CHAPTER 1

Back to the Future: Fiduciary Duty Then and Now

Susan R. Martyn

In the 1985 movie Back to the Future, the characters accidentally time-travel back in history. Unexpectedly, this travel allows them to shape their future much more favorably. I hope to accomplish the same feat. By traveling back 100 years to the ABA Canons, and considering how the drafters themselves traveled back another 100 years, I hope we can travel back to our own future as a profession and consider how we can shape it to better our client representation.

When lawyers regulate something, especially for the first time, we turn to legal analogies in the law with which we are familiar. The drafters of the 1908 Canons were no exception. They began in the preamble by stating that the future of the republic was at stake. They then expressed their specific purpose—to promote public confidence in the administration of justice by maintaining “Justice pure and unsullied.”1 And they believed that justice could not “be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.”2 To achieve these goals, they formulated neither a code nor a “set of rules” that would particularize the lawyer’s duties, but instead opted for canons of ethics that would pro-
vide a “general guide,” which should not be construed as limiting other “equally imperative though not specifically mentioned” obligations.\(^3\)

In addressing the conduct and motives of lawyers, the Canons drafters articulated the essential fiduciary duties of the client-lawyer relationship. In doing so, they borrowed from three familiar bodies of nineteenth-century common law that informed their work:

1. Agency law, which articulated duties of loyalty of agents to principals;
2. Negligence law, which addressed duties of care and competence; and
3. Evidence law, which developed duties of confidentiality in the attorney-client privilege.

In relying on these relevant legal doctrines in the Canons, the drafters crafted what was essentially the first restatement of the law governing lawyer conduct. The lawyer’s fiduciary duties articulated in the Canons, like those in the common law, were intended to guarantee that lawyers remain true to their client’s interests and goals.

Today, my colleague Larry Fox and I like to call these core fiduciary duties the “5 Cs”\(^4\)—the lawyer’s obligations to:

1. Respect client *control* of the goals of representation;
2. Initiate *communication* with the client;
3. Remain loyal—that is, resolve *conflicts of interest*;
4. Keep client *confidences*; and
5. Provide *competent* legal services.

All of these fiduciary obligations originate in the reality that lawyers represent some interest other than their own. They recognize that it is humanly impossible for lawyers to have perfect knowledge about whether they are articulating their client’s interests, their own, or the interests of some third party. The legal imposition of fiduciary duty on lawyers keeps them focused on the client’s interests as articulated by the client.

In the chart at the end of this chapter, I trace the development of the 5 C’s over the past 200 years. The chart begins by looking in the first column at an 1824 decision by then-Judge Joseph Story. *Williams
v. Reed was a fraud suit in equity against a lawyer for failing to tell a client that he represented another client with a conflicting interest. The case involved a lawyer who simultaneously represented two clients, each of whom sought to make an attachment on the same piece of real estate to make good on a debt owed by the same debtor. The lawyer’s first client wanted confidentiality as to the existence of his suit, and the lawyer therefore did not tell the second client about the first client’s retainer. Judge Story eventually concluded that no fraud existed, but he nevertheless used the opinion to articulate the lawyer’s obligations and the client’s other remedies.

Williams also offers us a good example of a carefully crafted opinion during what Roscoe Pound called “The Formative Era of American Law.” Judge Story seems to have used the dispute as an opportunity to apply English common law to American conditions. In doing so, he assisted the “reshaping of traditional legal materials . . . and the adaptation of these materials as a whole to the securing of human claims and satisfaction of human wants under new conditions of life in civilized society.” In particular, he adapted and enlarged on Blackstone’s original articulations of the law of agency in the eighteenth century. As Story later explained in his treatise on agency law, legal recognition of agency relationships protected individual liberty by extending a person’s capacity to do business through employees and other agents.

