





use these opportunities to help students understand the complexities of the lawyer's role, including the lawyer's work and ethical obligations, while assisting students to develop constructs for resolving these dilemmas in the future.<sup>4</sup>

I began using the film *To Kill a Mockingbird* many years ago as a tool to help teach the basic Professional Responsibility ("PR") course.<sup>5</sup> Near the beginning of the first class, I showed Attorney Atticus Finch's powerful closing argument in the trial of Tom Robinson, an African-American facing a rape charge.<sup>6</sup> I also showed the scene in which African-Americans in the courthouse balcony rose to recognize Atticus Finch's passionate defense of Tom Robinson.<sup>7</sup> The film excerpts engaged student attention, facilitated classroom discussion, and underscored the importance of learning about lawyers and their professional responsibility.<sup>8</sup> In short, the film provided an effective and rewarding teaching experience.

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is particularly effective for learning and exploring the dynamics of human relationships at the center of family law cases.").

4. See *infra* Section II.B.

5. The American Bar Association ("ABA") requires all accredited law schools to offer a course in PR or ethics. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–2018, at 15–16, [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2017-2018ABASstandardsforApprovalofLawSchools/2017\\_2018\\_standards\\_chapter3.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASstandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf). This is often a three-credit-hour, semester-long course that covers lawyer and judicial conduct rules, disciplinary standards, professionalism concepts, the attorney-client evidentiary privilege, and other statutory and regulatory law governing lawyer behavior. My goal in using the *To Kill a Mockingbird* film is to encourage students to reflect on their reasons for wanting to become lawyers while highlighting the important role that lawyers can play in our society. I note in class that Atticus Finch's defense of Tom Robinson has inspired many lawyers to fight for justice and others to consider joining the profession. See, e.g., Stacy Caplow, *Still in the Dark: Disappointing Images of Women Lawyers*, 20 WOMEN'S RTS. L. REP. 55, 55 (1999) ("For many of us, Atticus Finch, the principled hero of the movie *To Kill a Mockingbird*, was our first positive legal role model. . . . [I]t was the dignified, sagacious, and unquestionably humane Gregory Peck on the screen, who educated us about what a lawyer was supposed to be [and motivated us] to go to law school and become a lawyer just like him." (footnotes omitted)).

6. TO KILL A MOCKINGBIRD (Universal Pictures 1962).

7. *Id.*

8. Student evaluations at the end of the course commonly note that students liked the use of films in the course.

I still begin my first PR class of the semester with these film excerpts from *To Kill a Mockingbird*. I have since added the dramatic scene where Atticus sits outside of the local jail at night to protect his client from a vigilante mob seeking to lynch his client.<sup>9</sup> After viewing all of the excerpts, I ask students to consider what kind of lawyers they hope to be and how they would like to be remembered. Students volunteer that they would like to emulate Atticus Finch and be respected advocates for justice and the rule of law. I refer to these excerpts and our related class discussion several times throughout the semester, usually to remind students of their wish to be like Atticus Finch. Sometimes I simply ask: “How do you think Atticus Finch would act or handle this matter?” This question brings the class full circle, returning to our first class discussion about the important role lawyers play in our society and how they can promote social justice.

Given my positive experience teaching PR with *To Kill a Mockingbird*, I have experimented using excerpts of other films in my PR class. This Article focuses on one such film, *The Rainmaker*,<sup>10</sup> based on John Grisham’s popular novel with the same title published in 1995.<sup>11</sup> *The Rainmaker* provides fertile ground for teachers to

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9. TO KILL A MOCKINGBIRD, *supra* note 6. The total amount of time devoted to showing the film, including the jailhouse scene, is less than 25 minutes. The class discussion may take another 10 to 15 minutes for a maximum total of 40 minutes. Students are emotionally connected to the powerful narrative of racial injustice and the difficult sacrifice and courage needed by the lawyer to do the right thing in defending the accused. I note in class that I use the film to convey an important message that, although we will focus often on technical professional conduct rules, the class should not lose sight of bigger, more fundamental concerns about morality and courage—what I like to refer to as “doing the right thing.” For example, under the Model Rules of Professional Conduct (“Model Rules”), Atticus Finch did not have to defend Tom Robinson. Students seem to appreciate my noting of these bigger, fundamental concerns and the need to do the right thing.

10. The film was released in 1997 and was directed for Paramount Pictures by the five-time Academy Award winner Francis Ford Coppola, starring Matt Damon, Clare Danes, John Voight, Danny DeVito, Mary Kay Place, and Mickey Rourke. Other films based on John Grisham’s books include: *The Runaway Jury* (2003), *A Time to Kill* (1996), *The Chamber* (1996), *The Client* (1994), *The Firm* (1993), and *The Pelican Brief* (1993). I only use material from the film for teaching my PR course, rather than including material from the book.

11. Both the film and the novel garnered significant acclaim in the film and publishing industries and with the public at large. See Todd McCarthy, *John Grisham’s The Rainmaker*, VARIETY (Dec. 4, 1997, 11:00

discuss a variety of ethical issues while simultaneously highlighting related professional responsibility doctrines for addressing those challenges.<sup>12</sup>

The film tells the story of Rudy Baylor, a recent Memphis State Law graduate,<sup>13</sup> who is desperately seeking employment in Memphis, Tennessee.<sup>14</sup> He finally acquires a job at the J. Lyman Stone Law Firm run by Bruiser Stone, a corrupt, yet successful, personal injury lawyer.<sup>15</sup> Rudy meets Deck Shifflet,<sup>16</sup> the firm's "paralawyer,"<sup>17</sup> who teaches Rudy about ambulance-chasing and other unethical ways to practice law.<sup>18</sup> As a new associate, Rudy's job, in part, entails finding

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PM),<http://variety.com/1997/film/reviews/john-grisham-s-the-rainmaker-111732352/>.

As carefully constructed, handsomely crafted and flavorsomely acted as a top-of-the-line production from Hollywood's classical studio era, Francis Ford Coppola's screen version of "John Grisham's *The Rainmaker*" would seem to represent just about all a filmmaker could do with the best-selling author's patented dramatic formulas without subverting them altogether. . . . [T]his story of a young Southern lawyer taking on an evil insurance giant exerts an almost irresistible David and Goliath appeal, and proves absorbing from beginning to end. Paramount release looms as a highly durable B.O. entry.

*Id.* Both were also commercial successes: the *New York Times* Fiction Best Seller List featured the book, and the film earned a total revenue of \$45,916,769. *Best Sellers*, N.Y. TIMES (June 4, 1995), <http://www.nytimes.com/1995/06/04/books/best-sellers-june-4-1995.html?pagewanted=all>; *The Rainmaker (1997)*, THE NUMBERS, <https://www.the-numbers.com/movie/Rainmaker-The#tab=summary> (last visited May 18, 2018).

12. See Lonnie T. Brown, Jr., "Lawyers" Not "Liars": A Modified Traditionalist Approach to Teaching Legal Ethics, 51 ST. LOUIS U. L.J. 1119, 1129 (2007) (discussing *The Rainmaker* as a vehicle for facilitating a "lively and entertaining discussion" about ethical issues and "making the lesson memorable" for students).

13. Memphis State University College of Law has since been renamed to The University of Memphis Cecil C. Humphreys School of Law.

14. THE RAINMAKER at 0:00:39–0:02:00 (Paramount Pictures 1997).

15. *Id.* at 0:02:05–0:04:18.

16. *Id.* at 0:04:38–0:04:47.

17. *Id.* at 0:17:08–0:17:10.

18. *Id.* at 0:15:37–0:19:14.











school provide a nice entrée for students to discuss what law school experiences and practices they feel promote (or undermine) being a good and ethical lawyer. I ask whether law school provides the kind of experience likely to produce future Atticus Finch-like lawyers. If not, I ask how we can improve the existing law school experience and culture. I take this opportunity to remind students that scholars have written much on the topic of changing law school culture,<sup>35</sup> and I briefly identify a proposal for change by Professors Eli Wald and Russell Pearce (“Wald” and “Pearce”) concerning relational self-interest.<sup>36</sup>

Law school culture remains intensely competitive and conformist,<sup>37</sup> which partially explains the students’ quick connection to this part of the film. They have firsthand experience of this intense competition and the related feelings of stress and discomfort that still

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*Id.* (citations omitted); *see also* David I. C. Thomson, *Teaching Formation of Professional Identity*, 27 REGENT U. L. REV. 303, 303 (2015) (reporting the 2007 landmark report on legal education by the Carnegie Foundation for the Advancement of Teaching (commonly known as the Carnegie Report) “focused its strongest criticism” on the failure of law schools to devote “sufficient attention to the formation of professional identity in their students”).

35. *See, e.g.*, Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don’t Law Professors Play Well with Others*, 93 NEB. L. REV. 547, 549 (2015) (exploring “the disconnect between the individualistic culture of law schools and the collaborative culture of the legal community at large” and discussing the benefits of changing the “individualistic law school culture” to a more collaborative enterprise); John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007) (exploring approaches to the competitive and stress-inducing culture of legal education in the twenty-first century).

36. Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 429–42 (2011).

37. *See* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 549 (2007).

The internal operating system of legal education integrates a theory of law (cognitive and objective); a concept of professionalism (adversarial and neutral); and a view of education (competitive and uniform). When students and faculty share an institutional culture that is organized around formalized and homogeneous measures of success, departures from that system of evaluation are necessarily marginalized.

*Id.*

resonate with them.<sup>38</sup> Student volunteers readily share their strong thoughts and experiences about the competitive nature of law school and its other shortcomings. Sometimes the criticism provokes counterpoints, but typically there is broad consensus about the corrosive effects of the competitive atmosphere in law school. In today's digital age, it is less likely that students will tear pages out of books to gain unfair advantages, but there are other ways to obtain unfair advantages regardless of today's wired law school environment. For example, some students may seek the impermissible assistance of classmates in researching, writing, or editing papers, and some students will even plagiarize submissions.<sup>39</sup> Other students may cheat by using prohibited materials while taking an examination or continuing to write after the examination period ends.<sup>40</sup>

Student comments reflect that one key cause of the intense competition in law school is the way law schools evaluate student performance. According to Professors Susan Sturm and Lani Guinier, the metric for evaluation is simple: out-compete and out-rank your classmates.<sup>41</sup> Most law schools have mandatory grading curves, which

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38. See Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 80 (2012) (discussing the "culture of cut-throat competition among law students").

39. For rules barring such conduct, see, for example, BOS. UNIV. SCHOOL OF LAW, 2017–2018 J.D. STUDENT HANDBOOK 43–45 (2017) (listing specific examples of violations, including plagiarism) and UNIV. OF AKRON SCHOOL OF LAW, STUDENT HANDBOOK, STUDENT DISCIPLINARY CODE 21–22 (2009) (“[F]ailing to adequately identify the extent of reliance on the work of another person.”).

40. For rules addressing such misconduct, see, for example, BOS. UNIV. SCHOOL OF LAW, 2017–2018 J.D. STUDENT HANDBOOK 37 (2017) (“Students must stop writing and turn in in-class examination papers when time is called.”) and UNIV. OF AKRON SCHOOL OF LAW, STUDENT HANDBOOK, STUDENT DISCIPLINARY CODE 21–22 (2009) (“A student violates this Code if: . . . in any . . . matter related to the School or legal profession, he or she seeks to obtain unfair advantage for himself, herself or another.”).

41. See Sturm & Guinier, *supra* note 37, at 537. The authors further argue that law schools

allocate[] value based on one's place in the performance hierarchy: we are excellent because we are highly ranked; we are successful because we have high LSAT scores or grades or make the most money or have the greatest number of publications or citations. Performance is embedded in a success narrative that constrains and structures every aspect of law school activity including admissions,

inevitably means that some students will be at the top of the curve and others at bottom.<sup>42</sup> This grading system promotes intense competition and stress among classmates in a contest to surface at the top of the curve.

Students sometimes raise another concern about law school grading and stress: professors often base grades on one end-of-the-semester examination. This examination provides a summative assessment with little individual and formative feedback.<sup>43</sup> Students are frustrated by this grading approach and desire more feedback during and at the end of the semester.<sup>44</sup> On the other hand, more detailed, individualized feedback is labor-intensive and time-

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faculty appointments and tenure, student assessment, resource allocation and career counseling.

*Id.*

42. Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 753–55 (2011).

43. *Id.* at 753; see also Daniel Schwartz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139, 140 (2017) (stating that “[f]or well over a century, students’ grades in most law school classes have been based exclusively on their performance on a single end-of-semester exam” with the notice of the letter grade occurring weeks after the exam and with no “individualized comments regarding their exam performance”).

44. Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225, 227–28 (2013).

Law student psychological distress has been attributed to a number of concurrent causes—including the lack of adequate performance feedback, which, in addition to being a stressor on its own, exacerbates the pressure caused by the competitive law school environment. Although most of the discussion about inadequacy of feedback has been centered on the dearth of feedback, infrequency is not the only problem. Even when feedback is delivered, it is often composed of controlling and non-informational statements—which, in addition to being of little instructional value, can lower student motivation, discourage persistence, and contribute to the decline in well-being experienced by many law students. Such feedback contributes to the autonomy-thwarting educational environment that is devastating for many students and fails to provide instruction that is compatible with developing self-determined learners and lawyers.

*Id.*

consuming.<sup>45</sup> Faculty often feel too pressed for time to engage in such individualized feedback.<sup>46</sup> Moreover, faculty efforts to provide such feedback often go unnoticed.<sup>47</sup> Institutions primarily reward faculty for their publication and scholarly presentation records.<sup>48</sup> These endeavors demand significant time and energy and, not surprisingly, become a top priority for faculty. This priority, along with other competing institutional responsibilities, such as committee work, often preclude the individualized feedback on examinations and papers that students desire.<sup>49</sup> The grading curve and lack of individualized

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45. See Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 174 (2012).

46. See, e.g., *id.* (“Another major criticism of legal education focuses on the lack of formative assessment early in a course. Instead, students typically get feedback only on a final exam, and that feedback is not likely to improve a student’s performance on subsequent exams. A number of factors make it difficult to include formative assessment in law school classes, including the large size of many doctrinal classes, the time constraints associated with being a professor (i.e., service and scholarship), and the lack of training on providing proper feedback to students.”).

47. See generally Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 420 (1998) (indicating a lack of recognition for individual feedback from faculty to students by arguing for another set of law school rankings that recognizes such individual feedback from faculty).

48. See Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY’S L.J. 301, 355 (2003) (“[T]he measure of a faculty member’s value is that faculty member’s scholarly productivity, and if the measure of a law school’s distinctiveness is in that same productivity, then there exists an amicable convergence of individual and institutional interests. . . . [E]mphasis on faculty scholarship [and its financial and other rewards are] necessary for the long-term interests of the institution and its current students and graduates.”).

49. See Manning, *supra* note 44; Carasik, *supra* note 42, at 753 (“Although some professors have implemented measures intended to address this pressure and provide some interim feedback, the fact remains that in most cases, the grade is premised almost entirely on one exam that typically requires and rewards a discrete skill set that comprises only a minute part of what lawyering requires. Compounding the pressure exerted by high-stakes exams is the fact that they are neither designed nor intended to provide formative feedback.”).

The suggestion that nonelite law schools hire faculty through national searches was intended to create an environment in which scholarship was even more valued than before.

feedback in law school help make its competitive culture even more alienating.

This stressful law school culture of competition is pervasive and transparent. It is ingrained in students beginning in their first year as they become immersed in law school culture.<sup>50</sup> Wald and Pearce argue that “[l]aw schools teach students to view their classmates as competitors and to pursue their own autonomous self-interest as students.”<sup>51</sup> Students publicly compete for grades and selection for law review,<sup>52</sup> moot court, practice skills teams, research assistantships,

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The creation of this environment made more important the criterion of scholarly promise and achievement in tenure applications. Although faculty members obtain tenure based on a measure of the tenure applicant’s teaching, scholarship, and service, the first among equals of these three tenure criteria at the vast majority of law schools is scholarship. Indeed, at a substantial number of law schools, scholarship is the only meaningful criterion for obtaining tenure.

Ariens, *supra* note 48, at 351. “This bias exists because institutional reputation and distinction are tested by the scholarly output of a law school’s faculty.” *Id.* at 353–54. See generally Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247, 274 (2008) (“[S]cholarship is the primary benchmark for the overriding extrinsic pursuit—rankings and relative prestige of law schools—scholarship typically transcends its original intended role as a balanced part of the law school mission and becomes the dominating concern of the faculty . . . [and] the principle requirement for gaining tenure, promotions, and financial benefits.”).

