fully tightened the camera on the
tripod and then slightly bumped it before leaving for her meeting
because the patio cocktail party filled the screen, so she stopped viewing
it. Recently, she saw news coverage about the million-dollar verdict and
recognized news footage of the patio, so she found the video-camera
disk and watched it, after which made a separate video file of only the
part showing the entire incident between Emma and Jesse, copied it onto
separate “thumb drives,” and returned to your community (near the
hotel) to meet you. She gives the thumb-drive and her telephone number
and leaves after asking you to call her after your view it.

In watching it, you discover it’s a high-quality video framing the middle of
the patio showing Emma and Jesse at a 3/4 angle as they faced the fish-
pond.
— With striking clarity, it showed that the entire incident occurred in almost exactly the way Jesse described it-- making it obvious she used her fingers to unhook the top-left side of her dress and then placed her left hand onto his waist.

What should you do?

§03H. Funds in Trust or Trust in Funds.

You are the successor to the initial lawyer (Cal Lussniss) for a personal-injury plaintiff (Shirley Fawltilis) sustaining severe head injuries and significant, potentially permanent impairment of mental functions requiring intense concentration when her vehicle was rear-ended at high speed by defendant's vehicle while plaintiff's vehicle was lawfully stopped at a stop-light.

While Cal was representing her, she was financially desperate and needed money for expensive medical treatment not covered by any available insurance. Cal arranged for Shirley to obtain the needed funds from a "Pre-Litigation-Settlement Funding" company (PLSF) under a contract under which PLSF agreed Shirley would not be obligated to repay such funds unless she were to obtain a recovery by trial or settlement, in reference to which the contract granted PLSF an "assignment" of, and a "lien" against such proceeds under terms that would, in the context of a loan rather than an "investment," would -- as a matter of law -- be usurious and unenforceable. The agreement also provides that the client agrees to direct her lawyer to honor such assignment/lien and for such lawyer not to disburse any amount to her unless and until such lawyer were to have disbursed to the PLSF company the full amount due under the terms of the funding agreement.

Shirley received the needed medical treatment, which at least partially diminished the mental-impairment effects of her injuries. For reasons having nothing to do with such funding agreement, but being dissatisfied with Cal’s recommendation of a settlement offer from the defendant, Shirley discharged Cal as her lawyer and hired you shortly before expiration of the statute of limitations. Cal has not asserted, and is not seeking, any attorney's lien in the matter.
After filing suit on her behalf, the defendant makes a wholly satisfactory multi-million-dollar offer (two-thirds of which would be in the form of structured settlement to be paid over a period of 15 years). On your recommendation, Shirley accepts the offer. On your advice, Shirley also understands the maximum amount of the claim against such funds by PLSF, but she feels she was misled about the contents of the agreement and did not at the time have the mental capacity to fully understand it. Your research of case-law in the controlling jurisdiction indicates the courts would deem such contract to be void against public policy and would deny enforcement claims by PLSF under the agreement at issue. On your advice, she is willing to offer the funding company a “repayment” amount ($50,000 for two advances totaling $23,000) that would include a reasonable amount of "interest" or "return" on such funding, which did, after all, enable her to receive timely medical treatment that was at least partially effective.

You tender such amount to the PLSF company as full satisfaction, which summarily rejects the offer, asserts it’s claims for a monthly-compounding rate of 3.5 percent and demands that nothing be disbursed to, or on behalf of, Shirley until full satisfaction of PLSF’s assignment/lien claims.

Assume your state’s version of trust account rules require an attorney receiving funds for a client to thereafter “promptly pay or deliver to the client and/or a third party such amount(s) the client and/or third party are/is entitled.”

The funds are now in your trust account. The client demands that you promptly tender $50,000 to the PLSF company and then promptly disburse all other funds to her, to third parties and to yourself for your fees, costs and expenses.

What should you do?

Appendix A: ABA Model Rules of Prof Conduct (selected Rules; not the entire set)
Appendix B: History of Standards. (A summary of the historical-evolution of civil and disciplinary
Appendix A: Particular ABA Model Rules.

Rule 1.5: Fees

Client-Lawyer Relationship

Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. 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 questions involved, and the skill requisite to perform the legal service 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) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(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 a writing signed by the client 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 the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. 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 its determination.

(d) A lawyer shall not enter into an arrangement 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 for 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 each lawyer assumes joint responsibility for the representation;
2. the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.