Next in this historical survey, the chart extracts excerpts from Fifty Resolutions in Regard to Professional Deportment (1836) (Hoffman’s Resolutions), a collection of guides, “never to be departed from,” to assist young practitioners by David Hoffman, a member of the Baltimore bar. Hoffman’s Resolutions influenced Judge George Sharswood’s 1854 lectures on legal ethics at the University of Pennsylvania Law School, which in turn shaped the Alabama Code of Ethics, the first state lawyer code, drafted by Thomas Goode Jones in 1887. These articulations of professional ethics led to the development of state ethics codes in 34 jurisdictions by 1905. The Florida bar published Hoffman’s Resolutions. The Alabama Code, based on Sharswood’s lectures, became the template in Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky, and Missouri. Washington, California, Oregon, and Louisiana modeled professional duties on seven Canons from the Geneva Oath of Advocates. By 1908, 17 other jurisdictions (Idaho, Illinois, Indiana, Iowa,
Kansas, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and Vermont) had developed their own state codes.\textsuperscript{14} All of these iterations of professional obligation provided rich fodder for the American Bar Association (ABA) committee appointed by President George R. Peck in 1905 to draft the ABA Canons. The committee’s report included a compilation of these state codes, as well as reprints of Hoffman’s \textit{Resolutions} and Sharswood’s \textit{Essays on Professional Ethics}.\textsuperscript{15}

The initial draft of the Canons precipitated more than 1,000 letters of comment. In 1908, 32 Canons of Professional Ethics were adopted by the ABA House of Delegates and recommended to the states for adoption. The Canons restated the fiduciary duties articulated in these historical precedents and adopted the narrative style of Hoffman’s \textit{Resolutions} and the Alabama Code. By 1914, the Canons had been adopted in 31 jurisdictions. Eventually, all jurisdictions adopted some form of the Canons.

Turning to the past 100 years, the chart next examines the ABA’s 1969 \textit{Model Code of Professional Responsibility}, which replaced the 1908 Canons. Here, for the first time, the narrative general guides of the canons were replaced with a code that included both black-letter disciplinary rules and narrative ethical considerations.

Next, the chart excerpts portions of a 1991 decision of the Texas Court of Appeals, \textit{Perez v. Kirk & Carrigan},\textsuperscript{16} a suit for breach of fiduciary duty against lawyers who disclosed to the prosecutor a client truck driver’s confidential statement made shortly after a terrible accident. Their unconsented-to disclosure resulted in 21 indictments for involuntary manslaughter against their client. Although the client was acquitted on all counts, it took several years for this to happen, during which time the client suffered extreme emotional distress. The court’s articulation of lawyer fiduciary duty substantially mirrors that of Judge Story in 1824.

Finally, we turn to articulations of fiduciary duty in the 2000 \textit{Restatement (Third) of the Law Governing Lawyers} and the current ABA \textit{Model Rules of Professional Conduct}, originally articulated in 1981 and recently amended just a few years ago. Here, rules replace code and canons. Both the common law and disciplinary rules now consciously mirror each other and provide significant content to the lawyer’s obligations.
What we find from this historical survey is this: the more things change, the more they stay the same. The 5 C’s are more carefully and clearly articulated today, but all five have been a part of the common law for 200 years.

The Five C’s

Control

The first fiduciary duty, control, emphasizes the obvious point that the lawyer represents the client’s interests, and therefore the client has the right to assume that the lawyer is devoted to the cause confided to him—that is, the lawyer is controlled by the client’s goals. Judge Story articulated this obligation in *Williams v. Reed* by pointing out that “[w]hen a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him.”

Hoffman similarly spoke in Resolution VII about a lawyer’s obligation to act “in union with his client’s wishes” and added, in Resolution XVIII, “To my clients I will be faithful; and in their causes zealous and industrious.”

Another significant nineteenth-century Supreme Court Case, *Baker v. Humphrey*, also invoked equity jurisdiction to remedy a lawyer’s conflict of interest in simultaneously representing two clients. In *Baker*, the lawyer represented both seller and buyers in a real estate transaction. When the lawyer discovered a defect in title, he reported it to the buyers, but not the seller. He then offered the buyers, but not the seller, an option of curing the title defect. When the buyers declined, the lawyer bought the property himself by procuring a quit-claim deed.

The Court found it hornbook law that “the confidence manifested by the client give him the right to expect a corresponding return of zeal, diligence, and good faith on the part of the attorney.” Citing Justice Story’s treatise on *Equity Jurisprudence*, the Court found that the lawyer’s failure to disclose the adverse interest to the client constituted constructive fraud, and that the lawyer held the property in constructive trust for the client’s use and purchase. This result was necessary because the legal profession “may be potent for evil as well as for good. Hence the importance of keeping it on the high plane it ought to occupy. . . . Courts of justice can serve both the public and the profession
by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients.”

Canon 15 restated this same notion of fealty to the client’s interest. It provided that a lawyer owes a client “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights . . . within and not without the bounds of the law.”

