Representing clients in litigation can be a real challenge. You must deal with a client or clients, opposing parties, witnesses, and, of course, the court. Although these issues may seem unique to your litigation practice, in fact most of them correspond to professional responsibility obligations that exist in every kind of client representation.

For this reason, to get us started, in this chapter we summarize our five-step approach to legal ethics issues generally, an approach that dictates the order of topics in this volume. We will refer to these issues often throughout this book. Along the way, we will focus specifically on the application of these rules and obligations to your litigation practice.

§ 1.01 Step One: Identify Your Client Obligations—The Six Cs

Lawyers assume six ethical obligations—what we call the six Cs—when an actual or implied client-lawyer relationship is established. These obligations rest on a key agency law insight now restated in the law governing lawyers: You derive your power from clients, but your superior knowledge and skill also allow you to overpower your client’s interests. You assume fiduciary duties of client identification, competence, proper deference to client control, communication, confidentiality, and conflict of interest resolution to prevent underidentification...
with clients and to ensure that the client’s best interests are promoted in a representation.4

The first C, client identification, requires you to properly recognize your clients, an inquiry that can produce unanticipated results.

In most situations, lawyers know who their clients are because they have expressly agreed to represent them. Increasingly, however, the law governing lawyers also has recognized what lawyers may think of as “accidental” clients, those a lawyer did not expect, but those recognized by law as being owed the same fiduciary duties that lawyers owe clients they intend to represent.

General rules of contract and tort govern the creation of client-lawyer relationships.5 If you provide or agree to provide legal advice or services in response to a request for either, you have a client. If you are asked to provide legal advice or services, fail to say “no,” and the person who asked reasonably relies on you to provide services, you have a client. Courts approach discrepancies in remembering what occurred from the viewpoint of the reasonable prospective client.6

These legal principles can create accidental clients when a lawyer does not intend them. Accidental clients lurk in all prospective client situations. They also can be created by court appointments7 and by imputation.8 Identifying some clients can be complicated by their organization, such as entities that act only through agents.9 They also can change, such as by merger, reorganization, bankruptcy, or death. Accommodating a client may create an accidental joint client. Accidental clients also can materialize as quasi-clients if your client designated them as third-party beneficiaries.10

Once you identify accidental as well as intended clients, you will be in a position to avoid client-lawyer relationships you do not wish to create and embrace those you do. When you know your clients, you will be able to know whom to bill and to whom you owe your other five C fiduciary duties.

§ 1.02 Step Two: Clarify Your Fee

Lawyers are fiduciaries and, therefore, they owe clients certain pre-contractual duties of fairness in bargaining for fees. Model Rule 1.5

4. RLGL § 16.
5. MR Scope ¶ [17]; RLGL § 14.
6. RLGL §§ 14(1)(b), 14 cmt. e.
7. Id. § 14(2).
8. MRs 1.8(k), 1.10, 1.11, 1.12.
10. RLGL § 51 cmt. f.
articulates this premise by providing that you may not agree to, charge, or collect an unreasonable fee or expense.\textsuperscript{11} Factors determining reasonableness include the time and difficulty of the matter, the fee customarily charged, the amount involved, results obtained, your experience and ability, and the kind of fee. You are free to charge an hourly, flat, contingent, or blended fee, but it must be reasonable. Contingent fees and agreements to split fees must meet specific written requirements. All other fees should be communicated to the client, preferably in writing, along with the scope of representation and the basis or rate at which expenses are charged. Failure to clarify the basis for expenses in such an agreement leaves you with the only option of passing on the actual cost.

In an increasing number of situations, courts determine a reasonable fee. Often this occurs in a statutory fee shifting case, but it also can occur where a court has jurisdiction to consider the fee as part of its general obligations, for example, in approving the reasonableness of amounts owed by an estate or trust to a lawyer for the personal representative or trust.

Courts also become involved in common-fund cases, especially class actions, by virtue of judicial obligations under court rules. And of course, whenever litigation over a fee occurs, courts look to the reasonableness of the fee in deciding the matter.