50. See Cassandra Sharp, *The “Extreme Makeover” Effect of Law School: Students Being Transformed by Stories*, 12 TEX. WESLEYAN L. REV. 233, 237–38 (2005) (“In one sense, we could liken the role of the law school to the transforming work of an extreme makeover. . . . To view law school in this way is to recognize its enormous propensity for transformation. . . . Through the exchange of knowledge, the challenging of perceptions and the developing of values, students are able to take part in a transformation of self.”).

51. See Wald & Pearce, *supra* note 36, at 415.

52. Although most law review positions are tied to grades, which are a product of intense competition, some positions on law review involve a write-on competition or a combination of the two. See, e.g., *Joining Law Review*, UNIV. OF MEM., <http://www.memphis.edu/law/programs/join-law-review.php> (last visited May 27, 2018). Membership on law reviews “vary dramatically” but share universal characteristics—“they are elitist” and “inherently selective.” J.C. Oleson, *You Make Me [Sic]: Confessions of a Sadistic Law Review Editor*, 37 U.C. DAVIS L. REV. 1135, 1137 (2004). Stated differently, law review participation embodies competition from start to end. *Id.*

and clerkships.<sup>53</sup> The winners of these law school competitions are not always the best lawyers, and many non-winners still have rewarding careers.<sup>54</sup> As Rudy states in the film's opening scenes, some of his classmates will get high-paying jobs with prestigious law firms because of their family connections and not because they were successful at winning a law school competition, such as being selected for law review.<sup>55</sup>

Sturm and Guinier argue that, even in the classroom, students learn the law in a competitive or adversarial frame because students study appellate cases in which conflict resolution occurs in a court-centered, win-lose, adjudicative environment.<sup>56</sup> In addition, the traditional law school pedagogy of the Socratic Method adds to the competitive atmosphere in the classroom where professors often call on students to individually argue competing positions or viewpoints of a case or issue.<sup>57</sup> Some critics argue that the Socratic Method can

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53. See Sturm & Guinier, *supra* note 37, at 523–24 (contending that students “get[] it” that their “success” is defined by their performance in these common, public competitions also promotes a culture of conformity).

54. See *id.* at 537–38 (reporting that non-winners do “go on to have successful and meaningful careers”). See generally Heather D. Baum, *Inward Bound: An Exploration of Character Development in Law School*, 39 U. ARK. LITTLE ROCK L. REV. 25, 25 (2016) (“Researchers and practitioners have identified certain character traits that successful lawyers and law students possess, and have noted that these traits can be better predictors of success than traditional measures such as class rank and membership on law review.”).

55. THE RAINMAKER, *supra* note 14, at 0:01:28–0:01:35; see also Sturm & Guinier, *supra* note 37, at 537–38.

56. See Sturm & Guinier, *supra* note 37, at 527–28.

57. See *id.* at 526. “In the conventional law school classroom, adversarial conflict provides the underlying framework of interaction, knowledge generation, and problem solving. As presented in most law school classes, law addresses conflict in highly formal settings aimed at determining winners and losers.” *Id.* “By adopting the stance of the Socratic judge,” similar to judges interrogating lawyers in a courtroom, “[t]he professor constructs a contest or an argument between different sides and serves as the arbiter of excellence and truth.” *Id.* Professors also “convey several important . . . messages” including that “students are rewarded for being able to differentiate between a winning and losing argument . . . and encourag[ing] law students to identify good lawyering primarily with skillful and quick-witted verbal combat [even though] most lawyers never go to court.” *Id.* at 527; *Socratic Method*, BLACK’S LAW DICTIONARY 1518 (9th ed. 2009) (“A technique of philosophical discussion—and of law-school instruction—by which the questioner (a law professor) questions one or more followers (the law students), building on each

alienate students because it asks them to divorce their personal moral convictions “from their professional identity as a lawyer.”<sup>58</sup> Students in my classes readily criticize the Socratic Method as being unnecessary and causing great stress because they fear embarrassment in front of their classmates. This stress adds to the class’s general feeling that law school culture is competitive.

Class ranking represents a critical manifestation of law school’s competitive culture. It suggests one’s value to others within the law school community, and it also serves as a trace-marker for employers who seek an efficacious method for hiring top students.<sup>59</sup> Class ranking creates enormous stress in student searches for employment because it often affects the number and type of job opportunities available to students. Large law firms that generally pay larger salaries

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answer with another question, esp[ecially] an analogy incorporating the answer. . . . [I]t forces law students to think through issues rationally and deductively—a skill required in the practice of law.”); see also Michael I. Meyerson, *Law School Culture and the Lost Art of Collaboration: Why Don’t Law Professors Play Well with Others?*, 93 NEB. L. REV. 547, 555 (2015) (“The Socratic Method, in which professors pose a series of questions to one student at a time, ‘creates a highly competitive environment’[;] [n]ot only are students forced to prepare and deliver their responses on their own, they are keenly aware that if they fail to give an adequate response they will either face additional personalized questioning or another student will swoop in to give the desired answer.” (citing Clifford S. Zimmerman, “*Thinking Beyond My Own Interpretation*”: *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957, 972 (1999))).

58. Carasik, *supra* note 42, at 750, 750 n.82 (noting that law school “curriculum[s] are] designed to neutralize . . . passion by imposing a rigor of thought that divorces law students from their feeling and morality” (quoting Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63, 73 (2003))); see also ANTHONY T. KRONMAN, *THE LOST LAWYER* 113–15 (1993). The Socratic Method requires students to disengage from their personal, moral positions in the interest of their professional career, dividing their personal and professional personas and causing students to feel like they are losing their souls. *But see* David D. Garner, *Socratic Misogyny?—Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 B.Y.U. L. REV. 1597, 1606 (2000) (“In addition, the Socratic method has been praised for helping students develop analytical skills and thinking on their feet. Socratic discourse requires participants to articulate, develop and defend positions that may at first be imperfectly defined intuitions.” (quotations omitted)).

59. See Sturm & Guinier, *supra* note 37, at 538 (“The grading system provides a signal to employers as to where students belong in the professional hierarchy.”).



look for top-ranked students.<sup>60</sup> The on-campus interview process reflects this dynamic when a law school's placement office collects resumes for an employer who has expressed an interest in only the top 10% of the class.<sup>61</sup> A student's family and friends will likely recognize these ranking consequences, especially in terms of the student's employment, which adds to the stress and competition associated with class rank.<sup>62</sup>

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60. Richard Abel, Book Review, *Crunched by the Numbers*, 66 J. LEGAL EDUC. 961, 972–73 (2017) (emphasizing that “students rightly anticipate that the [U.S. News & World Report] rank of the school from which they graduate will influence their career paths” and improve their chances of being hired “by the largest firms, which pay the highest salaries and confer their own prestige on associates”). ROBERT HALF LEGAL, 2017 SALARY GUIDE FOR THE LEGAL PROFESSION 8 (2016), [https://www.roberthalf.com/sites/default/files/Media\\_Root/images/rhl-pdfs/2017\\_salary\\_guide\\_roberthalflegal.pdf](https://www.roberthalf.com/sites/default/files/Media_Root/images/rhl-pdfs/2017_salary_guide_roberthalflegal.pdf).

First year associate	2016	2017	% increase
Large law firm	\$116,000– \$143,500	\$123,750– \$151,750	6.2%
Midsized law firm	\$81,250– \$112,750	\$84,250– \$116,500	3.5%
Small/Midsized law firm	\$63,750– \$90,250	\$65,000– \$92,500	2.3%
Small law firm	\$55,250– \$79,500	\$56,500– \$82,000	2.8%

61. See Rebecca A. Cochran, *Hope, Again: Hope Theory in Bar Exam Preparation*, 48 DUQ. L. REV. 513, 517–18 (2010) (“Law school students cope with and respond to law school, which may be viewed as a series of ever-heightening hurdles. Each law student begins law school with several personal or professional goals in mind. An informal survey of law students—from first semester to final semester—produced a wide range of goals. These self-reported goals included: . . . obtaining full time legal work after graduation; . . . graduating in the top ten percent . . . . A few students will approach graduation having met many of their goals. Some will have met none of them.”); see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 78 (2002) (“We know there are a number of sources of law student distress and alienation. A primary stressor is the grading and ranking system. . . . Grades and class rank are significant gatekeepers to the reward system during and after law school—law review membership . . . and jobs.”).

62. See Ben Gibson, *How Law Students Can Cope: A Student's View*, 60 J. LEGAL EDUC. 140, 143 (2010) (“For many students, the pressure to succeed in law

In short, class ranking is a major stressor for students because of its potential to negatively impact a student's professional and social standing in the law school community and a student's prospects for summer or permanent employment. The job search is the paramount challenge for most students, especially today with the ever-changing landscape for the delivery of legal services,<sup>63</sup> including the significant unemployment and underemployment of lawyers,<sup>64</sup> competition from new providers of legal services,<sup>65</sup> and the globalization of law practice.<sup>66</sup>

Rudy underscores this concern about finding a job when he derisively states that some of his classmates will not have to worry about finding a job because of their family connections.<sup>67</sup> For Rudy and many others, however, finding a job will be difficult as reflected in his comment: “[T]here are too many lawyers in Memphis. This city is infested with them.”<sup>68</sup> Rudy ultimately accepts an unattractive employment arrangement with a local law firm where his livelihood depends on his bringing in business to cover his law firm compensation.<sup>69</sup>

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school is enormous. This pressure can come from family members, friends, professors, or even from within. It is often believed, albeit falsely, that unless a student performs well in law school she never will be able to land that high-paying dream job, and her life, as a result, will end up in her mind as a complete and total failure. With so much on the line, there is no wonder that law students experience high amounts of stress and anxiety.”).

63. E.g., Jack P. Sahl, *Real Metamorphosis or More of the Same: Navigating the Practice of Law in the Wake of Ethics 20/20—Globalization, New Technologies, and What It Means to Be a Lawyer in These Uncertain Times*, 47 AKRON L. REV. 1, 2 (2014) [hereinafter Sahl, *Real Metamorphosis or More of the Same*].

64. *Id.*

65. W. Bradley Wendel, *Foreword: The Profession's Monopoly and Its Core Values*, 82 FORDHAM L. REV. 2563, 2582–83 (2014) (discussing that Limited License Legal Technicians “can operate without being under the supervision of a lawyer admitted to practice in Washington state”).

66. See Sahl, *Real Metamorphosis or More of the Same*, *supra* note 63, at 4.

67. THE RAINMAKER, *supra* note 14, at 0:01:28–0:01:35.

68. *Id.* at 0:01:49–0:01:57.

69. *Id.* at 0:03:11–0:03:22 (“Now it ain’t exactly a salaried position. . . . I expect my associates to pay for themselves and generate their own fees.”). The employment arrangement is unattractive because it is already difficult for a recent graduate to begin practicing law without having the added distraction and stressful burden of having to generate sufficient business while a neophyte to cover your

Some students also express concern about feeling conflicted between their personal and professional identities and feel that law school offers little help in resolving these conflicts.<sup>70</sup> Like Rudy, “many students enter law school with idealistic notions of advancing social and economic justice but find that our system of ethics instructs lawyers that the broader social implications of legal work are subverted by the goals of individual representation.”<sup>71</sup> Role morality enables lawyers to provide legal assistance to a client even if it conflicts with the lawyer’s personal moral grounding and notions of justice. This is because the lawyer’s role is simple: the lawyer is the agent for the client-principal and is ethically obligated to advance the client’s interests.<sup>72</sup> Thus, the lawyer’s conduct on behalf of the client does not

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compensation. Unfortunately, this kind of employment arrangement for neophyte-lawyers is not unique. It places a premium on marketing legal services on a beginning lawyer who often lacks the general experience, let alone expertise, to fully appreciate the scope and complexity of a client problem and whether or to whom to refer the client for legal assistance.

70. For example, how does a student resolve the hypothetical situation in which a client wants you to negotiate and draft a lease for a building that will house an abortion clinic and you are opposed to abortion? What should you do? Another example of a conflict may involve a student who wants to do environmental work in the public interest field, but for financial reasons, her family needs her to accept her only summer employment offer with a large firm that specializes in representing off-shore oil exploration clients. How should she resolve this dilemma? “The Model Rules are largely stripped of moral directives” and like all written codes, there is sufficient ambiguity or silence in the rules to allow lawyers, “to game and manipulate them to excuse unethical conduct.” See JOHN P. SAHL, R. MICHAEL CASSIDY, BENJAMIN P. COOPER, & MARGARET C. TARKINGTON, PROFESSIONAL RESPONSIBILITY IN FOCUS 25 (2018) [hereinafter SAHL, CASSIDY, COOPER & TARKINGTON]. Thus, it is unlikely that students will find much solace, let alone answers, by examining the Model Rules.

71. Carasik, *supra* note 42, at 751 (“The repeated focus on just one client rather than lofty ideals of systemic change can be disappointing . . .”).

72. See SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 86–87 (noting “the close connection between the rules of professional conduct and the establishment of a fiduciary relationship” and that plaintiffs often assert that the “[agent-]lawyer[‘s] violation of a duty contained in professional conduct rules is significant evidence that the lawyer breached his fiduciary responsibility to protect and promote the [principal-]client’s interests.” (emphasis added)). See Burnett v. Sharp 328 S.W.3d 594, 601 (Tex. App.–Houston [14th Dist.] 2010) (holding that the word “fiduciary” refers to “integrity and fidelity” and that lawyers owe fiduciary duties to clients).

represent the lawyer's morality, but instead reflects the client's moral or immoral perspective.<sup>73</sup> The end result is that the lawyer can help the client with his representational, albeit immoral by the lawyer's standards, goals. These conflicts and the lack of law school guidance to help resolve them increase student stress and alienation.<sup>74</sup>

### *C. Advocating for Improved Culture*

Wald and Pearce propose an argument for changing law school culture. Rather than continuing to focus solely on the professional model that places self-interest over important competing interests, they suggest that law schools, both institutionally and professors individually, adopt a relational self-interest approach—a more nuanced and balanced approach to resolving conflicts (“relational interest approach”).<sup>75</sup> This approach

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73. See MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 2017) (“[A] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.”).

74. Michael T. Colatrella Jr., *Learning “The True, the Good and the Beautiful” in Law School: Educating the Twenty-First Century Litigator*, 33 REV. LITIG. 741, 773–74 (2014) (“Lawyers regularly confront this type of ‘right versus right’ dilemma in their practices, albeit most often in less dramatic form, with little guidance from their professional education. These type of moral questions are in fact much more prevalent in practice than clear-cut ethical issues. Lawyers must decide whether to grant extensions for filing documents to their adversaries that might provide a small but concrete advantage in the legal struggle. They must decide how much unsavory, even if legal, behavior to tolerate from clients before ceasing representation. What these moral dilemmas have in common is that the ethical rules provide no guidance and most law schools provide no education regarding how to manage the moral issues that are central to an attorney's professional identity.” (citations omitted)).

75. Wald & Pearce, *supra* note 36, at 411.

It seems clear that law schools ought to advance and promote relational self-interest as a viable alternative to autonomous self-interest. Law students, unlike mature experienced lawyers, are in the early formative years of their professional development. Rather than implicitly advancing only one approach to professional identity, law schools should explicitly and openly offer their students alternative visions of professional identity, so their students can choose on an informed basis the kind of lawyers they wish to become and the kind of professional values they wish to adopt.

*Id.* at 432–33.

understands clients as attempting to pursue and maximize their self-interest in relation to others, conducting themselves pursuant to the principles of *mutual benefit and mutual respect*.<sup>76</sup> It understands lawyers' role, in turn, as *facilitators of such relational goals, whose spirit of public service manifests itself in a duty to act as civics teachers educating and advising clients to act relationally* and in a commitment to enhance access to legal services.<sup>77</sup>

Law schools ought to ensure that they are developing this type of professionalism and professional identity.<sup>78</sup>

The Model Rules recognize that lawyers are supposed to do more than simply offer technical legal advice to clients.<sup>79</sup> Lawyers should educate their clients about important competing concerns, such as social concerns.<sup>80</sup> The relational-interest approach incorporates client education and emphasizes the need for lawyers to highlight how the client's self-interests affect the client's relations with others in hope of promoting "mutual benefit[s] and mutual respect."<sup>81</sup> Overall, this

76. Stated differently, the lawyer helps the client to pursue his or her maximum self-interest, but that self-interest is self-constrained by the client's desire to maintain good relationships with others and promote the public's interest. *See id.* at 410–11, 419 & 443 (criticizing "the culture of autonomous self-interest in legal education," the marginal role of lawyers as public citizens, and low prioritization of commitment to the public good, and arguing that lawyers must help clients balance their autonomous self-interests with their relationships with others and the public).