The *Model Code of Professional Responsibility* mirrored and expanded on the meaning of this admonition. Canon 7 was titled “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.” Disciplinary Rule 7-101(A) detailed the obligation of zealous representation. A lawyer should not “fail to seek the lawful objectives of his client,” “fail to carry out a contract of employment” with a client, or “prejudice or damage his client during the course of the professional relationship.”

Near the end of the twentieth century, the Texas Court of Appeals described the relation between client and lawyer as “highly fiduciary in nature” and explained that “[t]he existence of this relationship encouraged Mr. Perez to trust his lawyers and ‘gave rise to a corresponding duty on the part of the attorneys not to violate this position of trust.’”

Today, the *Model Rules of Professional Conduct* provide that a lawyer “shall abide by client’s decisions concerning the goals of representation” but “shall not counsel . . . or assist a client in conduct that the lawyer knows is criminal or fraudulent.” Controlling the goals of the representation specifically requires that the lawyer abide by the client’s decision whether to settle a matter, and in criminal cases, whether to plead guilty, waive a jury trial, or testify.

Similarly, the *Restatement (Third) of the Law Governing Lawyers* provides for three spheres of control between lawyer and client. The client has the exclusive right to control the goals of the representation; the lawyer has the exclusive right to act for the client before a tribunal and to refuse to engage in criminal or fraudulent activity, and they share decision-making authority with respect to all other aspects of the representation.

*Communication*

Judge Story offered a broad and eloquent articulation of the fiduciary duty of communication in *Williams v. Reed*. Because the lawyer cannot
know the client’s interest without asking, Story saw communication as the foundational fiduciary duty for maintaining the client’s trust and control. He specifically agreed with and adopted the doctrine urged by the plaintiff—former client “as to the delicacy of the relation of client and attorney, and the duty of full, frank, and free disclosure by the latter of every circumstance, which may be presumed to be material, not merely to the interests, but to the fair exercise of the judgment, of the client.”32

Hoffman said little about communication. He did perhaps assume it when he stated in Resolution XIX that a lawyer should “greatly respect his client’s wishes and real interests.”

Nineteenth-century cases follow Story’s articulation of this fiduciary duty. In Baker v. Humphrey, the Supreme Court relied on two cases33 for the very clear proposition that a lawyer has a duty “to advise the client promptly whenever he has any information to give which it is important the client should receive.”34 The Court found both the lawyer’s initial failure to communicate the property title defect to his client/seller and the lawyer’s subsequent attempts to create his own interest in the property and to “wrest it from” the client as “condemned alike by sound ethics and the law.”35

Canon 6 framed this duty of disclosure in similarly broad terms. The lawyer has a duty “to disclose to client all circumstances of his relation to the parties which might influence client’s selection of counsel.”

The Model Code of Professional Responsibility detailed specific disclosure duties in Disciplinary Rules concerning conflicts of interest36 and confidentiality.37 It also imported some of the broader language of disclosure found in Baker in an Ethical Consideration, which specified that lawyers should exert their best efforts to make sure clients are properly informed before making decisions, and that lawyers should initiate the decision-making process.38

The Texas Court in Perez noted that the client-lawyer relationship requires “absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.”39 In fact, had the client’s former lawyers asked whether they were free to disclose the client’s statement to the prosecutor, the client’s new lawyer opined that as an experienced criminal law practitioner, he would have been able to explain the client’s inculpatory statements as the result of the client’s employer’s
failure to instruct Mr. Perez about proper use of the truck’s brakes. He also said that Perez’s explanation would have prevented his indictment.

Today, both the Model Rules and the Restatement recognize the lawyer’s duty to inform and consult with the client. Both require that a lawyer shall promptly inform the client of decisions to be made, keep the client reasonably informed about the status of the matter, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

Conflicts of Interest
The main concern in Williams v. Reed was conflict of interest. Because the lawyer simultaneously represented two clients with an economic interest in the same property, the lawyer became involved in what we would today call a zero sum game; there was no way one client could prevail unless that other lost. Although Judge Story found no fraud, he nevertheless used the case to articulate the proper response to such a conflict. Specifically, he tailored the lawyer’s obligation of disclosure to address this problem, stating that “[a]n attorney is bound to disclose to client every adverse retainer and every prior retainer which may affect the attorney’s discretion.” In fact, Story reasoned, “When a client employs an attorney, he has a right to presume that he has no interest, which may betray his judgment, or endanger his fidelity.”

