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Killer Correspondence for Lawyers!
Seminar Written Materials

One of the sharpest tools in the lawyer's arsenal is a surprisingly common item. The letter. But a letter that's written by a lawyer is not a simple piece of correspondence. It's a legal writing, albeit in a shorter form than some of the other forms of legal writing we usually discuss. There are issues of negotiation involved, persuasion, client communication (including informed consent) and even legal research. So let's go over some important legal writing concepts and apply them to the correspondence format.

Before I get into the substance of these materials, one note about an example I'll use throughout the program. There is one line from a letter that I'm going to pick apart to illustrate some issues in this program. Here it is:

> As to the following alleged conditions: Missing roof shingles; gutter draining at the roof surface; rusty appurtenances regarding chimney; loose cabinets and Parge coat missing or deteriorated, Sellers offer a concession of $2,500,00 in lieu of contesting or effectuating any such repair.

1. The basics

A. Outline your letters — The very basic structure: Intro, substance, Call to action.
B. Use plain English
   1. Be clear: Stay away from correspondence speak. Here's what I mean by that. Think about the way lawyers have been trained to write correspondence. It makes no sense. To prove it, I want you to look at the following fictional exchange between lawyers and a judge. This is what it would sound like if we talked the way we wrote correspondence.

      Lawyer #1: Your honor, enclosed herewith please find my trial memo for the within matter.

      Lawyer #2: Judge, I too am submitting pleadings that pertain to the above referenced litigation.

<u>Judge:</u> Thank you, counselors. I will forward same to my assistant and ask that she process this documentation accordingly.

<u>Lawyer #1:</u> Judge, this will confirm my conversation with your office wherein I was advised that the trial for this matter will take place on Monday, June 30th.

<u>Lawyer #2:</u> Your honor I concur in my adversary's position, though I am hesitant to acknowledge the time for the trial, as I have not yet been apprised of same.

<u>Judge:</u> Okay counselors, I will review the file on Friday and advise each of your offices as to the status of this matter no later than the following Wednesday.

2. Be concise: One point per paragraph and reduce the number of syllables in your words
3. Be direct. Say what you mean. Also, you always need a call to action. Say want you want.

2. The Demand letter.

Writing a letter that sets forth a demand in behalf of your client is an exercise in persuasive legal writing. Below is my process, which I'll elaborate upon during the program.

- <u>Conclusion</u>
  - Set them up. Why are you writing to them? (Introduction)
  - Make your claim. *"This is where I am going…this is what I'm expecting when I'm done…and here's why"* (Thesis)

- <u>Issue and Explanation:</u> This is how we got here and this is why I have to write this letter altogether.
  - Cast this in the light most favorable to your client.

- **<u>Argument paragraphs (instead of "Analysis")</u>**
- This is the fundamental element. A single convincing paragraph. Okay, more if you need it, but try to be concise.

  - **Tell them what you want them to believe (topic sentence)**
  - **Justify why they should believe it**
    - **Introduce and state your support**
    - **Explain why they should believe it; make the connection; slam this connection home**
  - *Transition to the next argument paragraph if there is one*

- <u>Conclusion:</u>
  - Synthesize and restate your arguments. Make them sound like a surgical strike. Biting, powerful, simple and direct.
  - Ask for what you want. Give them the call to action. What do you expect them to do? Demand it clearly

3. How to write a change-letter in drafting

- You need to make your letter easy to follow:
  - For ease of negotiation purposes- isolate the issues
  - For response purposes
  - For contract editing purposes
    - To make it easier when you track the changes that are ultimately made to the document. If you are writing the document amendments, you don't want to miss any changes. If the other side is doing the writing, you want to have a complete checklist so when you review the amended document you can ensure that all changes were made.
- How to make it easier to follow
  - Refer to the paragraphs in the agreement clearly
  - If you are responding to another lawyer's letter, refer to their points clearly
- Do a little negotiating in your proposed changes
  - Explain why you need the change
    - Consider the tone of your writing. Is it in your interest to be stern? Conciliatory? Assertive, but nice?
  - Provide proposed new language if you're able
    - If the other side already provided new language, then you need to address that. Maybe redline their proposed changes.
  - Choose your words carefully. This might not feel like "negotiation," but it very much is.
- Do you want to recommend a phone call or a meeting to address these issues?
  - PRO: It might be easier to address certain tough issues that way
  - CON: It prolongs resolving these issues
  - Maybe you identify just a few key issues that you talk about and resolve all the rest by letter.
- Have your client sign off on the letter before you send it
  - 1.2 issues, 1.4 issues.