77. *Id.* at 411 (emphasis added).

78. *Id.* at 433 ("[T]he hegemony of autonomous self-interest must be challenged and relational approaches have to be advanced and promoted to allow law students, lawyers, and law professors room to develop and practice richer conceptions of professionalism and professional identity."). According to some experts, there has been "palpable energy for chang[ing]" legal education for some time. *See Sturm & Guinier, supra* note 37, at 516. One of the challenges of changing legal education will be identifying "organizational catalysts" to help promote such change. *See id.* at 516–17, 520 (describing "organizational catalysts" as deans and faculty who "occupy strategic positions [at] different institution[s]" that enable them to act as "catalysts for change both within their own institutions and across a set of law schools").

79. *See* MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2015).

80. *See, e.g.,* David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955 (1995).

81. Wald & Pearce, *supra* note 36, at 411.

kind of approach promises a more humane and public-spirited way for lawyers to help resolve individual and societal problems. The ripple effect of the relational interest approach promises a more respectful society where mutuality of interests, not self-interest alone, governs affairs. Finally, lawyers may find the relational interest approach to practicing law more satisfying on a personal level. The approach offers lawyers the opportunity to have a positive and rewarding experience by helping others and building mutual respect and a greater understanding among persons with competing interests.

As we conclude our classroom discussion about the parallels between Rudy's law school experience and my students' experiences, the class seems appreciative for the opportunity to discuss their own experiences and thoughts, including criticisms, about law school. I hope the discussion has built a bridge for exploring other important issues about the legal profession.

### III. *THE RAINMAKER*, ESTABLISHING LAWYER-CLIENT RELATIONSHIPS, AND RETENTION AGREEMENTS: SOME LESSONS

#### A. *New Clients: The Black Family Retention Agreement*

Early in the film, Attorney J. Lyman Stone, known simply as "Bruiser," hires Rudy to work for him.<sup>82</sup> Bruiser directs Rudy to recruit prospective clients that Rudy claims he can bring to the Stone law firm.<sup>83</sup> Rudy met these prospective clients at a Memphis State Law workshop where they sought help with their legal needs.<sup>84</sup> Rudy's compensation from the Stone firm depends on Rudy bringing clients to the firm.<sup>85</sup> As a result of this employment arrangement, *The Rainmaker* shows Rudy driving to Mrs. Black's home, one of these prospective clients, to have her, her husband, and her son sign a retention agreement.<sup>86</sup> The film portrays the signing of the agreement

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82. *THE RAINMAKER*, *supra* note 14, at 0:02:05–0:02:18.

83. *Id.* at 0:03:52–0:04:18. Bruiser specifically directs: "I want you to draw up a lawsuit against this Great Benefit, and you put my name on it. We're gonna file it today." *Id.*

84. *Id.* at 0:04:04–0:04:18.

85. *Id.* at 0:03:11–0:03:22.

86. *Id.* at 0:07:30–0:10:03.

as a relatively quick and simple matter, although Rudy seems uncomfortable with the signing process.<sup>87</sup>

Rule 1.5(c) requires Rudy to have a written retention agreement with Mrs. Black and her family since the representation calls for a contingency fee.<sup>88</sup> When Rudy asks Mrs. Black to sign the retention agreement, she asks him what is in the agreement.<sup>89</sup> Rudy falters in explaining the contents of the agreement.<sup>90</sup> He refers to it as a standard contract in which Mrs. Black and her family agree to hire “us,” the Stone law firm, and the firm agrees to represent them in their action for a bad-faith denial of insurance claim against Great Benefit Insurance.<sup>91</sup> Rudy tells Mrs. Black that, in return for the firm’s work, the family agrees to pay the firm one-third of any recovery while the firm covers all litigation expenses.<sup>92</sup> Mrs. Black, surprised by Rudy’s

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87. *Id.* at 0:09:49–0:11:07; 0:11:52–0:12:12. Some of Rudy’s discomfort may concern Mrs. Black’s son, who suffered a nosebleed while signing the retention agreement, causing Rudy to assist the son in providing his signature. *Id.* at 0:11:18–0:11:28.

88. MODEL RULES OF PROF’L CONDUCT r. 1.5(c) (AM. BAR ASS’N 2015).

89. THE RAINMAKER, *supra* note 14, at 0:10:00–0:10:35.

90. *Id.*

91. *Id.*

92. *Id.* at 0:10:08–0:10:19. In the film, Rudy simply states that the firm will “handle all expenses.” *Id.* He should not assume that the Blacks know what that means. Rudy should have limited the scope of this statement to “court costs and expenses of litigation”—the general standard. *See* MODEL RULES OF PROF’L CONDUCT r. 1.8(e) (AM. BAR ASS’N 2015) (“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.”). At least ten states permit lawyers to advance “humanitarian expenses,” such as cost of medical care and housing. *See* Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 40 (2015) (“This rule bars lawyers from assisting their low-income litigation clients with living expenses . . . though such clients may suffer or even die while waiting for a favorable litigation result. Because of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effects on indigent clients, Rule 1.8(e) stands out as an unethical ethics rule.”); Jack P. Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 ST. MARY’S L.J. 795, 802–03 (2004) [hereinafter Sahl, *The Cost of Humanitarian Assistance*] (“[W]hether lawyers should be permitted to advance non-litigation expenses or living expenses to clients is often relegated to a footnote when examining the economic

brief description of the agreement, skeptically asks Rudy why it takes two pages “to say all that.”<sup>93</sup>

*B. Considering Other Provisions in a Retention Agreement*

Hollywood’s cursory treatment of retention agreements may not be surprising given a film’s traditional time constraints to tell a story and since the explanation and negotiation of retention agreements are not generally dramatic events. Nevertheless, retention agreements are very important events in a lawyer-client relationship, and lawyers should not treat them as quick and simple matters.<sup>94</sup> Retention agreements provide an “explicit description and a continuing record of the purpose for and the arrangements under which representation takes place.”<sup>95</sup> The scene involving the Blacks’ retention agreement provides PR teachers with a wonderful opportunity to highlight some significant points about retention agreements.<sup>96</sup>

After viewing the film scenario in class, I remind students that the lawyer-client relationship is a fiduciary one.<sup>97</sup> “The cornerstone of the fiduciary relationship is trust [and this] is reflected in traditional agency law . . . .”<sup>98</sup> The lawyer is an agent for the principal-client and owes the client loyalty, confidentiality, and a commitment to

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relationship between the lawyer and the client. Non-litigation expenses, otherwise known as and referred to in this Article as *living expenses*, may include the cost of medical care, housing, food, clothing, utilities, and transportation.” (emphasis added)).

93. THE RAINMAKER, *supra* note 14, at 0:10:20–0:10:24.

94. William C. Becker, *The Client Retention Agreement—The Engagement Letter*, 23 AKRON L. REV. 323, 346 (1990) [hereinafter Becker, *Retention Agreement*] (“The retention agreement is a key document in the lawyer-client relationship and affords a unique opportunity for Lawyer and client to discuss the elements, expectations and costs of the relationship which is to follow.”).

95. *Id.*

96. I generally show these two scenes from *The Rainmaker* after covering Model Rules 1.1 through 1.5 in class. This enables students to more fully appreciate the ethical issues involved in these scenes and facilitates a more informed and robust discussion.

97. SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 156; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986).

98. See SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 86.



advancing the client's interests.<sup>99</sup> Given that fiduciary relationship, lawyers should openly and fully inform the client about the nature of their relationship.<sup>100</sup>

Relevant to Rudy's interaction with the Blacks, Model Rule 1.4, titled "Communication," while not explicitly referencing retention agreements, requires that lawyers explain matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>101</sup> This ethical duty of communication governs the formation of the lawyer-client relationship.<sup>102</sup> The

99. WOLFRAM, *supra* note 97, at 146–47. Professor Wolfram writes:

The law of contract defines the client-lawyer relationship for many, but hardly for all purposes. . . . But because the relationship is a fiduciary one, a lawyer may incur legal responsibilities that have no parallel in the law of contract. It is best, then, to speak of the lawyer's professional undertaking rather than the lawyer's contractual duties. . . . [C]lients have a right to assume that a lawyer who undertakes to listen to them and to render legal assistance can be trusted with information and with the responsibility of handling the client's matter in the client's best interest.

*Id.*; see also SAHL, CASSIDY, COOPER, & TARKINGTON, *supra* note 70, at 86 (highlighting that the agent-lawyer owes the principal-client a fiduciary duty to be "trustworthy, including being loyal, competent, and protective of client confidences").

100. See, e.g., *Hodges v. Reasonover*, 103 So. 3d 1069, 1077 (La. 2012). In *Hodges*, the Supreme Court of Louisiana discussed the fiduciary relationship between a lawyer and a client and the lawyer's duty to adequately explain the terms of a retention agreement. *Id.* at 1073. The court noted that a lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. *Id.* at 1077. The *Hodges* court ruled that an arbitration clause in the retention agreement was unenforceable because the attorney failed to fully disclose the scope and terms of the clause to the client. *Id.* at 1078.

101. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2015).

102. See *Statewide Grievance Comm. v. Paige*, No. CV030198335S, 2004 WL 1833462, at \*4 (Conn. Super. Ct. July 14, 2004) ("An attorney-client relationship is established when the advice and assistance of the attorney is sought and received in matters pertinent to his profession. The relation of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from conduct of the parties. It is not the rendering of legal advice that established the attorney-client relationship . . . Rather, it is the client's seeking of legal advice . . . that establishes the relationship." (quotations and citations omitted)); Michael C. Wallace, Sr., *Make the Hand Fit the Glove: OPR Finds Professional Misconduct*, 57 WAYNE L. REV. 497, 522 (2011)

decision to retain a lawyer may be one of the most important decisions a client makes in a matter or in the client's lifetime.<sup>103</sup> The client's decision should be informed.<sup>104</sup> The Model Rules expect fiduciaries to safeguard their clients' interests, and full disclosure should be the lawyer's lodestar in negotiating or explaining a retention agreement to a client.<sup>105</sup>

I typically ask students for their reaction to Rudy's conduct with Mrs. Black and her family at the retention agreement signing. Generally, an ample supply of volunteers comment about Rudy's conduct and related professional conduct rules, raising some of the following concerns about Rule 1.5(c). First, Rudy has no discussion with the Black family about Rule 1.5(c)'s other requirements for contingency fees, and it is unclear whether the written retention agreement proffered by Rudy comports with Rule 1.5(c).<sup>106</sup> For example, the agreement must

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

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("The formation of an attorney-client relationship is the first step in determining whether there is a legal duty to communicate.").

103. See 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* 8-3 (4th ed. 2016 & Supp. 2017) ("Adequate communication is essential to the establishment of a sound client-lawyer relationship, and to its fruitful continuation.").

104. The "terminology" section of the Model Rules defines "informed consent" in Rule 1.0(e) to mean "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." MODEL RULES OF PROF'L CONDUCT r. 1.0(e) (AM. BAR ASS'N 2015).

105. Clients go to lawyers because they "have special skills and knowledge not generally shared by people and which it would be uneconomic for most people who are not themselves lawyers to attempt to acquire." WOLFRAM, *supra* note 97, at 145-46.

106. No character thoroughly describes the document, and the film does not provide the viewer with a chance to review its total contents. *THE RAINMAKER*, *supra* note 14, at 0:09:49-0:12:13.

recovery; . . . whether such expenses are to be deducted before or after the contingent fee is calculated . . . <sup>107</sup>

and what, if any, expenses the client must pay whether or not the client prevails.<sup>108</sup> This language is a de facto recognition of the conflicting interests inherent in the contingent fee situation (even though such fee agreements are permissible under Rule 1.5(c)).<sup>109</sup> The client has an interest in minimizing the cost of legal services deducted from his recovery of damages, while the lawyer wants to maximize his fee for legal services in obtaining the recovery.

Rudy also fails to note that, at the conclusion of the contingent fee matter, the firm will provide the Blacks 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.”<sup>110</sup> This is worth highlighting to the class, given Mrs. Black’s skepticism about the two-page retention agreement.<sup>111</sup> If Rudy had informed Mrs. Black that she was entitled to a written accounting at the close of the case, it might have allayed any concerns she had about Rudy and/or the agreement.<sup>112</sup> I raise this possibility to emphasize that sometimes

107. MODEL RULES OF PROF’L CONDUCT r. 1.5(c) (AM. BAR ASS’N 2015).

108. *In re Disciplinary Proceeding Against Van Camp*, 257 P.3d 599, 609–10, 16 (Wash. 2011) (holding that a lawyer must adequately explain how a fee will be calculated at the outset of representation and the failure to do so violates Model Rule 1.4(b)’s duty to adequately communicate with the client to enable informed decisions regarding representation; disbarring the lawyer for six ethical violations).

109. *See, e.g., People v. Doolin*, 198 P.3d 11, 32 (Cal. 2009).

[A]most any fee arrangement between attorney and client may give rise to a “conflict.” . . . The contingent fee contract so common in civil litigation creates a “conflict” when either the attorney or the client needs a quick settlement while the other’s interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of “conflict” are infinite.

*Id.* (quoting *Maxwell v. Superior Court*, 639 P.2d 248, 255 n.8 (Cal. 1982)).

110. *See THE RAINMAKER*, *supra* note 14, at 0:09:49–0:12:13; MODEL RULES OF PROF’L CONDUCT r. 1.5(c) (AM. BAR ASS’N 2015).

111. *THE RAINMAKER*, *supra* note 14, at 0:10:20–0:10:24.

112. It is worth noting, by the way, that Mrs. Black seemed interested in further addressing the nature of the retention agreement when her son interrupted her about her smoking and, in effect, preempted any further questions. *Id.* at 0:10:20–0:10:26. As a fiduciary, Rudy should have revisited the provisions of the retention agreement given Mrs. Black’s remark and skepticism.

the professional conduct rules offer lawyers a helpful roadmap to avoid potential conflicts with their clients.

It is unreasonable to expect the film to cover all, or even many, of the important aspects of a retention agreement in a brief scene between a lawyer and client. The absence of any reference to these aspects and related rules, however, allows both students and the teacher to consider their significance.<sup>113</sup>

First, for example, there is no mention of who is responsible for the continuation of representation should Bruiser or Rudy become unable to continue representing their clients.<sup>114</sup> In other words, if Rudy leaves the firm or dies, does the firm continue representing the Blacks? The Stone law firm is ultimately responsible for providing legal services to the Blacks since they signed the agreement with the firm.<sup>115</sup> One must wonder, however, if the Black family fully understands that fact since Rudy was their only contact.<sup>116</sup> They may instead believe

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113. I note in class that some of the unreferenced aspects of a retention agreement may have been included in the written document that Rudy was offering to the Black family. We do not know from the film, but the lack of reference justifies noting some of the aspects.

114. See generally Jack P. Sahl, *Thinking About Leaving? The Ethics of Departing One Firm for Another*, 19 PROF. LAW. 2, 9–10 (2008) [hereinafter Sahl, *Thinking About Leaving?*] (reporting that Model Rule 1.4 “requires that a lawyer ‘keep [a] client reasonably informed about the status of [the client’s] matter,’” that ABA Formal Opinion 99-414 found that “the impending departure of a lawyer who is responsible for the client’s representation or who plays a principal role in the law firm’s delivery of legal services currently in a matter . . . constitutes ‘information that may affect the status of a client’s matter as contemplated by Model Rule 1.4,’” and that “both the departing lawyer and responsible members of the law firm who remain’ have a duty to notify the client about departure”).

115. See *In re Kiley*, 947 N.E.2d 1, 5–6 (Mass. 2011) (“Where, as here, the client enters into a representation agreement with a law firm rather than a sole practitioner, the law firm may not terminate the agreement simply because the attorney who had been handling the case has died, left the practice of law, or moved to a different firm. While the departure of the responsible attorney may cause the client to leave the firm, it may not cause the firm to leave the client if withdrawal will have a material adverse effect on the client’s interests and none of the circumstances requiring or permitting withdrawal is present.”).

