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ALFN ANSWERS WEBINAR

Legal Ethics in the Movies

*Wednesday, August 12, 2020
12:00-1:15 PM Central Time*

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Disclaimer for Movie Clips

WARNING - There are some racial slurs and profane language used in some of the movie clips we will play during this webinar.

Please be advised that the comments and opinions expressed in these movie clips do not reflect the views of the ALFN.



Legally Blonde & A Few Good Men Movie Clips



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Legally Blonde

Confidentiality

Setting the scene...

The accused has a rock-solid alibi but chooses to disclose it to only one member of the defense team – Elle Woods – a first year law student clerking for her boss in a high-profile criminal defense case. The disclosure is made on the condition of strict confidentiality (the defendant – a famous fitness instructor – was getting liposuction at the time of the crime). Woods informs her co-clerk colleague but not her boss.

Legally Blonde

Confidentiality (*continued*)

What (if anything) can Woods do with this information?

ABA Model Rule of Professional Conduct 1.6(a)

“...[a] lawyer shall not reveal information relating to the representation of the client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted [to prevent substantial and imminent physical harm or financial damage to a third party].”

Confidentiality (continued)

Who owns/controls the attorney-client privilege?

THE CLIENT

With five qualifiers...

- Imminent danger of physical harm;
- Imminent danger of significant financial damage to 3rd party;
- Litigation between attorney and client;
- Informed (express) consent; and,
- Implied authorization.

Confidentiality (continued)

Informed Consent

Is that the same as “express” consent?

What’s the best way to get it?

In writing with detailed parameters

Engagement letter?

Associated risks



Confidentiality (continued)

Implied Authorization

- TWO KEYS:
- (1) Scope of ***“implied authorization”***
 - (2) ***“...impliedly authorized to carry out the representation”***

DISCLOSURE TO

Other attorneys on case? Other attorneys in office but not on case? Other attorneys in general?

Paralegals and other staff members on case? In office but not on case?

Judges and other court personnel?

Family members and friends who might never meet the client?



Confidentiality (continued)

Takeaways

- ✓ Communicate clearly with client; the more significant the disclosure, the more important to obtain express authority;
- ✓ Disclose the information to a limited audience on a “need-to-know” basis (i.e., the bigger the pool, the greater the risk of leaks);
- ✓ Express to the audience the sensitive, confidential nature of the disclosure and the need to keep it confidential;
- ✓ Limit and guard the number of written disclosures – notes to self and e-mails/letter to third-persons
- ✓ Recognize that every disclosure puts your bar license on the line.
- ✓ Clients need to be able to trust their attorneys: ***Golden Rule.***

Confidentiality (continued)

Polling Question One: Who owns the privilege?

1. The Client, with limited exceptions;
2. The Attorney, without exceptions;
3. The Court;
4. Your spouse or significant other.



Confidentiality (continued)

Polling Question Two: With what exceptions?

1. When implied consent is given;
2. When necessary to win case;
3. When it otherwise serves the client's best interests;
4. When it makes for a really, really, really good story.



A Few Good Men

Fidelity to the Law and Rules

Setting the scene...

Under blistering examination from prosecuting attorney Lt. Daniel Kaffee, Col. Nathan Jessup shouts out the iconic charge from the witness stand: ***“You Can’t Handle the Truth!”*** Col. Jessup then proceeds to admit that he ordered a “Code Red,” thereby implicating himself in the murder of one of his men.

A Few Good Men

Fidelity to the Law and Rules (*continued*)

What, if anything, did the officer do wrong?

ABA Model Rule of Professional Conduct 3.4(c)

“A lawyer shall not: (c) knowingly disobey an obligation under the rules of a tribunal.”



A Few Good Men

Fidelity to the Law and Rules (*continued*)

Col. Jessup: -- put himself above the law and ordered a “Code Red” – *i.e.*, the ends justified the means (in his mind).

Lt. Kaffee: -- put himself above the law, continuing to badger the witness over sustained objections and even a finding of contempt – *i.e.*, the ends justified the means (in his mind).



