Conflicts in Legal Ethics

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LEGAL ETHICS:

All States, except California, have adopted rules of professional conduct based upon and, for the most part, are the same as the American Bar Association's Model Rules of Professional Conduct (the "Model Rules"), with some modifications. *See generally* Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* (3rd Ed. 2000) ("Hazard & Hodes") § 1.15. California is apparently in the process of adopting the rules of professional conduct patterned after the Model Rules.

The rules of professional conduct adopted by the States provide baseline guidance regarding the professional relationship between the lawyer and the client, third parties and tribunals, among other things.[1] The failure to comply with a Rule may result in discipline, but is generally not considered a *per se* basis for civil liability. *See Schmitz v. Davis*, 2010 U.S. Dist. Lexis 101913 (D. Kan. Sept. 23, 2010) ("The court agrees that a violation of disciplinary rules does not per se constitute tort liability.").[2]

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[1] The rules of professional conduct also contain rules addressing public service, information about legal services, law firms, and, of course, maintaining the integrity of the profession.

[2] For a discussion of the use of ethical rules in malpractice cases, see Douglas L. Christian, *Twice Bitten: Violation of Ethical Rules As Evidence of Legal Malpractice*, 28-SPG Brief 62, 63 (1999); Bruce S. Ross, *The Role of Ethical Rules in Malpractice Litigation*, SD63 ALI-ABA 393 (1999). The American Law Institute has adopted the *Restatement of the Law Governing Lawyers* (the "Restatement"), which, among other things, defines the basis for claims against attorneys. For example, Section 71 of the Restatement contains the basic rule of liability and states:

> A lawyer is civilly liable to a person to whom the lawyer owes a duty of care within the meaning of § 72 and § 73, if the lawyer fails to exercise care within the meaning of § 74 and if the failure is a legal cause of injury within the meaning of § 75, unless the lawyer has a defense within the meaning of § 76.

See also Hazard & Hodes §§ 1.20, 1.21,

Although the ABA Model Rules are the basis for the Rules of Professional Conduct adopted in essentially all of the States, and the Rules of those States ("State Rules" or "Rule") are for the most part the same as the Model Rules, this paper will cite to the Rules adopted in selected States.[3]

I. Client Relations

Rules 1.1 through 1.18 of the State rules are the primary provisions which directly govern the client-lawyer relationship. Some of the basic rules regarding the client-lawyer relationship are discussed in this Part I.

A. Scope/Competence/Diligence

(1) Scope:

A fundamental rule governing the lawyer-client relationship is Rule 1.2 which discusses the purpose, scope and limitations of the relationship. The Rule states:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4 [communication], shall consult with the client as to the means by which they are to be pursued.[4] A lawyer may take such

[3] *See Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791, 800 (5th Cir. Tex. 2002) ("To sum up this section, we hold that when Veeck copied only 'the law' of Anna and Savoy, Texas, which he obtained from SBCCI's publication, and when he reprinted only 'the law' of those municipalities, he did not infringe SBCCI's copyrights in its model building codes."). Accordingly, in these materials, the citations to the applicable rule are to various selected States.

[4] The distinction between the "objective" of the representation and the "means" is not a clear line. Geoffrey C. Hazard, Jr., *Sumner Canary Lecture: Under Shelter Of Confidentiality*, 50 Case W. Res. L. R. 1, 7 (Fall, 1999)("" The distinction between "objectives" and "means" is clear at either end of a spectrum but notoriously and unavoidably ambiguous in the middle range."). Generally, the objective of the representation is the purpose of the engagement, and the means of achieving the purpose are the tactics or strategy used. *See* Hazard & Hodes § 5.6. In *Davis v. McKune*, 2006 U.S. Dist. LEXIS 90479 (D. Kan. 2006), the court citing the comments to Rule 1.2 stated:

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

action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.[5] In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic social or moral views or activities.

See also O'Brien v. Superior Court, 939 A.2d 1223, 1233-1234 (Conn. App. Ct. 2008) ("The commentary to rule 1.2 stated in relevant part that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so."); *Esguerra v. State*, 2005 Alas. App. LEXIS 2 (Alaska Ct. App. 2005) ("[I]t is clear that the choice of defense witnesses (other than the decision as to whether Esguerra himself should testify) was a tactical matter reserved to Esguerra's defense attorney. That is, the choice of defense witnesses was a "means", not an "objective", for purposes of apportioning authority between lawyer and client under Professional Conduct Rule 1.2(a)…."); *Chief Disciplinary Counsel v. Rozbicki*, 2013 Conn. Super. LEXIS 542 (Conn. Super. Ct. 2013) ("Attorney Rozbicki breached his duty as fiduciary and representative of the estate by failing to communicate with the beneficiaries as to the means by which to best administer the estate."). Of course, the client, who must be consulted about the means, has the ultimate authority regarding the means, since the client can unilaterally terminate the relationship, and as discussed regarding Rule 1.16 (withdrawal) the attorney has a right to withdraw if the objective of the representation is deemed imprudent, among other things. *Id.*