116. Near the beginning of the film, while Rudy and Deck are having a discussion in a mall parking lot about Rudy’s possible clients, Deck directs Rudy to “*sign ‘em all up to J. Lyman Stone*” and adds, “I’ll help you on this one. . . . There’s nothing more thrilling than nailing an insurance company.” THE RAINMAKER, *supra*

that Rudy is their lawyer, not fully appreciating that their client file is actually with the Stone law firm.<sup>117</sup> Likewise, Rudy cannot simply leave the firm and take their file.<sup>118</sup> The Blacks can, of course, terminate the agreement with the Stone law firm and follow Rudy or hire another lawyer.<sup>119</sup> There is always the potential for a dispute, however, over who is entitled to the fee should there be a recovery when the lawyer leaves the firm, and a firm client follows the departing lawyer.<sup>120</sup> If the client retained the firm, as in the case of the Blacks, then the firm is arguably entitled to some portion of the fee.<sup>121</sup> Rudy

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note 14, at 0:07:14–0:07:29 (emphasis added). Deck’s statement suggests that the retention agreement with the Blacks was between them and the Stone law firm.

117. Later in the film, Rudy tells the presiding judge at a motion hearing that the Blacks are his clients and that Bruiser filed the claims for him until he was admitted to practice. *Id.* at 0:42:45–0:42:50. Rudy removes the Blacks’ file from Bruiser’s office after Bruiser’s arrest and before the FBI searches his office. *Id.* Rudy assumes control of the Blacks’ representation for the remainder of the film. *Id.*

118. The Blacks’ belief that Rudy is their lawyer is especially possible given Rudy’s statement to them when describing the retention agreement as a standard agreement where the Blacks agree to hire “us” and that “we” will represent you (i.e. the Blacks) in the case. *Id.* at 0:09:49–0:12:13. The Blacks could construe “us” to mean Rudy and the Stone firm. See Sahl, *Thinking About Leaving?*, *supra* note 114, at 2, 9 (discussing professional conduct issues involved in a lawyer departing a law firm, including the issue of whether the departing lawyer or the firm continues to represent clients and how any potential fee may be shared between the departing lawyer and his former firm); see also ROBERT W. HILLMAN & ALLISON MARTIN RHODES, *HILLMAN ON LAWYER MOBILITY* 2:11, 2:166–68, 2:190–97 (3d ed. 2017).

119. MODEL RULES OF PROF’L CONDUCT r. 1.16 (a)(3) cmt. 4 (AM. BAR ASS’N 2015).

120. HILLMAN & RHODES, *supra* note 118, at 2:190–97; see ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 99-414 (1999) (“Any *initial* in-person or written notice informing clients of the departing lawyer’s new affiliation that is sent before the lawyer’s resigning from the firm generally should conform to the following: 1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (i.e., the current clients); 2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer’s willingness and ability to continue her responsibility for the matters upon which she currently is working; 3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and 4) the departing lawyer must not disparage the lawyer’s former firm.”). See generally Sahl, *Thinking About Leaving?*, *supra* note 114, at 2 (discussing the repercussions of departing lawyers changing firms).

121. HILLMAN & RHODES, *supra* note 118, at 2:191; see Sahl, *Thinking About Leaving?*, *supra* note 114, at 2.

should note these important considerations in a client-centered approach to representation.

Additionally, the film did not reference the lawyer's duty of confidentiality at the retention agreement signing.<sup>122</sup> This is a key principle to emphasize to clients, and a brief discussion about the confidential nature of the relationship should promote client communications with the lawyer.

Nor was there any reference to how the firm would handle conflicts of interest. Conflicts of interest are important concerns for lawyers,<sup>123</sup> even when the likelihood of conflict seems remote, as in *The Rainmaker* in which it appears that neither Bruiser nor Rudy have existing or potential conflicts of interest representing the Blacks in their lawsuit against Great Benefits. Nevertheless, a lawyer needs to explain to the client how the lawyer will act should a conflict arise.<sup>124</sup> For example, the lawyer needs to remind the client that he will not undertake any new client matters that will limit him from exercising independent judgement for the client or protecting the client's confidential information.<sup>125</sup>

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122. See MODEL RULES OF PROF'L CONDUCT r. 1.6, 1.18 (AM. BAR ASS'N 2015). Rudy does raise confidentiality and the attorney-client privilege in another scene involving a prospective client, Miss Birdie, involving a will matter with her son who is attempting to ascertain his mother's wealth in hope of inheriting it. *THE RAINMAKER*, *supra* note 14, at 0:33:28–0:33:34. The confidential nature of lawyer-client communications is a core principle that warrants reference in the written retention agreement and at the signing of the agreement.

123. See RICHARD E. FLAMM, CONFLICTS OF INTEREST IN THE PRACTICE OF LAW 3–5 (2015) (reporting that “many courts have remarked upon the need for lawyers to . . . scrupulously avoid representing clients whose interests are in conflict, as well as to refrain from undertaking representation of clients whose interests conflict” and highlighting that “[m]ore than three decades ago the United States Supreme Court observed, in *Cuyler v. Sullivan*, that attorneys have an ethical obligation to avoid engaging in conflicting representations”).

124. See Jack P. Sahl, *A 2018 Update: What Every Entertainment Lawyer Needs to Know—How to Avoid Being the Target of a Legal Malpractice or Disciplinary Action in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 2018*, at 1-495, 1-511 to 1-512 (2018) [hereinafter Sahl, *What Every Entertainment Lawyer Needs to Know*] (“Lawyers should inform clients that their professional code of ethics may preclude them from accepting employment where a conflict of interest exists in certain circumstances.”).

125. See MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2015).

Rudy should highlight another aspect of the attorney-client relationship that should be in the retention agreement: the client's obligation to keep the lawyer informed of any material changes in the client's life, such as a change of address or employment.<sup>126</sup> Communication is a two-way street between the lawyer and the client. The client should promptly notify the lawyer about any material developments related to the client matter. Likewise, in addition to the client's responsibility to keep the lawyer informed, the client needs to cooperate with the lawyer by providing materials and other assistance the lawyer requests to facilitate representation of the client.<sup>127</sup> The attorney-client relationship should be largely collaborative in nature while appreciative of the established roles and responsibilities of each party. For example, the client has ultimate authority to accept a settlement, enter a plea, and decide whether to have a jury trial or to

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126. See, e.g., SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 199 (citing Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 748 (2008)); see Sahl, *What Every Entertainment Lawyer Needs to Know*, *supra* note 124, at 1-510 ("Clients need to understand that effective communication is a two-way street and that the client bears some of the responsibility for ensuring good communication. A client should apprise the lawyer of any material changes in the client's personal and professional life that may affect the representation—ranging from the client's change of address to his or her discovery of relevant information or evidence.").

127. See MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(5) (AM. BAR ASS'N 2015) (providing for permissive withdrawal by the lawyer when "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"); see also Sahl, *What Every Entertainment Lawyer Needs to Know*, *supra* note 124, at 1-510 (discussing the responsibilities of the client in the lawyer-client relationship).

testify,<sup>128</sup> and the lawyer has the responsibility to avoid assisting the client in a fraud.<sup>129</sup>

Additionally, there are other aspects of a retention agreement that Rudy should have explained or at least noted. For example, what if Rudy wants to associate another lawyer in the Blacks' case? What is the process for this and how should he divide fees with such an associate?<sup>130</sup> How will the parties resolve any disputes concerning the agreement? Will the parties agree to arbitrate a dispute? How will the matter of withdrawal occur? Rule 1.16(a), for example, requires mandatory withdrawal in certain circumstances, such as when the representation violates a rule of professional conduct or the client discharges the lawyer.<sup>131</sup> Rudy should make certain that the Blacks know that they can terminate their agreement with him at any time and that they will only be responsible for the reasonable cost of Rudy's time and services up to that point, commonly known as quantum meruit recovery.<sup>132</sup> Also, Rudy should mention that if either party

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128. See MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2015) (directing a lawyer to "abide by a client's decision whether to settle a matter . . . [or] a plea to be entered . . ."). Although the clients have the ultimate say about accepting a settlement or plea, lawyers generally play a significant role counseling clients about settlements and pleas. For films portraying the lawyer's role in both settlement and plea context, see *A CIVIL ACTION* (Paramount Pictures 1998) (showing the awkwardness of advising clients about an unattractive settlement offer when, based on a real case, attorney Jan Schlichtman recommends to families in Woburn, Massachusetts that they accept a settlement in a toxic tort case) and *MARSHALL* (Starlight Media 2017) (revealing vigorous discussions about a plea among two defense attorneys, including future United States Supreme Court Justice Thurgood Marshall, and a black defendant charged with sexual assault and attempted murder based on a real case in the 1940s in Bridgeport, Connecticut).

129. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2015) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

130. MODEL RULES OF PROF'L CONDUCT r. 1.5(e) (AM. BAR ASS'N 2015) (providing for the division of fees between lawyers not in the same law firm).

131. MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1) (AM. BAR ASS'N 2015).

132. MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2015); RONALD E. MALLEN, 1 *LEGAL MALPRACTICE* § 2:109 (2018 ed.) (advising attorneys to inform unsophisticated "contingent-fee clients" of "their right to discharge the attorney, and the possibility of *quantum meruit* recovery") ("In the absence of clear language regarding withdrawal prior to the occurrence of the contingency, the authorities are divided on whether, and to what extent, a lawyer may collect a quantum



terminates the representation for any reason, ethical rules obligate him to take steps to protect the Blacks' interests, "such as giving reasonable notice to [them]," allowing time for employment of other counsel, surrendering papers and property to which [they are] entitled and refunding any advance payment of fee or expense that has not been earned or incurred."<sup>133</sup>

Clients go to lawyers because they "have special skills and knowledge not generally shared by other people and which it would be uneconomic for most people who are not themselves lawyers to attempt to acquire."<sup>134</sup> This is especially true when it comes to negotiating what is in—or perhaps more importantly—what is *not* in the client's retention agreement. Rudy should have personally reviewed each provision of the retention agreement with the Blacks. At the very least, Rudy needed to explain several important provisions, such as the ones concerning fees, confidentiality, conflicts of interest, and termination before asking Mrs. Black and her family to sign it. The scene involving the Blacks signing the law firm's retention agreement provides an effective springboard for underscoring the

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meruit fee. An attorney discharged for cause may recover in *quantum meruit* recovery, less damages caused by the lawyer's misconduct. But if the attorney voluntarily withdraws before the case concludes, the attorney may forfeit all rights to compensation unless the client's conduct forced the withdrawal." (footnote omitted). Accord BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT: PRACTICE GUIDES, CONTINGENT FEES 29 (2018) ("Of course, it is a good idea to alert the client up front that counsel will seek quantum meruit if the client fires her attorney before the contingency has come to pass."); see also W. BRADLEY WENDEL, EXAMPLES & EXPLANATIONS: PROFESSIONAL RESPONSIBILITY 28, n.2 (2d ed. 2007) ("[T]here are complex issues of remedies law involved in cases where clients fire lawyers who are compensated on a contingency fee basis. Many courts permit a fired contingency-fee lawyer to recover the fair value of her services *quantum meruit*."). See generally WOLFRAM, *supra* note 97, at 546–47 (explaining that "[t]he rule, which is now recognized in almost every state . . . is that a client's discharge of a lawyer ends the lawyer's right to recover on the contract of employment," including contingency fee contracts, and entitles the lawyer to *quantum meruit* recovery, or the reasonable value of the lawyer's services; but also noting that "[i]f the contract has been substantially performed—for example, a client under a contingent fee contract waits to discharge the lawyer until a favorable settlement offer has been received—courts hold that the lawyer can recover on the contract if the discharge was without cause").

133. MODEL RULES OF PROF'L CONDUCT r. 1.16(d) (AM. BAR ASS'N 2015).

134. See *supra* note 105.

importance and the complex nature of forming an attorney-client relationship.

#### IV. THE LAWYER'S DUTY OF COMPETENCE

##### A. *Rudy and Taking the "Great Benefit" Case*

A central part of *The Rainmaker* story involves Rudy's struggle to represent a young man, Donny Ray Black, who is dying of leukemia. Donny and the Black family seek Rudy's help in getting the Blacks' insurance carrier, Great Benefit, to cover some of Donny's medical expenses.<sup>135</sup> The Blacks especially want a bone marrow transplant for Donny that might save his life.<sup>136</sup> Rudy unceremoniously discusses the Black case behind his car with Deck Shifflet in a strip-mall parking lot.<sup>137</sup> Rudy reports that, according to Mrs. Black, Great Benefit Insurance Company denied coverage on several grounds, including that Donny's policy did not cover leukemia and that Donny's leukemia was a disqualifying pre-existing medical condition.<sup>138</sup> Rudy shows Deck the Great Benefit Insurance Policy, and Deck concludes that the insurance policy is a scam commonly called "street insurance."<sup>139</sup> Deck directs Rudy to "sign them all up to [the] J. Lyman Stone [firm]" and adds, "I'll help you on this one. . . . There's nothing more thrilling than nailing an insurance company."<sup>140</sup>

This discussion with Deck, the "paralawyer," seems to be the extent of Rudy's consultation with persons experienced in this kind of litigation. It is unclear whether Rudy was getting help from Bruiser in the Blacks' lawsuit, but it is unlikely given the film's portrayal of

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135. THE RAINMAKER, *supra* note 14, at 2:00:40–2:02:45.

136. *Id.* at 2:01:00–2:01:15.

137. *Id.* at 0:06:35–0:07:11.

138. *Id.* at 0:06:45–0:06:56.

139. *Id.* at 0:06:35–0:07:11. "Streetsurance originally meant the policy a pimp paid to work a particular corner, so it should come as a surprise to nobody that the term migrated to include companies that sold next-to-worthless health insurance policies, often for cash and often door-to-door in poor neighborhoods." Charles P. Pierce, *Don't Sleep on Ted Cruz: His Healthcare Bill Isn't as Dead as His Social Life*, ESQUIRE (July 11, 2017), <https://www.esquire.com/news-politics/politics/news/a56251/ted-cruz-healthcare-bill/>.

140. THE RAINMAKER, *supra* note 14, at 0:07:14–0:07:29.

Bruiser as a self-absorbed and unethical lawyer.<sup>141</sup> Once Rudy and Deck leave the Stone firm following Bruiser's indictment and arrest,<sup>142</sup> there is no indication that Rudy consults with someone more experienced in this kind of lawsuit.<sup>143</sup>

### *B. Competency: The Model Rules*

Rule 1.1 requires lawyers to provide competent representation to their clients.<sup>144</sup> The Rule defines competency as having the “legal knowledge, skill, thoroughness, and preparation necessary for the representation.”<sup>145</sup> Whether one meets this standard depends on a number of factors. These factors include

the relative complexity and specialized nature of the matter,<sup>146</sup> the lawyer's general experience,<sup>147</sup> the lawyer's training and experience in the field in

141. *Id.*

142. *Id.* at 0:38:25–0:40:25. Deck informs Rudy that Bruiser could be charged with jury tampering, money skimming, tax evasion, and racketeering based on a newspaper article reporting that one of Bruiser's ex-partners “cut a deal” with the government. *Id.* at 0:38:25–0:38:51. Deck tells Rudy that arrest warrants are out for Bruiser and that “things may get a little hot.” *Id.*

143. *Id.* at 1:05:06–1:05:12 (“I'm alone in this trial. I'm seriously outgunned, and I'm scared.”). At one point at the end of the Great Benefit trial, Deck calls Bruiser, who is on a beach somewhere, looking for a case that supports the admission of evidence. *Id.* at 1:49:05–1:50:11. This is kind of call for help from someone with experience that Rudy should have made earlier in the case.

144. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2015).

145. *Id.*; *see also* *People v. Bontrager*, 407 P.3d 1235, 1254 (Colo. 2017) (affirming a lawyer's nine-month suspension by the Colorado Supreme Court for acting incompetently and violating Colorado Rules of Professional Conduct Rule 1.1 by “fail[ing] to reasonably investigate whether he could sue the Tribe—including by researching the law of sovereign immunity—before filing suit against the Tribe”).