ABA Model Rule 1.6 Confidentiality.  
[http://www.abanet.org/cpr/mrpc/rule_1_6.html]  

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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 a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

ABA Model Rule 1.7 [http://www.abanet.org/cpr/mrpc/rule_1_7.html].  
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.

ABA Model Rule 1.8 [http://www.abanet.org/cpr/mrpc/rule_1_8.html].

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(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 gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to 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 the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include 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:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized 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.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

**ABA Model Rule 1.9** [http://www.abanet.org/cpr/mrpc/rule_1_9.html](http://www.abanet.org/cpr/mrpc/rule_1_9.html)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are 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 former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or 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 these Rules 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 these Rules would permit or require with respect to a client.

**ABA Model Rule 1.10** [http://www.abanet.org/cpr/mrpc/rule_1_10.html](http://www.abanet.org/cpr/mrpc/rule_1_10.html)

(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 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
(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 a client represented by the formerly 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.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.


(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:

1. withdrawal can be accomplished without material adverse effect on the interests of the client;

2. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

3. the client has used the lawyer's services to perpetrate a crime or fraud;

4. the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. 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 a 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 2.1 [http://www.abanet.org/cpr/mrpc/rule_2_1.html].

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.

ABA Model Rule 3.1 [http://www.abanet.org/cpr/mrpc/rule_3_1.html].

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact 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.

ABA Model Rule 3.3 [http://www.abanet.org/cpr/mrpc/rule_3_3.html].

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has
offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.


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, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(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, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ABA Model Rule 4.1 [http://www.abanet.org/cpr/mrpc/rule_4_1.html](http://www.abanet.org/cpr/mrpc/rule_4_1.html).

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.


(a) A lawyer who knows 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 who knows 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 participating in an approved lawyers assistance program.
Appendix B:

Historical Background on Evolution of Civil and Ethical Standards

§01 Historical perspective.

In Anglo-American law generally, duties owed by lawyers to clients, to courts, the legal system and third parties as well as the rules for enforcing such duties via civil actions and/or disciplinary measures evolved from common law before becoming formalized by the judicial and legislative branches of government. Although this seminar describes this process from a historical perspective in Virginia, such perspective provides a reasonably representative description of this developmental process in most states in the United States.

§01.01 Historical periods.

The history of the evolution, development and enforcement of legal ethics lends itself to classification into three broad eras: the Common-Law Era, a Transitional Era and the Modern Era. The historical-perspective portion of this seminar selectively focuses on a number of salient aspects of the developmental and evolutionary history of legal ethics.

§01.01-A Common-Law Era

1. Nature of Duties.

(a). Duties to clients.

Duties to clients evolved from common law duties of agents to principals. During the colonial period, *Pitt v. Yalden*, 4 Burr 2060, 98 Eng.Rep. 74 (K.B. 1767), held that an attorney ought to be liable for "gross negligence" but not an "honest mistake." Thus, *Pitt* constituted a nascent recognition of a two-fold aspect of a lawyer's duty to a client: a duty of competence deemed violated by "gross negligence" and a duty of loyalty deemed violated by a lack of honesty.

The earliest reported legal-malpractice case in the United States, *Stephens v. White*, 2 Wash. 203, 2 Va. 203 (1796) held that a lawyer's liability for malpractice for work undertaken was not dependent upon the lawyer having received consideration for such engagement. In *Stephens*, the court held: "Though a man is not bound to do an act for another without a reward, yet, if he will voluntarily engage and enter upon the performance of it, he is liable for the consequences of his improper management, and cannot allege a want of consideration for his engagement." (Emphasis added.)

Yet in 1807, courts viewed a debt due from an attorney to his client for money collected on a judgment as "only a debt by simple contract." *Gaithright v. Marshall*, 1 Hen. & M. 427, 11 Va. 427 (1807). Worse, although *Rootes v. Stone*, 2 Leigh 650, 29 Va. 650 (1831), held an attorney negligently losing debts he was employed to collect liable to the client for the principal, *Rootes* ruled the attorney not liable for interest on the lost principal.

However, by 1850, courts began applying more stringent definitions of the dual standards of care and loyalty: *Pennington's Ex'r s v. Yell*, 11 Ark. (6 Eng.) 212, 52 Am.Dec. 262 (1850) articulated "reasonable skill and diligence" as the standard of care defining a lawyer's duty of competence. *Stockton v. Ford*, 52 U.S. (11 How.) 232, 13 L.Ed. 676 (1850) became a leading case applying stringent standards defining a lawyer's duty of loyalty to exalt the client's interests over his own as well as the interests of others. As late as 1890, *Thomas v. Turner's Adm'r*, 87 Va. 1, 12 S.E. 149
(1890), identified Stockton as a leading authority for such fiduciary aspects of a lawyer's duties to a client.