[5] The Rule is clear that the client makes the ultimate decision on whether to make or accept a settlement. *See Lawyer Disciplinary Bd. v. Wheaton*, 610 S.E.2d 8, 13 (W. Va. 2004) ("Moreover, Mr. Wheaton's unilateral rejection of a proposed settlement offer without advising Ms. Christensen of the same violated Rule 1.2(a) of the Rules of Professional Conduct."); *In re Indeglia*, 765 A.2d 444, 447 (R.I. 2001) ("Accordingly, by accepting Callahan's offer, against the express directive of his client, the respondent clearly has violated the directive of Rule 1.2. Whether or not he believed the client's settlement position was unreasonable in these circumstances is irrelevant."). An engagement letter or fee agreement cannot be used by lawyers to effectively shift the decision making regarding a settlement to the attorney. *See In re Lansky*, 678 N.E.2d 1114 (Ind. 1997). Likewise it is unethical to use coercive means to force a client to settle. For example, threats of withdrawing for the sole purpose of forcing a settlement is inappropriate. *See Kay v. Home Depot, Inc.*, 623 So.2d 764 (Fla. Dist. Ct. App. 1993); *McGann v. Wilson*, 701 A.2d 873, 877 (Md. Ct. App. 1997) (malpractice claim based upon coercion of the client to accept a settlement). A malpractice claim can be based upon the failure of the attorney to allow the client to make the decision regarding a settlement. *See Perez v. Trahant*, 806 So. 2d 110, 117 (La. Ct. App. 2001); *Cannistra v. O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 728 N.Y.S.2d 770, 771-772 (N.Y. App. Div., 2001) (malpractice claim based upon failure to inform client of deadline for settlement.). "[T]he trial lawyer is not permitted to withdraw due to the client's refusal to settle. The prohibition applies even if the lawyer thinks that the settlement offer adequately reflects the worth of the case and that the client is acting unreasonably." Gary L. Stuart, Ethical Litigation § 20.1 (1997).

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.[6]

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,[7] but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[8] [9]

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[6] "Reasonable" or "reasonably" when used in relation to conduct by a lawyer generally denotes the conduct of a reasonably prudent and competent lawyer. See e.g. Ariz. R. Prof. Cond. 1.0(h). A reason to limit the scope of the engagement may involve a situation where the amount involved in the transaction does not warrant the amount of time an attorney would normally allocate to a case of the complexity involved. If reasonable, the scope of the engagement can be limited to a more superficial representation regarding the matter.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Rule 1.0(e). *See further Dignity Health v. Seare*, 493 B.R. 158, 186 (Bankr. D. 2013) ("If limited representation is selected, the lawyer must also alert the client to reasonably related problems and remedies that are beyond the scope of the limited-service agreement.").

The court in *In re Minardi*, 399 B.R. 841, 851 (Bankr. N.D. Okla. 2009) stated regarding the Rule:

> Dismukes argues that Oklahoma Rule 1.2 allows him to exclude particular services, specifically negotiation of reaffirmation agreements, from his representation of debtors, as long as they consent to the limitation…. The Court does not read this rule as granting an attorney permission to exclude whatever services he or she may find too time-consuming, onerous, or fraught with potential liability. The limitation of services is subject to two important conditions precedent: 1) the limitation must be reasonable under the circumstances; and 2) the debtor must give informed consent.

In *Dignity Health v. Seare*, 493 B.R. 158, 185 (Bankr. D. Nev. 2013), the court observed:

> In spite of the concerns that unbundling raises, the ABA amended Model Rule 1.2(c) in 2002 to expressly allow limited-scope representation and provide a mechanism to regulate it…. The ABA's goal was to "encourage attorneys to provide some assistance to low- and moderate-income litigants who could not otherwise afford full representation."

[7] The terms "knowingly," "known," or "knows" require actual knowledge of the fact in question. However, a person's knowledge may be inferred from circumstances. Rule 1.0 (f).

[8] Referring to Model Rule 1.2(d), it is noted in Hazard & Hodes:

> The dividing line is simply this: while a lawyer may discuss, explain and predict the consequences of proposed conduct that would constitute crime or fraud, a lawyer may not counsel or assist in such conduct.

Id. at § 5.12. Further:

> [I]t is often difficult for a lawyer to discern the client's intentions, and difficult as well to draw a line between innocent discussion and active participation. A variation on this

The Rules generally do not define the attorney-client relationship. Fundamentally, the relationship is one of contract, and, accordingly, contract principles apply. As a result, whether or not a relationship exists depends on a meeting of the minds. *See Lynn v. Romar Marina Club, LLC*, 2009 U.S. Dist. Lexis 111333 (S.D. Ala. 2009) ("To create an attorney-client relationship, there must be an employment contract 'either express or implied' between an attorney and 'the party for whom he purports to act or some one authorized to represent such party."); *Tocco v. Argent Mortg. Co., LLC*, 2007 U.S. Dist. Lexis 3533 (E.D. Mich. 2007) ([T]he attorney-client relationship is based in contract."); Hazard & Hodes § 2.5. ("The law looks primarily to the manifest intentions of the parties to determine whether they have entered into a client-lawyer relationship."). The client is given the benefit of any doubt as to the creation of the relationship. *Id; see also Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th

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> theme occurs when a lawyer gives little or no direct advice, but provides "information" about the law that is likely to be put to illicit use by the client. In this context, the problem is to assess not only the passive versus active quality of the lawyer's conduct, but the level of certainty that the client will actually misuse the information.

