



**Annual Meeting 2011**  
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# Movie Lawyer Ethics: Corporate Counsel, This Time, It's Personal

October 24, 2011

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## Now playing . . . .

- Disclaimers and the Real World
- The Movie World and Hollywood's Take
- Ethical Issues:
  - Fundamentals
  - Negotiation Ethics
  - Upjohn and Communications with Current Employees
  - Communications with Employees Represented by Counsel
  - Organization as Client; Affiliates
  - Privileges and Confidences
  - Document Retention
- As if ethics credits were not enough . . . .



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## **Disclaimers: 1 of 3**

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## **Disclaimers: 2 of 3**

- The Godfather (1972)
- Network (1976)
- Cape Fear (1991)
- The Spanish Prisoner (1998)
- The Insider (2000)\*
- Enron: The Smartest Guys in the Room (2005)\*
- Syriana (2005)
- Michael Clayton (2007)



## Disclaimers: 3 of 3

**This motion picture would have been rated**





## Real World: Risk

<p><b>CALIFORNIA (2008)</b></p> <ul style="list-style-type: none"><li>165,474 Lawyers</li><li>11,664 Inquiries</li><li>2,802 Investigations</li><li>469 Adverse Actions</li></ul>	<p><b>ILLINOIS (2008)</b></p> <ul style="list-style-type: none"><li>83,881 Lawyers</li><li>5,897 Investigations</li><li>135 Sanctions</li><li>131 Lawyers</li></ul>	<p><b>MISSOURI (2008)</b></p> <ul style="list-style-type: none"><li>23,362 Lawyers</li><li>2,362 Complaints</li><li>757 Investigations</li><li>168 Sanctions</li></ul>
<p><b>NEW YORK (2007)</b></p> <ul style="list-style-type: none"><li>150,000 Lawyers</li><li>13,973 Complaints</li><li>898 Discipline by C'mte</li><li>208 Discipline by Court</li></ul>	<p><b>PENNSYLVANIA (2008)</b></p> <ul style="list-style-type: none"><li>60,531 Lawyers</li><li>4,787 Complaints</li><li>301 Sanctions</li></ul>	<p><b>TEXAS (2008)</b></p> <ul style="list-style-type: none"><li>81,601 Lawyers</li><li>7,308 Grievances</li><li>299 Sanctions</li></ul>



## Other Risks

- Sanctions
- Civil Liability
  - Direct
  - Indirect
- Disqualification
- Embarrassment
- Unemployment





# Real World: Risk

## Google Rallies Defenses After Italian Court Convicts Company Execs Over Online Video

An Italian criminal court judge has convicted three Google executives, including chief legal officer David Drummond, for footage on the company's now defunct video-sharing platform that prosecutors say violated that country's privacy laws. Though the Google executives don't face any prison time, it is a huge setback, especially considering the liability precedent it could set in Europe, according to attorney Samuel Buffone, who says this is the sort of thing that could "break the Internet."

## Prison Sentence For Ex-Converse Executive

Former senior general counsel, William Sorin, was found guilty in options backdating case.  
By [W. David Gardner](#)  
[InformationWeek](#)

## 3rd Circuit Upholds Conviction of Former Rite Aid General Counsel

However, judges agree that Brown, who is about halfway through a 10-year prison term, is entitled to a new sentencing hearing

Shannon P. Duffy  
The Legal Intelligencer  
February 25, 2010

## Former General Counsel of Monster Worldwide Gets Probation in Backdating Case

Mark Hamblett  
New York Law Journal  
March 03, 2010

The former general counsel at Monster Worldwide Inc. was sentenced to one year of probation Tuesday, getting a break on his sentence because of his extensive cooperation with a government probe into backdating stock options at the job search company. Myron Olesnycky, 48, was also ordered by Southern District of New York Judge Jed S. Rakoff to forfeit \$381,000 and pay a fine of \$6,000. The sentence was imposed more than three years after Olesnycky pleaded guilty to securities fraud and conspiracy to commit securities fraud.