(b) Duties to the courts.

Duties to the courts evolved from individual courts exercising inherent power to authorize persons deemed by a court to be sufficiently trained in the law to serve as an "officer of the court" to represent the interest of others before the court in a manner consistent with the court's procedural requirements and rules of evidence. Courts viewed such officer-of-the-court status of attorneys sufficiently important to deem them privileged from service of all process in civil suits "while attending court" and even viewed such privilege as extending to a "counselor of the supreme court during the sitting of the court even though not in actual attendance." See Com. v. Ronald, 4 Call, 97, 8 Va. 97 (1786).

(c) Duties to the public.

Duties to the public remained little more than the duties of citizens to be law-abiding. The courts declined to deem the "officer of the court" status of a lawyer to be the equivalent of a "public office." For example, In re Leigh, 1 Munf. 468, 15 Va. 468 (1810), ruled a lawyer's officer-of-the-court status to be insufficient to render the lawyer a "public officer" for purposes of the statute requiring all public officers to take an oath "to suppress dueling."

2. Enforcement of Duties.

(a) Duties to clients.

Civil actions for malpractice comprised the method for enforcement of such duties. In the first reported legal-malpractice case in the United States, Stephens v. White, 2 Wash. 203, 2 Va. 203 (1796), the court held: "Though a man is not bound to do an act for another without a reward, yet, if he will voluntarily engage and enter upon the performance of it, he is liable for the consequences of his improper management, and cannot allege a want of consideration for his engagement."

(b) Duties to the courts.

The inherent judicial power exercised by courts in authorizing persons to serve as attorneys a fortiori included the power to revoke such authorization for conduct deemed inimical to the status of "officer of the court." For an example of federal recognition of such inherent power, see Ex Parte Secombe, 19 Howard 9, 15 L.Ed. 565 (1856). More often, however, courts used their powers of contempt to exercise regulatory control over lawyers. For example, see Wise v. Com., 34 S.E. 453, 97 Va. 779 (1899). Although Wise found the evidence insufficient to support contempt, it illustrates a court's use of its contempt power to determine whether a lawyer's conduct breached a duty to the court. Wise involved a determination of whether a lawyer's being scheduled to appear in two different cases in two different courts at the same time evinced contemptuous conduct by the lawyer.

(c) Duties to the public.

As stated in §01.01-A -1(c), courts did not construe the mere status of attorney as imposing special duties to the public. However, as stated in §01.01-A -2(b), courts
exercised inherent power to revoke or suspend officer-of-the-court status of a lawyer engaging in conduct exhibiting bad character.

§01.01-B. Transitional Era

1. **Nature of Duties.**
   
   (a). Duties to clients
      
      (1) *Malpractice* case-law continued evolving broader and deeper duties deemed owed by lawyers to clients. For example, even though *Stein v. Morris*, 91 S.E. 177, 120 Va. 390 (1917), rejected a claim by a client against his lawyer for successfully establishing a bank in his own interest in the wake of the failure of a bank which the client had employed the lawyer to establish, it contemplated the issue of whether the lawyer's bank succeeded by utilizing information gained by the lawyer in the confidential relationship of his engagement by the client in what became an unsuccessful attempt to establish a bank for the client.

      (2) *Ethical Standards:* Formalization of ethical standards for attorneys first occurred in the United States in the form of a Code of Ethics promulgated by the Alabama Bar Association in 1887.\(^1\) Proposals for state-by-state adoption of ethical standards first occurred in 1908 when the American Bar Association (ABA) adopted thirty-two *Canons on Professional Ethics.*\(^2\)

   (b). Duties to the courts, the public and third parties
      
      In addition to the evolutionary process by which case-law defined duties owed by attorneys to the courts, the public and third parties, formalization of standards articulating such duties first occurred as stated in §01.01-B -1(a)(2), supra. Similarly, widespread adoption of the ABA Canons thereby formally recognized and articulated duties of lawyers to the courts, the public and third parties as part of the Canons' broad mosaic defining the ethical duties of lawyers.

   (c). Duties to the public and to third parties-- see "(b) immediately above.
      
      Formalization of standards articulating attorneys' duties to the public and third parties first occurred as stated in §01.01-B -1 (b), immediately above.