Once you take on a representation and agree to a fee, fiduciary duties attach, making any attempt to modify a fee after the initial agreement subject to a presumption that you unduly influenced the client. To rebut this presumption, you should recommend that clients have outside legal advice before agreeing to a fee modification. Clients also have the right to fire lawyers at any time for any reason, or no reason at all, and you must withdraw from a matter if this occurs. You also must withdraw when, if you continue a representation, any of your other ethical obligations will be violated.

\section*{§ 1.03 Step Three: Attend to the Six Cs}

\textbf{Client Identification}

We introduced the first “C,” client identification, in § 1.01. But knowing you represent a “client” also requires attention to the precise identification of that client. When you represent entities, you must know who is empowered by the entity to direct your services.\textsuperscript{12} In all client

\textsuperscript{11} Id. § 34.

\textsuperscript{12} MR 1.13(a); RLGL § 96(1).
representations, you also need to clarify whether you represent more than one client, including any constituent of the entity. You also must identify whether you do or do not represent a prospective client or a third-party payer. Once identified, you must remain alert to the possibility that client identity can change during the representation due to reorganization, death, or disability, among others.

**Competence**

The second “C,” competence, focuses on why you were hired in the first place: to provide competent and diligent service in a complex legal system that clients are not able to navigate themselves. Both tort law and the Rules of Professional Conduct require “reasonable” competence and diligence. You do not have to be perfect, but you do have to meet or exceed the standard of practice in your jurisdiction. A violation of the Rules of Professional Conduct may be evidence of a lapse from the appropriate standard of care.

In both malpractice and disciplinary matters, reasonable care can be established by expert testimony, although disciplinary agencies typically do not proceed against lawyers for isolated instances of incompetence or lack of diligence. Some errors are deemed so obvious that they are within the common knowledge of a fact finder. These include the failure to file within a mandatory time period and the failure to perform legal or factual research. Most courts also recognize another obvious error, often labeled breach of fiduciary duty, which includes a failure to fulfill the obligations just identified.

Malpractice requires not only that a client prove a lawyer violated the appropriate standard of care, but also that the violation caused the client harm. The same is true of suits for breach of fiduciary duty, which typically allege violation of a well-defined core professional duty, such as communication, confidentiality, or conflict of interest.

If you make a mistake, notify your client as well as your carrier. You do not need to fall on your sword, but you do need to explain the facts that led to your error, the conflict of interest you now face, and your need to withdraw. Do not attempt to settle the matter yourself; your now former client needs independent representation before deciding

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13. MRs 1.7, 1.13(f); RLGL § 96 cmt. h.
14. MR 1.18.
15. MR 1.8(f).
16. MRs 1.1, 1.3; RLGL §§ 16(2), 48–54.
17. MR Scope ¶ [20].
18. Id.
what to do about your mistake. Moreover, the law of undue influence is likely to invalidate any agreement you negotiate solely with your client, and the potential for serious discipline also should not be overlooked. Above all, avoid any deceit or cover-up of any relevant facts. That constitutes breach of fiduciary duty and often fraud, which brings additional adverse tort and disciplinary consequences.

Lawyers also need to think about competence in a limited but growing class of cases where third-party nonclients seek relief. In most jurisdictions, third parties who are intended beneficiaries or who are invited to rely on your representation of a client may sue for malpractice. Third parties also may sue for fraud, which includes intentional as well as reckless misstatements of material fact, as long as the third party reasonably relies on the misstatement and can prove damages. Some courts also recognize a cause of action against lawyers for negligent misrepresentation and for aiding and abetting a client’s breach of fiduciary duty, but only if the lawyer gives substantial assistance to the client’s breach, for example, by engaging in fraud, a crime, or statutory breach.

Control
Unlike competence, the other Cs are measured by a client’s reasonable expectations, not a lawyer’s sense of professional practice. These Cs are aspects of your basic loyalty obligation to clients. They keep you focused on your client’s objectives and prevent your inadvertent shift to the competing interests of others, including yourself.

