

BEST PRACTICES AND RISK MANAGEMENT TIPS TO AVOID OR MINIMIZE MALPRACTICE CLAIMS



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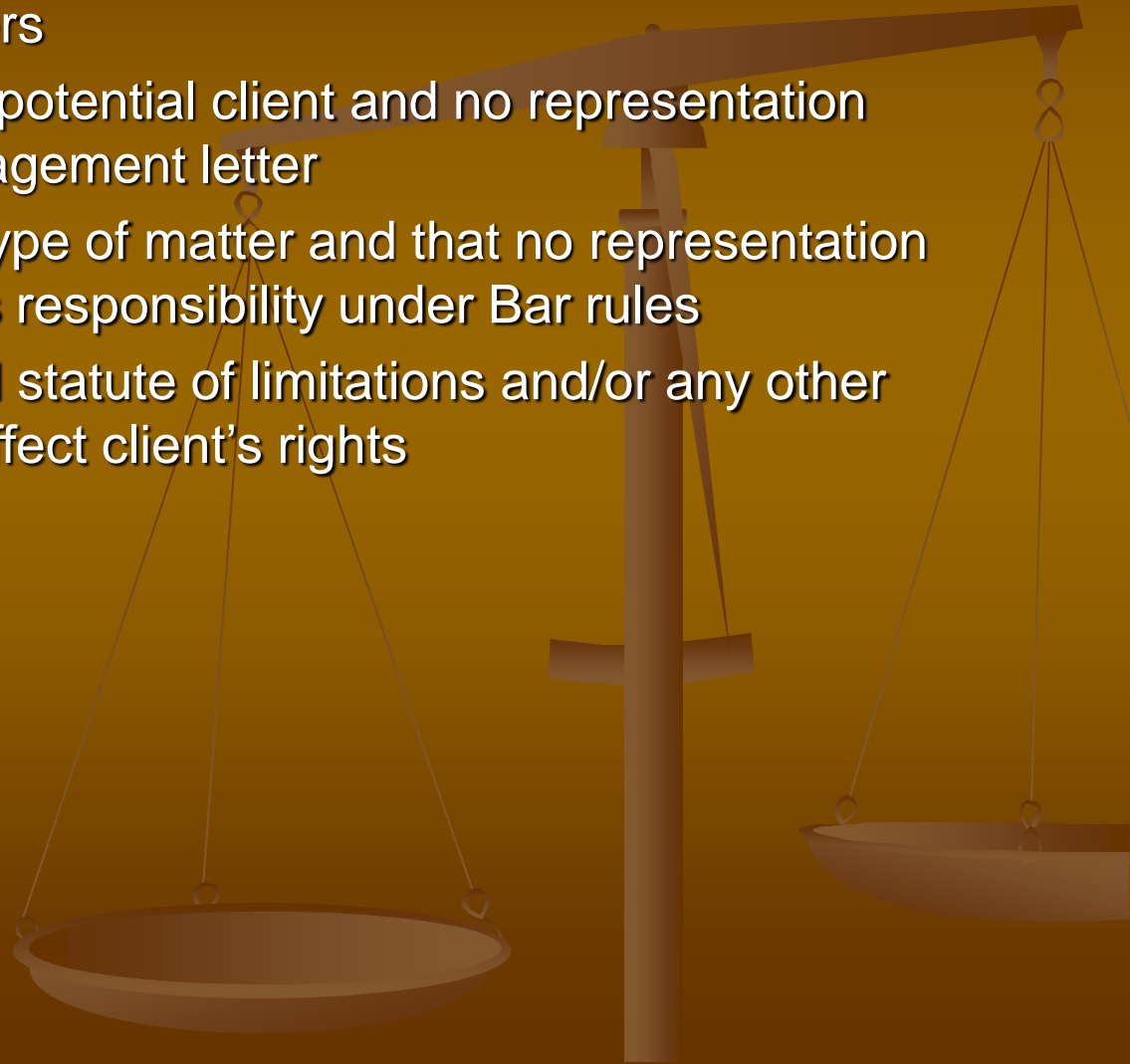
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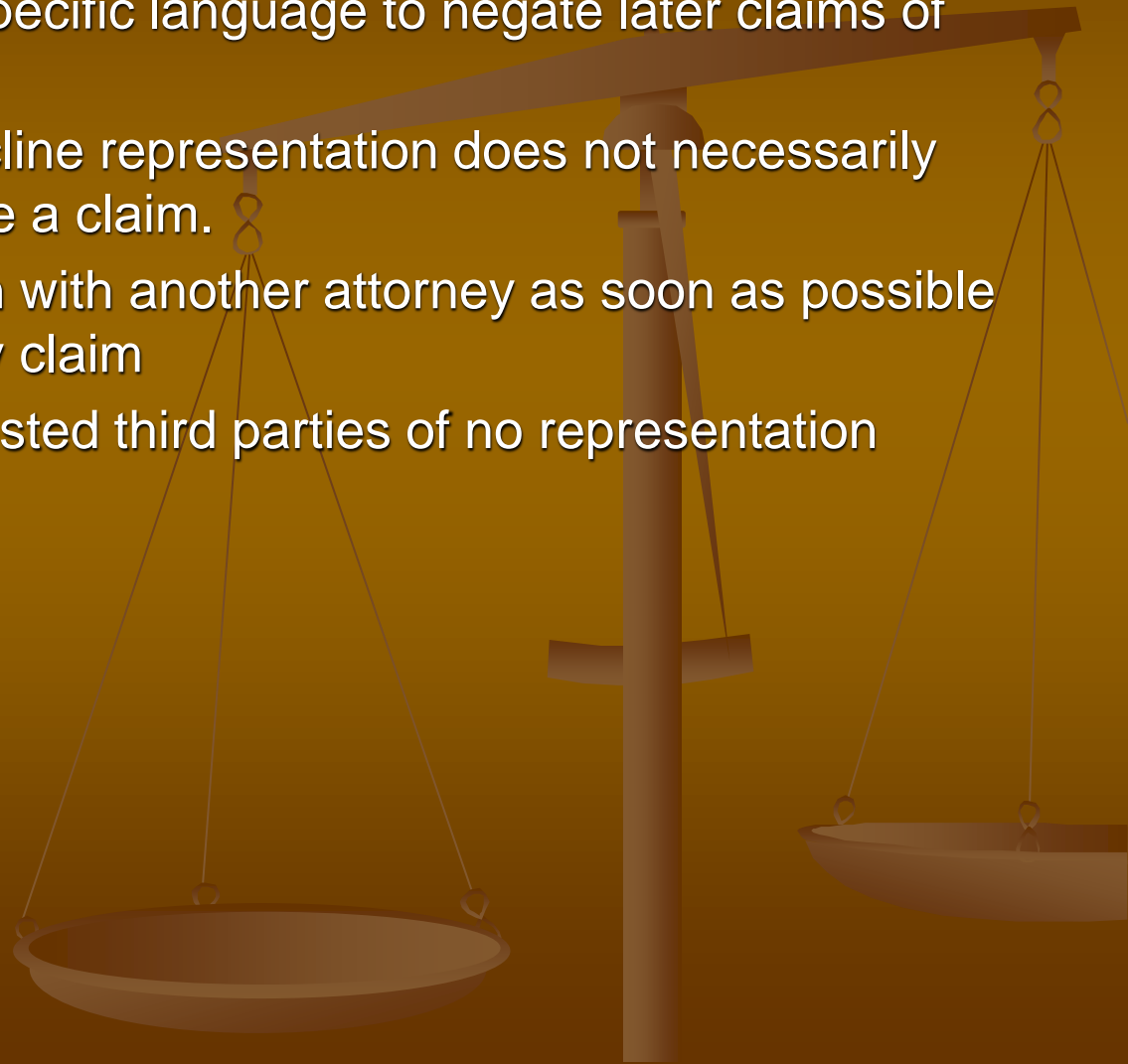
Withdrawal and Non-engagement/Disengagement Letters