Hoffman agreed. He said that a lawyer should promise to “never permit myself to be engaged on the side of my former antagonist” and should promise to be faithful to clients and “in my client’s causes to be zealous and industrious.”

The Supreme Court applied this idea to a lawyer’s personal conflicts of interest in Baker, laying down as a general rule of numerous cases “that an attorney can in no case, without the client’s consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.” A decade earlier, the New York Court of Appeals similarly found it a settled equity principle that a person placed in a trust situation cannot purchase property for his own account, and the client has the option to repudiate or affirm the transaction regardless of any proof of actual as opposed to constructive fraud.

Canon 6 succinctly summed up this loyalty obligation, finding it “unprofessional to represent conflicting interests except by express consent of all concerned given after a full disclosure of the facts. Canon 11
added the lawyer’s personal conflicts to the list of recognized loyalty issues. It provided that a lawyer “should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.”

Canon 5 of the *Model Code of Professional Responsibility* expressed a similar admonition: consent following full disclosure of relevant facts was required to allow the lawyer to “exercise independent professional judgment on behalf of a client.” This fiduciary duty extended to the lawyer’s personal conflicts of interest, conflicts created by third parties, and those created by the representation of other clients.

Perez demonstrates that the common law also provides monetary remedies for breaches of this professional obligation of loyalty. The “absolute and perfect candor” required of lawyers flows directly from the attorney-client relationship itself, which the court characterized as “one of *uberrima fides*, which means ‘most abundant good faith’, requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.”

Today’s Model Rules and Restatement follow the articulation of the *Code of Professional Responsibility*. Lawyers have obligations to disclose personal, third-person, and other client conflicts of interest and obtain informed consent from affected clients if the lawyer reasonably believes he or she will be able to provide competent and diligent representation to each affected client. Although modern regulations are far more extensive and detailed than predecessor articulations, they remain premised on the same basic notions of loyalty to the client’s interest.

**Confidentiality**

Nineteenth-century notions of confidentiality were assumed more often than they were articulated. Judge Story, for example, seems to take for granted that the defendant lawyer’s first client “required secrecy as to the existence of the suit” as an explanation for why the lawyer failed to disclose the conflict to the second client.

Hoffman spoke in Resolution XVIII about faithfulness to clients but said little else about confidentiality, perhaps because the common law protected confidentiality as part of the lawyer’s obligation of loyalty, or perhaps because confidentiality was then considered a species of the law of evidence in the guise of the attorney-client privilege.
The nineteenth century was not without common-law articulations of both the agency and evidentiary duty of confidentiality. With respect to agency, for example, the Supreme Court in Baker relied in part on a North Carolina case about a client who was entitled to recover against his lawyer for improperly disclosing defects in the client’s property title to another person. The attorney-client privilege also became well-established in the nineteenth century. For example, the California Supreme Court, writing in 1865, had no trouble articulating the prima facie obligation of lawyers to regard all communications with a client in the professional relationship as confidential and therefore privileged against testimony in adjudicatory proceedings.  

Reflecting awareness of both the privilege and the fiduciary duty to keep client confidences, Canon 6 articulated the lawyer’s obligation as the duty “not to divulge [client] secrets or confidences,” and extended this prohibition to “the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.” By 1928, Canon 37 made even more specific that “[t]his duty outlasts the lawyer’s employment.”  

The Code of Professional Responsibility repeated this language in Canon 4: the lawyer’s obligation to preserve the client’s “confidences” (protected by the privilege) and “secrets” (any other information the lawyer learns that might be detrimental to the client). Lawyers were prohibited from either revealing or using confidences or secrets without express client consent.  

Perez, of course, was primarily a suit about breach of confidentiality. Mr. Perez was driving his employer’s truck when the brakes failed and the truck hit a school bus filled with children. The accident killed 21 of the 81 children on the bus, who drowned in a water-filled pit after the bus was pushed off the road by the truck. Lawyers hired by the employer’s insurer visited Mr. Perez in the hospital shortly after the accident. They told him they were his lawyers and promised him confidentiality before taking his statement about the accident.  