## Real World: Risk

“Puzzled by these recent headlines? Reminiscing about the ‘good old days’ when lawyers’ actions were basically immune from regulatory enforcement actions and criminal prosecution? Well, those days are over and its time to wake up and smell the mixed brew of civil penalties and criminal charges against lawyers.” Vol 11, No. 7, Bloomberg Law Reports: Corporate Governance, Ralph C. Ferreira & Ilona B. Coleman



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## Real World: Risk

“Puzzled by these recent headlines? Reminiscing about the ‘good old days’ when lawyers’ actions were basically immune from regulatory enforcement actions and criminal prosecution? Well, those days are over and its time to wake up and smell the mixed brew of civil penalties and criminal charges against lawyers.” Vol 11, No. 7, Bloomberg Law Reports: Corporate Governance, Ralph C. Ferreira & Ilona B. Coleman (2005)



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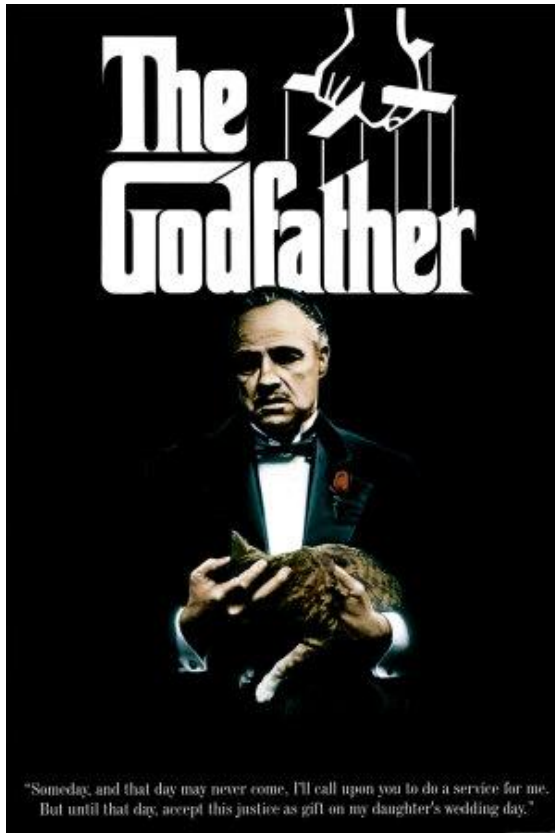




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## The Godfather (1972)



- The Great American (Lawyer) Movie
- Tom Hagen has a “special practice . . . limited to one client.”



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## **The Godfather (1972)**

- Tom Hagen = Ethical lawyer?





## **The Godfather (1972)**

- Rule 1.4(a)(3) Communication: “A lawyer shall ... keep the client reasonably informed about the status of the matter....”



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## **The Godfather (1972)**

Why is Michael a smart client?



## The Godfather (1972)

Why is Michael a smart client?

- Ethics -- Rule 1.2(d) Scope of Representation: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent....”
- Law -- Crime-Fraud Exception: *Clark v. U.S.*, 289 U.S. 1 (1933) (“A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.”)



## The Godfather (1972)

Why is Michael a smart client?

- Model Rule 1.6(b)(1) Confidentiality of Information: “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm.”
- Illinois Rule 1.6(c): “A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm.”
- N.D. Illinois Local Rule 83.51.6(b): “A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.”



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## **The Godfather (1972)**

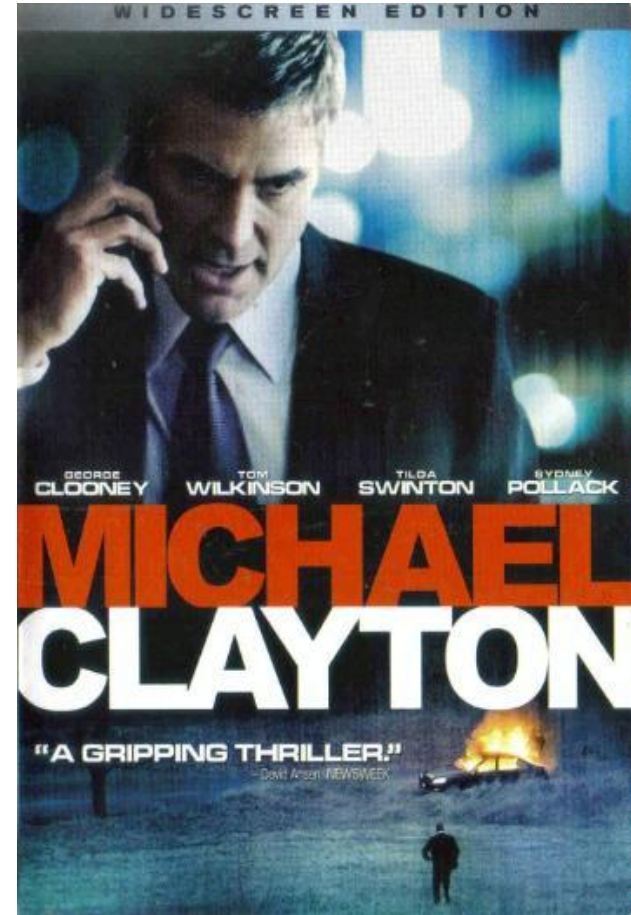
- Rule 1.2(a): “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation....”