2. **Enforcement of Duties.**
   
   (a) Duties to clients
      
      In the early Twentieth Century, while legal-malpractice case-law continued serving as a mechanism for enforcing duties to clients, bar associations acting as collective arms of the courts' inherent power to regulate the conduct of attorneys and/or acting pursuant to statutory authority began enforcing duties owed clients under ethical standards by investigating, and prosecuting as parties litigant, civil disciplinary proceedings seeking disbarment, suspension or reprimand of attorneys violating such standards.

      For example, although Virginia case law asserted the *inherent power* of a court to suspend or revoke the license of a lawyer to practice therein, it construed such power as limited to the jurisdictional reach of such court absent legislation extending such power

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1 Legal Malpractice, Third Edition, by Ronald E. Mallen and Jeffrey M. Smith, §15.7.
2 See the Preface to the 1969 ABA Code of Professional Responsibility.
further. Such legislation in the form of 3423 & 3424 of the Code of 1919 constituted a historical antecedent for the Bar Act enacted in 1938 by making suspensions and revocations imposed pursuant to the statutory procedure effective statewide. A Supreme Court decision construing such legislation described it as having merely recognized an existing inherent power of the Supreme Court. Legal Club v. Light, 137 Va. 249 (1923)

(b) Duties to the courts, the public and third parties

In addition to the inherent power of a court sua sponte to exercise disciplinary authority over licensure issued by such court to an attorney, the emergence of bar associations acting as arms of the courts and/or acting pursuant to legislative authority and/or rules of courts began augmenting such disciplinary enforcement as described in §01.01-B -2(a), immediately above. Concurrently, as such structures emerged as the primary mechanisms for enforcing duties to clients, they also became the primary mechanisms for enforcing duties to the courts, the public and third parties. Nevertheless, in virtually every jurisdiction, the courts construed such enforcement mechanisms as merely augmenting, rather than supplanting, the courts' inherent power to discipline attorneys.

(c) Duties to the public and third parties-- See "(b) immediately above.

In addition to the inherent power of a court sua sponte to exercise disciplinary authority over licensure issued by such court to an attorney, the emergence of bar associations acting as arms of the court and/or acting pursuant to legislative authority began augmenting such disciplinary enforcement as described in §01.01-B -2(a), supra.

§01.01-C. Modern Era (Late-Middle Twentieth Century to the Present)

1. Nature of Duties.

The By the mid-Twentieth Century, case-law evolution, legislation and promulgation of rules of court defining and affecting the duties of lawyers to clients, the courts, the public and third parties wrought changes which, for purposes of this historical perspective, warrant reclassification of such duties.

(a) Civil-liability standards-- Development.

Malpractice case-law continued evolving broader and deeper duties deemed owed by lawyers to clients. Although most jurisdictions construed legal malpractice claims as breach-of-contract claims, others construed them as tort claims, but even those treating them as breach-of-contract claims did not preclude the possibility of tort claims arising against lawyers for tortious breaches of the attorney-client relationship. Such case-law also evolved a variety of theories on the circumstances under which lawyers may be

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3 Legal Club v. Light, 137 Va. 249 (1923)
4 The original Bar Act in 1938 was later re-codified as Va. Code §§54-73 & 54-74 and later again re-codified as Va. Code §§54.1-3900, et seq. (Code of 1950). It created the Virginia State Bar as an administrative agency of the Supreme Court charged with responsibility for regulating the practice of law in Virginia.
5 See generally, Legal Malpractice, Third Edition, by Ronald E. Mallen and Jeffrey M. Smith,
deemed liable to, or immune from liability to, third parties or adversaries on breach-of-contract and/or tort-liability theories.\(^6\)

By the mid-Twentieth Century, courts typically defined the two-fold competence/loyalty nature of the standard of care owed by lawyer to client as obliging the lawyer to furnish a reasonable degree of legal knowledge, skill and diligence exercised with utmost loyalty (with the law, of course) to the best interests of the client. Several Virginia cases illustrate standards had become accepted on a widespread basis:

(1) **Competence element of civil-liability standard.**

*Glenn v. Haynes*, 192 Va. 574, 581, 66 S.E.2d 509, 513 (1951), provided an excellent articulation of that part of the standard of care focusing on competence:

> By expressly or impliedly\(^7\) undertaking to handle a legal matter for another, a lawyer warrants that he possesses, or will acquire, sufficient legal skill to serve adequately the interests of the client and will exercise a reasonable degree of legal care, skill and diligence in doing so.