A Few Good Men

Fidelity to the Law and Rules (*continued*)

Common challenges officers (of the court) experience in face of their ethical obligation to the law and rules:

- Sheer bravado/arrogance;
- Ignorance (of law and/or fact)/lack of preparedness;
- Lack of self-awareness;
- Immunity to conscience;
- Opposing counsel is just a jerk.



A Few Good Men

Fidelity to the Law and Rules (*continued*)

Rising to the challenge:

- Jerks--don't be one.
- Don't let your legal practice be your only point of reference in life;
- Read transcripts from hearings/depos you conducted or attended;
- Educate yourself -- learn the law, the rules, and the facts of each case;
- Being self aware will make us humble.



A Few Good Men

Fidelity to the Law and Rules (*continued*)

Takeaways

- ✓ Lawyers (and others) should be beyond reproach, not beyond the law;
- ✓ You cannot expect yourself to act in accordance with the law or the rules unless you know them;
- ✓ Let your intellect, training and knowledge govern over a passing frenzy;
- ✓ Stick to your role, your part, in the legal system, recognizing there are others with their own roles (e.g., legislature, state bar);
- ✓ Don't let your profession overshadow everything else in your life (e.g., family, spiritual and religious values)
- ✓ Remember, lawyers talk amongst themselves – and so do judges!

A Few Good Men

Fidelity to the Law and Rules (*continued*)

Polling Question Three: Who in the movie violated the Rules of Professional Ethics?

1. Col. Jessup;
2. The Judge;
3. Lt. Daniel Kaffee;
4. Tom Cruise.



A Few Good Men

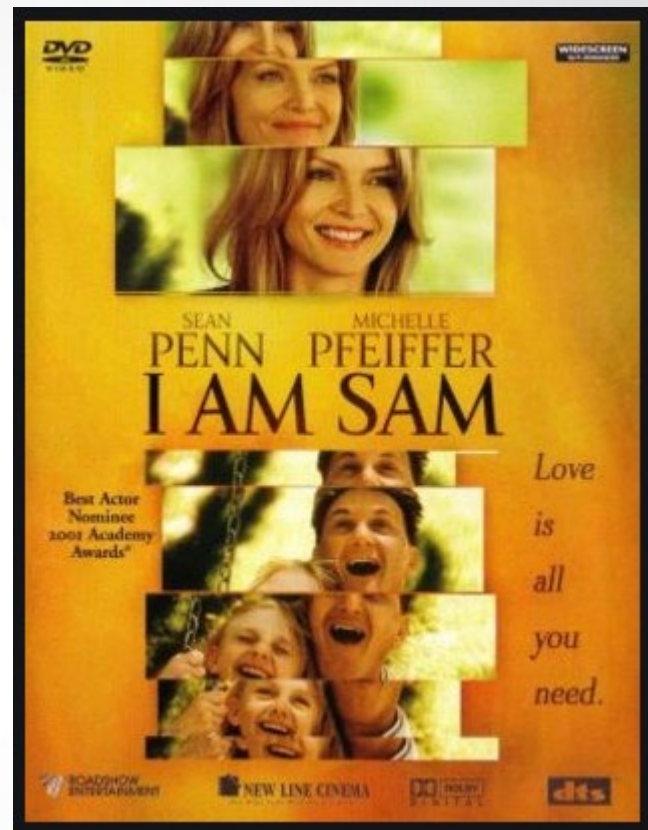
Fidelity to the Law and Rules (*continued*)

Polling Question Four: How can one keep himself/herself within the confines of the rules?

1. Know the rules;
2. Be aware of your role within the system;
3. Don't be a jerk.
4. All of the above.



A Time to Kill & I Am Sam Movie Clips



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A Time to Kill

Setting the Scene:

Carl Lee Hailey, an African American Man accused of murder after brutally killing two white racists who brutally raped and attempted to hang his 10-year old daughter.

In his closing argument, Jake Brigance, instructs the jurors to close their eyes as he recaps, in detail, the attack on Hailey's daughter.