## Michael Clayton (2007)



- Trivia Answer
- GC Tilda Swinton has grown dissatisfied with U-North's outside counsel.







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## The Basics

- Rule 8.4(b): “It is professional misconduct for a lawyer to ... commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects....”
- Rule 1.2(d): “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”



- Cape Fear (1962) is better.
- Former PD Nick Nolte is being stalked by former client, Robert DeNiro.
- DeNiro does his time, and intends to instruct Nolte on the meaning of “loss.”
- Nolte tries everything, admits his misdeeds to his partner.



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## **Cape Fear (1991)**

- Question: Can a lawyer reveal a confidence to another lawyer in connection with seeking legal advice?



## Cape Fear (1991)

- Question: Can a lawyer reveal a confidence to another lawyer in connection with seeking legal advice?
  - Rule 1.6(b)(4): “A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to secure legal advice about the lawyer's compliance with these Rules.”



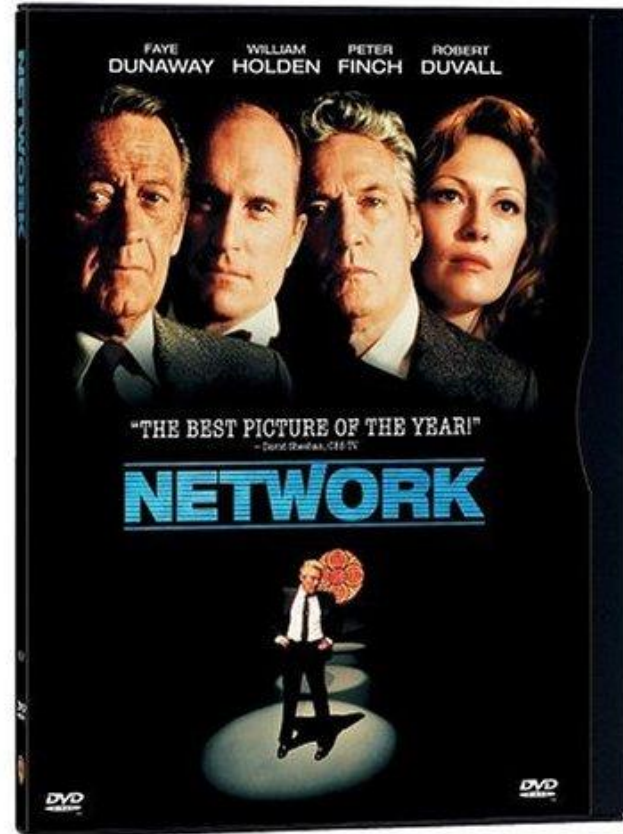
## Cape Fear (1991)

- Does Thompson have a duty to report?
- Rule 8.3, Reporting Professional Misconduct:
  - (a) “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”
  - (c) “This Rule does not require disclosure of information otherwise protected by Rule 1.6 ....”



## Network (1976)

- “I’m as mad as hell ....”
- Oscar® Trivia
- What else was on the UBS Network, other than the Howard Beale Show?







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## Negotiation Ethics

- Limitations on advocacy:
  - Rule 3.1, Meritorious Claims: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”
  - Rule 3.4, Fairness to Opposing Party: “A lawyer shall not ... unlawfully obstruct another party' s access to evidence or ... falsify evidence, counsel or assist a witness to testify falsely, or ... request a person other than a client to refrain from voluntarily giving relevant information to another party unless....”



## Negotiation Ethics

- Key Ethical Rule on Negotiations
  - Rule 4.1: “[A] lawyer shall not knowingly ... make a false statement of material fact or law to a third person; or ... fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”



## Negotiation Ethics

- “Knowingly” requires “actual knowledge of the fact in question,” which “may be inferred from the circumstances.” Rule 1.0(f).
  - *Brown v. Genesee County*, 872 F.2d 169 (6<sup>th</sup> Cir. 1989) (when defense counsel did not know, but only “believed it probable” that plaintiff and her lawyer were mistaken concerning computation of damages in employment discrimination case, lawyer “under no legal or ethical duty” to correct factual error).
  - *In re Eliassen*, 913 P.2d 1163 (Idaho 1996) (collections lawyer who warned debtor his driver’s license would be suspended if he did not pay, violated Rule 4.1 by sending a second letter with same warning after being informed that Legal Aid lawyer contacted department of motor vehicles and was advised license could not be suspended; “lawyer should have done more research before . . . reasserting his earlier misstatement of the law”).