Id. at § 5.13; *see also In re Potts*, 158 P.3d 418, 423 (Mont. 2007) ("The Commission concluded that, based on these findings, clear and convincing evidence supported the conclusion that Potts knew that his clients were using his services to perpetuate fraud in violation of Rules 1.2(d)…").

[9] *See* Ariz. R. Prof. Cond. 1.2; Colo. R. Prof. Cond. 1.2; Mass. R. Prof. Cond. 1.2 (with some modification to the paragraph (c) allowing limitation on the objective of the representation, as opposed to scope, and a subpart (e) regarding professional limitations on the scope of the representation imposed by the Rules); Mich. R. Prof. Cond. 1.2 (which has the same type of modifications as Massachusetts, i.e. limitation on "objective" as opposed to scope, and professional limitations imposed by the Rules); N.Y. R. Prof. Cond. 1.2 (which also includes paragraphs (e) through (g) regarding professionalism and civility); Iowa R. Prof. Cond. 1.2; Ill. R. Prof. Cond. 1.2 (which also includes paragraphs (e) through (i) regarding professionalism and civility, and other prohibited conduct); Utah R. Prof. Cond. 1.2; D.C. R. Prof. Cond. 1.2 (which contains a provision regarding government attorneys and a paragraph regarding professional limitations imposed by the Rule). Florida Rule 1.2 does not contain the provision regarding implied authorization in paragraph (a), but does contain a paragraph (e) on professional limitations imposed by the Rules).

Cir. 1995)(“The attorney-client relationship is viewed as a contractual relationship in which the attorney agrees to render professional services on behalf of the client…. The attorney-client relationship can be formed by an expressed agreement of the parties or may arise by implication from the parties' actions.”); *Resolution Trust Corp. v. Gibson*, 829 F. Supp. 1121, 1127 (D. Mo. 1993) (“An [attorney-client] relationship results from "the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."); *see further Boston Sci. Corp. v. Johnson & Johnson, Inc.*, 647 F. Supp. 2d 369, 373 (D. Del. 2009) (“Under Delaware law, where there is no express contract or formal retainer agreement evidencing an attorney-client relationship, courts look at the contacts between the potential client and its potential lawyers to determine whether it would have been reasonable for the 'client' to believe that the attorney was acting on its behalf as counsel.”).

Even when there is not a formal or expressed attorney client relationship, such a relationship can be established based upon implication. The concept of the “implied” attorney-client relationship is based upon the totality of the circumstances that a potential client reasonably believes that the attorney is representing the client. For example, an attorney representing a company may become sufficiently involved with the individual equity holder’s interest an implied representation can arise. Although the general rule is that an attorney representing an entity does not represent the equity holders, if the equity holder reasonably believes, based upon the totality of the circumstances, that the

attorney is also representing the equity holders, then an implied attorney client relationship is created. A factor that can support a finding of an implied relationship is if the individual interest of the equity holders is directly involved in the representation. *See Hackett v. Feeney*, 2010 U.S. Dist. LEXIS 113553, 15-16 (D. Nev. 2010) ("An implied individual attorney-client relationship with a member of the organization may be found where a lawyer performs personal legal services for the organization as well as an individual, or where the organization is small and characterized by extensive common ownership and management."); *Norman v. Arnold*, 57 P.3d 997, 1002 (Utah 2002) (discussing the implied relationship); *In re Gabapentin Patent Litig*., 407 F. Supp. 2d 607, 612 (D.N.J. 2005) (noting "counsel working together within a defense consortium and sharing otherwise privileged information of their respective clients could create implied attorney-client or fiduciary obligations under certain circumstances."); *Dexia Credit Local v. Rogan*, 231 F.R.D. 287, 291 (D. Ill. 2005) (stating "an implied attorney/client relationship, and the privilege flowing from it, may arise 'when the lay party submits confidential information to the law party with the reasonable belief that the latter is acting as the former's attorney . . .'"); Rule of Professional Conduct 1.13 (regarding representation of an entity).

Although the attorney-client relationship is based upon privity, third parties that are not in privity with the attorney can be considered clients. *See Charleson v. Hardesty*, 108 Nev. 878, 882-83, 839 P.2d 1303, 1306-07 (1992). The courts in many jurisdictions have adopted a balancing test to determine if an attorney owes a duty to a third party. The test in essence considers: (i) the extent to

which the transaction was intended to benefit the plaintiff, (ii) the foreseeability of harm to the plaintiff, (iii) the degree of certainty that the plaintiff suffered injury, (iv) the closeness of the connection between the defendant's conduct and the injury suffered, (v) the moral blame attached to the defendant's conduct and (vi) the policy of preventing future harm. *See* Comment, *Attorney v. Client - - Privity, Malpractice and the Lack of Respect for the Attorney-Client Relationship in Estate Planning,* 68 Tenn. L. Rev. 261 (Winter 2001). The extent to which the transaction was intended to benefit the plaintiff is the most significant factor. *See e.g. B.L.M. v. Sabo & Deitrsch*, 64 Cal. Rptr.2d 335 (Cal. App. Ct. 1997). In *Francis v. Piper*, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999), the court observed:

> The requirement that the third party be an intended beneficiary is a threshold requirement for an attorney to have a duty to a third party. In [*Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981)] and subsequent cases the supreme court's and this court's analyses of an attorney's liability to a third party begin with an examination whether the third party was an intended beneficiary.

