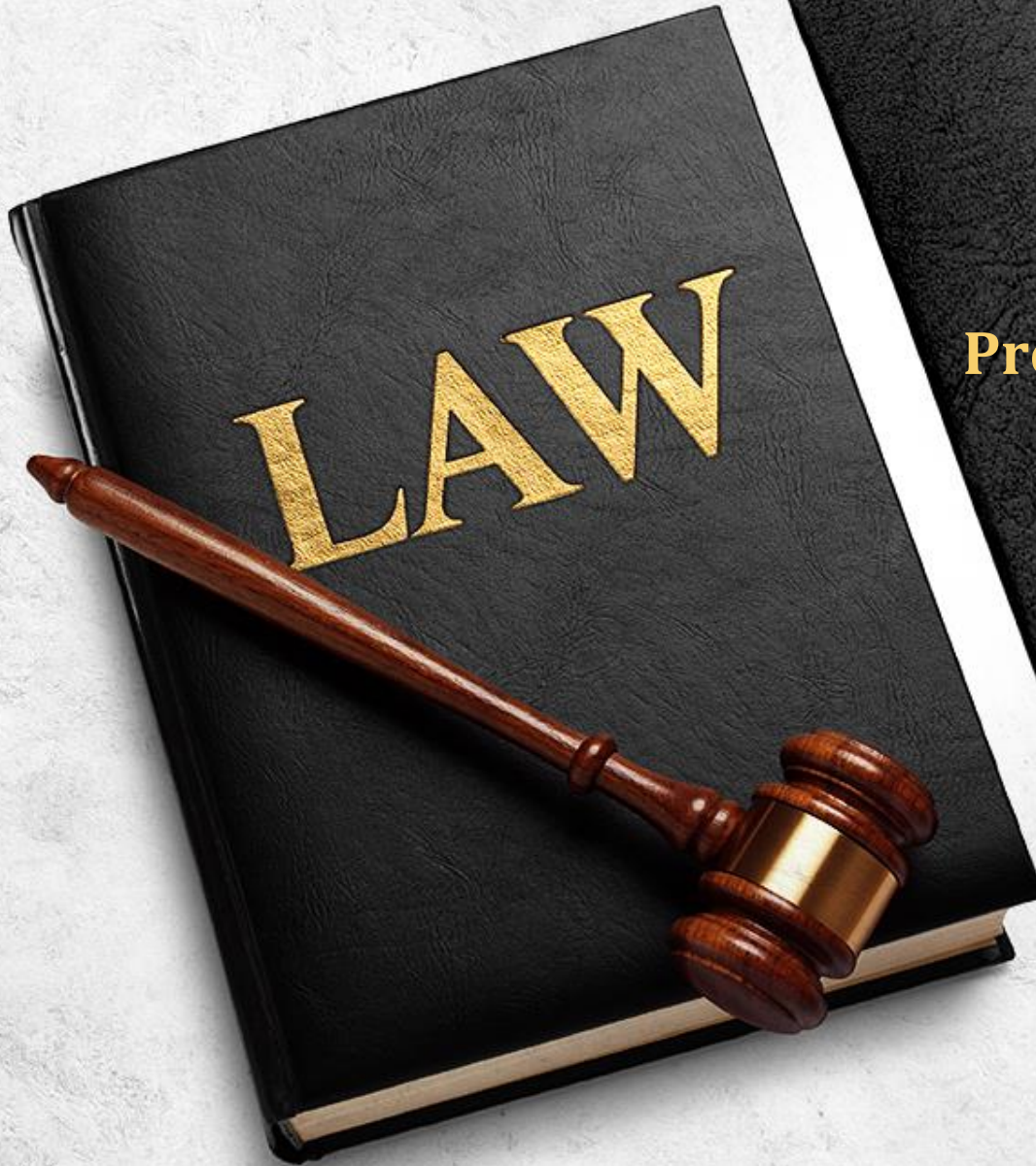


# Legal Ethics

## Lecture 08

Prof. Marvin Longabaugh

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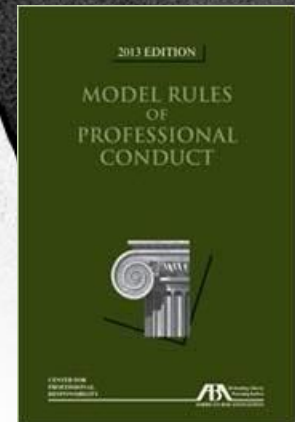




# MRPC 1.6

## Confidentiality of Information

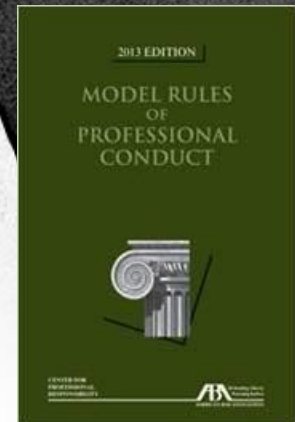
- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's compliance with these Rules;



# MRPC 1.6

## Confidentiality of Information

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (6) to comply with other law or a court order; or
  - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.