A Time to Kill

Lesson for Lawyers:

When we learn the law and its application, we assume that it will be neutrally applied to all, regardless of race, gender, sexual orientation, hair color, religious beliefs, hair color, or other individual characteristics.

Model Rule of Professional Conduct

Rule 1.1: Competence

A lawyer shall provide competent representation to a client



A Time to Kill

Setting the Scene #2: Carl Lee Hailey plots to murder the suspects and outlines his plan to his attorney.

Model Rule of Professional Conduct Rule 1.6(b):

Confidentiality of Information - Client-Lawyer Relationship

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...

A Time to Kill

Setting the Scene #3:

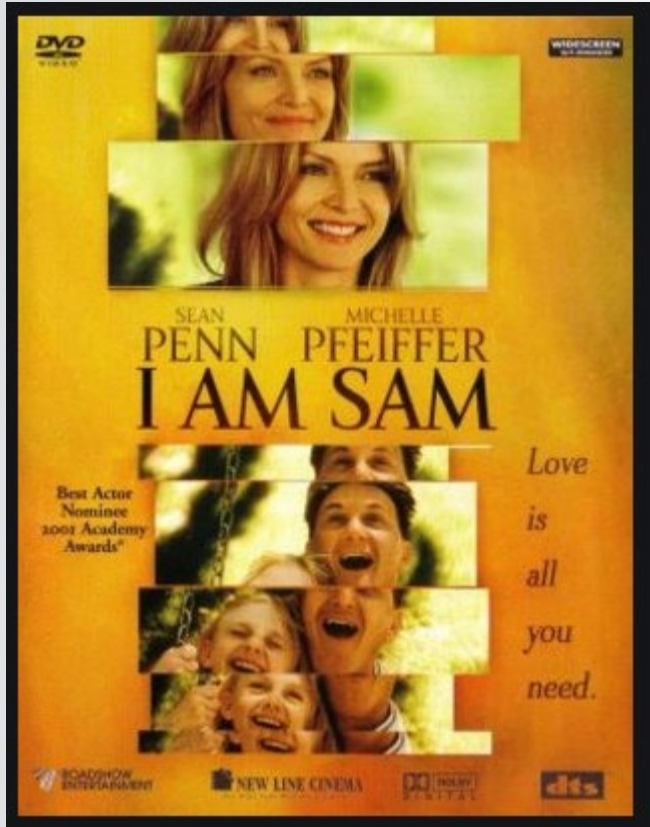
The young intern from the District Attorney's Office starts assigning the defense after her internship is over and provides information to the defense on the prosecution's case.

Model Rule of Professional Conduct 1.11: Special Conflicts of Interest for Former & Current Government Officers & Employees

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.



I Am Sam



Setting the Scene: Lawyer Rita Harrison Williams is trying to prepare her client Sam Dawson, who has the intellectual capacity of a 7 year old, to show he is capable of raising his daughter.



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I Am Sam

Model Rule of Professional Responsibility

Rule 1.14: Client with Diminished Capacity

Client-Lawyer Relationship

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.



Anatomy of a Murder & Chicago Movie Clips



Anatomy of a Murder

Witness preparation/coaching

Setting the scene...



Paul Biegler is considering representing Lt. Manion, who is charged with murdering Barney Quill. Manion admits that he shot Quill. Biegler then gives Manion what has become known as “The Lecture” about potential defenses and what facts would support them BEFORE asking Manion what happened.

Anatomy of a Murder

Witness preparation/coaching

ABA Model Rule of Professional Conduct 3.4:

“A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely; or offer an inducement to a witness that is prohibited by law;”



Anatomy of a Murder

Witness preparation/coaching

As a general rule, lawyers are permitted to tell witnesses about the applicable law and necessary proof. *Restatement of the Law Third, The Law Governing Lawyers* § 116, Comment b; *State v McCormick*, 259 SE 2d 880 (NC Sup.Ct. 1979); Nassau County (N.Y.) Ethics Opinion 94-6 (1994) (lawyer may inform client about law before getting client's version of facts as long as lawyer in good faith does not believe that he or she is participating in creation of false evidence).