See also Hewko v. Genovese, 1999 WL 543229 (Fla. App. 4 Dist.) ("The rule of privity in legal malpractice actions is relaxed when the plaintiff is the intended third-party beneficiary of the contract between the client and the attorney.") Accordingly, when an attorney prepares opinion letters for a client that the attorneys should reasonably anticipate will be relied upon the third party, or when preparing documents or undertaking any work that directly benefits a third party, the attorney must consider any duty in favor of the third party. *See also* Restatement §73.[10]

[10] Regarding opinion letters and other disclosures to third parties, Rule 2.3 typically provides:

The scope of the representation of a defined or identified client is a fundamental aspect in a malpractice claim. In *Hofmann v. Fermilab NAL/URA*, 205 F. Supp. 2d 900, 903 (N.D. Ill. 2002) the claim of malpractice was based upon a misunderstanding regarding the scope of representation. In *Dahlin v. Jenner & Block, L.L.C.*, 2001 U.S. Dist. LEXIS 10512 (N.D. Ill. 2001) the court stated: "Accordingly, in order to properly state a claim for legal malpractice where an attorney has failed to advise a client, the client must allege that the scope of representation sought by the client included the advice that the defendant failed to give." *See also Gaddy v. Eisenpress*, 1999 U.S. Dist. LEXIS 19710 (S.D.N.Y 1999) (same); *Jackson v. Pollick*, 751 F. Supp. 132, 134-135 (E.D. Mich. 1990) ("I find that after adequate discovery, plaintiff cannot produce more than a scintilla of evidence that he had an attorney-client relationship with defendants as to any other matter than the workers compensation claim.").

(2) Competence

An attorney must provide competent representation within the scope of the representation. Rule 1.1 states:

> (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
>
> (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
>
> (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

See Ariz. R. Prof. Cond. 2.3; Fla. R. Prof. Cond. 2.3; *see also* N.Y. R. Prof. Cond. 2.3; Fla. R. Prof. Cond. 2.3; Mich. R. Prof. Cond. 2.3.

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[11]

The rule of competence does not require that the attorney possess the knowledge and skill to handle a matter before assuming responsibility for it. A lawyer can provide adequate representation in a wholly novel field thorough study. *See e.g.* Comment 2, Fla. R. Prof. Cond. 1.1; Iowa R. Prof. Cond. 1.1.[12] Required preparation and thoroughness depends in part on the complexity of the matter and the amount involved. As noted in the Comments:

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[11] States have adopted Rule 1.1 as cited. *See e.g.* Ariz. R. Prof. Cond. 1.1; Colo. R. Prof. Cond. 1.1; Fla. R. Prof. Cond. 1.1; Iowa R. Prof. Cond. 1.2; Mass. R. Prof. Cond. 1.1; Utah R. Prof. Cond. 1.1. Other states have included additional provisions regarding standards of professional conduct. For example, D.C. R. Prof. Cond. 1.1 states: "A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters." New York Rule 1.1 contains the following provisions:

> (b)A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
>
> (c) lawyer shall not intentionally:
>
> (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
> (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Illinois Rule 1.1(c) has an additional provision that provides that "[a]fter accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the lawyer's firm the responsibility for performing or completing that employment, without the client's consent." This practice would be at least partially prohibited by confidentiality rules found in Rule 1.6.

[12] In *Beverly Hills Concepts v. Schatz & Schatz*, 717 A.2d 724, 730 (Conn. 1998) the court found that an associate committed legal malpractice because, in her position, she failed to seek appropriate supervision based upon the provisions of Rule 1.1 of the Rules of Professional Conduct. The court noted that the commentary to Rule 1.1 provides in part that a lawyer who lacks relevant experience may "associate or consult with, a lawyer of established competence in the field in question. . . ." The court concluded that "[h]aving little experience in franchising, [the associate], therefore, could have rendered competent representation by seeking appropriate supervision. She failed to do so." *Id. See also In re Smith,* 2013 Bankr. LEXIS 368 (Bankr. E.D. Tenn. 2013) ("When an attorney is hired to make filings in a particular court, one of the skills required in order to provide competent assistance would be the ability to practice before the court in which the litigation is to be initiated. Alternatively, one of the acts of preparation would be to obtain admission to that court *pro hac vice* or to associate counsel who was admitted so that the filing could be made in compliance with the rules of that court.").