# Attorney-Client Confidentiality: Establishing the Relationship

- Applies in any of the following cases:
  - The attorney or firm has been retained by the client
  - The client comes to the attorney for advice but never retained the attorney
  - The client told the attorney the information while thinking that the attorney was representing him
- Does not apply where:
  - The communication had nothing to do with the representation
  - The client had no reasonable basis to believe there was a representation



# Attorney-Client Confidentiality: Confidential Communications

- Communication must be intended to be confidential
- Communication must relate to the representation
- Confidentiality **must not be waived**
- **Waiver** of confidentiality is accomplished by:
  - Revealing the information to any third party
  - Making the communication such that a third party can hear it
  - Failing to assert the privilege when asked to divulge the information





# Attorney-Client Confidentiality: Effect

- If the HOLDER (client) asserts the privilege, the attorney or his or her staff may not reveal the confidential information to any third party
- The attorney may assert the privilege on the client's behalf, but only if he's doing so in the client's interests, not his own
- Attorney-Client confidentiality is an **ethical rule**, not an **evidentiary** rule!
- Thus, if a court or law forces a revelation, the confidentiality rule cannot prevent the disclosure (unless one of the evidentiary privileges applies)
- Note: *The duty of Confidentiality survives the death of the client!*



# Attorney-Client Confidentiality: Exceptions

- Client **Consent**; express or implied
- Preventing serious crime that will lead to **death or serious injury** (the “maim or murder” exception)
- **Self-Defense**: If the client accused the attorney of malpractice or misfeasance; the lawyer may use confidential communications to respond to the charge
- The attorney may reveal confidences that are necessary in a proceeding to **collect a fee**; but not to “blackmail” a client into paying a fee
- Attorney **compelled to testify** before a court or grand jury cannot invoke the duty of confidentiality to keep quiet unless an evidentiary privilege also applies
- Attorney *must* (under Model Rule 3.3) **remedy past false information** that he or she already was presented to the court (whether or not the attorney knew it was false when it was presented). This is true even if it requires disclosure of confidential information.





# Attorney-Client Privilege – In General

- **EVIDENTIARY RULE**
  - (Prevents evidence from being entered about the communication with the attorney in court)
  - NOT just an ethical rule
  - This rule is what provides attorneys with the right to refuse to reveal information in court
- Depends on the existence of the five “C”s:
  - Communication by a
  - Client to
  - Counsel, in
  - Confidence, for the purpose of obtaining
  - Counsel (advise)





# Attorney-Client Privilege – In General

## EVIDENTIARY RULE

- Same exceptions apply, except the “intent to commit a crime” exception is much broader:
- All that is required is intent to commit any “crime or fraud” to alleviate the privilege
- The privilege can be waived if the attorney needs to remedy a past perjury or past presentation of false evidence



# Attorney-Client Privilege – Communication

- The only thing that is privileged is the *communication* from client to attorney
- What is NOT protected?
  - The identity of the client or witness; unless that identity came from a protected communication (*Dean v. Dean*)
- **Example:**
  - If the court asks “Who is your client?” that is not protected
  - If the court asks, “Who did your client name as his accomplice?” that is protected





# Attorney-Client Privilege – Physical Evidence

## ABA Standards for dealing with physical evidence:

- Counsel receives physical item under circumstances that implicate client in criminal conduct:
  - Counsel can disclose location only if required by law or court order
- Counsel receives evidence under circumstances that do not require disclosure:
  - Counsel should return it from whence it came and not tamper with it
- If it's not practical or could be dangerous to return it,
  - Counsel should retain the item in a safe place in a manner that doesn't interfere with or damage its evidentiary value