4. The details inside your legal correspondence. Speed bumps!

A. Here are the rules on commas that we'll be talking about in the program:

Rule 1:
To separate a series.

Ex:
"I have syphilis, herpes, and a backache.

Rule 2:
Between adjectives

Ex: "I have a svelte, toned body."

“I once had a svelte, toned body.”

But not between all adjectives…
“I want some cold ice cream”

Trick, if you can insert the word, “and” then it gets a comma

Rule 3:
Before Conjunctions ? FAN BOYS…
For, And Nor, But Or Yet So

EX: “My wife went to the gym, and I went to Gelatissimo.”

But not always….There are two sentences—only place it when there are two sentences

“I thought of eating salad but ate pizza instead.”

Not two sentences, so no comma
Must be a sentence on BOTH sides of the conjunction

Comma Rule #4
Separate the excess: Comma off the “not needed” part of the sentence
Sometimes referred to as “nonrestrictive” clauses.

EX, “The Instructor who is quite handsome always shows up on time.”
Part of the sentence is not needed. Remove that clause....if the rest of the sentence can stand alone without changing the meaning, surround the clause with commas.

REVISED: “The Instructor, who is quite handsome, always shows up on time.”

Opposite (restrictive):
“Everyone who is handsome should get a prize”

Comma Rule #5

Introductory words or phrases

Use commas after words like “well, yes, why, oh, no” etc., when they begin a sentence
EX: “Yes, my Instructor is the most intelligent man I have ever met.”

Also after introductory phrases

EX: "Before leaving for the CLE, I drank five cups of coffee."
A little trick

If the first word has an -ing or -ed ending, then put the comma before the person/thing the sentence describes

"Screaming at the top of his lungs, the lawyer cheered when Teicher was introduced.."

Same thing with appositives.
Those are nouns that are not needed. These nouns refer to other nouns. If they're not needed, then they are appositive.

1. Stuart Teicher, the CLE Performer, is famous for his wit.
2. The attorney Teicher is more famous for his teaching abilities than his lawyering.
3. The New York Giants, those bums, surprised no one by stinking it up again all year

Comma Rule #6
"Point at the person"

You, Stuart, are a classic hunk.
Stuart, I think you're gorgeous.
You are stunning, Stuart.

Comma Rule #7
For quotes

The crowd said in unison, "We're sorry you're so tortured by your mother, Stuart."

Comma Rule #8
US style point — in dates, set off the day from the month, and the month from the year.

On Monday, April 4, 1978, Stuart had a realization.
Stuart had a realization on April 4.

4 April 1978

B. When do you capitalize words?

- When it's the first word in a sentence.
- When you're using the pronoun "I"
  - Unless it's in a text and you are trying to show that you are a child:

    - i'm super bummed…seriously, i can't even.
- Proper nouns.
    - A specific person, place, or thing.
        - Don't cheat if you go to a university. They'll probably kick you out.
        - vs. If you cheat at the University, you will be subject to discipline.
    - Or the name of a specific place: I want to go to Paris or Mississippi.
    - Or the name of a specific monument: Have you ever been to the top of the Empire State Building?
    - Or the name of a specific company: Nike, or Amazon.

5. Practical considerations for smoother sailing

- Don't write your email in the email, do it somewhere else
- Same thing for text boxes on line
- The benefits of attachments
    - The best of both worlds- professionally & tech-wise
- Start new emails to avoid the *Forwarding Follies*
- Lost or inadvertently sent emails. Know your version of 4.4(b)

6. Client Communications

A. Breaking Bad News to Clients

Breaking bad news is what I call an "ethical skill." To do it right, one must navigate a host of ethical issues. But those ethics rules aren't just a set of restrictions— those very rules can provide a ton of guidance about how to accomplish this task effectively. And the place we start when learning any skill is the "MPH Approach."

If you've ever seen my programming then you know how much I believe in the MPH approach. The key to succeeding in many situations is to have the right "Mindset" employ a smart "Process", and repeat those smart choices over and over again until they become good long term "Habits." As MC Hammer would have said, let's "break it down."