- Non-Engagement letters
- If there is contact with potential client and no representation results, send non-engagement letter
- Clearly state general type of matter and that no representation exists-this is attorney's responsibility under Bar rules
- Advise of any potential statute of limitations and/or any other deadlines that might affect client's rights



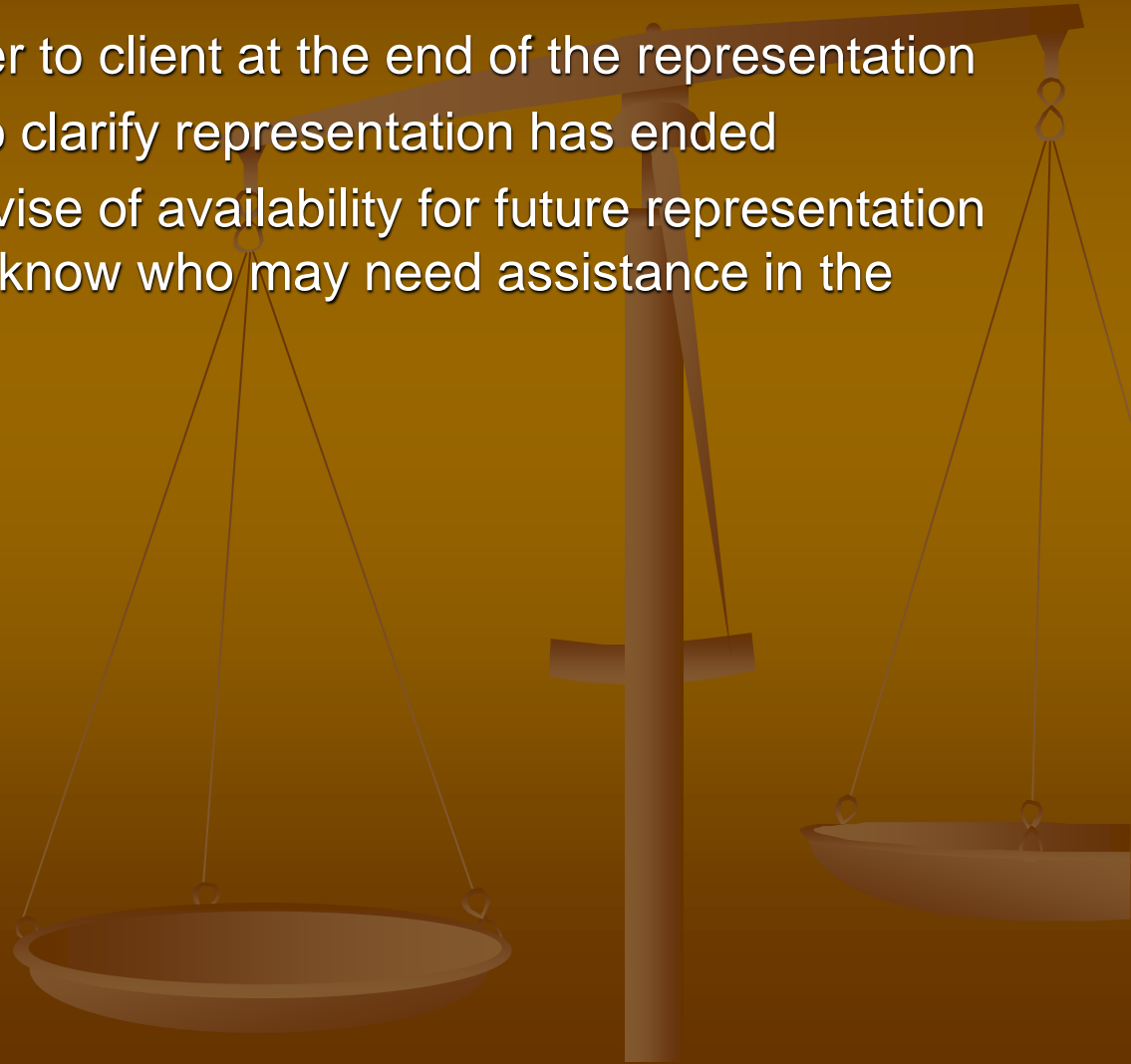
Withdrawal and Non-engagement/Disengagement Letters