146. *In re Alexander*, 300 P.3d 536, 544 (Ariz. 2013) (en banc) (holding that the lawyer failed to render competent representation given the “relative complexity and specialized nature of the matter”—factors used to determine whether a lawyer acted competently).

147. *See, e.g., People v. Cole*, 293 P.3d 604, 611–14 (Colo. 2011) (ruling that the lawyer, who was handling a case of a particular kind for the first time, provided incompetent representation because he had inadequate knowledge and lacked the general experience necessary to provide competent services).

question,<sup>148</sup> the preparation and study the lawyer is able to give the matter,<sup>149</sup> 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.<sup>150</sup>

### C. *Falling Short of Competence*

Although lawyers do not need specialized training or experience to handle an unfamiliar legal matter,<sup>151</sup> Rudy's work on behalf of the Blacks involves a major lawsuit alleging a bad-faith denial of insurance coverage against a large insurance company.<sup>152</sup>

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148. Att'y Grievance Comm'n of Maryland v. Kendrick, 943 A.2d 1173, 1179 (Md. 2008) (holding that a respondent-attorney violated Model Rule 1.1 by "probat[ing an] Estate with very little experience and direction, and despite the eight years of problems that she [had] been experiencing with several courts in administering this Estate, the Respondent refuse[d] to admit to her ignorance of the probate procedures involved or to seek and accept help from qualified legal professionals in getting her problems resolved . . . to close the Estate"); see also *In re Seare*, 493 B.R. 158, 223–24 (Bankr. D. Nev. 2013) (finding that the lawyer's training and substantial experience constituted aggravating factors when he acted incompetently).

149. *People v. Bontrager*, 407 P.3d 1235, 1247 (2017) (ruling lawyer acted incompetently and violated Colorado's Rule 1.1 when he filed an appeal that unreasonably ignored that his client's claims were barred by a "long standing race-notice statute"). The *Bontrager* court further stated, "There is no legal reason why the statute should be altered in application" to the client matter, noting that the lawyer also violated Colorado's Rule 3.1 for filing a claim that lacked any factual or legal support. *Id.* Finally, the court found that the lawyer disregarded Colorado Appeal Rule 28(k) which "evinced a level of procedural incompetence that cannot [be] ignore[d]." *Id.*

150. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2015).

151. See, e.g., Att'y Grievance Comm'n of Maryland v. Narasimhan, 92 A.3d 512, 519 (2014) ("A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar." (quoting MD. LAWYERS' RULES OF PROF'L CONDUCT r. 1.1)).

152. THE RAINMAKER, *supra* note 14, at 2:00:40–2:01:45. The U.S. District Court for the Southern District of Florida, in *Falic v. Legg Mason Wood Walker, Inc.*, discussed *Peckham v. Continental Casualty Insurance Co.*, 895 F.2d 830 (1st Cir. 1990), where "the district court allowed two attorneys well-versed in the nuances of insurance law to offer opinion evidence as to proximate cause in a bad-faith insurance case." No. 03-80377-CIV, 2005 WL 5955704, at \*4 n.2 (S.D. Fla. Jan. 10, 2005). The *Peckham* court noted, however, that "[i]nsurance is a complicated subject

Rule 1.1 recognizes that, in some cases, such as the Great Benefits case, “expertise in a particular field may be [necessary] . . . .”<sup>153</sup> The film depicts nothing that prevents Rudy from associating or consulting with a more experienced lawyer or someone with expertise in insurance litigation.

Furthermore, there is no evidence suggesting that Rudy, as a recent law graduate and new bar member, has much “general experience,” let alone expertise in insurance coverage litigation.<sup>154</sup> Nor is there evidence that Rudy has any inkling for the complexities and nuances of a civil action for a bad-faith denial of insurance coverage. In fact, the film suggests just the opposite: Rudy lacks the requisite preparation, knowledge, and experience to competently handle the matter.<sup>155</sup>

For example, a newly assigned judge calls Rudy and the Great Benefit lawyers to a meeting in his chambers.<sup>156</sup> The judge rules against Great Benefit’s motion to dismiss the Blacks’ lawsuit.<sup>157</sup> He then sets a pretrial schedule and, in the process, rejects several requests by the defense that would have delayed the trial date.<sup>158</sup> The judge

and the industry, over time, has developed a patina of custom and usage. Arcana abound. Defendant’s proffered experts could reasonably be expected to shed some light in a shadowy domain.” *Id.* Unlike the *Peckham* case, the *Falic* court did not require an attorney expert to “shed some light in a shadowy domain.” *Id.*

153. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS’N 2015); *see also* Fla. Bar v. Kane, 202 So. 3d 11, 14 (Fla. 2016) (involving an action against Progressive Insurance for its bad faith in systematically refusing to pay valid insurance claims). In *Kane*, to handle the bad-faith litigation, the lawyers also brought specialized counsel (collectively referred to as “the bad-faith attorneys” by the court). *Kane*, 202 So. 3d at 14.

154. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS’N 2015) (identifying “general experience” as one factor for determining “whether a lawyer employs the requisite knowledge and skill in a particular matter”). Rudy did attend a Memphis State Law workshop where he met the Blacks and may have gained some practical experience. *THE RAINMAKER*, *supra* note 14, at 0:52:40–0:52:48. What the workshop involved and what Rudy’s role in it is not clear in the film. In any event, it is unlikely he gained the kind of experience needed to protect the Blacks in their lawsuit against Great Benefit.

155. *See* *THE RAINMAKER*, *supra* note 14, at 0:52:40–0:52:48 (showing Rudy admitting that he is in over his head).

156. *Id.* at 0:49:41–0:50:30.

157. *Id.* at 0:51:55–0:52:08.

158. *Id.* at 0:50:10–0:51:55.

seems sympathetic to Rudy and the plaintiff's wish to have the merits of the case heard quickly, at one point sharply stating, "This boy is going to die gentlemen. You do agree we need to record his testimony?"<sup>159</sup> The defense team agrees, and the judge schedules the boy's deposition to "next Thursday afternoon, 2:00 P.M."<sup>160</sup> The parties videotape the deposition at Donny's home.<sup>161</sup>

At the conclusion of a pretrial hearing, the newly assigned judge leans over the bench and asks a somewhat bewildered-looking Rudy, "[o]ver your head son?"<sup>162</sup> Rudy emphatically replies: "Absolutely!"<sup>163</sup> In class, I note that this exchange should be a clarion call for Rudy to associate or consult with another "lawyer of established competence in the field."<sup>164</sup> Further, the need for Rudy to consult a more experienced lawyer becomes even more apparent during the Great Benefit trial. Toward the end of the trial, Rudy uses a former Great Benefit employee to offer a document that shows that the company denied the Blacks' insurance claim in bad faith.<sup>165</sup> This document was "smoking gun" proof of Great Benefit's fraudulent scheme—exactly what the Blacks needed to win their lawsuit.<sup>166</sup> The defense team, however, objected to the document's admissibility because someone had stolen the document from Great Benefit.<sup>167</sup> Precedent called for excluding stolen evidence, and, upon reviewing

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159. *Id.* at 0:51:13–0:51:18.

160. *Id.* at 0:51:25–0:51:55.

161. *Id.* at 0:56:20–0:57:15. There is only one camera recording the deponent's, Donny's, testimony. *Id.* at 0:56:20–0:57:15. Sometimes, in cases when the opposing counsel is difficult, experienced counsel may have a second camera on the deposing lawyers to minimize the likelihood of abusive tactics by them. Rudy is inexperienced and may not know this, suggesting another instance in which consultation with a more experienced lawyer would be good for Rudy and his clients, as the Great Benefit's legal team was uncooperative.

162. THE RAINMAKER, *supra* note 14, at 0:52:40–0:52:43.

163. *Id.* at 0:52:45–0:52:48.

164. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2015). Another point to raise with the class concerns the judge. What, if anything, should the judge do after Rudy's admits a lack of competence? I suggest to the class that the judge should delicately ask Rudy if he plans to associate or consult with another lawyer experienced in this kind of lawsuit.

165. THE RAINMAKER, *supra* note 14, at 1:41:24–1:45:18.

166. *Id.* at 1:54:41–1:55:33.

167. *Id.* at 1:44:40–1:45:18.

the case, the judge dutifully excluded the document.<sup>168</sup> A dejected Rudy thought the evidence was forever lost. He did not consider consulting with a more experienced lawyer to see if there was a way to admit the document or its contents into evidence.

Deck, however, thought Bruiser knew a case that admitted stolen evidence.<sup>169</sup> He contacted Bruiser, who was on a sunny beach sipping a drink, presumably no longer a lawyer, who told Deck the case was *Club Ruby v. Carmine DeSoto*, 585 S.W.2d 431.<sup>170</sup> The *DeSoto* case held that stolen evidence was admissible if the party seeking its admission had no involvement in the theft.<sup>171</sup> Rudy showed *Desoto* to the judge who then reversed his earlier ruling excluding the document.<sup>172</sup> The assistance from Bruiser, a more experienced lawyer, underscored Rudy's poor judgement in not initially associating or consulting with a more experienced lawyer in the Blacks' lawsuit. Rudy's failure to seek more expert advice for the Blacks' lawsuit exposed Rudy and his clients to harm.<sup>173</sup> The client harm is obvious; the Blacks could have lost their lawsuit.

The consequences for Rudy include possible disciplinary and legal malpractice action. As mentioned above, Rule 1.1 establishes the competency standard.<sup>174</sup> It requires adequate preparation and possession of the requisite knowledge and training necessary to

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168. *Id.* at 1:48:20–1:48:27.

169. *Id.* at 1:49:05–1:49:34.

170. *Id.* at 1:49:05–1:50:11. Although *Club Ruby v. Carmine DeSoto*, 585 S.W. 431 (Ky. Ct. App. 1979) is a real reported case, its depiction in the film is fictional, in part, because it does not involve stolen evidence.

171. *Id.* at 1:53:35–1:53:42.

172. *Id.* at 1:53:15–1:53:55.

173. For a case involving lawyer incompetency and client harm, see *In re Cuomo*, No. NV-13-1294-PaJuHI, 2014 Bankr. LEXIS 4523 (B.A.P. 9th Cir. Oct. 21, 2014). The *Deluca* court stated, “[t]here is no precise definition of ‘competence’ under either Nevada or federal law, but relevant factors include the lawyer’s training, experience and preparation.” *Id.* at \*27–28. The court held that “[the] lack of a reasonable inquiry into Cuomo’s financial affairs *arguably caused an injury or prejudice not only to his client*, but to the public (which relies upon the accuracy of bankruptcy filings), and to the legal system (which is burdened by the additional legal procedures stemming from the omission of the Ritchie Debt).” *Id.* at \*35 (emphasis added).

174. *See supra* Part IV.B.

represent someone in a matter.<sup>175</sup> Part of Rule 1.1's competency standard is also knowing when it is necessary to associate or consult with a more experienced lawyer in the field to ensure competent representation.<sup>176</sup> Rudy arguably violated this standard by not knowing of the *DeSoto* case that permits the admissibility of stolen evidence.<sup>177</sup> Rudy also violated Rule 1.1 by failing to associate or consult with a more experienced lawyer in the Blacks' insurance coverage case. He was a recent law school graduate and an inexperienced new lawyer in a complex case. These factors militate in favor of Rudy having an obligation to associate or consult with a more experienced lawyer.<sup>178</sup> Failing to know about the *DeSoto* decision and

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175. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 2015) ("[Competent handling] 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 extensive treatment than matters of lesser complexity and consequence.").

176. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2015) ("Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve. . . . Competent representation can also be provided through the association of a lawyer of established competence in the field in question.").

177. *See Dahl v. Dahl*, 345 P.3d 566, 592 (Utah 2015) ("Pretrial discovery and disclosure are basic skills that we expect all attorneys to possess. . . . Our courts rely heavily on the competence and diligence of counsel.").

178. Although each case is uniquely different in terms of the disciplinary process, the ABA provides a list of aggravating and mitigating factors that indicate the appropriate level of discipline. *See* AM. BAR ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS 17 (1992), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/sanction\\_standards.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.authcheckdam.pdf).

After the establishment of misconduct, aggravating factors calling for a more serious action include (1) prior disciplinary offenses; (2) a dishonest or selfish motive; (3) a pattern of misconduct; (4) multiple offenses; (5) a lack of cooperation; (6) the submission of false evidence, false statements, or other deceptive conduct during the disciplinary process; (7) a refusal to acknowledge wrongdoing; (8) the failure to make restitution; and (9) the vulnerability of and resulting harm to victims of the misconduct.

Some mitigating factors favoring a lesser sanction are (1) the lack of a prior disciplinary record; (2) the absence of a dishonest or selfish motive; (3) a timely, good faith effort to make restitution or rectify the consequences of misconduct; (4) full disclosure; (5) cooperation



consult with more experienced counsel subject Rudy to possible discipline.<sup>179</sup>

The Blacks also could have sued Rudy for malpractice had he failed to argue the *DeSoto* case. In a legal malpractice action, courts generally accept expert testimony concerning the standards in the professional conduct rules.<sup>180</sup> These standards provide some, but not exclusive, evidence of the duty of care that a lawyer owed to a plaintiff in a legal malpractice action.<sup>181</sup> The same Rule 1.1 standards applicable in a disciplinary action also apply in a civil court for legal

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during the process; (6) imposition of other penalties (e.g., loss of employment); (7) good character or reputation; and (8) existence of a medical disorder.

SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 68 (citing OHIO GOV. BAR r. I, § 13(A)–(C)).

179. See SAHL, CASSIDY, COOPER & TARKINGTON *supra* note 70, at 67.

The ABA Standards for Imposing Lawyer Sanctions identify four factors that courts should consider in imposing appropriate discipline involving the following concerns: (1) the duty violated; (2) the lawyer’s mental state (intentional or negligent); (3) the seriousness of the actual or potential injury; and (4) the existence of aggravating and mitigating factors.

*Id.* [S]anctions generally include: disbarment, suspension, public reprimand, and private reprimand. *Id.*

180. *Wong v. Ekberg*, 807 A.2d 1266, 1270–71 (N.H. 2002) (“Other jurisdictions that have addressed this issue have held that, except in clear or palpable cases, ‘in an action for legal malpractice, expert testimony is generally needed to establish both the level of care owed by the attorney under the particular circumstances and the alleged failure to conform to that benchmark.’” (citing *Wagenmann v. Adams*, 829 F.2d 196, 218 (1st Cir. 1987))). “The reason for this requirement is that without expert testimony lay juries cannot understand most litigation issues, local practices, or the range of issues that influence how an attorney should act or advise.” *Id.* at 1271 (quotations and citations omitted).

181. SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 81. See *Sands v. Menard*, 904 N.W.2d 789 (Wis. 2017); Samson Habte, *Menard Beats Ex-Fiancee Lawyer’s Bid for Share of Retail Empire*, ABA/BNA LAW. MAN. PROF. CONDUCT (Jan. 10, 2018) (reporting that the Wisconsin Supreme Court held that generally ethics rules may guide courts in determining required standards of care but they cannot be an absolute defense in a civil suit; in *Menard* the defendant-fiancee argued that his former fiancee-lawyer who advised him violated Rule 1.8(a)’s rule governing lawyer involvement in a client’s business transaction).

malpractice.<sup>182</sup> Rudy arguably breached a duty of care to the Blacks by failing to know about *DeSoto*'s ruling on admissibility.<sup>183</sup> The judge's initial exclusion of the document could have caused the Blacks to lose their case.<sup>184</sup> In addition, a reasonable lawyer who was as inexperienced as Rudy would have sought help from a more experienced lawyer to ensure he competently represented his clients. Rudy breached a standard of care by not associating or consulting with a more experienced lawyer to protect the Blacks in their lawsuit against Great Benefits. If the Blacks lost their case, Rudy could be liable for the value of the unrealized recovery from Great Benefits and related costs, such as court expenses.<sup>185</sup>

One final note concerning the Blacks' trial against Great Benefits: before the jury decided in favor of the Blacks, Rudy arrived late to the court.<sup>186</sup> Deck was standing before the judge and addressing the court,<sup>187</sup> clearly engaging in the unauthorized practice of law

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182. Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 534–35 (2004) (“The duty of competence—lawyers’ first professional responsibility under the Model Rules and the duty that, together with the duty of diligence, lies at the heart of the standard-of-care analysis courts apply in legal malpractice cases—requires lawyers to employ the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of their clients.” (quotations and citation omitted)).