(2) **Loyalty element of civil-liability standard.**

Although *Norman v. Insurance Company*, 218 Va. 718 (1978) found no evidence of any breach of the duty of loyalty in that case (involving a policyholder’s claim that counsel employed by the insurer was representing conflicting interests), it contains an excellent recitation of the duty of loyalty:

> No one questions the fact that the standards of the legal profession require undeviating fidelity of a lawyer to his client, and no exceptions can be tolerated. A client may presume that his attorney has no interest which will interfere with his devotion to the cause confided in him. *Norman*, at 727.

Furthermore, when the potential for adverse influence upon a lawyer’s fidelity to the best interest of the client derive from the self-interests of the lawyer, evidence of such self interest creates a presumption of constructive fraud in favor of the client against the lawyer:

> [A]ll dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence. The rule is founded in public policy, and operates independently of any ingredient of actual fraud, or of the age or capacity of the client, being intended as a protection to the client against the strong influence to which the confidential relation naturally gives rise. (Emphasis added.) *Thomas v. Turner*, 87 Va. 1, 12 S.E. 149, 668 (1890).


\(^7\) Regarding attorney-client relationships impliedly, though unintentionally or unwittingly, undertaken by a lawyer, see **CROSS-REFERENCE**.

\(^8\) I prefer to use male pronouns with gender-neutral intent rather than “he/she,” “him/her,” etc.
The lesson of these two cases about the duty of loyalty is that evidence of the existence of interests of others than a client as a source for influencing the attorney’s duty to exercise his legal judgment in the best interests of the client shifts to the attorney the burden to prove the judgment he exercised was in the best interests of the client rather than a product of the influence of such other interests.

(b) Ethical standards--Development.

For nearly three-fourths of the Twentieth Century, Canons of Ethics adopted by the ABA and promulgated in virtually all states by the judiciary and/or bar associations comprised the ethical standards. For example, in 1938, the Supreme Court of Virginia promulgated Rules of Court adopting the ABA Canons of Ethics,9 which remained virtually unchanged for thirty years.

In the late 1960’s the ABA adopted the Code of Professional Responsibility (CPR) to express the ethical duties of lawyers in the form of codified mandates defined as minimum standards10 in contrast to the primarily platitudinous, aspirational nature of the Canons of Ethics. For example, the CPR mandated, rather than merely recommending, that lawyers maintain clients’ funds in fiduciary accounts and prohibited, rather than merely discouraging, commingling of such funds with the lawyers' funds.

1. Enforcement of Duties.

(a) Civil-liability standards--Enforcement.

The evolutionary case-law process continued as the dominant mechanism for enforcing civil-liability standards deemed owed by lawyers to clients and third parties. The trend continued toward treating such claims as breach-of-contract claims rather than tort claims absent unusual circumstances. However, most case law declined to treat the ethical standards promulgated as the Canons of Ethics or Code of Professional Responsibility as bases for civil-liability claims to clients and/or third parties.11

Likewise, most case-law declined to treat such ethical standards as bases for liability of lawyers to adverse parties. For example, the Virginia Supreme Court has expressed disfavor towards civil claims predicated upon allegations of breaches of the ethical standards.12 However, lawyers should take little comfort in any assertion that such standards are, therefore, per se irrelevant and inadmissible in cases adjudicating the two-fold civil standard13 of competence and loyalty. Why? Because an insightful expert on the civil standard of care would opine that a lawyer exercising the applicable standard of care and loyalty would, a fortiori, comply with the minimum standards articulated in the ethical standards imposed by the standards of ethics imposed by the Supreme Court of his state.

(b) Ethical standards--Enforcement.

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9 Rules of the Supreme Court of Virginia, Part Six, Section II. 171 Va. xvii (1938).
10 The Preamble to the Code of Professional Responsibility described the Disciplinary Rules as "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."
13 See §03.01, supra.
In the modern era, the judiciary's assertion of inherent power over the regulating of lawyers became widespread. To understand modern enforcement systems generally, it's useful to classify them according to structure and according to function.

(1) **Systemic characteristics of enforcement systems.**

(a) In 1961 in *Lathrop v. Donahue*, 367 U.S. 820, 81 S.Ct. 1826 (1961), the United States Supreme Court reaffirmed federal recognition of the inherent power of the judiciary to regulate the conduct of lawyers within its jurisdiction. *Lathrop* upheld the power of the judiciary to make the organized bar an administrative agency of the judiciary for the purpose of conditioning licensure of lawyers upon membership in good standing and empowering the bar to discipline lawyers as an administrative agency of the judiciary.