The third “C,” control, assumes that, like other agents, you have a duty to act on the client’s behalf, subject to the client’s right to control the objectives of the representation. The law governing lawyers divides client-lawyer authority into three spheres. Clients have sole authority to determine the objective or goals of the representation. Lawyers have sole authority to take actions required by law before tribunals and to refuse to engage in unlawful conduct. Clients and lawyers share authority and are free to negotiate control in the vast middle sphere that governs all other aspects of the representation.19

The client’s ambit of authority includes the goals of the representation and specific decisions where clients retain sole authority, including whether to settle or appeal a matter, and, in criminal cases, how to plead, whether to waive a jury trial, and whether to testify.20 Clients may authorize you to make a particular decision within this area,

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19. MR 1.2; RLGL §§ 21–23.
20. MR 1.2(a); RLGL § 22(1).
but the ultimate authority of clients to decide may not be delegated completely.

The lawyer’s sphere of sole authority includes refusing to perform, counsel, or assist a client’s unlawful act. Despite client preferences that might be to the contrary, the lawyer also has sole authority to bind clients by actions taken before tribunals that are required by law or court order.

The third sphere, where your clients and you share authority, often is labeled the means to accomplish the client’s objectives. Tactics are part of this vast middle ground, where your client and you are free to agree to a strategy. You may bargain for authority in this middle sphere before a client engages you, and if you do not feel comfortable with your client’s later requests, you may withdraw from the representation. This sphere also includes the scope of the representation, which you may limit only if the limit is reasonable and secured with the client’s informed consent.

All three spheres of authority require that you initiate communication during a representation. When a client decision arises, you must promptly inform and consult with your client, and then clarify your client’s decision. When a client insists on illegal conduct, you must inform the client that the conduct is not permitted and explain why. When a client has decided on an objective, you should consult with the client about the means to accomplish it.

The outcome of these consultations creates your actual authority and empowers you to act on behalf of the client. Clients also can be legally bound by apparent authority, which requires their own holding out to a third party that you are duly authorized, even if you in fact are not.\(^\text{21}\)

**Communication**

The fourth “C,” communication, is essential to every aspect of the client-lawyer relationship.\(^\text{22}\) It defines the initial terms of the representation and is necessary to make each of your fiduciary duties work properly. Clients cannot control the goals of a representation without understanding feasible legal options. You cannot act competently without understanding what your client hopes to accomplish and knowing how to get there. You need facts sufficient to permit you to apply the law to your client’s situation, and confidentiality helps you gather research for the client’s benefit. And you must search for and resolve conflicts of interest to avoid favoring your own or some other person’s interest over that of your client.

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\(^{21}\) RLGI §§ 25–28.  
\(^{22}\) MR 1.4; RLGI § 20.
The key to fulfilling the scope of this duty: Lawyers cannot wait for client inquiries; lawyers must initiate the conversation. Seven specific events trigger this obligation. First, when you initially agree to a fee, you should define the scope of a representation and craft an engagement agreement. Second, throughout the representation, you should explain the matter to enable the client to determine the objectives of the representation. Third, you should keep the client reasonably informed about the status of the matter throughout the representation, including changes in your practice, such as a serious illness or a law firm merger. Fourth, you must inform the client when you make a material mistake in a matter. Fifth, you should promptly respond to your client’s requests for information. Sixth, you must inform your client whenever the law imposes limits on conduct the client expects you to undertake. Finally, you must specifically obtain your client’s informed consent to important decisions, including placing limits on the scope of a representation, obtaining exceptions to fiduciary duties (especially confidentiality and conflicts of interest), and before providing an evaluation for use by third parties that is likely to adversely affect the client’s interests.

Like other fiduciary duties, informed consent is viewed from the client’s perspective. To obtain informed consent, you must first disclose and explain the risks of the proposed course of conduct and, second, inform the client of alternatives to that option. When considering litigation, disclosure of ADR options could be one such alternative.

Confidentiality

The fifth “C,” confidentiality, assures that clients are encouraged to share all relevant information with their lawyers. Without relevant facts, you can mistake what your client wishes to accomplish, the law that is relevant to your client’s circumstance, and other legal options that might be available to fulfill your client’s needs. Breaching confidentiality can result in serious harm to client interests.