- General and not overly specific language to negate later claims of reliance
- State that decision to decline representation does not necessarily mean that they don't have a claim.
- Recommend consultation with another attorney as soon as possible if they wish to pursue any claim
- Consider informing interested third parties of no representation



Withdrawal and Non-engagement/Disengagement Letters

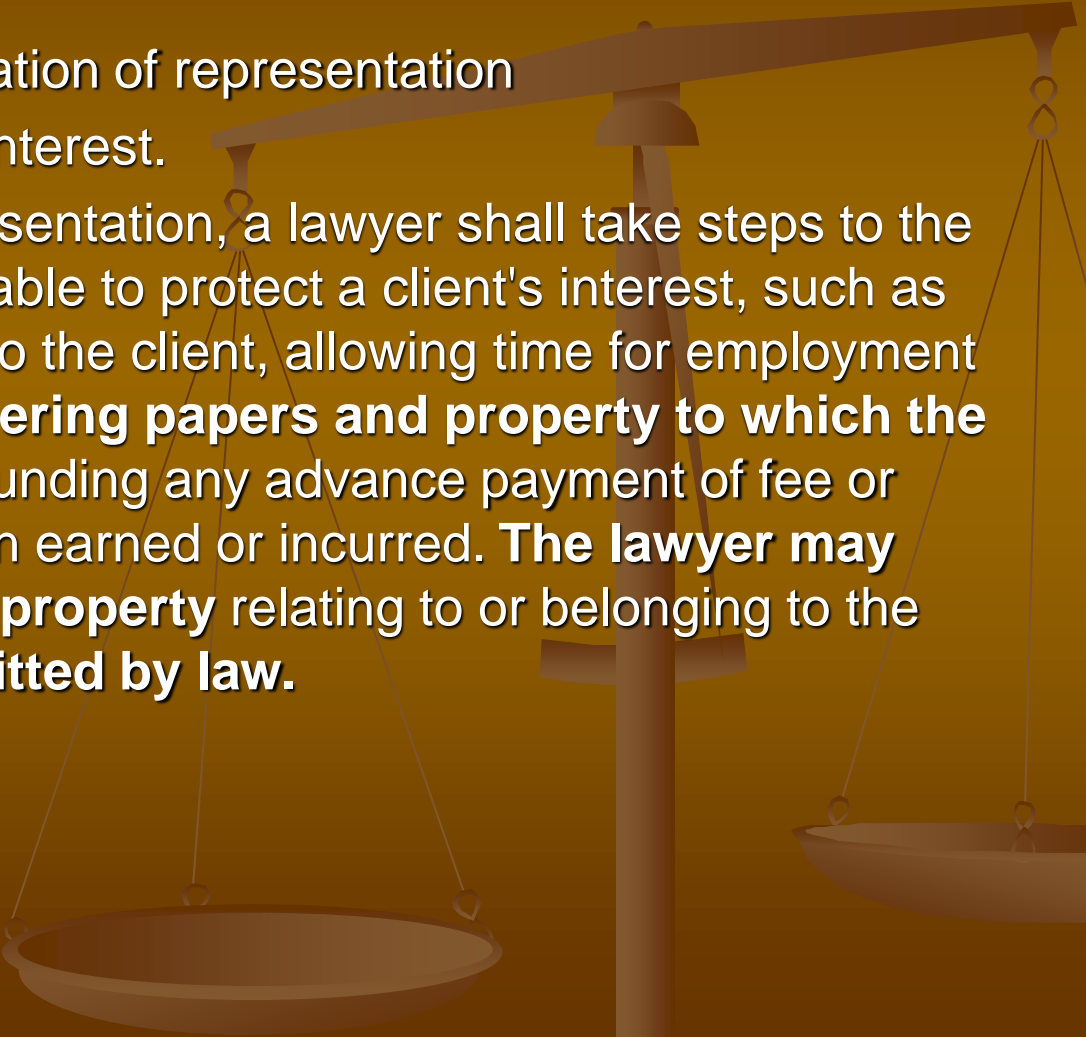
- Send disengagement letter to client at the end of the representation
- Attorney's responsibility to clarify representation has ended
- May be a good time to advise of availability for future representation of client or someone they know who may need assistance in the future