> Competent handling of a particular matter includes inquiry into and analysis of the actual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

The requirement of legal knowledge requires basic legal research and knowledge of applicable procedure. *See Attorney Grievance Comm'n v. Zdravkovich*, 762 A.2d 950 (Md. 2000) (lawyer filing petition for removal from state court to federal district court did not read the federal removal statute); *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000) ("To fulfill this basic duty, the attorney must prepare carefully for the task at hand: "Competent representation requires . . . thoroughness and preparation reasonably necessary for the representation."). "The level of competency heightens as the complexity and specialized nature of the matter increase." *In re Slabbinck*, 482 B.R. 576, 590 (Bankr. E.D. 2012). Competence may also require the knowledge and effective use of technology. *See generally*, Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet has Raised the Bar on Lawyers' Professional Responsibility to Research & Know the Law*, 13 Geo. J. L. Ethics 607 (Summer 2000); John Healy, *Joining the Technology Revolution is No Longer an Option,* 26 San Francisco Att'y 32 (Aug/Sept 2000).[13]

[13] The duty of competence can extend beyond the actual performance of legal services. For example, there are cases where the attorney making a referral who has selected an incompetent or dishonest attorney has been held liable. At a minimum, the referring attorney should verify that the attorney selected for a referral is competent to handle the matter. *See generally*, Jeffery P. Miller, *Liability for Attorney Referrals*, 1 Legal Malpractice Rep. 17 (1996); *see also In re Ark. Bar Ass'n Petition*, 2005 Ark. LEXIS 787 (Ark. Mar. 3, 2005) ("A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.").

(3) Diligence

Diligence is required by Rule 1.3, which states:

> A lawyer shall act with reasonable diligence and promptness in representing a client.[14]

An attorney's work load should be managed in order that each client's matters can be handled competently. *See e.g.* Comment 1, D.C. R. Prof. Cond. 1.3.

There is probably no more frequent complaint against the legal profession than a lack of diligence. *See e.g.* Comment 3, Ariz. R. Prof. Cond. 1.3 ("Perhaps no professional shortcoming is more widely resented than procrastination."); Comment 2, Fla. R. Prof. Cond. 1.3 (same); Comment 8, D.C. R. Prof. Cond. 1.3. Obviously the failure to meet statutory and other deadlines is a lack of diligence. *See, e.g. In re Juarez*, 24 P.3d 1040 (Wash. 2001). The duty of diligence requires more than merely meeting any applicable deadlines. In Comment 1 to Florida Rule 1.3, it is stated:

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[14] *See* Ariz. R. Prof. Cond. 1.3; Colo. R. Prof. Cond. 1.3; Fla. R. Prof. Cond. 1.3; Ill R. Prof. Cond. 1.3; Mass. R. Prof. Cond. 1.3; Mich. R. Prof. Cond. 1.3. Some jurisdictions have included additional provisions. For example, D.C. R. Prof. Cond. 1.3, which is entitled "Diligence and Zeal" provides:

> (a) A lawyer shall represent a client zealously and diligently within the bounds of the law.
> (b) A lawyer shall not intentionally:
> (1) Fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or
> (2) Prejudice or damage a client during the course of the professional relationship.
> (c) A lawyer shall act with reasonable promptness in representing a client.

Mass R. Prof. Cond. 1.3 also includes: "The lawyer should represent a client zealously within the bounds of the law. N.Y. R. Prof. Cond. 1.3 includes: "(b) A lawyer shall not neglect a legal matter entrusted to the lawyer. (c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules."

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

See also In re Smith, 659 N.E.2d 896, 903 (Ill. 1995) (“[I]t is especially important that attorneys take all reasonable steps to ensure that client matters are handled expeditiously, inasmuch as "dilatory practices bring the administration of justice into disrepute." In *Atty. Griev. Comm'n of Md. v. Page*, 62 A.3d 163, 173 (Md. 2013) the court found:

> Respondent violated Rule 1.3 on multiple instances in the course of Ms. Jackson's representation. At the outset of the representation, Respondent represented to Ms. Jackson that he would gather documents, prepare and send a demand letter to the builder and investigate whether the potential defendants had filed for bankruptcy protection. Respondent failed to do any of the tasks outlined. The Court finds that Respondent's nine-month delay in filing Ms. Jackson's complaint is a violation of Rule 1.3. Ms. Jackson provided Mr. Page with multiple documents at the outset of their relationship, and Respondent could provide no creditable explanation for the delay.

The duty of diligence does not preclude the lawyer from granting professional extensions and courtesies, or require the use offensive tactics with opposing counsel. Rule 1.3 Comment 1.

(4) Advisor.

The attorney acting as an advisor must also exercise independent judgment and provide candid advise.

Rule 2.1 – Advisor:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[15]

As noted in Comment 1, D.C. R. Prof. Cond. 2.1, and the comments to the rule in other states, a client is entitled to a candid and honest assessment and evaluation of the matter submitted to the attorney for consideration. This may involve unpleasant facts, conclusions, alternatives and advice for a client. "However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." *Id* ; *see also* Comment 1, Ariz. R. Prof. Cond. 2.1; Comment 1, Mich. R. Prof. Cond. 2.1.[16]

B. Communication

A frequent client complaint regarding the legal profession is the lack of communication between the attorney and client. The duty of communication is contained in Rule 1.4, which states:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

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[15] *See* Ariz. R. Prof. Cond. 1.2; Colo. R. Prof. Cond. 1.2 (Colorado adds the following: "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."); Fla. R. Prof. Cond. 2.1; Ill R. Prof. Cond. 2.1; Mass. R. Prof. Cond. 2.1; Mich. R. Prof. Cond. 2.1; N.Y. R. Prof. Cond. 2.1.

[16] *See Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 689 (D. Colo. 2007) ("The Special Master believes there is a substantial question as to whether Rodman violated this Rule by failing to exercise independent professional judgment and render candid advice to Thorne. The Special Master further believes there is a substantial question as to whether Rodman's conduct in his representation of Thorne was materially affected by his prior and ongoing relationship with State Farm.").