Modern confidentiality obligations originated in both agency law and the attorney-client privilege, an evidentiary doctrine. Today, the agency fiduciary duty can be found in both the Rules of Professional Conduct as well as agency law. It protects all information relating to the representation of a client, from the initial prospective client communication, throughout the representation, and beyond, even after your client’s death or reorganization.23 The evidentiary privilege is narrower, and may be invoked only before a tribunal to block offering or disclosure of confidential communications between client and lawyer or the

23. MRs 1.6, 1.8(b), 1.9, 1.18; RLGL §§ 59–68.
agents of either for the purpose of seeking legal advice. The law of evidence also immunizes from discovery lawyer work product, which includes the lawyer’s opinions and mental impressions formed in representing the client in anticipation of litigation.

Both fiduciary duty and the evidence-based privilege recognize parallel exceptions whose exact dimensions nevertheless may differ substantially, even within the same jurisdiction. Exceptions to the fiduciary duty of confidentiality usually grant lawyers discretion to disclose, and if you choose to do so, you must only disclose to the extent reasonably necessary to accomplish the narrow purpose of the exception. Once privilege exceptions are established, courts may order lawyers to testify on pain of contempt if they refuse to do so.

Express or implied client consent allows disclosure or use of client confidences. Most jurisdictions also recognize a confidentiality exception to prevent future client crime or fraud. Whether criminal or not, the Rules of Professional Conduct also recognize future threats of serious bodily harm as an additional sufficiently weighty reason to permit disclosure, even without client consent.

Two exceptions grant you some measure of self-protection. One allows you to employ confidential information to collect fees and to defend yourself against charges of misconduct by clients or others. The other allows you to seek guidance about how to comply with your ethical obligations by sharing otherwise confidential information with another lawyer.

Most jurisdictions also recognize an exception “to comply with other law or a court order.” “Other law” includes the Rules of Professional Conduct, statutory legal requirements, and court rules. In the context of the evidentiary privilege or work-product protections, this exception requires you first to claim the privilege (or the client will lose it) and then, if the other side prevails, either to appeal the order to testify or produce documents, or to obey it if no appeal or collateral attack is available.

**Conflicts of Interest**

Your sixth “C” requires you to identify and avoid or resolve conflicts of interest. This obligation is based on your fiduciary duty of loyalty, which imposes the obligation to seek client consent whenever, from the client’s point of view, your judgment might reasonably be called into

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24. RLGL §§ 68–86.
25. Id. §§ 87–93.
26. MRs 1.7–1.12; RLGL §§ 121–135.
question. It also prevents client harm by imposing on you the obligation to recognize and respond to any influences that may interfere with your ability to act in the client’s best interests as defined by the client.

Both agency law and the Rules of Professional Conduct recognize that conflicts of interest can arise from several sources, including the lawyer’s own personal interests, the interests of other clients, third persons, and former clients. Pursuing the client’s best interests requires you to remain vigilant throughout the representation so that you can recognize conflicts when they arise. Once identified, a conflict must be disclosed to your client(s), unless doing so would violate another client’s confidentiality. If confidentiality obligations intrude, you should resolve the conflict by not proceeding in the matter.

A lawyer’s conflicts are imputed to the lawyer’s “firm,” a defined term that includes any law office, practice, department, or organization. This imputation is premised on the fiduciary principle that all firm lawyers owe loyalty to all firm clients and lawyers readily interact with each other in firms. Imputation also requires a conflict of interest system to check for conflicts whenever a firm takes on a new lawyer, new matter, or new client.

If conflict disclosure will not violate the lawyer’s duty of confidentiality, such disclosure is the beginning of the informed-consent process, which allows your client to consent to continuing the representation in spite of the conflict. In some situations, conflicts are so serious that client consent cannot vitiate them. When this occurs, you may not seek an exception to the loyalty requirement and must turn down a prospective client or withdraw from representing the current client(s) to avoid the conflict.

Failure to recognize and properly respond to conflicts creates overlapping remedies for clients. If harm is caused, the client may seek tort relief. If harm is threatened, the client may seek disqualification or injunctive relief ordering you to end the representation of the conflicting interest. If you have proceeded in a representation without disclosing a conflict, your client also can seek fee forfeiture, disgorgement of fees already paid, or a constructive trust of other property that is implicated.