Withdrawal and Non-engagement/Disengagement Letters

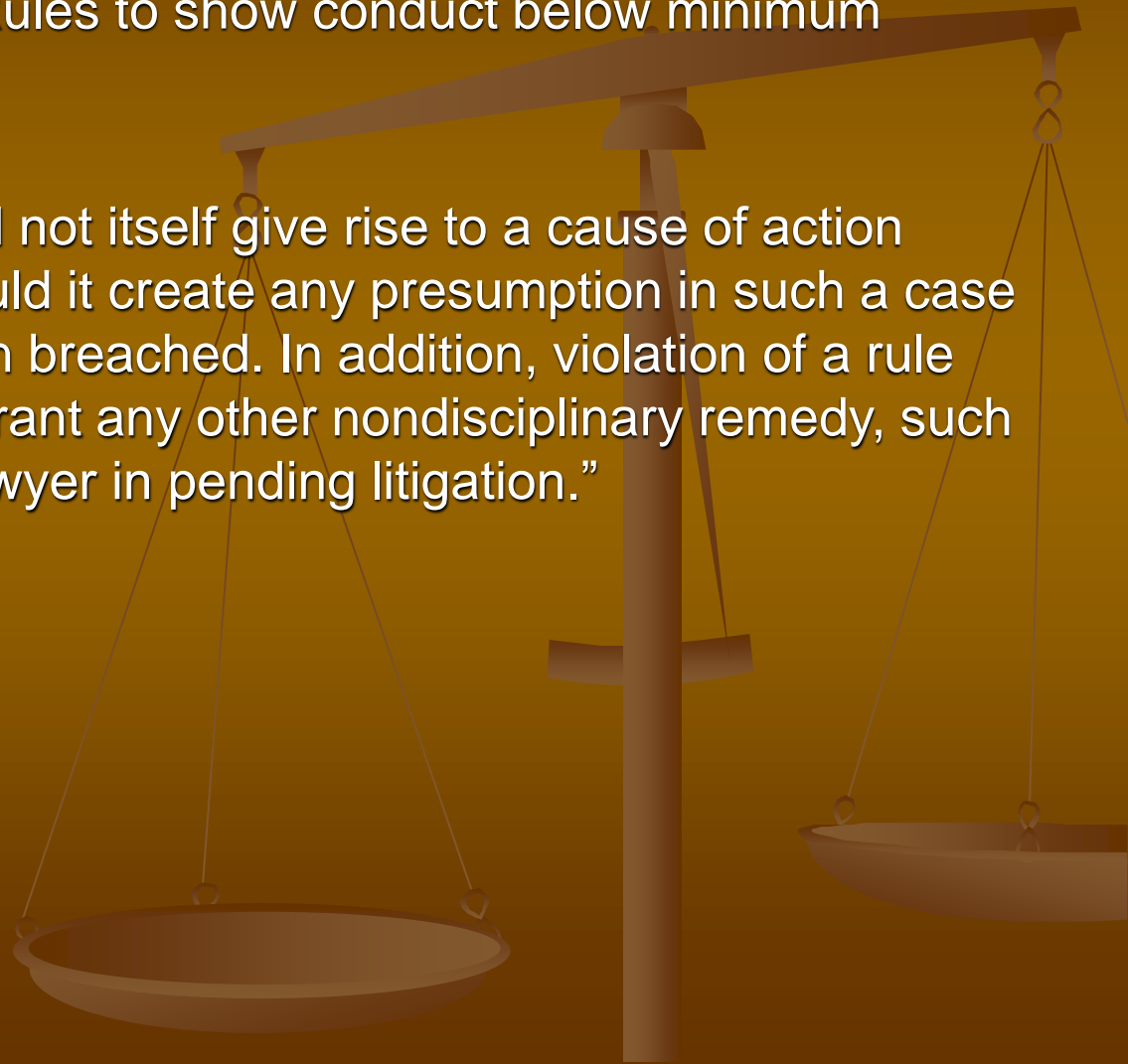
- 4-1.16 Withdrawal/termination of representation
- (d) Protection of Client's Interest.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, **surrendering papers and property to which the client is entitled**, and refunding any advance payment of fee or expense that has not been earned or incurred. **The lawyer may retain papers and other property** relating to or belonging to the client to the extent permitted by law.