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[17]

The duty of communication requires "prompt" communication or communications within a reasonable time. Promptness is defined by the circumstances. For example, during a trial, an attorney obviously may not be able to promptly explain the means that are being empowered to effectuate the purpose of the representation. Accordingly, the client cannot be consulted before the adoption of the tactic or strategy. However, the client must be consulted as

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[17] *See* Ariz. R. Prof. Cond. 1.4 (Arizona includes a paragraph (c), which states: "In criminal case, a lawyer shall promptly inform a client of all proffered plea agreements."); Colo. R. Prof. Cond. 1.4; Utah R. Prof. Cond. 1.4. See also N.Y. R. Prof. Cond. 1.4 (which is substantively the same). Many states have a shorter version of the duty of communication. For example, Illinois R. Prof. Cond. 1.4 states:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See also Fla. R. Prof. Cond. 1.4; Mich. R. Prof. Cond. 1.4 (Michigan also includes a provision in its shorter version that "[a] lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains."); D.C. R. Prof. Cond. 1.4 (D.C. also provides: "(c) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.").

soon as reasonable. The guideline is whether the attorney has satisfied the reasonable expectations of the client for information consistent with the duty to act in the client's best interest. *See* Comment 5, Ariz. R. Prof. Cond. 1.4. *See also Lawyer Disciplinary Bd. v. Nace*, 753 S.E.2d 618, 631 (W. Va. 2013) ("The undisputed facts indicate that Mr. Nace also did not adequately communicate with Mr. Trumble. Mr. Nace did not make any attempts to communicate with Mr. Trumble between early 2005 when he signed and returned the affidavit and October 2008 when he responded to Mr. Trumble's request for communication in October of 2008. Events pertinent to Mr. Nace's representation of Mr. Trumble of which Mr. Trumble should have been apprised occurred during this time frame."). The duty of communication also precludes the attorney from attempts at a cover up of the attorney's own lack of performance or negligence. *See In re Hyde*, 950 P.2d 806 (N.M. 1997).

The duty of communication includes a duty to explain the scope of the representations and the fees that will be charged. In *Atty. Griev. Comm'n of Md. v. Page*, 62 A.3d 163, 174 (Md. 2013) the court stated:

> The Court finds Respondent violated Rule 1.4(b) by failing to explain the terms of his representation to Ms. Jackson to the extent reasonably necessary to permit her to make informed decisions about the representation. The retainer agreement prepared by Respondent and executed by Ms. Jackson fails to adequately outline the terms of the representation and the fees that would be associated with the representation. The retainer agreement refers to the $5,000 fee as an "initial fee" and then as a "flat rate." The retainer agreement goes on to provide that, "An additional fee or retainer may be required if [sic] becomes evident that I must prepare for unforeseen contestion [sic]." The retainer agreement does not in any way define what "unforeseen contestion" is or provide what additional fee may be required, whether an additional flat fee or hourly fee and if so how that fee would be calculated.

The *Page* court also determined that he attorney failed to adequately describe the summary judgment process. The court stated:

> The Court finds that Respondent violated Rule 1.4(b) by failing to adequately explain the summary judgment process to Ms. Jackson. Respondent admitted at trial that, at the time the Motion for Summary Judgment was filed, he did not think it would be successful. Respondent failed to convey that information to Ms. Jackson, depriving her of the ability to make informed decisions about her case.

Id. at 174.

There are a few exceptions to the duty of communications. For example, a court order may preclude the attorney from informing the client of a specific factual matter. Comment 5, Ariz. R. Prof. Cond. 1.4. An attorney is justified in withholding information for a reasonable period for the safety of the client or a third person. *Id.*

C. Confidentiality

There are two principles of confidentiality created by the attorney-client relationship, which include the ethical rule of confidentiality and the evidentiary rule of attorney-client privilege. These two rules are not the same, but in some states the ethical rule is defined by the evidentiary rule.

(1) The Ethical Rule of Confidentiality

Rule 1.6 sets forth the ethical rule of confidentiality and states:

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

(6) to comply with other law or a court order.[18]

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[18] See Colo. R. Prof. Cond. 1.6; Iowa R. Prof. Cond. 1.6 (which includes a paragraph (c) that provides: "A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm."); Utah R. Prof. Cond. 1.6. Ariz. R. Prof. Cond. 1.6 (substantially the same). There is a divergence between the states on what information must be kept confidential. In Alaska R. Prof. Cond. Rule 1.6(a) states:

> (a) For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

In Illinois, only a "confidence or secret of the client known to the lawyer" must not be disclosed. Ill R. Prof. Cond. 1.6. New York in its Rule 1.6 defines the information that must be maintained as confidential as follows:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii)

The duty of confidentiality is a fundamental principle in the attorney-client relationship that, in the absence of informed consent, requires that the attorney not reveal information relating to the representation. This contributes to the trust between the attorney and client, and encourages clients to seek legal assistance and to communicate freely, fully and frankly.

Although the Rule cited in text is entitled "confidentiality," all information, regardless of the source, is subject to the rule of confidentiality, if it relates to the representation.[19] Comment 3 of Ariz. R. Prof. Cond. 1.6 states:

> The confidentiality rule, for example, applies not only to information communicated in confidence by the client but also to all information relating to the representation, whatever its source.