B. Mindset

Here is where your head needs to be at when breaking bad news to a client— acceptance. You must accept that the situation is going to be very difficult., You must accept

that it's going to put you in an uncomfortable situation. It's an unfortunate reality which is made clear in our obligation to advise our clients (Rule 2.1).[1]

> 2.1. Advisor.
> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

1. Sometimes you need to be a bad guy or gal.

Rule 2.1 makes me feel uncomfortable because it tells me that I need to stand up to my client. Maybe "stand up to the client" is a bit harsh. It might be more accurate for me to say that the rules requires us to "stand our ground." That phrase sounds better because it seems to confirm that lawyers need to maintain a sense of independence and speak the truth to our client. That's what Rule 2.1 means when it says, "exercise independent professional judgment and render candid advice." And that's why I say that Rule 2.1 means that sometimes you need to be a bad guy or gal.

Sometimes a lawyer needs to give a client the straight dope. And that straight talk might not be the message that the client wants to hear. In other words, sometimes a lawyer needs to give clients some bad news. Maybe our client has unreasonable expectations about what the justice system could deliver. Maybe the client doesn't understand the impact of some document they wrote or statement that they made. Oftentimes it's up to the lawyer to explain how a matter is likely to unfold, or to explain the possible negative ramifications of a client's behavior. That's what "independent professional judgment" is all about. it's about delivering a lawyer's honest assessment of a matter, even if that independent judgment differs with the client's expectations.

[1] A brief note about the rules...I'd like to reference the ABA Model Rules of Professional Conduct because most states' rules are a derivative of that code. However, copyright restrictions prevent me from doing so. As a result, the within rules are actually the Delaware Rules of Professional Conduct which are, for the most part, the same as the ABA code, but not subject to the same copyright restrictions.

2. Candor — a different angle

The idea of candor has long been associated with telling the truth, and that's accurate. But candor is about more than simply ensuring that the content of your speech is truthful. It's also about the manner in which you articulate those truthful statements. To be candid one must also be direct. That facet of candor is set forth in Comment [1] to Rule 2.1: "A client is entitled to straightforward advice expressing the lawyers honest assessment.

3. It's mandatory

The other aspect that makes Rule 2.1 uncomfortable is the fact that it's mandatory. The rule states that the lawyer "shall exercise independent professional judgment and render candid advice" (emphasis added). It doesn't say that you could render candid advice if you feel like it...or you need only do so in situations where you don't feel awkward. No, the rule requires that lawyer render that candid advice. This mandate is consistent with other rules. Take, for instance, the rule on communication.

The first part of Rule 1.4 makes it vey clear that a lawyer is duty-bound to speak to a client. Notice the use of the word "shall" in the early part of the rule. Rule 1.4 confirms that a lawyer is *required* to have difficult conversations with the client.

> Rule 1.4. Communication *(in part)*
> (a) A lawyer shall:
>> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>> (3) keep the client reasonably informed about the status of the matter;

C. Process

1. In the beginning:

a. Think ahead

You're giving bad news, which means that you know your client will not be pleased when they hear what you have to say. So do yourself a favor and don't go into that

conversation cold. Be prepared. And it's not just for you — think about you're client's experience. Yes, you need to be candid, but it would also be nice if you could make it as painless as possible. For that reason, you don't want to jump right into bad news. Stop and give a little thought first. That's why you need top consider the following things before you actually walk into the conversation (or pick up the phone, or draft the email):

— Consider their reaction. How will they feel? Empathize. Are they going to be angry? Sad? Confused? Will they cry? Yell? Lash out? Run out of the room? If you don't think of these things and you're caught off guard you could end up looking stupid and unprepared. Consider their reaction and also consider how you will react to those potential client behaviors.

— What questions will they ask? They will have questions and you need to be prepared for them. You need to have answers ready or they will doubt your competence. For this you need to consider those conversations you had with your clients in the past. What were their expectations? How does this bad news jive with those expectations? What will their biggest concerns be? Answer these questions before you break the bad news. Formulate some potential answers ahead of time so you'll seem like a confident advisor when the actual conversation takes place.

b. Covering your behind.

If you know that your client will not be pleased when they hear the bad news, then you might be concerned that the client will blame you for the distasteful situation that they find themselves in. As a result, there might be a temptation for you to want to protect yourself by obtaining a waiver of malpractice liability. Rule 1.8 addresses that situation. Notice that in order for the advance waiver of malpractice liability to pass ethical muster, the client must actually retain independent counsel.

