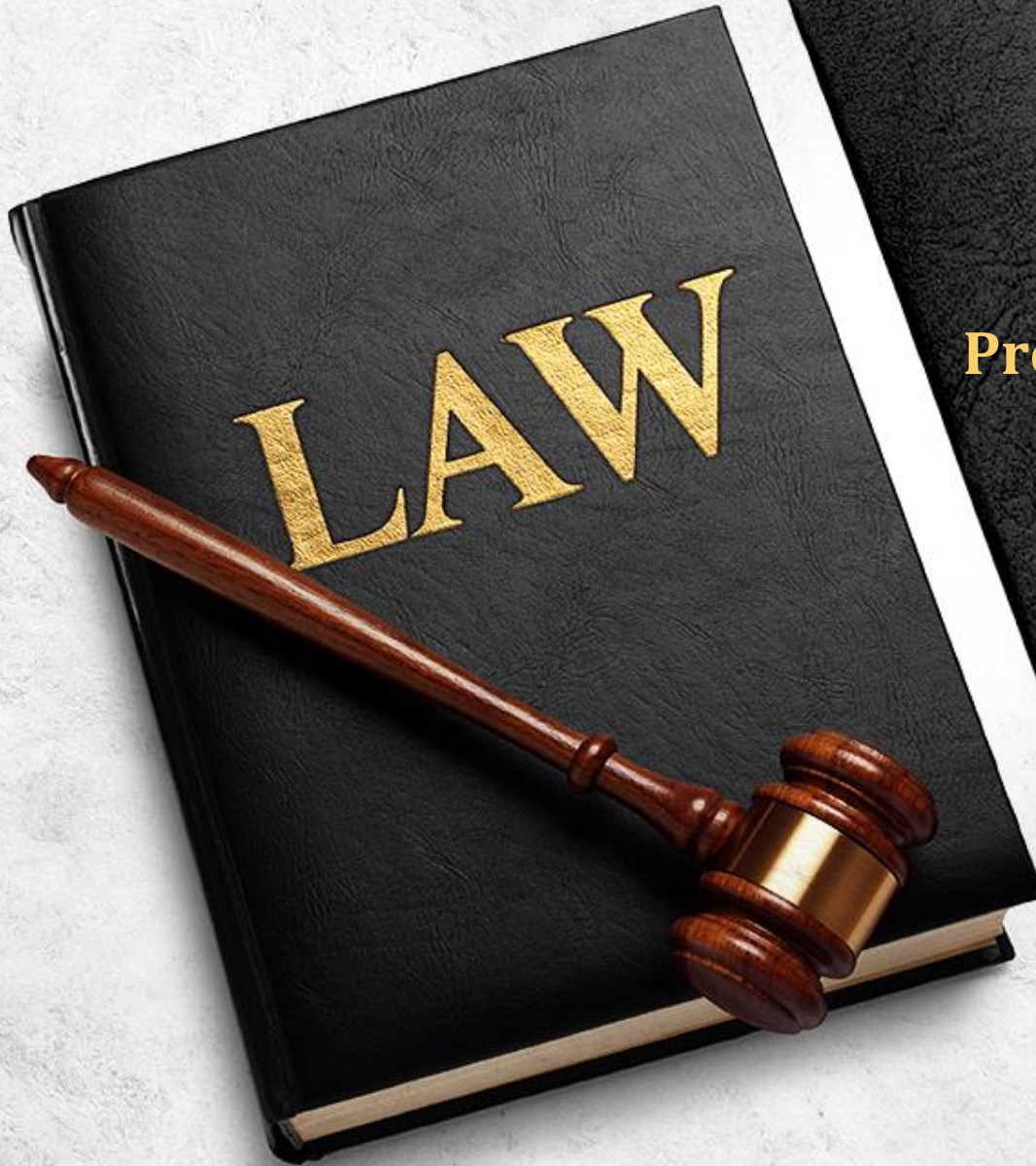


# Legal Ethics

## Lecture 11

Prof. Marvin Longabaugh

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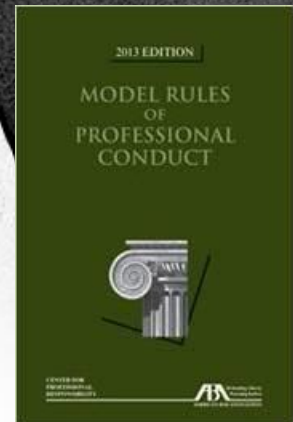




# MRPC 1.8

## Conflict Of Interest: Current Clients: Specific Rules

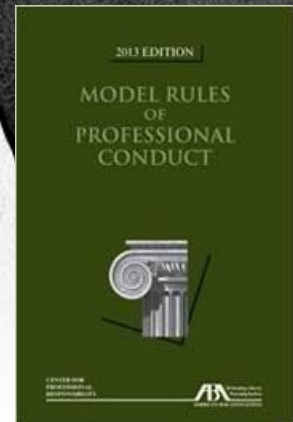
- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.