See also Comment 3, Colo. R. Prof. Cond. 1.6; but see Comment 5B, Mass. R. Prof. Cond. 1.6 ("The exclusion of generally known or widely available

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> information that is generally known in the local community or in the trade, field or profession to which the information relates.

Likewise, in the D.C. R. Prof. Cond. 1.6 confidential information is defined as:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

See also Mich. R. Prof. Cond. 1.6 ("(a) 'Confidence' refers to information protected by the client-lawyer privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."); Mass. R. Prof. Cond. 1.6 ("A lawyer shall not reveal confidential information relating to representation of a client….").

[19] *See H20 Plus, LLC v. Arch Pers. Care Prods., L.P.*, 2010 U.S. Dist. LEXIS 124055, 33-34 (D.N.J. 2010) ("The reference to Rule 1.6 is noteworthy because that Rule addresses basic confidentiality and has been interpreted broadly to encompass the full scope of an attorney-client relationship. *See e.g.*, In re Adv. Op. No. 544 of New Jersey Supreme Court Adv. Comm. on Prof'l Ethics, 103 N.J. 399, 406-07, 511 A.2d 609 ("this Rule [1.6] expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client.").

information from the information protected by this rule explains the addition of the word "confidential" before the word "information" in Rule 1.6(a) as compared to the comparable ABA Model Rule.”). Of course, an attorney is permitted to make disclosures when appropriate in discharging the representation.

Rule 1.6(b)(2) and (3) require that the lawyer’s services have been used by the client to commit the fraud or crime before the attorney is permitted to make any disclosure. If the lawyer discovers the crime or fraud of a client, but his or her services were not used in connection with the wrongful conduct, the lawyer is not permitted to make a disclosure.

Rule 1.6, together with Rule 1.16, contemplate a “noisy withdrawal” when necessary. See Hazard & Hodes. § 9.31; *see also* Nancy A. Welsh, *Funding Justice: What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 Ariz. L. Rev. 395, 471 (Summer 2010) (“A lawyer's "noisy withdrawal" from the representation of a client has long been understood as ethical, under certain conditions.”). When a lawyer learns that his or her client has engaged in fraudulent activity and the services of the attorney have been used in connection with the fraud, there are risks now being imposed on the attorney. To avoid personal risk, the lawyer should immediately withdraw, but the rule of confidentiality is still applicable. As opposed to disclosing the fraud, the attorney may engage in a “noisy” withdrawal, i.e. disclaimer of all prior acts and representations, which should alert the opposition that there is something wrong, but without disclosing the specific wrong.[20]

[20] *Teleglobe Communs. Corp. v. BCE, Inc.*, 493 F.3d 345, 369 (3d Cir. 2007) (“While there is much debate over how corporate counsel should go about promoting compliance with law (e.g.,

An attorney must take reasonable safeguards to assure confidentiality of client information. For example, when communicating electronically, steps must be taken to assure that information is not given to unintended recipients. The amount of precaution taken depends on the circumstances and the nature of the information. In advent disclosure to a third party can result in violation of the rule of confidentiality.[21]

(2) Attorney-Client Privilege

Related to the ethical rule of confidentiality is the evidentiary rule of attorney-client privilege. Comment 5, Mass R. Prof. Cond. 1.6 ("The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (and the related work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics."). The distinction between the two rules is that the rule of confidentiality is an ethical rule that applies generally, and the attorney-client privilege is a rule that only applies regarding evidentiary matters. *See United States v. Evans*, 954 F. Supp. 165, 170 (D. Ill. 1997) (stating that the attorney-client privilege exists apart from, and is not coextensive with, the ethical confidentiality precepts); *see also Hustler Cincinnati, Inc. v. Cambria*, 2014 U.S. Dist. LEXIS 11760 (S.D. Ohio 2014) ("The court reasoned that Comment 3 clarifies 'the rule of client-attorney confidentiality

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the usefulness of "noisy withdrawal" requirements versus going up the corporate chain with concerns), both sides of the debate seem to see in-house counsel as the 'front lines' of the battle to ensure that compliance while preserving confidential communications.").

[21] A malpractice claim can arise when the attorney for the insured reveals a confidence to the carrier that provides the carrier with a basis to deny coverage to the insured. *See CHI of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1128 (Alaska 1993). The duty of confidentiality continues after the termination of representation. *Kilpatrick v. Wiley*, 37 P.3d 1130, 1141 (Utah 2001).

as set forth in Rule 1.6 does not apply to restrict testimony in judicial proceedings in which a lawyer is a witness, or is required to produce evidence concerning a client. The attorney-client privilege and the work-product doctrine may apply, as recognized by the rule.'").

Federal Rule of Evidence 501 provides that the privilege of a witness or person shall be governed by the principles of common law as interpreted by the courts of the United States, and as to civil actions with respect to an element of state law, the privilege of a witness or person is to be determined in accordance with state law. *See Camden v. Maryland*, 910 F. Supp. 1115, 1119 (D. Md., 1996) ("Although a federal court in a civil action follows state law on privileges when the action is premised on state law, federal common law on privileges applies with regard to federal actions.").