(b) However, through the 1960's, states in which the judiciary had made the bar associations their administrative agencies for purposes of disciplining lawyers were the exceptions rather than the rule. In most states, voluntary bar associations maintained procedures by which they voluntarily enforced ethical standards by bringing civil actions as *parties litigant* against lawyers when their voluntary investigations had found grounds for seeking disciplinary action.

(c) In the mid-1960's, the ABA established a "Special Committee on Evaluation of Disciplinary Enforcement." That committee became popularly known as the "Clark Committee" because then U.S. Supreme Court Justice Tom Clark served as its chairman. By 1970, the Clark Committee issued a report (the *Clark Committee Report*¹⁴), which the ABA adopted, recommending nationwide, state-by-state adoption of a comprehensive system broadening and deepening the function and power of organized bars to discipline lawyers as administrative agencies of the state judiciaries. *Key elements* of these voluminous, far-reaching recommendations included:

(i) Creating a state-wide bar organization to serve as an administrative agency of the judiciary (or conferring such status upon an existing, voluntary bar association) for regulating the practice of law;

(ii) Vesting such organization with subpoena power;

(iii) Vesting such organization with the duties and powers to discipline lawyers and/or to initiate proceedings in appropriate courts to seek such discipline;

(iv) Appointment of professional, full-time prosecutors rather than relying solely upon voluntary service in such capacity by lawyers in private practice; and

(v) Funding such system by dues imposed upon lawyers to be within the control of the judicial branch (as was the case in *Lathrop*, *supra*) rather than by taxes from revenue subject to control of the legislative branch.

(d) By the mid-1970's, the judiciaries of a majority of states had promulgated rules (with legislative approval in some states) establishing disciplinary systems bearing substantial similarity to the system recommended by the *Clark Committee Report*.

¹⁴ Although the Clark Committee Report has long been out of print, copies may still be available from ABA headquarters.
(2) Functional characteristics of modern enforcement systems.

(a) Prosecutorial/adjudicative functions.

Most modern disciplinary systems confer a mixture of investigative, prosecutorial and adjudicative functions upon judicial-branch administrative agencies charged with enforcing the standards of ethics for lawyers. Although fear of public distrust of "plea bargaining" initially made many jurisdictions reluctant to countenance imposition of discipline by consent, "agreed dispositions" or similar consensual resolutions of grievances are now commonplace.

(b) Advisory/legislative functions.

Most modern systems (as well as most in the minority of states that created judicial-branch enforcement agencies early in the Twentieth Century, such as Virginia) provide advisory services to lawyers and perform limited legislative functions within the judicial branch to serve the larger purpose of enforcing the ethical standards for lawyers. However, performance of such advisory functions sometimes led to unexpected problems-- See §1.02 Historical Speed-Bump, infra.

(c) Prophylactic functions.

Most modern systems impose prophylactic requirements deemed likely to increase compliance with ethical standards. Two examples are mandatory continuing-legal-education requirements and expansion of the authority of enforcement agencies to audit trust accounts without being required to establish specific cause for doing so.

(d) Remedial functions.

Most modern systems include remedial functions such as (i) client security funds to recompense clients whose funds were lost through mishandling by their lawyers and (ii) procedures to arbitrate fee disputes.

§01.02 Historical Speed-Bump-- Regulation of Legal Fees.

In the 1970's, decisions in litigation against the aspects of the modern-era system for regulating lawyers dramatically altered the legal landscape for such regulation. Federal court decisions declaring unconstitutional the long-standing ethical restrictions on advertising by lawyers as well as restrictions on extra-judicial statements by lawyers followed quickly in the wake of the landmark decision in Goldfarb v. VSB, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), invoking anti-trust grounds to invalidate parts of the advisory-opinion function of lawyer-regulation systems. Although the decisions on advertising, solicitation and extra-judicial statements fundamentally limited the constitutional reach of traditional ethical standards, the Goldfarb decision imposed systemic limitations on the regulation of lawyers by bar-related disciplinary systems.

§01.02-A The Best and the Brightest.