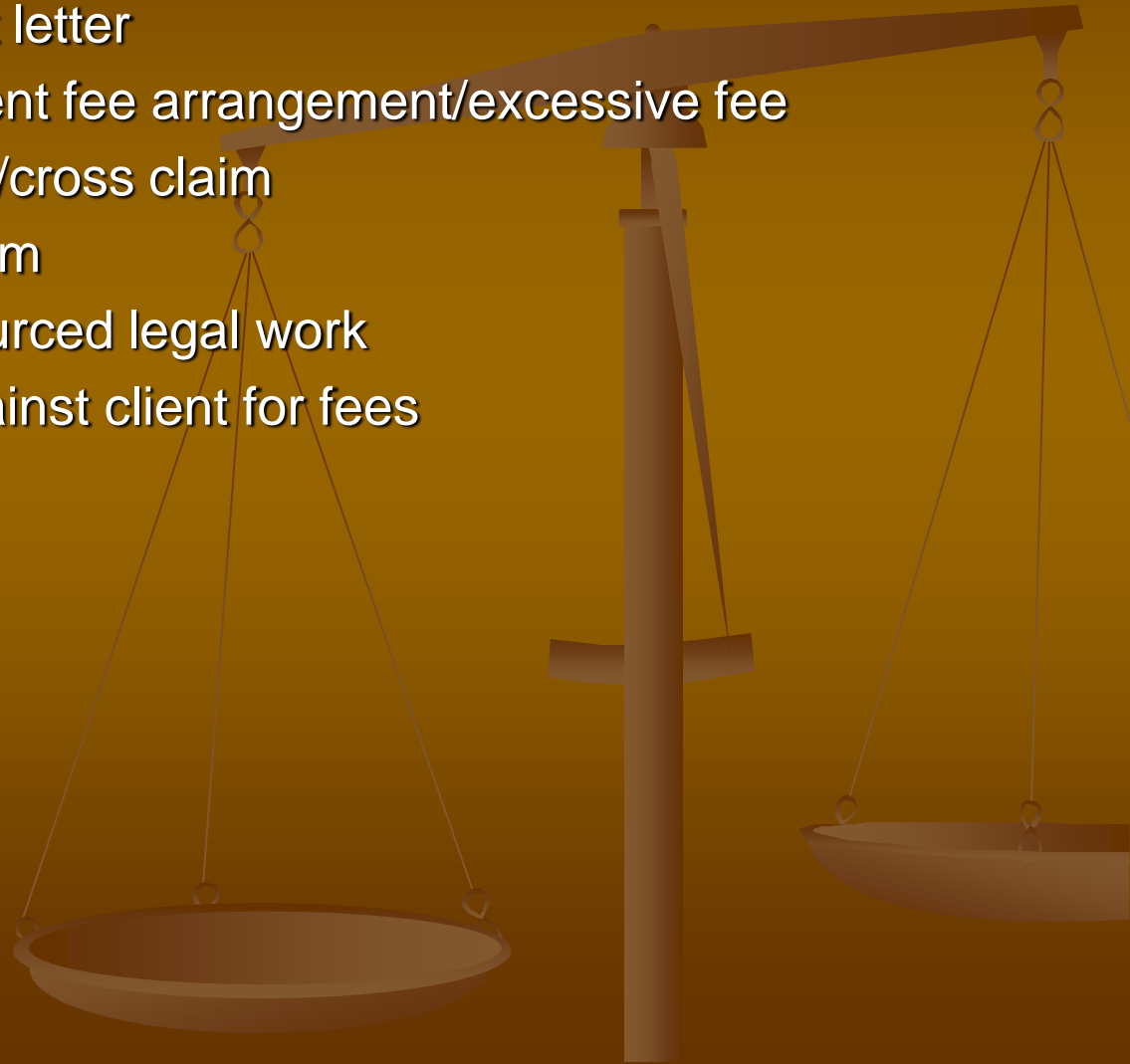
Top Malpractice Issues

- Alleged violation of Bar Rules to show conduct below minimum standards
- Preamble to Bar Rules:
- “Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.”