The United States Supreme Court Standard 503[22] sets forth a restatement of the common law of the attorney-client privilege. The Standard states as follows:

> (a)-- Definitions--As used in this rule:
>
> (1)-- A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.[23]

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[22] Supreme Court standards are not part of the Federal Rules of Evidence. The Supreme Court proposed the Standards as Rules, but Congress did not adopt the proposed rules. *See* 3-503 Weinstein's Federal Evidence § 503.02. However, Supreme Court Standard 503 states the common-law lawyer-client privilege, and has some utility as a guide to the federal common law referred to in Rule 501. *Id.*

[23] Some states have codified the phrase "representative of the client" to mean: a person having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client. *See* Alaska Rule of Evidence 503(2); Arkansas Rule of Evidence 502(2); Hawaii Rule of Evidence 503(2); Nevada Revised Statutes § 49.075. Utah Rule of Evidence 504(a) additionally includes one specifically authorized to communicate with the lawyer

(2)-- A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3)-- A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(4)-- A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b)-- General rule of privilege.--A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.[24]

(c)-- Who may claim the privilege.--The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the

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concerning a legal matter. *See also* Uniform Rules of Evidence, Rule 502(a)(2); *Attorney-Client Privilege: Who Is "Representative Of The Client" Within State Statute Or Rule Privileging Communications Between An Attorney And The Representative Of The Client* 66 A.L.R.4th 1227 (1988).

[24] The attorney-client relationship need not be formal for the privilege to apply. As noted in *United States v. Evans*, 954 F. Supp. 165, 167-68 (D. Ill., 1997):

> The attorney-client relationship may arise in the absence of mutual consent. Here, the putative client must show (1) that he submitted confidential information to a lawyer, and (2) that he did so with the reasonable belief that the lawyer was acting as his attorney. The existence of the relationship is not dependent upon the payment of fees nor upon the execution of a formal contract. However, the attorney-client relationship does not arise where one consults an attorney in a capacity other than as an attorney.

(citations omitted).

contrary.[25]

(d)-- Exceptions.--There is no privilege under this rule:

(1)-- Furtherance of crime or fraud.--If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;[26] or

(2)-- Claimants through same deceased client.--As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3)-- Breach of duty by lawyer or client.--As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4)-- Document attested by lawyer.--As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5)-- Joint clients.--As to a communication relevant to a matter of common interest between two or more clients if the communication was made by

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[25] The client holds the privilege and only the client may claim the privilege. *See Resolution Trust Corp. v. Massachusetts Mutual Life Ins. Co.,* 200 F.R.D. 183, 188 (W.D.N.Y. 2001). When a corporation is the client, then only the corporation can claim or waive the privilege, acting through its authorized management. The United States Supreme Court in the case of *Commodity Futures Trading Com'n v. Weintraub,* 105 S.Ct. 1986, 1991 (1985), stated:

> The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. *See, e.g., Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W.668, 684 (1919).

See also In re Perrigo Co. 128 F.3d 430, 437 (6th Cir. 1997).

[26] The crime-fraud exception does not apply to prior wrongdoing, but to the planning, or commission of ongoing fraud and crimes. *United States v. Zolin,* 491 U.S. 554, 562-63, 109 S. Ct. 2619, 2626 (1989) (exception applies only to future wrongdoing); *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (the "privilege does not apply where the client consults an attorney to further a crime."); *Motley v. Marathon Oil Co.,* 71 F.3d 1547, 1551 (10th Cir. 1995). *See generally, Lifewise Master Funding v. Telebank*, 206 F.R.D. 298, 304-05 (D. Utah 2002).

> any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.[27]

3-503 Weinstein's Federal Evidence § 503.01.

The purpose of the attorney-client privilege is to encourage full and frank communications between attorneys and their clients, and the privilege exists to protect not only the giving of advice to those who can act on it, but also the giving of information to the lawyer to enable him or her to give sound and informed advice. *Upjohn Co. v. United States,* 449 U.S. 383, 389, 391 (1981). Although the attorney-client privilege is based on sound public policy, the privilege is confined to its narrowest possible limits. *Abbott Laboratories v. Alpha Therapeutic Corp.,* 200 F.R.D. 401, 405 (N.D. Ill. 2001). This is based on the policy of encouraging full disclosure between the parties in litigation. *Id.*

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[27] There are other exceptions to the lawyer-client privilege than those set forth in text. For example, in the corporate context there is also the "good cause" exception to the privilege, which permits shareholders suing the corporation to show good cause why the privilege should not apply. This exception was established in the case of *Garner v. Wolfinbarger,* 430 F.2d 1093, 1103-04 (5th Cir. 1970). The *Garner* court stated:

> In summary, we say this. . . . the corporation is not barred from asserting [the privilege] merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.

See also, Moskowitz v. Lopp, 128 F.R.D. 624, 637 (E.D. Pa. 1989) (noting courts have questioned application of *Garner* in cases where the shareholders are not pursuing a derivative action); *Deutsch v. Cogan*, 580 A.2d 100, 104-06 (Del. Ch. Ct. 1990) (discussing the "good cause" exception in the context of a "suing shareholder."); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 678-79 (D. Kan. 1986) (applying the exception in the context of a union asserting the privilege against union members).