# MRPC 1.8

## Conflict Of Interest: Current Clients: Specific Rules

- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
  - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

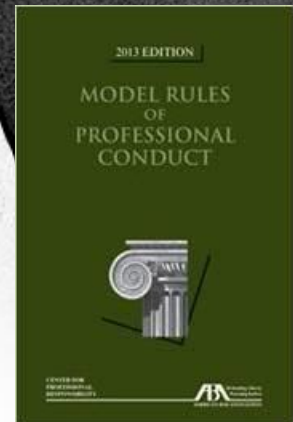




# MRPC 1.8

## Conflict Of Interest: Current Clients: Specific Rules

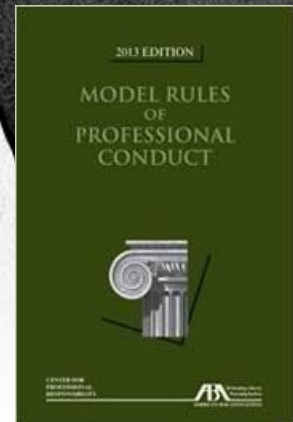
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client gives informed consent;
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.



# MRPC 1.8

## Conflict Of Interest: Current Clients: Specific Rules

- (h) A lawyer shall not:
  - (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
  - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
  - (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
  - (2) contract with a client for a reasonable contingent fee in a civil case.
- (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.





# Transactions Between Attorney and Client

- Concern: Attorney will use position as trusted fiduciary to take advantage of the client
- **Rules:**
- Attorney may ONLY do business with a client if
  - Terms are fair and reasonable (***Objective*** standard)
  - Client is fully informed about the facts and circumstances of the transaction
  - Client is advised, in writing, to seek outside counsel to make sure the deal is fair
  - The client consents in writing, to the deal, in spite of the confidential relationship
- Attorney may not use confidential information to get a better deal, unless the client consents
- Legal representative may NOT solicit a gift (e.g., in a will) from a client unless the parties are related



# Other Rules Regarding Transactions

- **Media Rights**

- Because of the First Amendment, you can't just say "No lawyer can speak to the media about a case"
- Attorney can't "sell" the story of the representation until the representation is over
- Even after the representation is over, the attorney must not disclose any client confidences to anyone

- **Lending Money to a Client**

- **Note:** These rules don't apply to "pro bono" representation
- Attorney cannot lend the client the money to finance the litigation
- The attorney *may not pay court costs* unless the client is indigent
- Attorney may, however, *advance* court costs to the client, as long as the client is to pay it back





# Other Rules Regarding Transactions

- Accepting payment from a third person
- **PROHIBITED**, unless:
  - The client gives informed consent; *and*
  - There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; *and*
  - No confidential information is disclosed to the third party





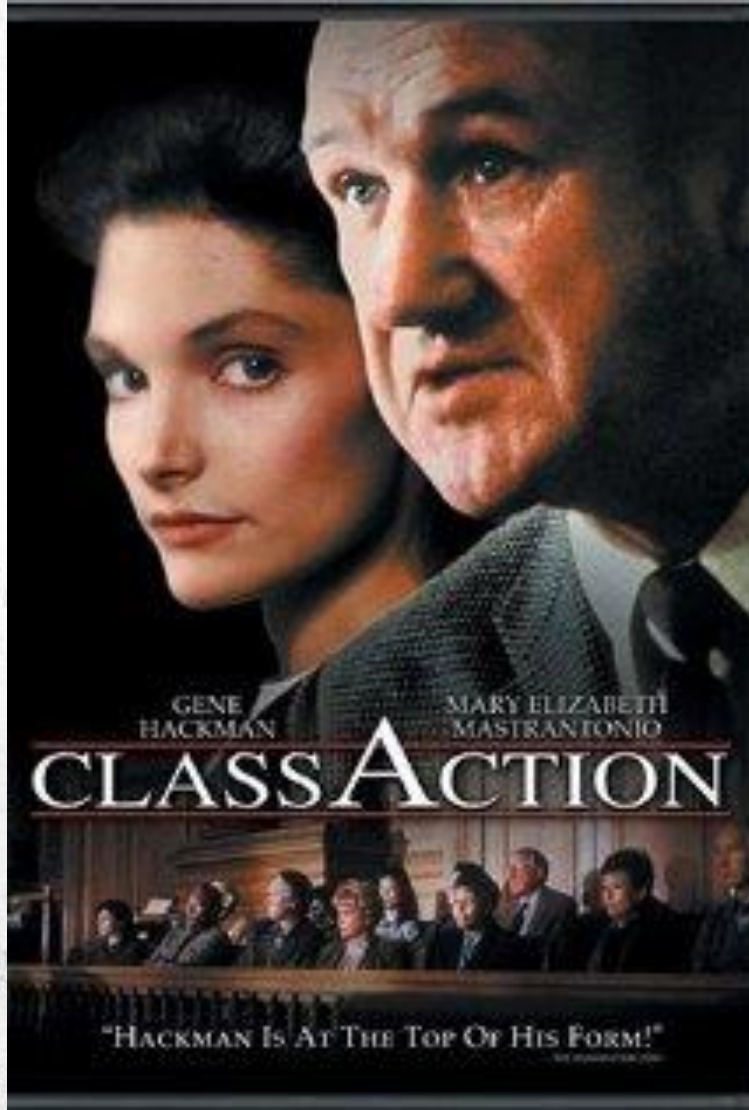
# Other Sources of Conflicts of Interest and Prohibited Activities