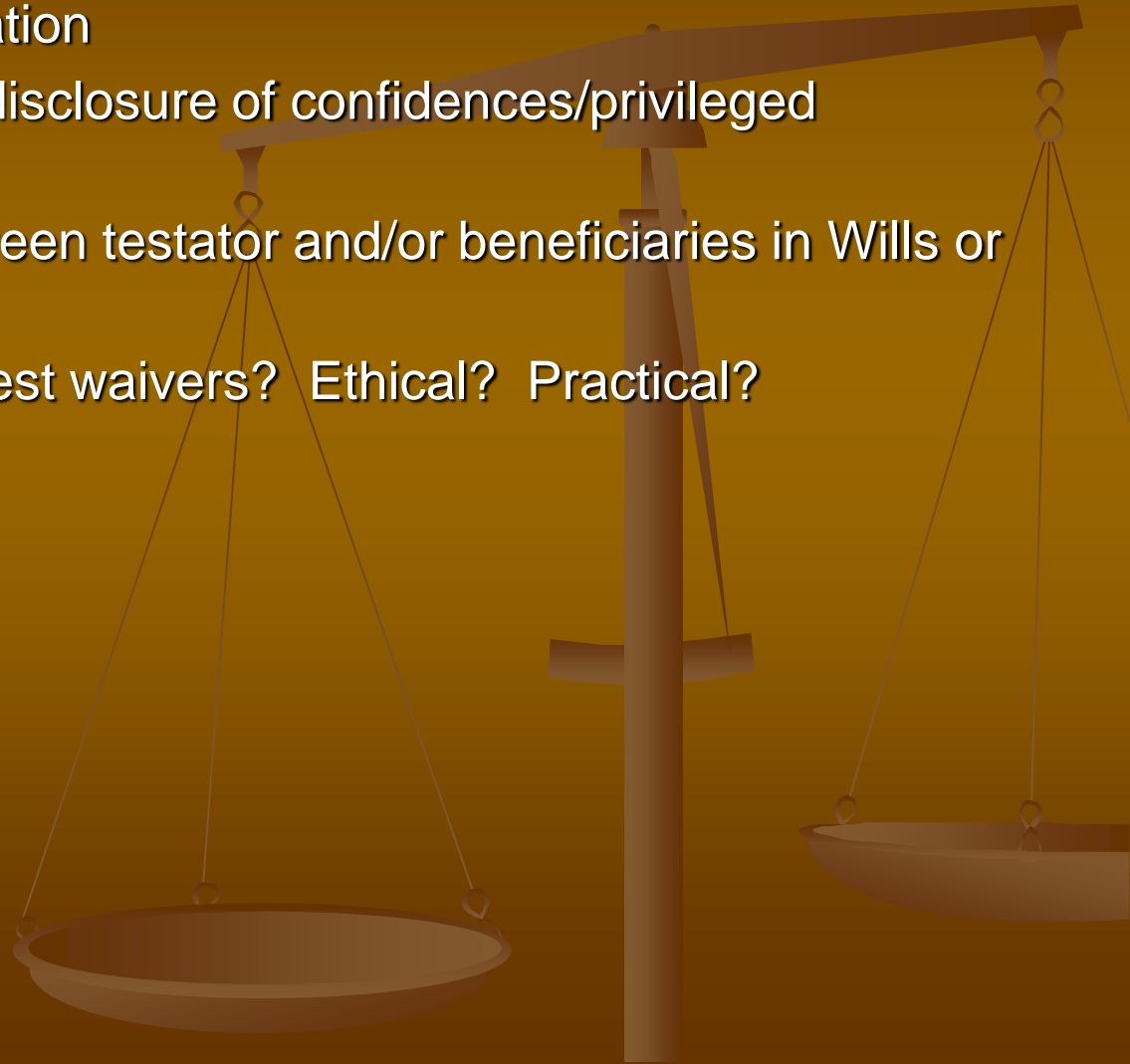
Top Malpractice Issues

- Failure to set out parameters and scope of representation in fee agreement or engagement letter
- Failure to properly document fee arrangement/excessive fee
- Failure to file counterclaim/cross claim
- Filing baseless counterclaim
- Failure to supervise outsourced legal work
- Counterclaim after suit against client for fees