Retainer



Setting the scene...

Roxie Hart has been arrested for murder. She and her husband believe she will only be successful if they hire renowned shyster Billy Flynn.

Retainer

ABA Model Rule of Professional Conduct 1.5:

(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:

- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained...

Decorum

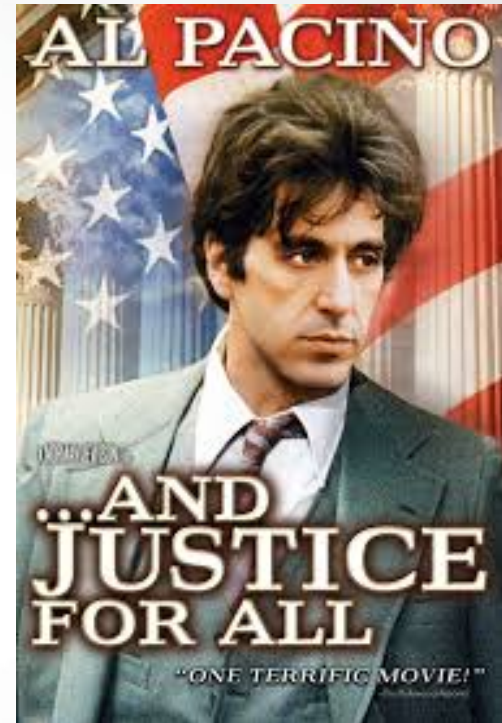
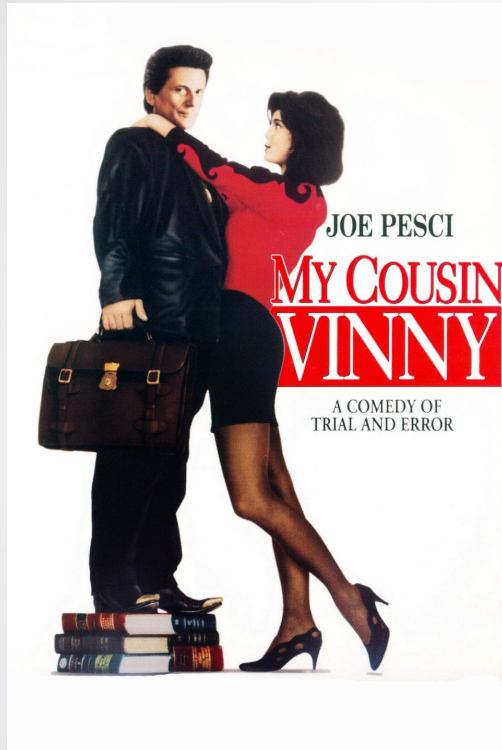
Model Rule of Professional Conduct 3.5:

A lawyer shall not:

(d) Engage in conduct intended to disrupt a tribunal



My Cousin Vinny & And Justice For All Movie Clips

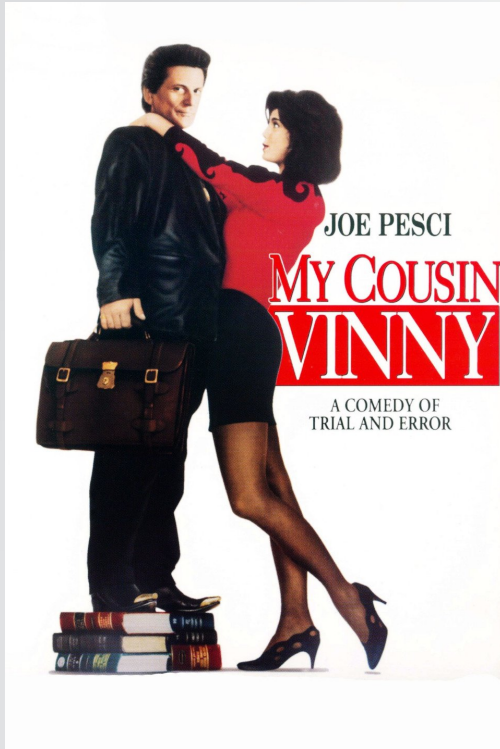


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My Cousin Vinny



In this legal comedy, inexperienced and brash Brooklyn lawyer Vinny Gambini (Joe Pesci) arrives in rural Alabama to represent two “yutes”, who are his cousin and a friend, both of whom are accused of robbing the Sac-O-Suds convenient store and killing the clerk.