Rule 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) * * *

Before we move past this topic, consider the following tricky situation. I could envision a situation where a lawyer just *knows* that their client will blame the lawyer for the difficult situation the lawyer is about to reveal. So, in order to protect themselves, the lawyer tries to obtain a waiver of malpractice liability before that lawyer reveals the bad news. And, to ensure that the lawyer actually obtains the waiver, the lawyer purposefully fails to mention the bad news until *after* the waiver is negotiated. Such a situation might be considered deception, which violates this rule on Misconduct, Rule 8.4(c). This could be true even if the client obtains independent counsel as required in Rule 1.8(h)(1). If a lawyer knows that there is some bad news coming and they withhold that bad news during the negotiations of the waiver with independent counsel, the hiding of that bad news could be considered deception which violates Rule 8.4(c) ("It is professional misconduct for a lawyer to...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...")

2. A process for actually breaking the bad news— follow the writing structure roadmap: CIRAC

Many of us remember our legal writing classes from law school where we were taught some acronym that was supposed to guide the structure of our writing. Some of us learned IRAC, others CRAC, and I'm sure there were other variations. If one wanted to include every letter, the acronyms would likely be CIRAC: Conclusion, Issue, Rule, Analysis and Conclusion.

There is a good reason that we use acronyms in legal writing because it allows us to present the material in a coherent manner. The better the structure, the better it will be understood by the reader and, ultimately, the documents will be more persuasive. It's for similar reasons that I believe the CIRAC structure is a great guide for breaking bad news to a client. If we can present the distasteful information in a coherent manner, we increase the

likelihood that it will be understood, and we put ourselves in the best position for charting a course forward, past the tough spot we might currently be in. Here is my version of how CIRAC looks in the breaking-bad-news context.

Important caveat: Remember that this is how I, personally, think the structure should look. You might think a different order is warranted and that's fine. But even if you choose to mess around with the order just make sure that you include all of these elements somewhere in your conversation.

a. Conclusion: Just like in a persuasive writing, you need to tell your client where you are going right from the beginning. They are going to want the bottom line— they don't want you to dance around it and keep them guessing — so give it to them right away. But you need to do it with some forethought. That means that you need a strong opening where you calmly introduce them to what's happening and then give them the functional equivalent of a thesis. Find some clear, concise, and direct way to explain the essence of the bad news. Force yourself to think of it as a thesis and you will then be able to create a short, meaningful, and complete statement that will set the tone for the conversation.

This approach is also consistent with the rules. In particular, Rule 1.14(a)(1) directs us to "promptly inform the client" of circumstances that require their attention. Sure, that phrase "prompt" is probably referring to the need to let the client know about important matters without significant delay in more of a bigger picture, "macro"-type setting. But it's also instructive about the way we should be approaching our clients in a "micro" setting. There is no reason to beat around the bush...to make the client wait for the bad news...to keep them on pins and needles. Get to the point promptly and let them know what they need to know — what they are *entitled* to know — immediately.

I think it's also important at the outset to also give them some indication of what you're going to recommend. Remember, your primary concern might be "how will the client take this bad news." But the client's ultimate concern is going to be, "so what does this mean for my matter...how does this bad news impact my case...where am I going to go from here?" That's

why I think you need to give them some indication about where you think it's all going. You'll explain the details more fully below, but part of your opening "Conclusion" needs to include where you think this is all going to end up.

b. Issue: In legal writing we then tell the author to explore the issue. We need to address the question that the court is facing. In the context of bearing bad news to a client, we need to address the question that the client is facing. And that question is "why."

i. WHY

When breaking bad news to a client you've got to explain why it happened. Why did we end up in this unfortunate situation? What happened? How did we get here? What issue arose/what phage was there that caused this bad news to come about? The client is going to want to understand how they got to the unfortunate situation before they will be able to consider the next step, so discussing the issue is critical in being able to move forward.

There are probably a bunch of reasons why the client finds itself in the unfavorable situation, and those reasons must be explained fully. In that respect your approach differs greatly from the legal writing context. I often coach lawyers to define the issue narrowly because by doing so you can direct the reader to look at the problem in a way that makes them favor your legal position. But context is everything. In the situation where you are delivering bad news to a client we are not trying to "convince" them of anything. You are explaining and consulting (to use the language of Rule 1.4). In these circumstances, a broad approach is probably warranted. In fact, the rules agree— Comment [2] to Rule 2.1 reminds us that, "Advice couched in narrowly legal terms may be of little value to a client..." Even the commentary is telling us that a broad approach is favored here.