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16 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)
Pursuant to studies of the economics of law practice spearheaded for the ABA by highly respected lawyers including Lewis Powell (the distinguished Virginia lawyer who later became a highly respected U.S. Supreme Court Justice), the ABA recommended, and most state and local bar associations across the country, developed and adopted, “minimum fee schedules” designed primarily to guide lawyers with sound legal judgment but poor insight into economics in setting fees for legal services with the goal being that such fees not be too high (in violation of the *Canons of Ethics* command against charging “excessive” fees) but not too low to prevent lawyers from operating with sufficient revenue to afford the resources to render competent services. The *SCV Rules, Part Six, Section II*, in the *Canons of Ethics* 18 (in effect from 1938 to 1971) and the *Virginia Code of Professional Responsibility* 19 (in effect from 1971 to 2001) not only cautioned lawyers against charging excessive fees but also recommended that they be guided (but not controlled) by “minimum” fees schedules adopted by local bar associations.

§01.02-B  Advisory Opinion Duties Imposed on Bar by Supreme Court.

From 1938, when the Supreme Court of Virginia (SCV) created the Virginia State Bar as its administrative agency for disciplining attorneys, until 1975, pursuant to duties imposed by the Supreme Court in *SCV Part Six Rules*, Section IV, ¶10, the VSB Council and its Standing Committees on Legal Ethics and Unauthorized Practice of Law routinely issued non-binding *advisory* opinions interpreting the applicable ethical standards and definitions of the practice of law.

§01.02-C  What's a "Reasonable Fee"-- Advisory Opinions.

Among the many Legal Ethics *advisory* opinions routinely issued by the VSB since 1938 were *Legal Ethics Opinion 98* (in 1960) and *Legal Ethics Opinion 170* (in 1971), which opined that a lawyer *habitually* charging less than the minimum fee recommended in the *Minimum Fee Schedule* for purposes of soliciting legal business rather than obeying the ethical obligation to accommodate clients unable to pay reasonable fees could be subject to disciplinary action in violation of ethical obligations imposed by the *SCV Rules Part Six, Section II*. 20 In *Goldfarb v. VSB*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the U.S. Supreme Court described those advisory Legal Ethics opinions as integral components of its holding that the promulgation of “minimum fee schedules” by organized bars violated Anti-Trust law notwithstanding the fact that the *SCV Rules Part Six, Section IV, ¶10* required the VSB (through the Council and/or its Standing Committee on Legal Ethics) to express opinions on Legal Ethics issues in response to questions from lawyers seeking guidance on such issues.

§01.02-D  Dilemma-- Duty to Opine without Right to be Wrong.

A year after *Goldfarb*, another anti-trust decision, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), cast a large, permanent cloud over the viability of the state-action exemption for advisory opinions rendered to lawyers by a bar pursuant to a rule-of-court requirement in the rules of court creating the bar an administrative agency of the judiciary for purposes of disciplining lawyers. Although Cantor invalidated on anti-trust grounds a light-bulb discount program approved by the governmental commission regulating power utilities in Michigan, the ominous implications of

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18 *SCV Rules, Part Six, Section II*-- see 171 Va. xxii and xxiii. (1938)
19 *SCV Rules, Part Six, Section II*-- see 211 Va. 295 at 313 et seq. (1970)
Cantor and Goldfarb were that they had in effect narrowed the state-action exemption (with respect to regulatory agencies affecting self-regulating businesses or professions) in such a way as to create potential anti-trust liability for an official performing a mandatory duty to render an advisory opinion on state law if such official were to commit the unpardonable sin of incorrectly interpreting the state law as prohibiting professional activities (i.e., rendering an opinion producing an "anti-competitive" effect).

§01.02-E Ask Us No Questions, We'll Give No Advice.

In the wake of the Goldfarb case, the existence of the VSB’s continuing obligation to render advisory opinions pursuant to SCV Rules Part Six, Section IV, ¶10 remained a ticking time-bomb to the extent to which rendition of advisory opinions could be deemed to have anti-competitive effects. Perceiving the obvious implications of Cantor and Goldfarb, a title insurance company, Surety Title, initiated anti-trust litigation against the Virginia State Bar (VSB). Surety Title contended anti-trust law to be violated whenever the VSB were to opine that certain activities by non-lawyers would constitute the unlawful practice of law notwithstanding the fact that the VSB’s act of rendering such opinion, in contrast to the conclusion expressed in any such opinion, would have been "compelled" by state law (i.e., VSC Rule). As a result of litigation in Surety Title v. VSB, the VSB rescinded the existing UPL opinions pending reevaluation of the entire process for issuance of advisory opinions pursuant to SCV Rules Part Six, Section IV, ¶10.