## Negotiation Ethics

- Standard: *Could* the statement have influenced the hearer?  
Not whether the statement actually influences.
  - *In re Merkel*, 138 P.3d 847 (Or. 2006) (information is material if it “would or could have influenced the decision making process significantly”).
  - *In re Summer*, 105 P.3d 848 (Or. 2005) (personal injury lawyer’s representations to insurer were material and violated Code analogue of Rule 4.1(a), notwithstanding that insurer denied claim anyway).



## Negotiation Ethics

- Rule 4.1, Comment [2]: “This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under **generally accepted conventions in negotiation**, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.”
- ABA Ethics Op. 06-439 (2006): Statements about a party’s negotiating goals or willingness to compromise are usually not covered by 4.1



## Negotiation Ethics

- *Ausherman v. Bank of America Corp.*, 212 F.Supp.2d 435 (D. Md. 2002).
- In negotiations with adversary, lawyer sent letter offering to settle, saying he had had information that he would disclose following settlement.
- When deposed, lawyer said he made “the representation, for the purposes of maximizing my clients’ settlement position.”
- “So at the time you made this statement, you were lying?” Mr. Sweetland answered, “That’s correct.”
- Four questions:
  - (1) What is the statement or omission in dispute?
  - (2) Is it untrue or deceptively incomplete in any significant respect?
  - (3) Reasonably viewed, is it important to the subject that is being negotiated?
  - (4) At the time it was made, did the attorney know or should have known under the circumstances that the statement was untrue?



# Negotiation Ethics

## Safe

- Downplaying a client's willingness to compromise.
- Overstating/understating the strengths/weaknesses of a client's position.
- Not advising your opponent that the statute of limitations has run on your client's claim.
- Generally, remaining silent okay (except, e.g., death of client).

## Not Safe

- Knowing misrepresentation of "a party's actual bottom line or the settlement authority given to a lawyer."
- "To the best of my knowledge, my client's insurance is limited to \$200,000." *Slotkin v. Citizens Casualty of New York*, 614 F.2d 301 (2d Cir. 1979) (holding that attorney exhibited "reckless indifference to error" because documents in attorney's possession showed that there was an additional policy of \$1 million dollars).

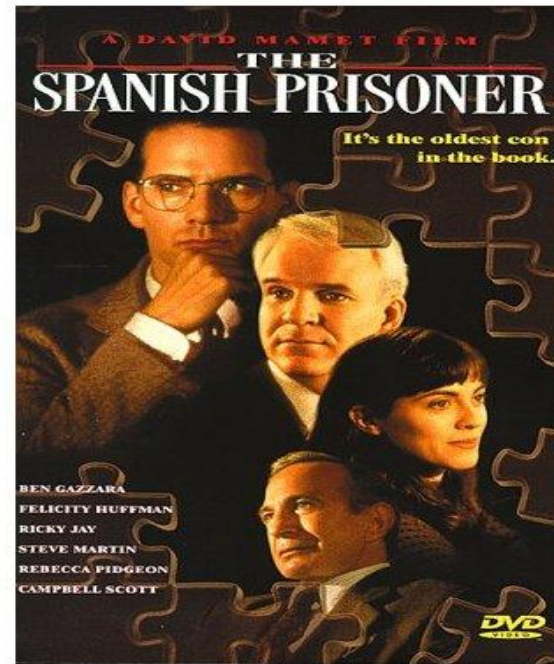
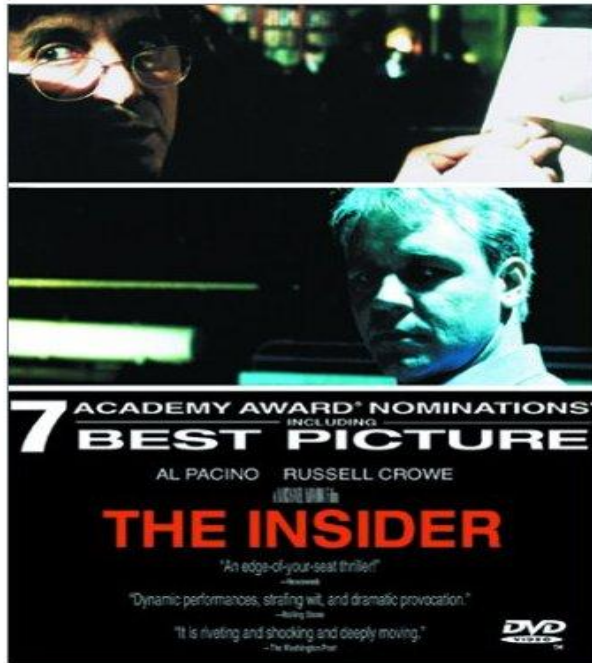