§ 1.04 Step Four: Observe the Limits of the Law

Every agency and client-lawyer relationship is subject to one significant limitation: Neither your client’s power of control nor your obligation of loyalty allows either of you to violate the limits or bounds of the law. Both of you remain responsible for the consequences of your conduct as
autonomous legal persons.\textsuperscript{27} The limits or bounds of the law remind us not to overidentify with clients.

The limits of the law include several familiar bodies of law that are explicitly incorporated into lawyer code provisions. This means that straying over the line can result in both professional discipline as well as other legal consequences, such as procedural sanctions, civil and criminal accountability, or equitable relief.

The most obvious legal limits are created by the criminal law, and today's thousands of criminal statutes can create legal limits that go unrecognized. Tort law, and in particular the law of fraud, create similar limitations. The law of evidence, which recognizes the client-lawyer privilege and the work-product doctrine, is enforced by contempt orders and sanctions when orders are violated. Courts also impose monetary sanctions for violations of procedural rules, such as Rules 11 and 26. Tribunals further exercise their inherent power when they disqualify, disbar, or discipline lawyers, or hold lawyers in contempt.

The Rules of Professional Conduct impose additional limits on client advocacy. Specific rules govern ex parte contact with opponents, define improper inducements to settle a matter, and regulate lawyers who serve as witnesses in client matters.

All of these bodies of law impose limits or bounds that restrain unfettered client allegiance. If you violate these legal limits or fail to identify them to avoid violation by clients, you also may face professional discipline. Taken together, these limits remind us that client-lawyer relationships do not exempt either client or lawyer from general legal requirements, some of which impose limits on client advocacy. This is not an unfamiliar role, because lawyers have long advised clients about how to avoid illegality. Many of these limits seek to provide a fair and accessible justice system. Others seek to avoid serious wrongdoing.

\section*{§ 1.05 Step Five: Recognize Remedies}

Lawyers owe agency-based fiduciary duties to clients, the violation of which can trigger equitable as well as legal remedies. These fiduciary duties are the foundation for many of the provisions in the Rules of Professional Conduct, violation of which also can trigger professional discipline. Lawyers who fail to understand a legal limit imposed on unrestrained client advocacy also may be accountable to third-party nonclients.

\textsuperscript{27} MRs 1.2(d), 8.4; RLGL §§ 6, 23(1), 30.
Client legal remedies include claims for breach of contract, malpractice, and breach of fiduciary duty. Equitable remedies for breaches of fiduciary duty also grant clients presumptions of undue influence and allow them to seek a constructive trust, disqualification, injunctive relief, fee forfeiture, or restoration of pre-contractual rights.\(^{28}\)

Nonclients can seek relief against you if they are identified third-party beneficiaries, invited by your client or you to rely on your legal services, or if you commit crimes or intentional torts against them. In an increasing number of situations, nonclients also seek relief for negligent misrepresentation or aiding and abetting a client’s breach of fiduciary duty. Nonclients involved in litigation also can seek procedural sanctions for filing frivolous actions or discovery abuse.

Both client and nonclient remedies have been created to support lawyer fiduciary duties or the limits on advocacy imposed by other law. If you understand and observe your six C obligations, you should not create grounds for client relief. Identifying and staying within the limits of the law also should keep you out of third-party trouble.

All of this legal regulation demands careful attention to your six C professional responsibilities, and proper identification of the limits of the law. It also requires that you understand a range of distinctive remedies created by the Rules of Professional Conduct, statutes, and common law. We hope this book will help heighten your understanding of this law governing lawyers, so that you will serve your clients well. If you do not, keep in mind you may confuse your client’s identity, or worse, misunderstand your own obligations created by the Rules of Professional Conduct or other legal regulation.

§ 1.06 Our Problem Approach
To appreciate our methodology, let’s get started with a typical problem:

**LinkedIn**

Q. You know about LinkedIn?
A. A little.

Q. That’s another tool our CMO loves. She wants each of us to be on there.
A. Why?

Q. It’s the social media site for professionals. When people go on our individual LinkedIn site, CMO tells us they should be

\(^{28}\) RLGL § 6.