183. *See, e.g., Rogers v. Zanetti*, 518 S.W.3d 394, 400 (Tex. 2017) (“To prove a legal-malpractice claim, the client must establish that: (1) the lawyer owed a duty of care to the client; (2) the lawyer breached that duty; and (3) the lawyer’s breach proximately caused damage to the client.” (citation omitted)).

184. *See, e.g., Border Demolition & Envtl., Inc. v. Pineda*, 535 S.W.3d 140, 156 (Tex. Ct. App. 2017) (“[W]hen a legal-malpractice case arises from prior litigation, the plaintiff must prove that the client would have obtained a more favorable result in the underlying litigation had the attorney conformed to the proper standard of care. This is typically referred to as the ‘case-within-a-case’ or ‘suit-within-a-suit’ requirement.” (citations omitted)).

185. *See Smith v. Lewis*, 530 P.2d 589, 597 (Cal. 1975) (“A plaintiff is entitled only to be made whole: i.e., when the attorney’s negligence lies in his failure to press a meritorious claim, the measure of damages is the value of the claim lost. An attorney’s liability, as in other negligence cases, is for all damages directly and proximately caused by his negligence.” (citation omitted)).

186. THE RAINMAKER, *supra* note 14, at 1:51:35–1:51:45.

187. *Id.*

(“UPL”). Rudy was surprised and agitated by Deck’s UPL.<sup>188</sup> In Part V, we examine the duty of lawyers to supervise nonlawyers, like Deck, to ensure that their conduct complies with the rules of professional conduct.

## V. AMBULANCE CHASING: COMMUNICATIONS WITH NONLAWYERS

### A. *Rudy and Deck’s Trip to the Hospital*

Soon after the J. Lyman Stone law firm hired Rudy, Bruiser introduces Rudy to his “associate,” Deck Shifflet, who calls himself a “paralawyer.”<sup>189</sup> Bruiser tells Rudy that Deck “will get [him] plugged in” to how the firm operates.<sup>190</sup> Rudy’s firm orientation is quick and scant—he briefly tours the offices, the small library, and kitchen, and he meets the firm’s secretary.<sup>191</sup> I emphasize to the class the importance of creating a positive first impression of a firm to both employees and clients. That impression should establish a professional tone, pleasant but business-like, to guide its future interactions with firm employees and clients.<sup>192</sup> The impression will hopefully promote a sense of commitment, mutual trust, and fairness between the firm and others. Even small and solo firms should devote time and resources to developing a meaningful orientation program with written materials, such as a firm handbook, and follow-up meetings.

After the quick office tour and the meeting with the Black family, Rudy follows Deck to the local hospital to visit a new patient who has come to their attention from a contact in the police department.<sup>193</sup> It becomes clear to Rudy that the visit’s purpose is to

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188. *Id.*

189. *Id.* at 0:04:18–0:04:48. Deck refers to himself as a “paralawyer” because he graduated from law school five years ago and failed the bar examination six times. *Id.* at 0:05:30–0:05:42.

190. *Id.*

191. *Id.* at 0:05:10–0:06:18.

192. See Dennis Beaver, *Appearance Matters in Hiring Process*, THE SENTINEL (Apr. 25, 2015), [https://hanfordsentinel.com/features/appearance-matters-in-hiring-process/article\\_4323f48f-f855-520a-bffd-5ca54fc42390.html](https://hanfordsentinel.com/features/appearance-matters-in-hiring-process/article_4323f48f-f855-520a-bffd-5ca54fc42390.html) (contending, in the employee hiring context, that “[e]mployers want and have the right to a professional and overall favorable image of the company or the brand projected” to promote the company’s or the brand’s best interests).

193. THE RAINMAKER, *supra* note 14, at 0:15:36–0:15:46.

solicit clients, and he questions: “So I should solicit?”<sup>194</sup> He continues, “They didn’t teach me how to chase ambulances.”<sup>195</sup> After leaving the new patient’s room, an appalled Rudy exclaims, “That was blatant ambulance chasing!”<sup>196</sup> Deck replies, “Right but who cares?”<sup>197</sup> Deck expounds further on his view of lawyering as they walk through the hospital ward; his view is simple and blunt, albeit unethical in tone.<sup>198</sup> “There’s a lot of lawyers out there. It’s a marketplace. It’s a competition. What they don’t teach you in law school can get you hurt.”<sup>199</sup>

### *B. Limitations on Soliciting Clients*

Rule 7.3 prohibits lawyers from soliciting in-person prospective clients. The profession’s anti-solicitation rule recognizes the potential for abuse when a solicitation involves direct “in-person, live telephone, or real-time electronic contact . . . [by] a lawyer . . . with anyone known to be in need of legal services.”<sup>200</sup> Rule 7.3’s ban on in-person solicitation protects laypersons from lawyers, who are trained advocates and whose motive for the in-person contact is pecuniary gain, from importuning them.<sup>201</sup>

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194. *Id.* at 0:15:59–0:16:00.

195. *Id.* at 0:16:02–0:19:14.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. MODEL RULES OF PROF’L CONDUCT r. 7.3(a), (c) (AM. BAR ASS’N 2015); *id.* cmt. 2 (“The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.”); *see also* N.Y. State Bar Ass’n Comm. on Prof’l. Ethics, Op. 1009 (2014), (“Press releases and tweets directed to potential clients in shareholder suits constitute advertising and solicitation . . . but are not prohibited by the rule against interactive solicitation.”), <https://www.nysba.org/CustomTemplates/Content.aspx?id=49755>.

201. MODEL RULES OF PROF’L CONDUCT r. 7.3(a) (AM. BAR ASS’N 2015) (prohibiting in-person solicitation by a lawyer when a “significant motive” for the conduct is pecuniary gain). *But see* David S. Rubenstein, *Remembering Monroe*, 84 J. KAN. B. ASS’N 14 (2015) (citing Monroe Freedman, *The Professional Responsibility to Chase Ambulances*, in *LAWYERS’ ETHICS IN AN ADVERSARY*

In *Ohralik v. Ohio State Bar Association*, the United States Supreme Court recognized the state's strong interests in regulating lawyers and in protecting clients from the "potential harm . . . of overreaching, overcharging, underrepresentation and misrepresentation."<sup>202</sup> The lawyer in *Ohralik* solicited two clients in person who were involved in an automobile accident. One of them was still in the hospital when the lawyer approached her, reminiscent of Deck's solicitation of patients while walking with Rudy in the hospital ward.<sup>203</sup> The Court noted "the detrimental aspects of face-to-face" solicitation, especially by lawyers who are "trained in the art of persuasion . . ." and in circumstances "inherently conducive to overreaching and other forms of misconduct. . . ."<sup>204</sup> The Court held that the state's absolute ban on solicitation was necessary and did not violate the free-speech provisions of the First and Fourteenth Amendments.<sup>205</sup>

Rule 7.3's anti-solicitation ban applies to Bruiser, but it does not apply to Deck since he is not a lawyer.<sup>206</sup> Rule 8.4(a), however,

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SYSTEM (1975)). Professor Monroe Freedman argued that "lawyers *should* chase ambulances—not to take advantage of victims, but rather to prevent insurance companies from doing so." *Id.*

202. 436 U.S. 447, 461 (1978).

203. *Ohralik*, 436 U.S. at 449–50. The other client in *Ohralik* was a female passenger who also had been injured. *Id.* at 449. The attorney attempted to solicit the passenger but "learned that she had just been released from the hospital." *Id.* at 450.

204. *Id.* at 464–65.

205. *Id.* at 449. The Court concluded that "[t]he Rules were applied in this case to discipline a lawyer for soliciting employment [in-person] for pecuniary gain under circumstances . . . inherently conducive to overreaching and other forms of misconduct." *Id.* at 464. Some experts have not fully embraced the Court's view of lawyer in-person solicitation. For example, Professor Monroe Freedman argued that lawyers should be ambulance-chasers. See H. Freedman, *Advertising and Soliciting: The Case for Ambulance Chasing*, in VERDICTS ON LAWYERS 94, 94–104 (Ralph Nader & Mark Green eds. 1976). Lawyers should meet in-person with prospective clients to inform them of their rights and responsibilities. *Id.* In an interview on the *60 Minutes* television show, Professor Monroe Freedman stated that an ambulance-chaser should be selected as Lawyer of the Year. *60 Minutes: Parachute Lawyer; Attorney John Coale, Successful Ambulance Chaser; Saviour to Some, Vulture to Others* (CBS television broadcast Feb. 13, 1994) (transcript on file with LEXIS).

206. MODEL RULES OF PROF'L CONDUCT r. 5.3 cmt. 2 (AM. BAR ASS'N 2015) ("[N]onlawyers . . . are not subject to professional discipline.").

makes it a violation for a lawyer “to knowingly assist or induce another to [solicit clients in person] . . . or to do so through the acts of another.”<sup>207</sup> Although Bruiser does not explicitly order Deck or Rudy to violate Rule 7.3’s anti-solicitation ban, the film conveys the idea that Bruiser countenances such misconduct.<sup>208</sup> For example, Bruiser arguably violated Rule 8.4(a) by inducing or assisting Deck to violate Rule 7.3’s anti-solicitation ban when he instructed Deck to go to the hospital and meet a patient whom a police department contact had identified.<sup>209</sup> Deck’s hospital visits to meet patients in-person were a standard operating practice for the Stone firm.<sup>210</sup>

I ask the class for their reactions to the solicitation scene in the hospital ward. Students generally condemn Deck’s conduct and his overall poor attitude about the profession and its ethics norms. Occasionally, a student volunteers that such solicitation may mirror reality and that in-person solicitation probably occurs behind closed doors at country clubs and other more private settings. This usually spurs some discussion about the need for professional conduct rules and the obligation of lawyers to follow them, even behind closed doors when no one is watching.

I suggest at this point that Rudy may want to reject working with Bruiser. I encourage the class to be prepared to expeditiously leave a job should they find themselves dealing with an employer, like the Stone firm, whose business model violates the profession’s behavioral norms or conduct rules. I acknowledge that it is easier to talk about rejecting an offer of employment or leaving a job in a classroom environment than in the real world, especially when students or lawyers need the income or have limited alternatives—not an uncommon situation in today’s legal services market.<sup>211</sup> I ask them

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207. MODEL RULES OF PROF’L CONDUCT r. 8.4(a) (AM. BAR ASS’N 2015).

208. THE RAINMAKER, *supra* note 14, at 0:15:38–0:15:58.

209. *Id.*

210. *Id.* Deck seems to be doing Bruiser’s bidding by soliciting prospective clients in the hospital ward. *Id.* As Deck and Rudy are walking into the hospital, Deck states, “*I go to hospitals all the time. Bruiser has contacts down at the main precinct. Guys he grew up with. They feed him accident reports every morning. . . . Get the case. Find the victims. Sign them up to the law firm J. Lyman Stone. Put the case together.*” *Id.* (emphasis added).

211. See Sahl, *What Every Entertainment Lawyer Needs to Know*, *supra* note 124, at 1-497–1-503 (discussing the underemployment, unemployment, and other

to consider, however, everything that they have sacrificed to earn the privilege to practice law and whether they want to risk losing that privilege. Students seem to appreciate my concern for their professional welfare.

I also ask the class if Rudy should report Bruiser to the Disciplinary Authorities based on Bruiser's approval of Deck's solicitation of clients—his willingness to use others to circumvent Rule 7.3, which violates Rule 8.4(a).<sup>212</sup> Students generally feel, and

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difficult challenges for lawyers in the legal services marketplace that limit employment alternatives). See generally Amy Larson, *Survival of the Most Adaptable: Why Law Firms Need to Change*, AM. B. ASS'N J. (Feb. 13, 2018) (arguing that “you need to . . . change[] how you run your practice if you want to be set up for future success” and reporting that “[s]even years of flat demand across all law firms—before 2008 the legal market grew 4 to 6% annually”), [http://www.abajournal.com/advertising/article/survival\\_of\\_the\\_most\\_adaptable\\_why\\_law\\_firms\\_need\\_to\\_change](http://www.abajournal.com/advertising/article/survival_of_the_most_adaptable_why_law_firms_need_to_change). Data further supports the notion that employment alternatives for students and lawyers are more limited than not. *Id.* (“[D]ecreasing productivity—with lawyers working 156 fewer billable hours annually than the beginning of 2007.”).

212. MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2015) (defining “misconduct” as violating or attempting to violate a professional conduct rule or “knowingly assist or induce another to do so, or do so through the acts of another”). Bruiser is subject to claims that he violated Rules 7.3 (the in-person anti-solicitation rule), 8.4(a) (attempting to use others to circumvent the conduct rules), and 5.3 (for failing as the supervisory lawyer to ensure that the conduct of nonlawyer employees, here Deck, is compatible with the conduct rules). For a case involving lawyer conduct under the former Ohio Code of Professional Responsibility that today would constitute a violation of the state's Rule 5.3, see *Richland County Bar Ass'n v. Akers*, 835 N.E.2d 29 (Ohio 2005). In *Akers*, the Ohio Supreme Court found that the attorney who “repeatedly allowed [his] former secretary,” who was not a lawyer, “to sign his name to pleadings without indicating to courts or others that he had done so” adversely reflected on his fitness to practice law. *Id.* at 33 (“He allowed his former secretary to take actions in his name without effectively overseeing those actions, and he failed to give his clients the competence, diligence, and good judgment that they deserved. Lawyers cannot practice law in absentia.”). The court suspended the attorney from the practice of law for 18 months with 12 months of the suspension stayed. *Id.* For additional cases involving Rule 5.3 violations, see *Ky. Bar Ass'n v. Mills*, 318 S.W.3d 89, 92 (Ky. 2010) (reporting lawyer involved in class-action litigation allowed nonlawyer employees to mislead clients about their rights under settlement agreement); *State ex rel. Okla. Bar Ass'n v. Martin*, 240 P.3d 690, 696 (Okla. 2010) (reviewing lawyer's failure to supervise a nonlawyer employee who was allowed to operate a “research center” in lawyer's office making it possible for employee to defraud client); *In re Guirard*, 11 So. 3d 1017, 1023 (La. 2009)

correctly so, that Rudy could report Bruiser even though Rudy has not yet been admitted to practice law. I note that Rudy may find it difficult to answer questions from a Character and Fitness Committee about what he did or witnessed while working for the Stone firm.<sup>213</sup> Rudy's failure to report Bruiser might suggest that Rudy lacks the requisite character to be admitted to the bar. It might raise questions about how importantly Rudy views the conduct rules and, once admitted, whether he will follow Rule 8.3 by reporting other lawyers whose conduct raises a "substantial question" about their character and fitness to practice law.<sup>214</sup> The self-regulatory aspect of the profession depends, in part, on lawyers reporting the misconduct of other lawyers under Rule 8.3.<sup>215</sup>

The drafters of the Model Rules did not feel that Rule 7.3's prohibition on in-person solicitation was especially onerous since lawyers have alternative ways to inform the public about their need for legal services and the lawyers' abilities to deliver such services.<sup>216</sup> The

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(discussing nonlawyers allowed to advise clients on viability of claims and given leeway to negotiate claims without lawyer supervision).

213. In general, anyone can report allegations of professional misconduct or problems with a lawyer. *E.g.*, *File a Grievance: Is Filing a Grievance the Right Option?*, STATE BAR OF TEX., [https://www.texasbar.com/AM/Template.cfm?Section=File\\_a\\_Grievance&Template=/CM/HTMLDisplay.cfm&ContentID=29656](https://www.texasbar.com/AM/Template.cfm?Section=File_a_Grievance&Template=/CM/HTMLDisplay.cfm&ContentID=29656).

214. MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2015). *Cf.* OHIO RULES OF PROF' CONDUCT r. 8.3(a) (2017) (imposing a greater duty of reporting by requiring lawyers who have "a *question* [—and not a substantial question—] as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," to "inform a disciplinary [entity] empowered to investigate or act upon such a violation" (emphasis added)).

215. *See* SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 6 (reporting that "the legal profession is generally considered a self-regulated profession" but that this "notion is overstated"; "[n]evertheless, in large part, the lawyers' rules of professional conduct can be viewed as a form of self-regulation"); *see also* WOLFRAM, *supra* note 97, at 20; Laura Gatland, *The Himmel Effect: "Snitch Rule" Remains Controversial but Effective, Especially in Illinois*, 83 AM. B. ASS'N J. 24, 24 (1997) (describing that following *In re Himmel*, the rate of lawyer reporting jumped in Illinois during the period of 1992–1995 to 8.9% of all complaints received, with "18.2% of the complaints . . . result[ing] in formal disciplinary charges").