When Mr. Perez admitted he did not check the brakes the day of the accident as was required by company policy, his lawyers perceived a conflict of interest, withdrew from his representation, and assigned another lawyer to represent Mr. Perez. Then, unbelievably, without asking his new lawyer, Mr. Perez’s original lawyers gave his statement to the
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prosecutor. Armed with this evidence, the prosecutor secured 21 grand jury indictments for involuntary manslaughter against Mr. Perez. Although the trial jury acquitted Mr. Perez on all counts (perhaps because it discovered that Mr. Perez’s employer had not provided him with instruction on how to check the brakes), Mr. Perez lived in a self-imposed bedroom prison for over three years before the trial took place.

The Texas Court of Appeals provided several civil remedies for this blatant breach of confidentiality. The court found that “because of the need for openness and candor within the relationship, certain communications between attorney and client are privileged from disclosure in either civil or criminal proceedings.” It further noted that “the general rule is that that confidential information received during the course of any fiduciary relationship may not be used or disclosed to the detriment of the one from whom the information is obtained.” It also made the point that such disclosure or use was prohibited by the state lawyer code.

Perez’s lawyers sought to avoid their client’s tort claim for breach of fiduciary duty by arguing that their client’s statement was not privileged. Since the client’s father and uncle were present during the attorney-client interview, the attorney-client privilege did not apply, which they argued excused their disclosure. Observing that the lawyer’s confidentiality duty went beyond the privilege, the court found that the lawyers had breached their fiduciary duty “either by wrongfully disclosing a privileged statement, or by wrongfully representing that an unprivileged statement would be kept confidential. Either characterization shows a clear lack of honesty toward, and a deception of, Perez by his own attorneys regarding the degree of confidentiality with which they intended to treat the statement.”

Today, this obligation not to use or disclose confidential client information remains in essentially the same formulation in both the Model Rules and the Restatement.

Competence

*Williams v. Reed* was a suit for fraud in equity. Judge Story eventually found no fraud, and could have left it at that, but once again he surprises us by recognizing that the lawyer’s lack of skill may have contributed to his agreeing to take on a client with a conflicting interest and his failure to disclose the conflict. Though he found no grounds for equi-
table relief, he again used the case to instruct in dicta that “a suit at law will lie for a lawyer's unskilfulness and negligence and the remedy is plain, complete and adequate.” At the time, this was a bit of an overstatement, as the leading case to establish negligence as a clear legal remedy was not decided until 1850. There could, of course, be no question about this conclusion by later in the nineteenth century.

Hoffman also spoke boldly about the lawyer's professional obligation of competence. In Resolution XX, he instructed a lawyer who does not understand his “client's cause, after due means to comprehend it,” to “retain it no longer, but honestly confess it, and advise [clients] to consult others, whose knowledge of the particular case may probably be better than my own.” He also recognized the client's point of view when he admonished in Resolution XXIII that “in small cases in which I may be engaged I will as conscientiously discharge my duty as in those of magnitude; always recollecting that “small” and “large” are to clients relative terms, the former being to a poor man what the latter is to a rich one. . . .”

Canon 15 articulated the duty of competence as part of client loyalty and faithfulness to the client's matter. “The lawyer owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his rights and the exertion of his learning and ability.”

By 1969, the competence obligation was singled out for attention as a separate Canon. The lawyer's duty to represent a client competently included Hoffman’s admonition not to take on a matter that the lawyer was incompetent to handle, handle a matter without adequate preparation, or neglect a matter.

Perez illustrates how this competence obligation mirrors the negligence law that originally inspired it. The court upheld a tort breach of fiduciary duty remedy for nonconsensual disclosure of client confidences, finding that the lawyers either acted incompetently in failing to exclude Perez's family to protect the privilege, or acted deceptively by promising him confidentiality when they did not intend to honor their obligation. The tort remedy included damages for the “mental sensation of pain resulting from public humiliation” suffered by Perez on account of the wrongful criminal indictments.

Today, the Restatement articulates two remedies for breach of fiduciary obligation: malpractice and breach of fiduciary duty. The Model Rules consciously mimic this articulation: “A lawyer shall provide competent and diligent representation to a client, including legal knowl-
edge, skill, thoroughness and preparation reasonably necessary for the representation.”

Conclusion

The 5 C fiduciary duties governed the conduct of lawyers both 100 years ago when the canons were produced, and also as far back as 200 years ago, when the common law was first being articulated in American courts. These duties are more carefully and clearly articulated today, but have been jewels abiding in the mines of agency, tort, and evidence law for centuries. Their basic requirements and rationale also have withstood the test of time.