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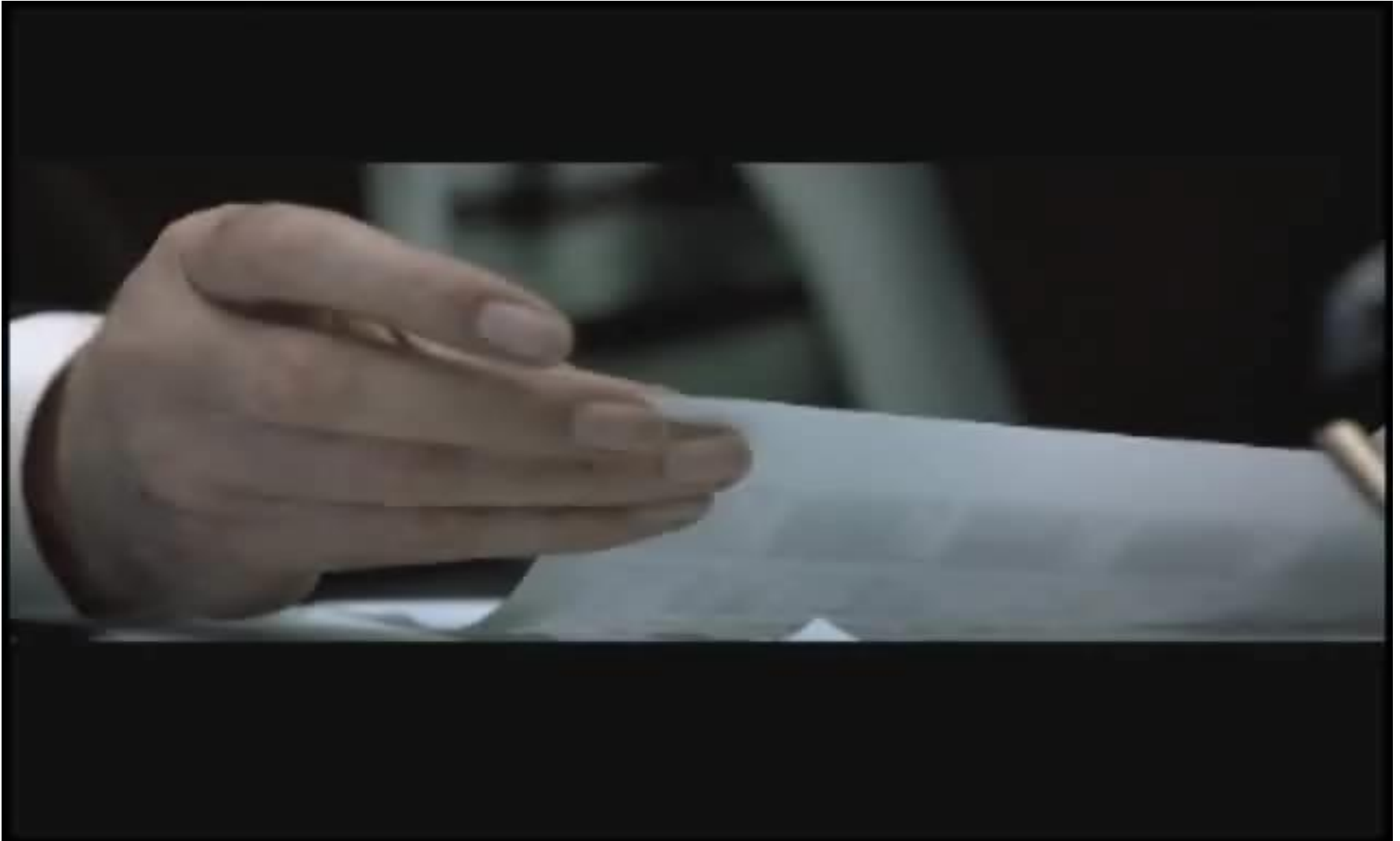
# Failure of Consideration





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## Communications With Represented Persons

- Rule 4.2, “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”



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## Organization as Client

- Miranda-like invocation of counsel?
- Is there any doubt that those lawyers do not represent Campbell Scott?
- Rule 1.13(f): “In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.”