216. *See, e.g.*, *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479 (1988) (holding that the First Amendment protected the direct mailing (and not just the bulk mailing) of solicitation letters to potential clients; the fact that some letters might be abusive is insufficient reason to ban all such mail). *Cf.* *Fla. Bar v. Went For It, Inc.*, 515 U.S.



United States Supreme Court has long recognized the important interests of the public and the bar in having access to information about legal services in the form of advertising.<sup>217</sup> Advertising provides the public with an efficient way to make informed decisions about the need for and how to obtain legal assistance without the attending concerns of lawyer-importuning and overreaching associated with in-person solicitation.<sup>218</sup> For example, lawyers can advertise on buses and billboards, and they can communicate through mail or electronically

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618, 629–34 (1995) (upholding Florida rule imposing a temporary thirty-day ban on the direct mailing of solicitation letters by plaintiff’s lawyers to victims or their families because of the state’s substantial interest in protecting the privacy of its citizens and noting that this ban on direct mail was narrower than the broad ban in *Shapiro*).

217. Sahl, *The Cost of Humanitarian Assistance*, *supra* note 92, at 832–33 (“In 1997, the profession experienced a seismic change in the regulation of lawyer advertising. . . . The Court held that the First Amendment protects truthful advertising of prices for legal services.”).

218. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376–77 (1977).

[A]dvertising by attorneys . . . may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. . . . Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar’s obligation to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

*Id.* (citations and quotations omitted). *Cf. Went For It, Inc.*, 515 U.S. at 618. In *Went For It*, the Court “upheld a Florida Bar Rule that prohibited only the plaintiff’s bar from sending direct-mail solicitation to victims or their relatives for thirty days following an accident or a disaster.” Sahl, *The Cost of Humanitarian Assistance*, *supra* note 92, at 844.

with potential clients, provided that there is no “real-time contact<sup>219</sup> and they do not violate other laws governing solicitations.”<sup>220</sup>

I remind students that the Model Rules prohibit the Stone law firm from paying or providing “anything of value” to its “contact” in the police department for recommending the Stone law firm or “for

219. MODEL RULES OF PROF'L CONDUCT r. 7.3(a) cmt. 3 (AM. BAR ASS'N 2015). See SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 530–31 (reporting that although “[t]he Model Rules do not define real-time electronic contact[, m]ost authorities agree that ‘instant messaging and communication transmitted through a chat room’ constitute real-time contact, while ‘[o]rdinary email and web sites’ do not” as the latter present no risk for lawyer overreaching because the consumer can simply ignore the email (citing N.Y. BAR ASS'N COMM. & FED. LITIG. SECTION, SOCIAL MEDIA ETHICS GUIDELINES No. 3.B., 10 n.28 (May 11, 2017), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=72708>) (internal quotations omitted)); see also W.V. Lawyer Disciplinary Bd., Op. 98-03, at 4–5 (1998) (prohibiting “[real time] solicitations on the computer, such as a chat room,” and stating that they “should be treated similar to telephone and in-person solicitations [because] real time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing” and finding, however, that real time communications present less opportunity than telephone or in-person solicitation to pressure or coerce a potential client).

220. Rule 7.3 (c)(1)–(3) of the Ohio Rules of Professional Conduct (“ORPC”) is an example of another regulation that governs written, recorded, or electronic communications. Rule 7.3 (c)(1)–(3) provides:

Unless the recipient of the communication is a person specific in division (a)(1) or (2) of this rule, every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer reasonably believes to be in need of legal services in a particular matter shall comply with all of the following: (1) Disclose accurately and fully the manner in which the lawyer or the law firm became aware of the identity and specific legal need of the addressee; (2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee’s case; (3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital— “ADVERTISING MATERIAL” or “ADVERTISEMENT ONLY.”

*Id.* Ohio can discipline lawyers for violating this and other rules or laws restricting solicitation by mail or electronic communication. See *Lorain Cty. Bar Ass’n v. Williams*, 81 N.E.3d 1254, 1255–56 (Ohio 2017) (issuing a public reprimand to a lawyer who, in part, violated Ohio Rules of Professional Conduct Rule 7.3(c)(1) by not “disclos[ing] accurately and fully the manner in which the lawyer became aware of the identity and specific legal need of the addressee”).

channeling professional work that violates Rule 7.3's ban on in-persons solicitation."<sup>221</sup> Rule 8.4(a) also bars the Stone firm from asking anyone in the police department to in-person solicit prospective clients on the firm's behalf, even in the unlikely event that the recommender is not receiving anything of value from the firm.<sup>222</sup> A firm cannot use a surrogate to knowingly attempt to violate a conduct rule.<sup>223</sup>

The rationale for the profession's anti-solicitation ban is to protect the public from importuning, trained advocates.<sup>224</sup> There is also a concern for the need to protect people's privacy, especially in trying circumstances, such as a personal injury context.<sup>225</sup> As part of my focus on lawyer communication, in the context of Deck's appalling, albeit humorous, solicitation of patients in a hospital, I ask the class to consider whether it is possible that the drafters overstated the rationale for the profession's anti-solicitation ban. These are

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221. Model Rule 7.2(b)(1)–(4) prohibits a lawyer from “givi[ng] anything of value to a person for recommending the lawyer’s services except” for four limited exceptions. See AM. BAR ASS’N, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 155 (2015 ed.) [hereinafter ABA COMPENDIUM]. See MODEL RULES OF PROF’L CONDUCT r. 7.2, cmt. 5 (AM. BAR ASS’N 2015) (“Except as permitted under paragraphs (b)(1)–(4), lawyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that violates Rule 7.3, [the bar against in-person solicitation]”); see also ABA COMPENDIUM, *supra*, at 156–57.

222. See STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 139 (2016). Model Rule 8.4 provides that “[i]t 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 . . . .” MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2015).

223. MODEL RULES OF PROF’L CONDUCT r. 8.4(a) (AM. BAR ASS’N 2015).

224. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 465 (1978) (“[I]t hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.”).

225. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626–629 (1995) (describing a Florida Bar study that offered statistical and anecdotal data to suggest that Floridians view direct-mail solicitation as an intrusion on privacy, especially immediately following an injury).

important concerns,<sup>226</sup> but do they warrant Rule 7.3's broad ban on in-person solicitation?

Not all bar associations prohibit lawyers from soliciting in-person prospective clients. With 104,935 members, the Washington D.C. Bar Association ("the D.C. Bar") is one of the nation's largest bar associations.<sup>227</sup> It does not have a rule that prohibits lawyers from soliciting prospective clients in person.<sup>228</sup> Former Disciplinary Counsel for the D.C. Bar, Wallace "Gene" Shipp, reported that neither the public nor the bar have raised any concerns with their office concerning lawyer in-person solicitation.<sup>229</sup> It simply is not a problem. This raises the noteworthy question of whether Rule 7.3's anti-solicitation ban in its current form is still necessary.

In another interesting development, many authorities have considered "instant messaging and communication through chat rooms" as "real-time electronic contact," tantamount to in-person communication and raising all of the concerns associated with it.<sup>230</sup> Thus, instant messaging and communication through chat rooms have fallen within the ambit of Rule 7.3's solicitation ban.<sup>231</sup> The

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226. The Court expressly addressed these concerns in *Went For It, Inc.* "The [Florida] Bar has substantial interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered." *Id.* at 682.

227. Not all of the lawyers reside in Washington D.C. See AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION SURVEY 1 (2017) (reporting that the number of resident active attorneys in Washington D.C. increased by 3.8% in 2017 to 54,692 from 52,711 lawyers in 2016), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/National%20Lawyer%20Population%20by%20State%202007-2017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202007-2017.authcheckdam.pdf).

228. See *The D.C. Bar at Work: A Year in Review*, WASH. LAW., July 2017, at 16, <http://washingtonlawyer.dcb.org/july2017/index.php?startid=1#/1>. It does not have a rule prohibiting lawyers from soliciting clients in person. *Id.*

229. Sahl, *The Cost of Humanitarian Assistance*, *supra* note 92, at 827, nn.155–58. Gene Shipp, Former Disciplinary Counsel for the D.C. Bar, reported that their office has not had concerns raised by the public or the bar concerning lawyer in-person solicitation, even though there is no "blanket ban on in-person solicitation." *Id.* at 827.

230. See *supra* note 222; MODEL RULES OF PROF'L CONDUCT r. 8.4(a) cmt. 3 (AM. BAR ASS'N 2015).

231. See N.Y. STATE BAR ASS'N, SOCIAL MEDIA ETHICS GUIDELINES OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR

Philadelphia Bar, however, rejected the idea that the usual concerns about in-person solicitation applied in the context of chat-room communications. The Opinion reasons:

It seems to us that with increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures [i.e., solicitations], and that everyone realizes that, like targeted mail, e-mails, blogs, and chat room comments can be readily ignored, or not, as the recipient wishes.<sup>232</sup>

I realize that electronic solicitations are qualitatively different and may pose less risk of overreaching than face-to-face or in-person solicitation; nevertheless the Philadelphia Opinion provides additional evidence that the traditional concerns and justifications for broad bans on in-person solicitation may warrant periodic review.<sup>233</sup>

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ASSOCIATION 13 (2017), <https://www.nysba.org/socialmediaguidelines17/> (“Guideline No. 3.B. Public Solicitation is Prohibited through “Live” Communications: Due to the ‘live’ nature of real-time or interactive computer-accessed communications, which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not ‘solicit’ business from the public through such means.”).

232. Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2010-6 (2010), <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf>. *Accord* Fla. Bar Standing Comm. on Advertising, Op. A-00-1 (2016), <https://www.floridabar.org/etopinions/etopinion-a-00-1-rev/> (“A lawyer may solicit prospective clients through internet chat rooms, defined as real time communications between computer users, only if the lawyer complies with the rules on direct written communications and files any unsolicited communications with The Florida Bar for review.”).

233. The ABA is currently reviewing professional conduct rules governing lawyer communications. The proposed Model Rule 7.3 does not ban “person to person contact occurring in chat rooms, text messages, or other written communications that recipients may easily disregard.” PROPOSED WORKING DRAFT r. 7.3 cmt. 2 (Dec. 21, 2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/scepr\\_advertising\\_rules\\_draft\\_12\\_21\\_17.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_advertising_rules_draft_12_21_17.authcheckdam.pdf). This is consistent with the Philadelphia Bar Opinion. Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2010-6 (2010), <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf>. The ABA’s proposed Rule 7.3

## VI. THE SUPERVISORY OBLIGATIONS OF LAWYERS

## A. Model Rules on Supervisory Obligations

A “major innovation” of the 1983 ABA Model Rules of Rules Professional Conduct over its predecessor Code of Professional Responsibility was the adoption of Model Rules 5.1 through 5.3.<sup>234</sup> These rules expressly address the “hierarchical authority within a law firm or other legal organization” and are, today, essentially the same as when originally adopted, which is partly a testament to the profession’s appreciation of their importance.<sup>235</sup> They constitute a key part of the profession’s efforts to promote individual compliance with lawyer conduct standards. Rules 5.1 through 5.3 extend compliance assessment beyond the individual self-assessment level to include

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does continue the ban on “[l]ive person to person contact [which] means in person, face to face, telephone and real-time person to person communications such as Skype or Facetime, and other visual/auditory communications where the prospective client may feel obligated to speak with the lawyer.” *Id.* The proposed Rule 7.3’s ban on in-person solicitation is less absolute than the current rule and arguably reflects less concern with overreaching, at least when it comes to business matters. In particular, subsection (a)(3) permits lawyers to in-person solicit employment with “a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.” PROPOSED WORKING DRAFT r. 7.3(a)(3) (Dec. 21, 2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/scepr\\_advertising\\_rules\\_draft\\_12\\_21\\_17.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_advertising_rules_draft_12_21_17.authcheckdam.pdf). An “experienced user” includes “constituents of a business entity who hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law, or intellectual property lawyers; small proprietorships that hire lawyers for lease or contract issues; and other people who retain lawyers for business transactions or formations.” It would not ordinarily include someone who has hired lawyers on multiple occasions for family law matters, criminal matters or persona injury claims.” PROPOSED WORKING DRAFT r. 7.3 cmt. 5 (Dec. 21, 2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/scepr\\_advertising\\_rules\\_draft\\_12\\_21\\_17.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_advertising_rules_draft_12_21_17.authcheckdam.pdf).

234. HAZARD, HODES & JARVIS, *supra* note 103, at 44-3 (reporting that the 1969 Model Code of Professional Responsibility did not address “*whether and when* one lawyer is responsible for overseeing the conduct of another,” except for Disciplinary Rule 4-101(D) that directed a lawyer to take “reasonable care to prevent associates and employees from disclosing” client confidential information (emphasis added)); MODEL RULES OF PROF’L CONDUCT r. 5.1 & 5.2 (AM. BAR ASS’N 2015).

235. HAZARD, HODES & JARVIS, *supra* note 103, at 44-3; *see* GILLERS ET AL., *supra* note 222, at 390-401.

assessment by other stakeholders, namely partners or comparable managerial lawyers in the legal organization, or a supervisory lawyer.

Rule 5.1(a) requires partners or lawyers with “comparable managerial authority” in a firm or other legal organization, such as a corporate law department or a prosecutor’s office, to undertake “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”<sup>236</sup> This managerial responsibility requires lawyers to be knowledgeable of recent developments in policies and procedures designed to promote firm-wide compliance with professional conduct standards.<sup>237</sup> Examples of such measures include having: (1) a conflict-of-interest-check system to identify and resolve conflicts of interest, especially at the client-intake stage; (2) a calendaring system, ideally with a back-up system, alerting lawyers

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236. MODEL RULES OF PROF’L CONDUCT r. 5.1(a) (AM. BAR ASS’N 2015). Although a controversial topic and also a rare occurrence, a couple of jurisdictions permit law firms, and not just individual lawyers, to be sanctioned for violating professional conduct rules. *See, e.g.*, Julie R. O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 GEO. J. LEGAL ETHICS 1, 4 (2002).

237. MODEL RULES OF PROF’L CONDUCT r. 5.1(a) cmt. 2 (AM. BAR ASS’N 2015). There is a cottage industry of companies and lawyers who help law firms develop policies and procedures to ensure lawyers comply with professional conduct standards. Insurance carriers also offer both individual lawyer and firm advice about good practice standards or “loss prevention.” *See* George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 307 (1997). *See generally* *Why Join ALAS?*, ATTORNEY’S LIABILITY ASSURANCE PROGRAM, [http://www.alas.com/public/why\\_join\\_alas.aspx](http://www.alas.com/public/why_join_alas.aspx) (last visited May 16, 2018).

about dates and times for action in a client matter;<sup>238</sup> and (3) a procedure to account for client funds and property.<sup>239</sup>

Implicit in Rule 5.1(a) is the duty of managerial lawyers to periodically evaluate internal organizational policies and procedures to see if the measures are working to ensure both individual and organization-wide compliance.<sup>240</sup> Second-level, managerial

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238. Lawyers should also consider using a calendaring system to remind them of the need to periodically communicate with clients. The failure to communicate with clients, such as not returning telephone calls or emails, may cause unnecessary client discontent and result in a formal grievance. See Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 WASH & LEE L. REV. 1457, 1510 (2017) (“Poor communication does not only generate attorney complaints—it also violates the profession’s ethical rules.”). I ask my students to think of the last time their doctor just called them to check on their well-being? The general response is that such a call has never happened. I use this response to underscore how important their telephone call might be in building valuable goodwill with a client that may redound to the lawyer’s benefit later when the lawyer makes a mistake—something no lawyer thinks they will make until it happens. See Melissa Mortazavi, *A No-Fault Remedy for Legal Malpractice?*, 44 HOFSTRA L. REV. 471, 480 (2016) (“Wrongs arising from failures in client communication continue to make up a sizeable portion of malpractice claims.” (citation omitted)).