# Attorney-Client Privilege – Physical Evidence (cont.)

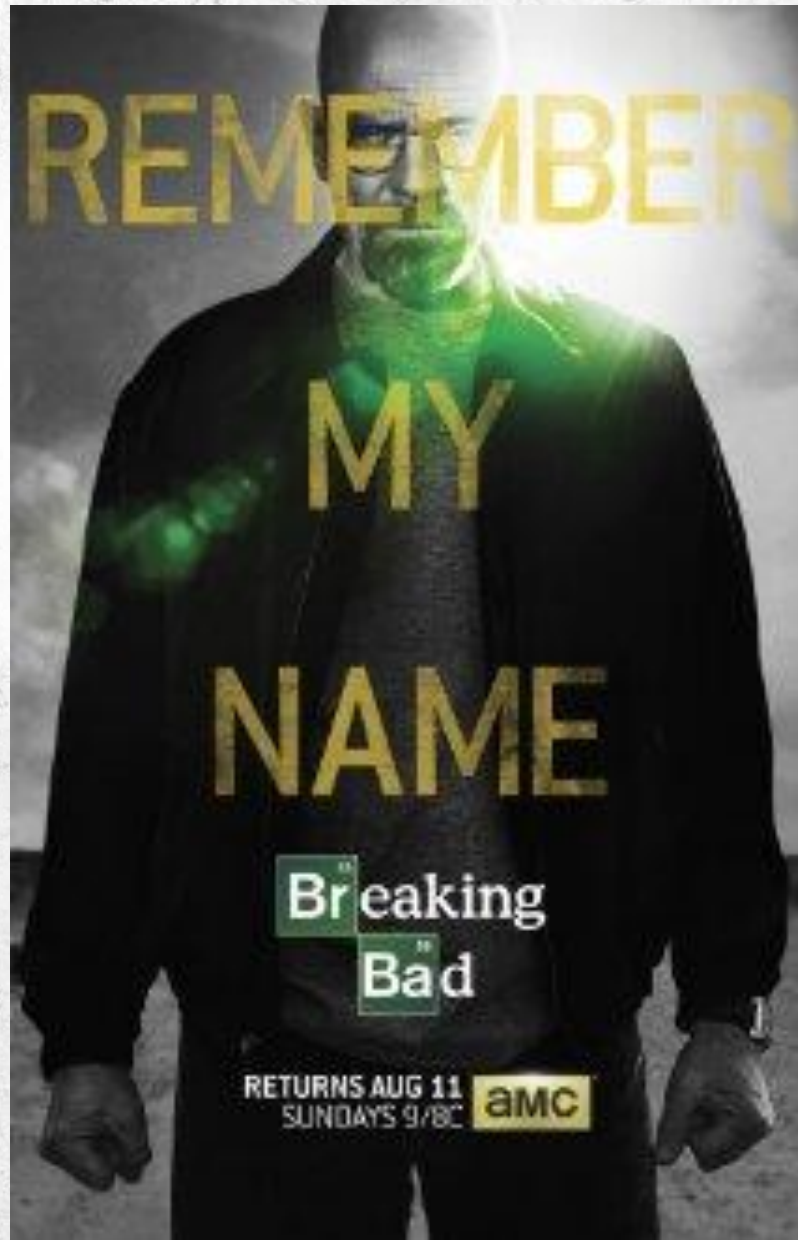
- If the item is contraband itself (e.g., an illegal gun or narcotics)
  - Counsel can suggest that client destroy it if there's no pending investigation about it and if destroying it is not illegal.
  - Otherwise, counsel must deliver the item to law enforcement authorities
- **NOTE: Any disclosure made in any of these circumstances should be made in a manner that best protects the client's interests**





# Breaking Bad (2008-2013)

M\_BBad\_S2E12\_01



# Client vs. Confidentiality

- Can Saul Goodman counsel Walter White on how to use his ill-gotten drug proceeds?
  - No. Rule 1.2 provides that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”
  - Rule 8.4 also prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.





# Client vs. Confidentiality

- Can Saul Goodman accept and keep Walter's money for him?
  - No. Rule 3.4(a) provides that a lawyer may not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;."
  - Rule 8.4(d) also provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."



# Client vs. Confidentiality

- What if Walter brings Saul a gun that he admits to having used to kill someone? Does Saul have to turn it over to law enforcement?
  - One court has stated “[a] criminal defense attorney in possession of physical evidence incriminating his client may, after reasonable time for examination, return it to its source if he can do so without hindering the apprehension, prosecution, conviction or punishment of another and without altering, destroying or concealing it or impairing its veracity in any pending or eminent investigation or proceeding. Otherwise he must deliver it to the prosecution on his own motion.”, Commonwealth v. Steinhach, 514 A.2d 114 (Pa. 1986).
  - BUT if the gun is obtained from a non-client, the attorney-client privilege is not implicated and the lawyer may be required to testify about the source of the evidence.





# Quick Quiz



# End Of Class Review Quiz

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**THE  
BIG  
QUIZ**





# The End