Broad advice would include making reference to the factors set forth in Rule 2.1, including the "economic, social and political factors that may be relevant to the client's situation. And don't forget that you're allowed to refer to moral and ethical considerations in giving advice. In fact, those elements ,ay be very important to your client. Clearly, however, lawyers aren't used to dispensing advice about things like morality. That's why Comment [2[to

Rule 2.1 explains that. “Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”

ii. BE DIRECT IN YOUR DELIVERY

While it might be advisable to approach the issue from a broad theoretical perspective, that’s not the case from a practical perspective. What I mean by that is, the manner in which you present the broad issues should be clear, concise, and direct (those really are the watchwords for this entire section, when you think of it). To accomplish that,

(a) Don’t talk in circles. Get to the point. I know you’ll be reluctant to do so because bad news is uncomfortable. But resist the temptation to beat around the bush, and

(b) Don’t sugar coat it…But a little artificial sweetener never hurt anyone. Yes, you need to be direct. No, you can’t cover things up and make tough circumstances seem better than they are — if the situation is dire, then that needs to be communicated to the client. (that’s part of our duty of candor per Rule 2.1. But you don’t have to be mean about it. You are allowed to present the bad news in a soft manner. Yes, that’s a style point, but it’s something to consider. Be candid, but try to be sweet about it.

(c) Define the issue clearly. Think about this before hand and go look up the phrase “circumlocution.” It basically means using many words when only a few will do.

(d) Consider using the best two words ever. “I understand.” Those words can validate a client’s feelings without forcing you to commit to anything substantive. I’m not saying you should use this to be evasive, but you’re going to be looking for some way to show empathy without necessarily agreeing with a client. Here it is.

(e) Tell them that you’re upset too. It might soften the blow if they know that you share their feelings in this regard. To a certain extent, this is an extension of empathy. But whatever you do, be authentic. If you’re not actually upset about the situation, then don’t fake it. You’re not that good of an actor. If you are disingenuous your client will sense it, your credibility will be shot, and ultimately that will destroy the lawyer-client relationship.

c. Rule: We already discussed how you’re going to explain the legal issues that are driving your advice. When doing so, make sure that you talk about the legal authority that governs the bad news. Explaining the lawyer is important to ensure that your client has a full understanding of the matter. In addition, being complete in this regard will help you comply with Rule 1.4. I know this seems obvious, but it’s the sort of detail that might slip through the

crack in tough situations. I'm including it here just so you don't forget about this aspect of the conversation.

d. Analysis: This section is all about making connections, and explaining those connections to the client. Analyze how the bad news affects their case and where they are going from here. Explain the ramifications on their matter. Does the bad news mean that their case is over? Are there any changes to strategy, or alternative tactics that could be employed? Is there some rehabilitation or mitigation that will help?

i. THE INFORMED CONSENT CHECKLIST

I'm a big proponent of using the rules as tools and here is place where that comes into play. Make sure that you provide a complete analysis to the client by using the rule on informed consent as a guide. The elements in these rules provide a great checklist for the critical factors that need to be addressed.

That phrase "Informed consent" has a lot of depth. It's defined in several places throughout the code, and much attention is given in those definitions to the contents of the conversation between lawyer and client. Those code sections reveal that in order to properly obtain informed consent, lawyers need to focus intently on the quality of the communication and the details of what's discussed. A conversation containing only generalities will not qualify as informed consent. To the contrary, if one breaks down the rules that address the term, one can see that a checklist of sorts emerges. A lawyer needs to hit all of these specifics in order to be said to have obtained informed consent from a client (the text below comes from the rules, but I added the dashes/parenthases and changed the spacing for effect).

> Rule 1.7 Commentary [6] Informed Consent…. The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent.
> * * *
> Ordinarily, this will require communication that includes
>
> —a disclosure of the facts and circumstances giving rise to the situation,
> —any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and
> —a discussion of the client's or other person's options and alternatives.

—In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.

When you make notes about the items you'l be talking about in the Analysis…those connections between the bad news and your client's case going forward…consider the elements in Rule 1.7 above and make sure you've addressed all of them. Cross check the 1.7 list with your notes to ensure that you're having a complete conversation with your client, both ethically and substantively.

In addition, there are two specific items that you should also include in your analysis…

ii. COSTS — Your client is going to care about money, thus, you must also talk about costs. Rule 2.1, Comment [2] explains that an important factor in the advice we give a client might be the question, *How will this bad news affect the cost of the matter?* It seems pretty elementary, after all, the dollars and cents are always a key part of an attorney-client relationship. So don't forget to include topic that in your checklist.

iii. THE EFFECT ON OTHERS — One last issue that should be covered, and this also comes from Comment [2] of Rule 2.1. The rule reminds us that the advice we give our clients should include some consideration of how their decisions impact others. Thus, at this point you should also cover, *What effect will this bad news have on other people that might be important to the client?* And it's not just because the rules direct us to consider this issue. It's likely a connection that will matter to the client as well.

e. Conclusion: Conclude with your plan of action. Yes, in the previous section you talked about "where do I go from here", but in this section you clearly set forth what the actual next steps will be. You need to clearly articulate the plan so that your client leaves the conversation will the feeling that you are competent (Rule 1.1) and diligent (Rule 1.3) and that you have the matter under control.