239. MODEL RULES OF PROF’L CONDUCT r. 5.1(a) cmt. 2 (AM. BAR ASS’N 2015). Firms may adopt these and other measures to meet its the duty to ensure that all lawyers comply with the professional obligations of lawyers. These measures may “depend on the firm structure and nature of its practice,” for example, “[i]n a small firm of experienced lawyers, informal supervision and periodic review of compliance with required systems ordinarily will suffice.” MODEL RULES OF PROF’L CONDUCT r. 5.1(a) cmt. 3 (AM. BAR ASS’N 2015). A significant percentage of my students work in small law firms or even open their own practice. I suggest to them that they organize periodic office “brown bag lunch” sessions to review recent developments in the practice of law, office protocols, and other noteworthy matters that that affect their delivery of legal services.

240. Managerial lawyers keeping abreast of compliance protocols may save the firm lost revenue and public embarrassment because of individual lawyer misconduct. Although rare, law firms have been disciplined for individual lawyer misconduct. See, e.g., Douglas R. Richmond, *Law Firm Partners as Their Brothers’ Keepers*, 96 KY. L.J. 231, 260 (2007/2008) (“Rules 5.1 and 8.3(a) are focused on individual lawyers. Two states—New Jersey and New York—make law firms subject to discipline. [For example,] New Jersey Rule of Professional Conduct 5.1, entitled ‘Responsibilities of Partners, Supervisory Lawyers, and Law Firms,’ provides in pertinent part: (a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization’s



assessment is potentially helpful in promoting compliance because these stakeholders may be able to impose direct sanctions on individual lawyers, especially subordinates.<sup>241</sup> These internal sanctions may include loss of income, loss of status, public embarrassment,<sup>242</sup> or termination.<sup>243</sup>

### B. Rudy and Bruiser's Supervision

As the managing partner of the J. Lyman Stone law firm, Bruiser must ensure that the firm has internal policies and procedures to assure all of the lawyers' conduct complies with the professional obligations of lawyers.<sup>244</sup> The film does not indicate whether Bruiser and the Stone firm had such policies and procedures. Given the

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work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.” (emphasis added)).

241. See Gary R. Weaver, *Encouraging Ethics in Organizations: A Review of Some Key Research Findings*, 51 AM. CRIM. L. REV. 293, 307–08 (2014) (“[R]esearch . . . shows the importance of leaders’ commitment to ethics as a key influence on the implementation and integration of corporate ethics and compliance initiatives. Organizationally, leaders—both high-level executives and lower-level supervisors—have major influence on ethical behavior through their ability to affect formal organizational processes (reward systems, decision processes, etc.) and by social learning (the informal process through which employees internalize how to behave in the workplace by modeling the behavior of persons in formal and informal leadership positions.)”).

242. See Nicole J.A. Reid, *The Legal Profession's “Dirty Little Secret”: Attorney-Client Sexual Relations and Public vs. Private Disciplinary Sanctions*, 24 GEO. J. LEGAL ETHICS 801, 818 (2011) (“Disciplinary committees have the discretion to impose either public or private sanctions on lawyers. There have been policy reasons put forth for preferring private sanctions to public ones. The main reason espoused is that private sanctions protect the attorney’s reputation.”).

243. *In re Farrell*, 21 P.3d 552, 561 (Kan. 2001) (disbarring an attorney for violating the rules of professional conduct).

244. MODEL RULES OF PROF’L CONDUCT r. 5.1 (AM. BAR ASS’N 2015) (requiring partners and others to institute firm measures ensuring compliance with a lawyer’s professional obligations); MODEL RULES OF PROF’L CONDUCT r. 5.3 (AM. BAR ASS’N 2015) (discussing the professional duty in a firm to oversee nonlawyer employees). The *Restatement of the Law Governing Lawyers* follows the same policy contained in Rule 5.3. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11(1) (AM. LAW INST. 2000) (assuring compliance by “all lawyers”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11(4) (AM. LAW INST. 2000) (addressing compliance by nonlawyers).

portrayal of Bruiser's shady character, ultimately reflected in his arrest and possible indictment for racketeering and income tax evasion, it is unlikely that either Bruiser or the Stone firm had such internal measures.<sup>245</sup>

In addition to Rule 5.1(a)'s call for lawyers to be proactive in internal self-regulation by designing policies and procedures to assure that lawyers comply with professional conduct standards, lawyers can act as "organizational catalysts for change" by promoting a more ethical environment.<sup>246</sup> Rule 5.1(b) imposes a duty on supervisory lawyers to monitor other lawyer conduct in the organization: "a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."<sup>247</sup> Bruiser did not supervise Rudy's work after Rudy became a new lawyer at the firm to ensure that Rudy complied with the professional conduct rules. Bruiser arguably only supervised Rudy when he was a law clerk.<sup>248</sup> He told Rudy not to study for the bar examination on law firm time and asked if he had personally contacted a prospective client in the hospital.<sup>249</sup> That kind of unimpressive supervision did little to ensure that Rudy's conduct followed the professional conduct rules.

The kind of direct supervisory oversight by a stakeholder-colleague mandated by Rule 1.5(b) can be effective for two reasons. First, a fellow colleague shares common professional values, goals, and experiences, and conducts the oversight, and this common ground should facilitate communication. The supervisor and supervisee have a mutual interest in establishing a firm-wide ethical atmosphere to pursue organizational and personal success. They do not want

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245. Although it is unclear exactly what the indictment provides and what happens to Bruiser after the FBI arrests him, Deck tells Rudy that Bruiser is in trouble for "[j]ury tampering, tax evasion, money-skimming, you name it." *THE RAINMAKER*, *supra* note 14, at 0:38:45–0:38:50.

246. See Sturm & Guinier, *supra* note 37, at 516 (employing the phrase to describe scholars with strategic positions at different organizations to affect change in their respective institutions and "across a set of law schools" (citing Susan Sturm, *The Architecture of Inclusion: Avoiding Workplace Equity in Education*, 29 *HARV. J.L. & GENDER* 247, 287–99 (2006))).

247. MODEL RULES OF PROF'L CONDUCT r. 5.1 (AM. BAR ASS'N 2015).

248. *THE RAINMAKER*, *supra* note 14, at 0:19:45–0:20:27.

249. *Id.*

unhappy clients, public embarrassment, or worse yet, becoming involved in a disciplinary and malpractice action to distract from this common pursuit.<sup>250</sup> Second, the supervisory lawyer has implicit authority to impose consequences on the supervisee-colleague who engages in unethical conduct.

Partners, or lawyers with comparable managerial authority, and supervisory lawyers are not vicariously subject to discipline for the misconduct of subordinate lawyers.<sup>251</sup> These lawyers, however, are responsible for another lawyer's misconduct if they order or, with specific knowledge of the lawyer's violation, ratify the conduct, or these "oversight lawyers" know of the misconduct "at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."<sup>252</sup>

Rule 5.2 addresses the responsibility of a subordinate lawyer like Rudy Baylor. It provides that a lawyer must act in accordance with professional conduct rules, even if another lawyer directs him to act otherwise.<sup>253</sup> A subordinate lawyer does not violate this rule, however, if she follows a supervisory lawyer's "reasonable resolution" of an "arguable question of professional duty."<sup>254</sup> I remind students that, when they become new lawyers, Rule 5.2 requires them to decide if there is an "arguable question" about a rule's applicability, instead of merely defaulting to the supervisor's judgment. For example, a subordinate lawyer cannot follow another lawyer's direction to solicit in-person the legal representation of an accident victim.<sup>255</sup> On the

250. See generally Sahl, *What Every Entertainment Lawyer Needs to Know*, *supra* note 124 (discussing good practice standards and cases involving malpractice and discipline against lawyers in the entertainment industry).

251. See HAZARD, HODES & JARVIS, *supra* note 103, at 45-3.

252. *Id.* at 47-3.

253. MODEL RULES OF PROF'L CONDUCT r. 5.2 (AM. BAR ASS'N 2015).

254. MODEL RULES OF PROF'L CONDUCT r. 5.2(b) (AM. BAR ASS'N 2015).

255. See, e.g., *Ky. Bar Ass'n v. Helmers*, 353 S.W.3d 599, 602-03 (Ky. 2011).

The Kentucky Supreme Court stated:

We are aware that as a new attorney . . . Respondent was inexperienced, impressionable, and may have been influenced, and perhaps even led astray, by those more seasoned lawyers. But, we cannot ignore the fact it takes no technical expertise or experience . . . to know that Respondent's course of conduct, personally and directly deceiving his clients, some of whom had been egregiously injured, was wrong. That he did so at the direction of his employer

other hand, if a supervisory lawyer interviews four eyewitnesses to an accident and tells an inexperienced subordinate lawyer not to interview the final and fifth eyewitness, then the subordinate arguably does not violate Rule 1.1's competency standard for any subsequent civil or disciplinary action against the supervisory or subordinate lawyer for not interviewing the final eyewitness.<sup>256</sup>

Rule 5.3 establishes the responsibility of managerial lawyers, or their counterparts, and supervisory lawyers to ensure that a firm has measures in place to have reasonable assurance that nonlawyer-employee conduct conforms to professional conduct rules.<sup>257</sup> This Rule is similar to Rule 5.1's construct, covering the responsibilities of supervisory lawyers to subordinate lawyers, and subjects individual lawyers to possible sanctions for ratifying a nonlawyer's conduct.<sup>258</sup> This rule applies not only to firm secretaries and paralegals, but also to non-firm employees like investigators, accountants, marketing personnel, independent researchers, and document managers.<sup>259</sup>

In *The Rainmaker*, Bruiser violated Rule 5.3 by not supervising the firm's "paralawyer," Deck Shifflet, to ensure that his conduct comported with the professional conduct rules.<sup>260</sup> Deck's improper solicitation in-person of patients in the hospital violates Rule 7.3's

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does not permit us to overlook the serious deficiency in character revealed by the facts before us.

*Id.* Respondent was permanently disbarred. *Id.* at 603.

256. D.C. Bar, Ethics Op. 362 (2012), <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion362.cfm> (concluding that a lawyer who works for a discovery service may rely upon management's explanation of the service's compliance with prohibitions on the unauthorized practice of law and on the passive ownership of entities that practice law, but Rule 5.2's safe harbor is unavailable if the lawyer learns the explanation was inaccurate).

257. MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2015). See HAZARD, HODES & JARVIS, *supra* note 103, at 47-3; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11(4) (AM. LAW INST. 2000).

258. MODEL RULES OF PROF'L CONDUCT r. 5.3(c)(1)-(2) (AM. BAR ASS'N 2015).

259. See *supra* note 257.

260. THE RAINMAKER, *supra* note 14, at 0:06:06-0:06:16.

anti-solicitation ban.<sup>261</sup> Bruiser's attempt to circumvent Rule 7.3 violates Rule 8.4(a) and Rule 7.3.<sup>262</sup>

Bruiser also violates Rule 5.3 when he fails to ensure that Deck is not appearing and arguing matters in court, because that violates Rule 5.5 that prohibits UPL.<sup>263</sup> Deck similarly violates Rule 5.5 when

261. See *supra* Part V.

262. See, e.g., *In re Karns*, 62 A.3d 523, 523–25 (R.I. 2013). The Supreme Court of Rhode Island has stated:

It is immaterial that the respondent used an intermediary to solicit in-person employment by [his client]. The investigator was acting pursuant to the respondent's instructions. Rule 7.3(a) clearly prohibits the respondent from engaging in such solicitation, and Article V, Rule 8.4 of the Supreme Court Rules of Professional Conduct entitled "Misconduct," provides, in relevant part, that "[i]t 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."

We have previously addressed an attorney's indirect solicitation of clients and have concluded that such indirect solicitation violates Rules 7.3(a) and 8.4(a). . . . We see no reason to vary from this conclusion.

*Id.* at 525 (quoting R.I. RULES OF PROF'L CONDUCT r. 8.4 (2017)).

263. MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2015). "State law defines 'the practice of law' and prohibits" anyone not licensed to practice law from doing so or even holding themselves out as being able to practice law. See SAHL, CASSIDY, COOPER & TARKINGTON, *supra* note 70, at 489. "What constitutes the 'practice of law' is controversial," but most states define the term broadly. *Id.* at 490. "In most jurisdictions, only lawyers may represent clients in court, draft certain legal documents, and hold themselves out as lawyers." *Id.*; see also HAZARD, HODES & JARVIS, *supra* note 103, at 44-3 (noting that UPL rules "restrict the practice of law to lawyers, on the theory that only lawyers have the qualifications to practice law competently and according to the rules of professional discipline"). Thus, Deck's actions constitute UPL. He readily admitted to Rudy, "I've gone to court a few times myself. [T]here are so many lawyers here that it's impossible to keep up with us." THE RAINMAKER, *supra* note 14, at 0:06:06–0:06:16.

The unauthorized practice of law is engaging in the practice of law by persons or entities not authorized to practice law pursuant to state law or using the designations "lawyer," "attorney at law," "counselor at law," "law," "law office," "J.D.," "Esq.," or other equivalent words by any person or entity not authorized to practice, the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in the state.

he dispenses bedside advice to patients in the hospital about not talking to insurance companies under the camouflage of being with the Stone law firm.<sup>264</sup> Such advice could conceivably harm the patients' legal and other interests, and moreover Deck is not licensed to give such advice. Under Rule 8.4(a), Bruiser cannot accomplish for his benefit through the acts of others what the professional conduct rules prohibit, namely Deck's UPL.<sup>265</sup> In short, Bruiser failed to exercise appropriate supervision over Deck and violated Rules 5.5 and 8.4(a) and should take corrective action against Deck and mitigate any harm that Deck's UPL caused.

## VII. CONCLUSION

Imagine an Oscar awards ceremony organized by law school faculty, honoring the film most likely to help teachers and students examine the professional responsibility of lawyers. Assuming such an event, *The Rainmaker* should be one of the nominees for Best Picture. *The Rainmaker* offers professional responsibility teachers a special opportunity to identify a variety of issues and discuss important professional responsibility concepts with students. The film is entertaining, which helps connect students to its narrative and related professional responsibility concerns. Another teacher who uses *The Rainmaker* in his professional responsibility course adds that it "typically [promotes] a lively and entertaining discussion" about

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Deck's statement also indicates that no one knew he was not licensed when he appeared in court.

*Unauthorized Practice of Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/u/unauthorized-practice-of-law/> (last visited Apr. 6, 2018). Bruiser also violated Rule 5.5's UPL ban if he "assist[ed] or induced" Deck to engage in this conduct. Bruiser seemingly countenanced Deck's efforts and this arguably counts as "assistance," especially since he has an obligation to supervise his nonlawyer employee and ensure his conduct is compatible with the professional conduct rules. See MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR ASS'N 2015).

264. THE RAINMAKER, *supra* note 14, at 0:17:08–0:17:16.

265. Bruiser certainly knew of Deck's visits to see patients and even directed him to talk with them. *Id.* at 0:15:38–0:15:46. Thus, Bruiser violated Rule 5.5's UPL ban by "assist[ing] Deck or through the "acts of another" to engage in UPL in violation of Rule 8.4(a). See MODEL RULES OF PROF'L CONDUCT r. 5.5 & 8.4(a) (AM. BAR ASS'N 2015).

professional responsibility and “serves as a good exam-simulation exercise because it requires students to spot and explain issues.”<sup>266</sup>

This Article covers only a few of the interesting ethical issues raised by John Grisham’s novel *The Rainmaker*. The film adaptation highlights these issues in an engaging and occasionally amusing manner. For example, the critical opening sermon about law school culture, including the stressful “job hunt” process, and other related film scenes, strike a personal chord with many law students and lawyers. These scenes poignantly illustrate how some aspects of law school culture cut against the ethical values law schools try to instill in students.

In addition to examining law school culture, this Article discusses the film’s portrayal of other important issues affecting lawyers and clients, such as the establishment of the lawyer-client relationship and issues concerning the signing of a retention agreement. The Article also discusses issues concerning competency, lawyer communications, and the duty of lawyers to create a firm wide ethical environment, including supervising and mentoring lawyers and non-lawyers. All of these issues promise to garner significant attention from law schools, the legal profession, and the public. Hopefully this Article offers both teachers and students some helpful ideas concerning these issues with the goal of improving the rendition of legal services and perhaps creating a more fertile environment for nurturing Atticus Finch-like lawyers.<sup>267</sup>

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266. See Brown, *supra* note 12, at 1129.

267. See *supra* notes 6–9 and accompanying text (discussing Atticus Finch, the protagonist in the film, *To Kill A Mockingbird*).