Henry Drinker, in his 1953 treatise, *Legal Ethics*, tells us that a major motivation in articulating these obligations in the nineteenth- and early-twentieth-century lawyer codes was “the imperative necessity of taking a firm stand against the rising tide of commercialism and the growing influence of those who would turn the profession from a “branch in the administration of justice” into a mere “money getting trade.” I submit we face that same daunting challenge today.

In 1908, the Canon drafters looked back 100 years to write for the next century. In the last decade of the twentieth century, drafters of the *Restatement (Third) of the Law Governing Lawyers* and the Ethics 2000 Commission did precisely the same. We have responded as did our predecessors, by remembering the centuries-old articulation of fiduciary duty in both the common law and lawyer codes. Armed with a renewed sense of back to the future, we should continue to refine and remember the basic 5 C’s: client control of the goals of the representation, communication, conflict of interest resolution, confidentiality, and competence. The next century of legal ethics should be premised on the same foundation that has protected clients for the past two.

Notes

2. *Id.*
3. *Id.*
5. 29 F. Cas. 1386 (D. Me. 1824).

7. Id. at 95.

8. See Sir William Blackstone, Commentaries on the Laws of England, at Book I, ch. 14, I. 4. (1765) (mentioning a “fourth species of servants, if they be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors, and bailiffs.”).


12. Drinker, Legal Ethics at 23.


14. Id. at 23, 24.

15. 31 A.B.A. Reports 681 (1907).


17. 29 Fed. Cas. 1390.

18. 101 U.S. 494 (1880).

19. Id. at 500.


21. Id. at 502–03.

22. Id. at 502.


26. 822 S.W.2d 265.

27. Model Rules 1.2(a), (d).

28. Model Rule 1.2(a).


30. Id. at § 23.

31. Id. at § 21.

32. 29 Fed. Cas. 1390.


34. 101 U.S. at 500.

35. 101 U.S. at 502.

36. See DR 5-101 to -107, all of which required consent of a client “after full disclosure” to properly resolve conflicts of interest.

37. See DR 4-101(C)(1), which allowed disclosure of client confidences only with the consent of the affected client “but only after a full disclosure.”

38. EC 7–8.

39. 822 S.W.2d 265.

40. Id. at 264 n.3.
41. **Model Rules of Prof’l Conduct R. 1.4; Restatement (Third) of Law Governing Lawyers § 20** (2000).
42. Resolution VIII.
43. Resolution XVIII.
44. 101 U.S. at 501.
46. DR 5–101 to 104.
47. DR 5–107.
48. DR 5–105 to 106.
49. 822 S.W.2d 265.
51. 29 Fed. Cas. 1391.
54. Hager v. Shindler, 29 Cal. 47, 64 (1865).
55. DR 4–101.
56. 822 S.W.2d at 265.
57. *Id.* at 266.
58. See **Model Rules of Prof’l Conduct R. 1.6** (disclosure), 1.8(b) (detrimental use).
60. 29 F. Cas. at 1389.
63. DR 6–101(A).
64. See 822 S.W.2d at 268–69, upholding claims for violations of the Texas Deceptive Trade Practices Act and conspiracy to violate unfair and deceptive practices provisions of the Texas Insurance Code.
66. **Model Rules of Prof’l Conduct R.1.1, 1.3.**
67. Drinker, Legal Ethics, at 20.
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<td>7, 8, 15, 16, 24, 31, 44 (added 1928)</td>
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<td>“The existence of [an attorney-client] relationship encourage[s clients] to trust [lawyers] and [gives] rise to a corresponding duty on the part of the attorneys not to violate this position of trust.”</td>
<td>§ 16: A Lawyer’s Duties to a Client-In General</td>
<td>§ 21: Allocating the Authority to Decide Between a Client and a Lawyer</td>
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<td>§§ 68-86: The Attorney-Client Privilege</td>
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<td>§§ 87-93: Lawyer’s Work Product Immunity</td>
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<td>1.6 Confidentiality of Information</td>
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<td>1.8(b): Use of Confidential Information</td>
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<td>Competence</td>
<td>“A suit at law will lie for [a lawyer's] unskilfulness and negligence, and the remedy is plain, complete, and adequate.”</td>
<td>XX (&quot;honestly confess&quot; lack of understanding of client’s cause and “advise client to consult others”); XXIII (In small cases as well as large, “I will conscientiously discharge my duty”);</td>
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**Back to the Future: Fiduciary Duty Then and Now**