§01.02-F Passing the Anti-Trust Buck.

Post-Goldfarb/Post-Surety Title advisory-opinion process. Subsequently, the Supreme Court of Virginia, upon recommendation by the VSB, extensively revised the procedure for issuance of advisory opinions on Unauthorized Practice of Law and Legal Ethics pursuant to SCV Rules Part Six, Section IV, ¶10 to prevent adoption of advisory opinions (on Legal Ethics as well as Unauthorized Practice of Law) expressing conclusions that could be deemed to have an anti-competitive effect without such opinions having first been adopted by the Supreme Court of Virginia as substantive law. See 221 Va. 381 et seq. (1980), 221 Va. 1147 et seq. (1981). In 1984, the VSB published a handbook containing such recodified versions of the Virginia Code of Professional Responsibility, Definitions of the Practice of Law, and the procedures for issuance of advisory opinions on Legal Ethics and on the Unauthorized Practice of Law.

§02. Legal malpractice-- Selected Issues.

§02.01-A. Nature of Cause of Action.


§02.01-B. Statute of Limitations-- Tolling-- Continuing Representation.

The breach-of-contract statute of limitations for legal malpractice commences upon termination of the attorney’s professional responsibility over the subject matter out of which the legal malpractice claim arises. For example, with respect to a error in a stock-purchase agreement prepared by the lawyer in 1975, the fact that he had a continuing obligation from time to time to review it rendered the date in 1980 when he discovered an error in the 1975 agreement (and so notified the client) as the date on which the statute of limitations

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commenced for the client’s breach-of-contract legal malpractice action against him for such error. *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987). From the attorney’s point of view (rejected by the Court), his review in 1980 of the agreement completed in 1975 constituted a “new” undertaking with respect to an “old” matter. Thus, *Denny* illustrates the importance of a formalized file-closing procedure as a mechanism to minimize the risk of indefinite postponement of the commencement of the statute of limitations for legal malpractice actions. See §02.01-B, *infra*.

§02.01-C. Damages

Generally, the measure of damages in a legal malpractice case is the difference between the actual result and what would have been the result if the lawyer were to have satisfied the applicable standard of care. For example, a legal malpractice plaintiff suing his former lawyer for negligent loss of his medical malpractice case must prove--as a part of the legal malpractice case—that if his former lawyer were to have satisfied the applicable standard of care, he would have won the medical malpractice case. Thus, legal malpractice cases often require proof of a case within a case to prove the damages element of the legal malpractice case. *Stewart v. Hall*, 770 F.2d 1267 (1985). However, for a result that’s difficult to reconcile with such general principle, see *Allied Productions v. Deusterdick*, 217 Va. 763, 232 S.E.2d 774 (1977), in which the Court ruled that the fact that a client, against whom a default judgment was entered due to his lawyer’s negligence, was unable to allege he had been required to pay such default judgment rendered him unable to allege damages as an essential element of his claim; Therefore, the Supreme Court ruled he had failed to state a viable cause of action for legal malpractice. In fairness to the *Deusterdick* decision, however, whether the debt represented by the default judgment did or did not comprise a valid debt owed by the client is analogous to the “case within a case” element often applicable to actions for legal malpractice. Although *Deusterdick* does not appear to reflect a majority rule outside Virginia, it nevertheless illustrates a type of damages issue that borders on being unique to legal malpractice litigation.

§03. Ethical Profiling

To our credit as a profession, the percentages of *complaints* alleging morally or ethically reprehensible misconduct by lawyers has always remained a very small percentage of the universe of complaints against lawyers.22 As lawyers, our failures to keep our clients informed about their legal matters, failures to impart to our clients clear understandings of fees, costs and expenses, and simple negligent oversight have collectively comprised an overwhelming majority of the factors generating complaints over the last several decades.

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22 I make this observation on the basis of the following experience: Serving as disciplinary counsel (Special Counsel and then as Bar Counsel) for the Virginia State Bar from 1972 to 1977, serving as President of the National Organization of Bar Counsel in 1976, and having confined my private practice from 1977 to the present mainly to the field of advising and judges on ethics issues and representing them in disciplinary proceedings. With respect to the kinds of conduct leading to grievances, the relative constancy of the malum-prohibitum (rather than malum in se) nature of the conduct in the overwhelming majority of complaints proves the old adage, “The more things change, the more they stay the same.”

Appendix B:
Historical Background on Evolution of Civil and Ethical Standards
page 11 of 11.