And before you walk away, double check yourself. When you articulate that specific plan, just double check to ensure that you've properly communicated all of the critical

information that your client needs to know. Use the elements listed in Rule 1.0(e) — the other rule where "informed consent" is defined. I'm paraphrasing the language of the rule when I say that you should make sure that you get your client's "Agreement" to the "Proposed course of conduct " and that in doing so you have communicated "Adequate information," explained the "material risks" and the "reasonably available alternatives to the proposed course of conduct."

D. Beware of the dangerous habit of paternalism

In all instances where we advise a client the client will want us to participate in the discussion. They will need us to give them the information they'll need in order to forge a plan to move forward. But in specific situations where we are delivering bad news to a client, there is an added concern that we will substitute our decision making for the client's. That's because our client will be in a vulnerable position, there will be difficult issues facing them, very likely there will be several distasteful options, and they often won't want to make the decision themselves. Instead, they'll say something like, "what do you think I should do." Now, answering that question might not be supplanting our decision for that of the client, but what about when they get a little more desperate and say something like, "I don't know what do to—just tell me what I should do." At that point we're probably crossing the line. Do not go there. One of the dangers of giving advice to clients is the potential of making the decision for the client, and you don't want to cross that line.

What we're really dealing with here is the question, *who gets to make the decisions in the attorney client relationship?* It's among the most difficult issues to navigate and the rules really don't help us very much (as you'll see below).

The question of who makes the decisions in a lawyer-client relationship is far more confusing than it first appears. There are a slew of factors that come into play, beyond the obvious Rule 1.2. Because of the myriad of factors that come into play, there is also a lot of overlap with other rules. For instance, there are issues of communication (Rule 1.4) and whether to withdraw (Rule 1.16).

There are practical issues as well- for instance, as lawyers we are required to maintain a sense of professional sovereignty. We can't simply act as tools and do what other people say-- in fact there are a variety of rules that require us to exhibit independence. However, sometimes lawyers end up taking so much control that they lean towards paternalism. In addition, there are ego issues. That's right, our ego creates a bit of havoc when determining who calls the shots in a lawyer-client relationship. Navigating the waters between being a person who executes a client's objectives and playing the role of independent advisor can be treacherous. Hopefully, the rules that follow will serve as a useful guide.

Who makes the decisions during the representation, lawyer or client? If I asked you to craft an answer, you could probably come up with a phrase that made sense, but I bet it would be relatively vague. That's because it's an easy answer in theory, but it gets tough to apply in real life. The rule that gives us direct guidance is Rule 1.2, which reads as follows:

Rule 1.2. Scope of representation *(in part)*
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's deci- sion, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

A review of the rule reveals that the client decides the objectives and we control the means, after consultations (that's where the rule on communication, Rule 1.4, comes in). While that's an easy theoretical concept, it's hard to determine how it translates into practice. What exactly constitutes an objective, versus means? Monumental decisions are easy to put in the former category and trivial matters into the latter. But what about the multitude of issues that fall in between? Unfortunately there isn't any guidance in the rules or commentary and, as usual, we are left to our own devices to figure it all out. Note, however, that there are a few items that

are clearly within the client's purview. Those particular instances are set forth in 1.2(a), and make special notice of the difference between a civil and criminal context.

E. Mistakes happen. How should you deal with them? (if time permits we'll talk about this. here is an outline of that discussion):

1- Should you apologize?

a. If it's you're fault, sure.
b. Remember- apologies are "but-less"
c. Be above board and be authentic

2- Unique issues for lawyers regarding apologies.

a. Malpractice issue
i. Watch for admissions
ii. Hire a lawyer? Contact your carrier?

b. Grievance issue to watch out for…be careful about getting them to settle and watch out for Rule 1.8.

Rule 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. [Emphasis added]

Note the key difference in those two sections — (h)(1) says that the client must be "independently represented" as opposed to (h)(2) which only requires that the client be "given a reasonable opportunity to seek the advice of independent legal counsel"