Vinny is the proverbial fish-out-of-water when he appears in the capital murder case after recently passing the bar (on his 6th try) and handling personal injury cases for a matter of weeks. He is clearly in over his head.

My Cousin Vinny



At the arraignment, Vinny offends the judge with his casual dress that includes a leather blazer and his less than professional courtroom demeanor, as he addresses the judge while seated in his chair. Judge Haller (Fred Gwynne) is having none of that.

Preamble: A Lawyer's Conduct

(5) A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.



My Cousin Vinny

One of the very first rules of Professional Conduct requires an attorney to provide competent representation for the matter that is before them, meaning they have or, in a reasonable time can obtain, the knowledge and skill necessary to diligently and competently advocate for their client.

Client-Lawyer Relationship

Rule 1.1 Competence

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



My Cousin Vinny

Comments: Legal Knowledge and Skill

(1) In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.



My Cousin Vinny

Comments continued:

(2) A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

(3) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

(4) A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.



My Cousin Vinny

Client-Lawyer Relationship

Rule 1.7 Conflict of Interest: Current Clients

(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.

Rule 1.7 Conflict of Interest: Current Clients continued

Comments:

A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.



My Cousin Vinny



Judge Haller later questions Vinny on his experience, likely in an attempt to head off a future ineffective assistance of counsel argument. Vinny lies to the judge about his criminal trial experience and claims to practice under a different name, Jerry Gallo, a well-known New York attorney

My Cousin Vinny

Advocate

Rule 3.3 Candor Towards the Tribunal

(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;

Comments:

(2) This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Rule 7.1 Communications Concerning a Lawyer's Services

Information About Legal Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comments

(4) It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.



My Cousin Vinny

Maintaining the Integrity of the Profession

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

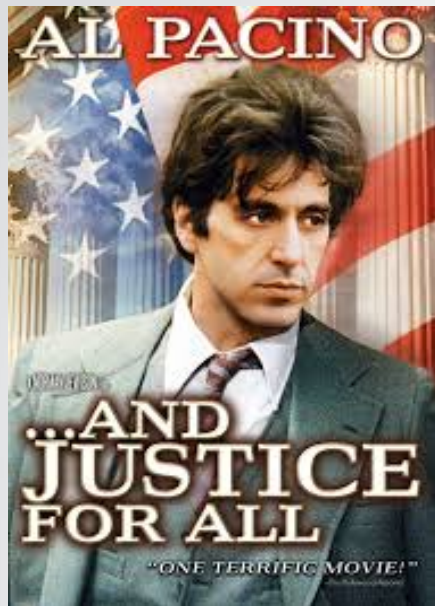
- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Comments: Maintaining the Integrity of the Profession

(1) Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.



And Justice For All



Al Pacino stars as Arthur Kirkland, a criminal defense attorney who loves provoking the legal system in the name of “justice” and defends those he believes are innocent. A judge he publicly despises (and landed in jail for once punching) is accused of rape and he is blackmailed into representing him to cover up his own violation of an attorney client-privilege (which, if it came to light, would likely result in his disbarment).

During opening remarks Kirkland does everything he can to compromise the trial, and his ethical obligations. He states his client took and passed a polygraph test (twice), the prosecutor objects and the judge tells the jury the test is inadmissible. Kirkland’s epic meltdown of cinematic lore is the ultimate compromise of one of the most sacred aspects of the legal profession: attorney-client confidentiality.

And Justice for All

Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

(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).

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comments:

(1) This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.