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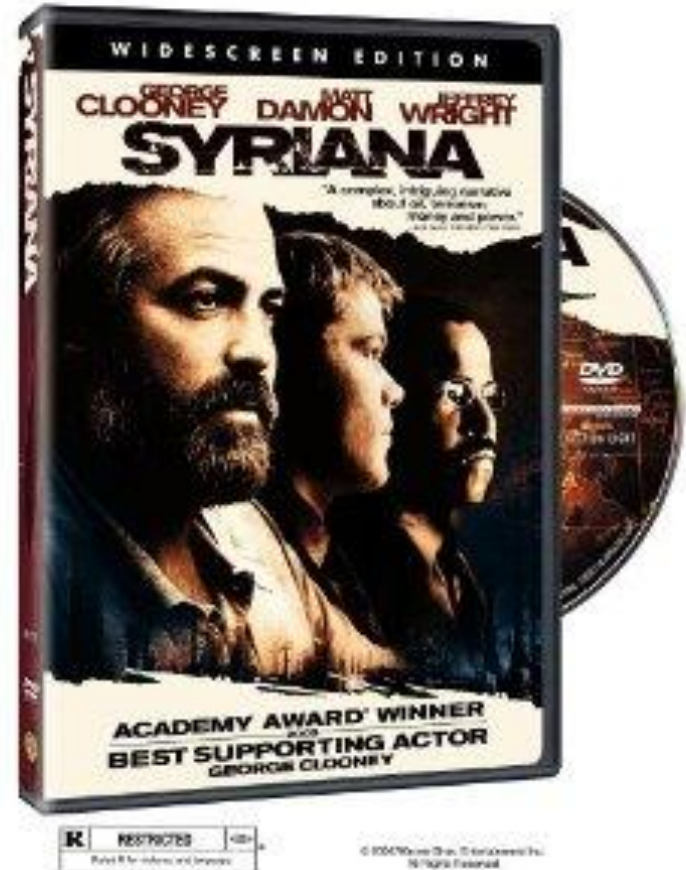
## Organization as Client

- What if CBS News and CBS Corporate were separate, but related entities: Who does Gina Gershon represent?
- Rule 1.13(g): “A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.”
- Rule 1.7, Comment [34]: “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.”



## Syriana (2005)

- The Plot
- Connex-Killeen
- Pay careful attention to what the lawyers say







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## **Syriana (2005)**

- “Confidentiality Agreement”
  - Does not necessarily address discoverability
  - May be vehicle to address who is and is not a client
- Who is the client?
  - Connex, Killeen, or both?
  - If both, is there a conflict?
- Are the discussions in the conference room privileged?



## Privileges, Confidences, etc.

- Reasons to Keep Secrets:

- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_



## **Privileges, Confidences, etc.**

- Reasons to Keep Secrets:
  - Attorney-Client Communication Privilege
  - Attorney Work Product Doctrine
  - Self-Critical Analysis Privilege
  - Common Interest – Joint Defense
  - Ethical Duty of Confidentiality
  - Subject Matter Rules (e.g., Fifth Amendment; Spousal; Doctor-Patient; Priest-Penitent; Executive; Deliberative Process; State Secrets; Law Enforcement; Peer Review)
  - Common Sense



## Privileges, Confidences, etc.

	<b>Attorney-Client</b>	<b>Work Product</b>	<b>Self-Critical</b>	<b>Ethical Conf.</b>
<b>Rule of</b>				
<b>Scope</b>				
<b>Who "Owns"?</b>				



## Privileges, Confidences, etc.

	<b>Attorney-Client</b>	<b>Work Product</b>	<b>Self-Critical</b>	<b>Ethical Conf.</b>
<b>Rule of</b>	Evidence	Civ. Pro.	Law	Ethics
<b>Scope</b>				
<b>Who "Owns"?</b>				



## Privileges, Confidences, etc.

	<b>Attorney-Client</b>	<b>Work Product</b>	<b>Self-Critical</b>	<b>Ethical Conf.</b>
<b>Rule of</b>	Evidence	Civ. Pro.	Law	Ethics
<b>Scope</b>	Narrow	Broader	Narrow	Broadest
<b>Who "Owns"?</b>				



## Privileges, Confidences, etc.

	<b>Attorney-Client</b>	<b>Work Product</b>	<b>Self-Critical</b>	<b>Ethical Conf.</b>
<b>Rule of</b>	Evidence	Civ. Pro.	Law	Ethics
<b>Scope</b>	Narrow	Broader	Narrow	Broadest
<b>Who "Owns"?</b>	Client	Attorney	Client	Both