- Attorney cannot make the client sign an agreement to waive the right to sue for malpractice
- Attorney cannot acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
  - Acquire a lien authorized by law to secure the lawyer's fee or expenses
- Attorney may not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced
- An attorney may not face off against an opposing attorney who is a close relative



# Class Action (1991)

M\_ClassAct\_01





# Westinghouse Elec. Corp. v. Kerr-McGee Corp.

## 580 F.2d 1311 (7<sup>th</sup> Cir. 1978)

- **Facts**

- In 1975, Congress examined proposals to break up many of the nation's largest oil companies to reduce each's control over production, transportation, and refining of petroleum products.
- In opposition of such efforts, the American Petroleum Institute (API) retained the law firm of Kirkland and Ellis (Kirkland) to prepare arguments against any future congressional action.
- API sent a memo to its member companies stating that Kirkland was acting as independent special counsel to collect data and would hold information it received in strict confidence, not to be disclosed to any other company, or even to API.
- The final report prepared by Kirkland concluded that oil company diversification did not threaten overall energy competition.



# Westinghouse Elec. Corp. v. Kerr-McGee Corp.

## 580 F.2d 1311 (7<sup>th</sup> Cir. 1978)

- **Facts**

- The same day the report was issued, Kirkland represented Westinghouse Electric Corporation (Westinghouse) (plaintiff) in filing an antitrust suit in federal district court against a number of petroleum companies that were members of API, including Kerr-McGee Corporation, Getty Oil Company, Gulf Oil Corporation, and others (defendants).
- Defendants filed a motion to disqualify Kirkland from further representation of Westinghouse.
- The district court denied defendants' motion.
- Defendants appealed.





# Westinghouse Elec. Corp. v. Kerr-McGee Corp.

## 580 F.2d 1311 (7<sup>th</sup> Cir. 1978)

- **Issue**

- May an attorney owe a fiduciary duty to a party when no express attorney-client relationship exists because of the specific facts and circumstances related to the legal issue and the potential for confidential information being disclosed?



# Westinghouse Elec. Corp. v. Kerr-McGee Corp.

## 580 F.2d 1311 (7<sup>th</sup> Cir. 1978)

- **Ruling**

- Yes. An attorney may owe a fiduciary duty to a party when no express attorney-client relationship exists because of the specific facts and circumstances related to the legal issue and the potential for confidential information being disclosed.
- In concluding that Kirkland should not be disqualified from representing Westinghouse, the district court noted that no express or implied attorney-client relationship existed between any of API's member companies and Kirkland.
- Further, the district court erroneously found that the large size of the Kirkland firm made it "increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests."
- A number of district courts have held that each individual member of an unincorporated association is a client of the association's attorney.
- However, API is not an unincorporated association.
- Rather, it is a non-profit, nation-wide trade association with 350 corporate and 7,500 individual members.





# Westinghouse Elec. Corp. v. Kerr-McGee Corp.

## 580 F.2d 1311 (7<sup>th</sup> Cir. 1978)

- **Ruling**

- There is no need for the court to create a *per se* rule that an attorney's representation of a trade association means representation to each member thereof.
- However, there are a number of situations where, although no express attorney-client relationship exists, a fiduciary obligation or implied professional relationship exists that may warrant disqualification of the attorney.
- Those situations include:
  - (1) when a prospective client seeks preliminary advice from an attorney, though does not retain him as counsel;
  - (2) when information detrimental to one defendant is passed between co-defendants and attorneys in a criminal case;
  - (3) when an insurance company retains counsel to investigate a claim, the insured cooperates with the attorney, and bars the attorney from filing suit against the insured individual; and
  - (4) when a law firm represents a plaintiff company but owns stock in a defendant company involved in the same suit.



# Westinghouse Elec. Corp. v. Kerr-McGee Corp.

## 580 F.2d 1311 (7<sup>th</sup> Cir. 1978)

- **Ruling**

- In each of the situations above there was no express attorney-client relationship.
- Here, none of the above situations applies.
- Rather, each of API's member companies expressed in writing that they were under the belief that Kirkland was not only representing API, but the individual member company as well.
- The professional relationship for purposes of the attorney-client privilege "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice."
- Although Kirkland argues that it constructed a "Chinese wall" between the attorneys working on the API matter and those working on the Westinghouse litigation, there nevertheless exists the real possibility of improper professional conduct despite Kirkland's efforts to segregate the two representations.





# **Westinghouse Elec. Corp. v. Kerr-McGee Corp.**

**580 F.2d 1311 (7<sup>th</sup> Cir. 1978)**

- **Black-Letter Rule**
  - **An attorney may owe a fiduciary duty to a party when no express attorney-client relationship exists because of the specific facts and circumstances related to the legal issue and the potential for confidential information being disclosed.**



# Quick Quiz





# End Of Class Review Quiz

19

**THE  
BIG  
QUIZ**



# The End