And Justice for All

(2) A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

(3) The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.



And Justice for All

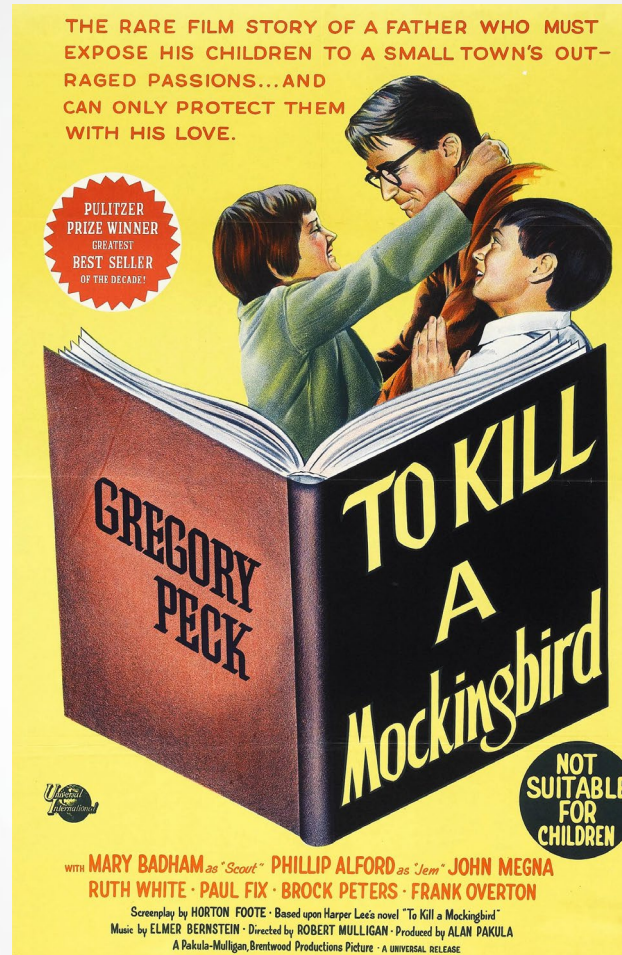
Client-Lawyer Relationship

Rule 1.18 Duties to Prospective Clients

- a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).



To Kill a Mockingbird Movie Clips



To Kill a Mockingbird

- Model Rules of Professional Conduct Rule 1.5 – Fees – Comment (4).
- [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). **A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i).** However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.
- Atticus is within ethical boundaries to accept collards and hickory nuts from his client as payment for his legal assistance. His clients' interests were not adverse.



To Kill a Mockingbird

- Model Rules of Professional Conduct Rule 6.2 Accepting Appointments.
- A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
 - (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
 - (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
 - (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.
- Atticus immediately accepts his appointment, but could one interpret the judge's discussion of his children as a potential "out" under 6.2(b)?



To Kill a Mockingbird

- Model Rules of Professional Conduct Rule 1.3 – Diligence Comment [1].
- [1] **A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.** A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.
- Atticus accepts his role and intends to give his client a defense, regardless of the inconvenience.



To Kill a Mockingbird

- Model Rules of Professional Conduct Rule 1.3 – Diligence Comment [1].
- [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. **A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.**
- Does Atticus go “too far” in assigning blame on Mayella?



To Kill a Mockingbird

- Model Rules of Professional Conduct Rule 8.4 – Misconduct.
- It is professional misconduct for a lawyer to:...
 - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- Atticus does not oppose the Sheriff's decision to treat the matter as an accident, rather than an act, possibly illegal, of Arthur (Boo) Radley. In doing so, he engages in conduct prohibited in this rule.



WEBINAR WRAP-UP: QUESTIONS & ANSWERS

If you did not submit a question during your registration process, you may now use your GoToWebinar toolbox on the right side of your screen to submit a question directly to our panelists live on the air. Note: not all questions will be answered during the Q&A. Should our panelists not be able to address your question, you may reach out to them directly or they will attempt to contact you with further information.

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WEBINAR CONCLUSION

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