## **Syriana (2005)**

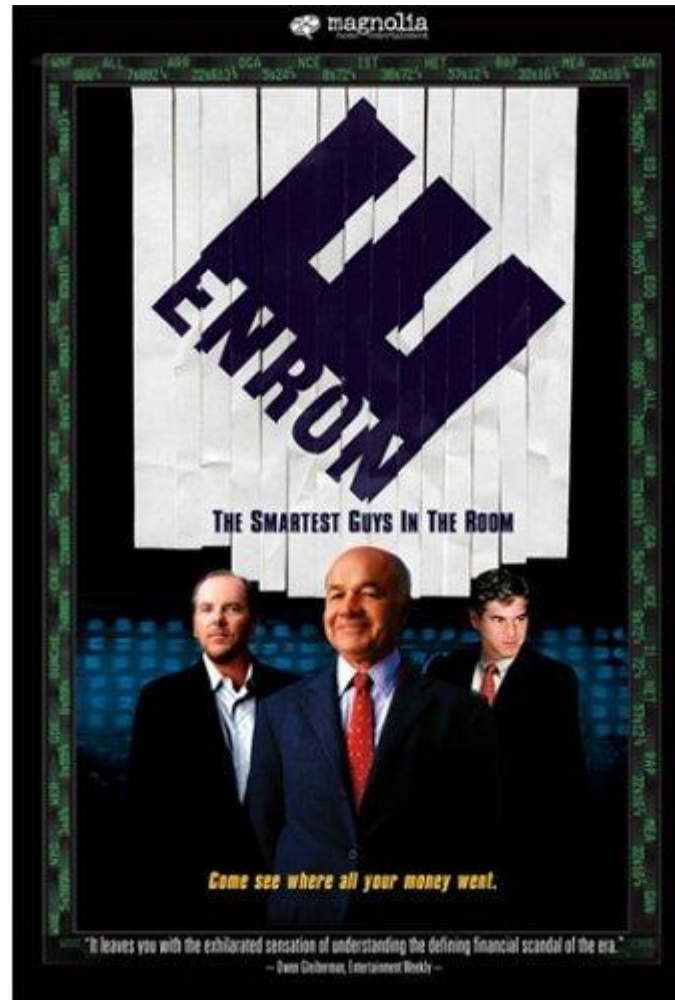
- Attorney-Client Privilege
  - If both Connex and Killeen are clients ....
  - If only Connex is a client ....
  - If the meeting is in Illinois ....
- Work Product Doctrine
  - Is there “anticipation of litigation”?
  - Is a government investigation enough?
  - If work product asserted, is there a corresponding obligation to preserve documents?



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# Privileges, Confidences, etc. in Action





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## Privilege, Preservation, and Risk

To: Michael C. Odom@ANDERSEN WO

cc:

Date: 10/12/2001 10:53 AM

From: Nancy A. Temple, Chicago 33 W. Monroe, 50 / 11234

Subject: Document retention policy

Mike-

It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.

Nancy

<http://www.intranet.andersen.com/onofirm.nsf/content/ResourcesFirmwidePoliciesPolicy-ClientInformationOrganization!OpenDocument>



## Privilege, Preservation, and Risk

10/1/01.  
TC John Stewart.  
What does should we keep? historically, keep everything.

Ben Newhouse  
+ Tom Green -



## Privilege, Preservation, and Risk

Highly probable some SEC investig.