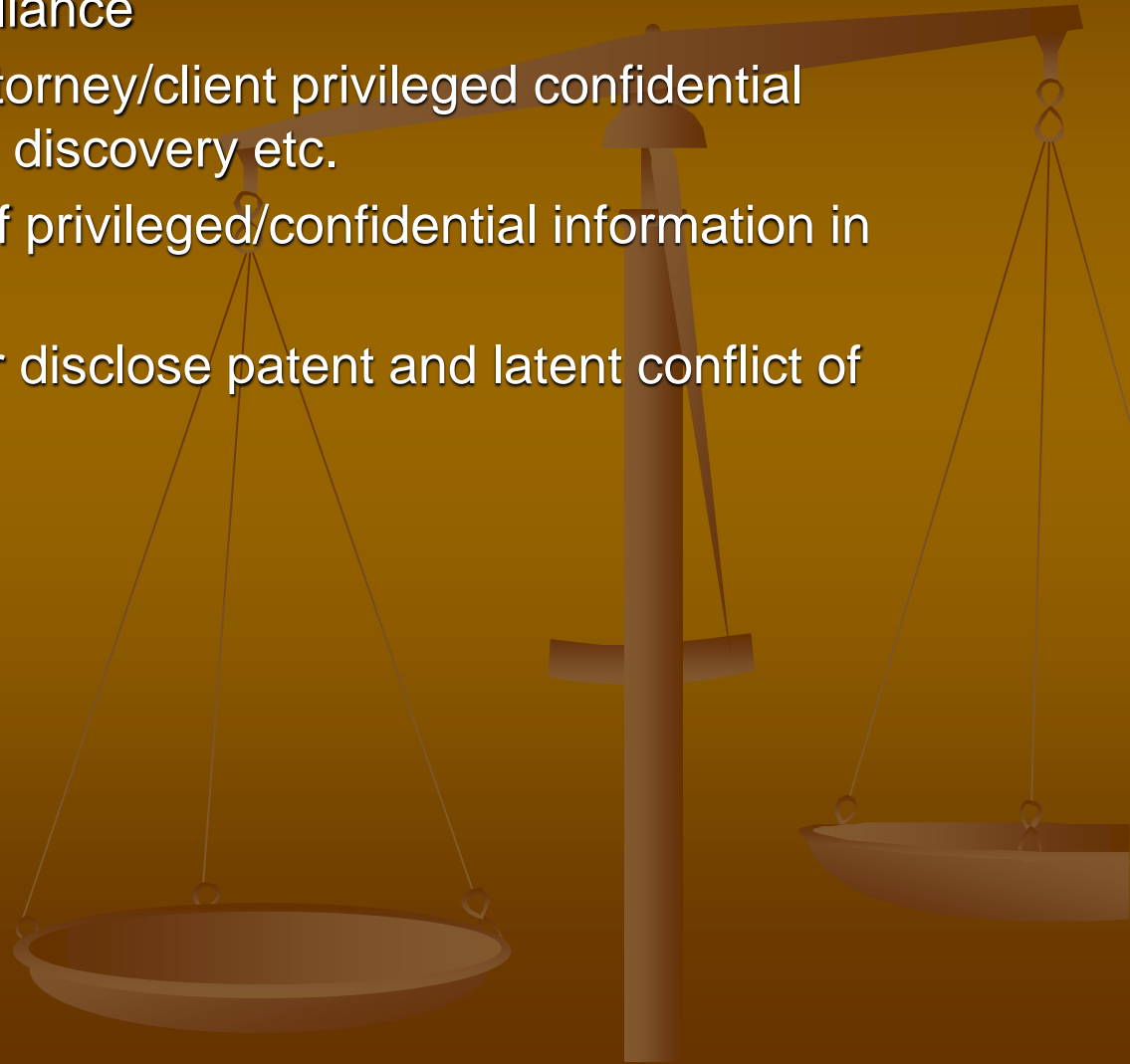
Top Malpractice Issues

- Improper/inadvertent discovery responses disclosing confidential and/or privileged information
- Other alleged improper disclosure of confidences/privileged information
- Conflicts of interest between testator and/or beneficiaries in Wills or Trusts
- Advance conflict of interest waivers? Ethical? Practical?