# Privilege, Preservation, and Risk

*Confidential - Attorney Work Product*

**SMARTCOUNSEL**  
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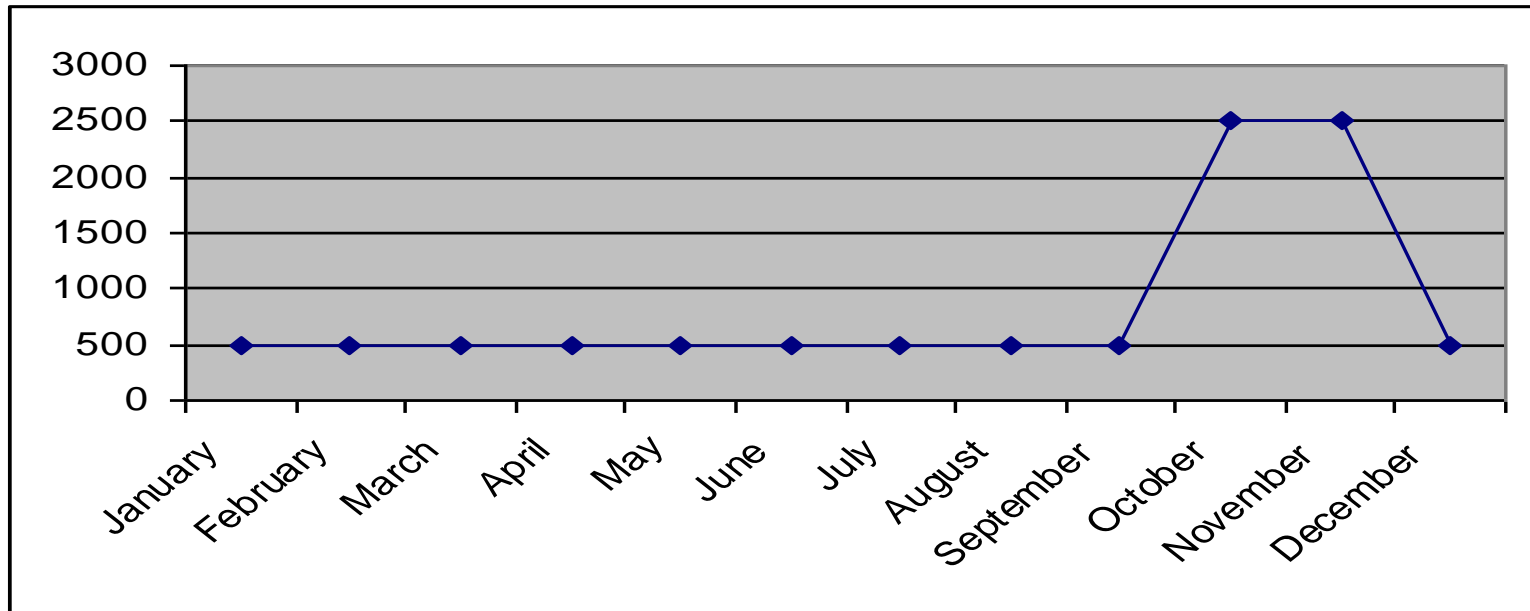
## Litigation

### Matter Description & Activity

External Client Name	ENRON CORP.
Matter Number	AA2001 002325
Matter Status	Open
Description of Claim and Contested Services: (Add Report Description)	(13-Dec-2001-Bernice P. Wolframski): - The U.S. Firm has been sued in state and federal court in Houston, Texas, in connection with accounting and auditing services the U.S. Firm provided to ENRON Corp. Shareholders have brought state court derivative claims against the U.S. Firm alleging negligence, fraud and breach of contract for auditing and accounting services. Shareholders have also brought claims for securities fraud under Section 10(b) of the 1934 Securities and Exchange Act alleging that Andersen's audit reports on Enron's financial statements for the years ended December 31, 1997 through 2000 were false and misleading.



# Privilege, Preservation, and Risk





# Privilege, Preservation, and Risk

**To:** David B. Duncan  
**CC:** Michael C. Odom@ANDERSEN WO; Richard Congd@ANDER WO  
**BCC:**  
**Date:** 10/16/2001 08:39 PM  
**From:** Nancy A. Temple  
**Subject:** Re: Press Release draft  
**Attachments:** ATT&ICIQ; 3rd qtr press release memo.doc

---

Dave – Here are a few suggested comments for consideration.

-I recommend deleting reference to consultation with the legal group and deleting my name on the memo. Reference to the legal group consultation arguably is a waiver of attorney-client privileged advice and if my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid.

-I suggested deleting some language that might suggest we have concluded the release is misleading.

-In light of the "non-recurring" characterization, the lack of any suggestion that this characterization is not in accordance with GAAP, and the lack of income statements in accordance with GAAP, I will consult further within the legal group as to whether we should do anything more to protect ourselves from potential Section 10A issues.



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## Depressed Yet?





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## **You're Not Alone . . . .**

- PARTNER received a seven-year prison sentence for his role as the lead attorney for the failed futures trading firm; convicted of conspiracy, wire fraud and securities fraud.
- PARTNER received a three-year prison sentence for his role in the wiretapping.
- PARTNER received a 6½-year prison term for his role in the sale of tax shelters.
- Multiple PARTNERS received sentences of 6 to 30 months for their role in paying kickbacks to lead plaintiffs and expert witnesses.
- PARTNER received a 15-month prison term for filing false documents in a corporate bankruptcy proceeding that did not disclose a conflict of interest.



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# Questions?

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