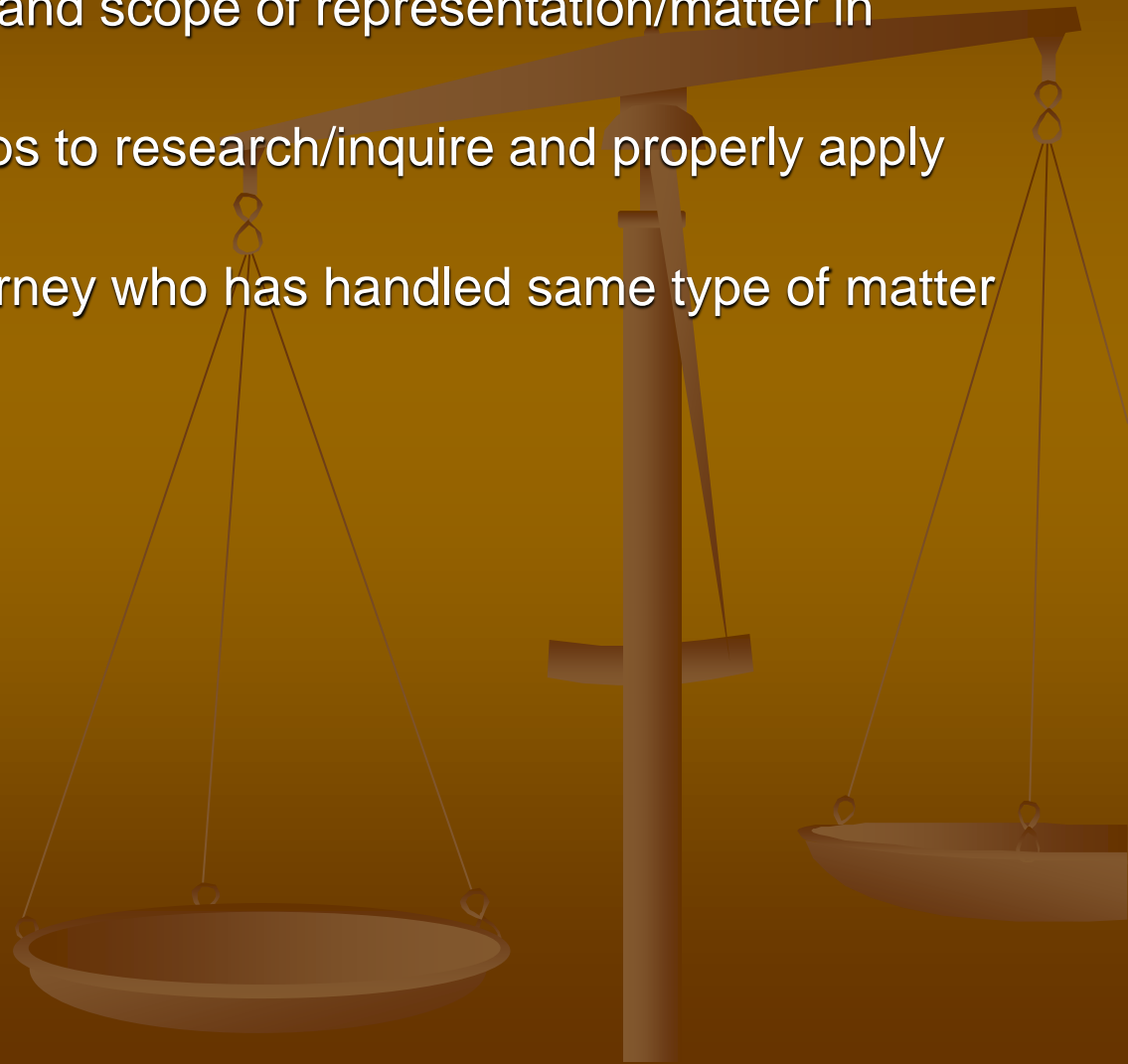
Top Malpractice Issues

- Failure to clearly decline representation after contact with potential client-creating claim of reliance
- Improper disclosure of attorney/client privileged confidential information/documents in discovery etc.
- Inadvertent disclosures of privileged/confidential information in metadata
- Failure to discover and/or disclose patent and latent conflict of interest



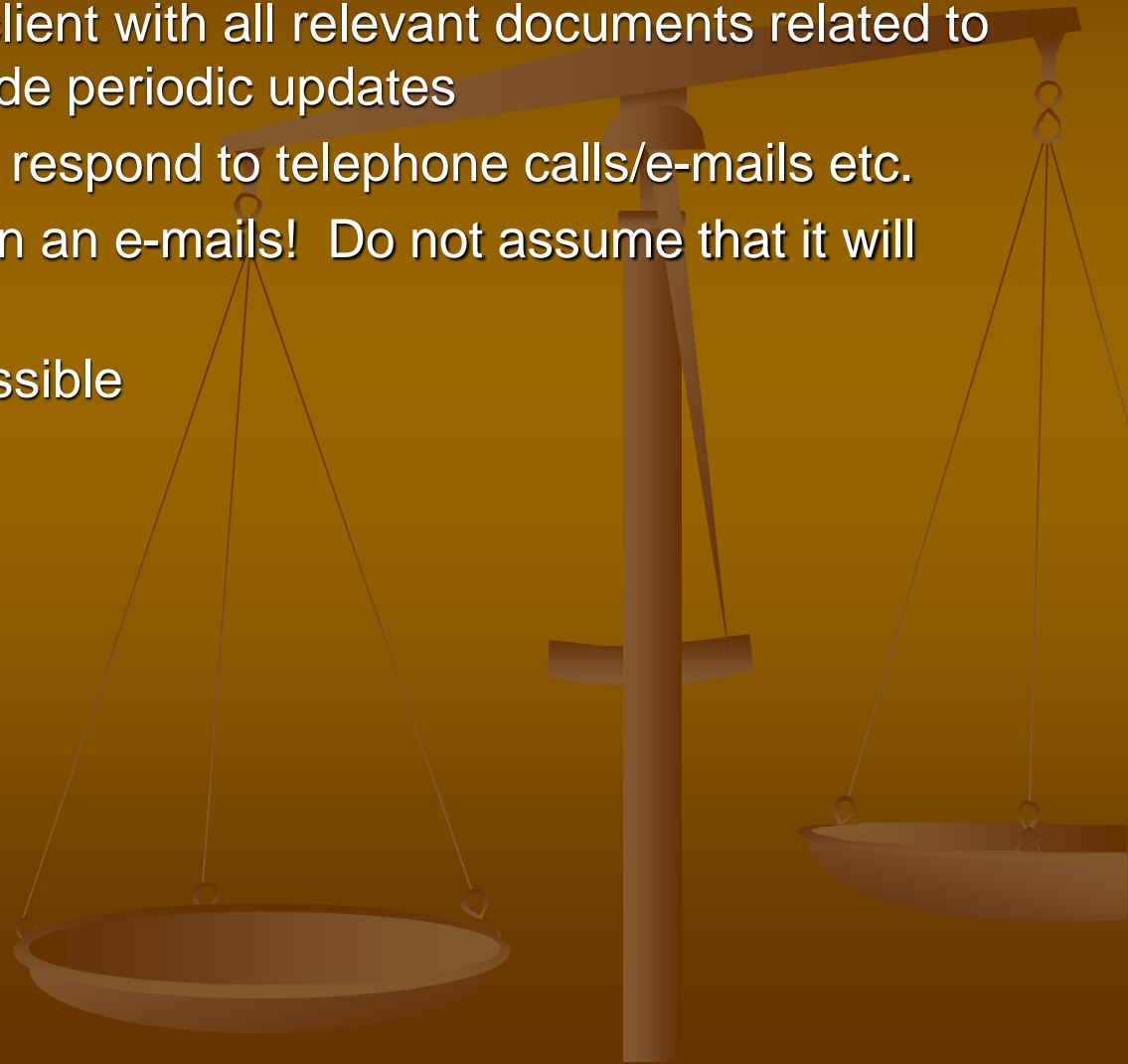
Best Practices/Risk Management Tips

- Screen clients/ thorough conflicts check
- Clearly identify the client and scope of representation/matter in written fee agreement
- Know the law or take steps to research/inquire and properly apply the law
- Consult with another attorney who has handled same type of matter



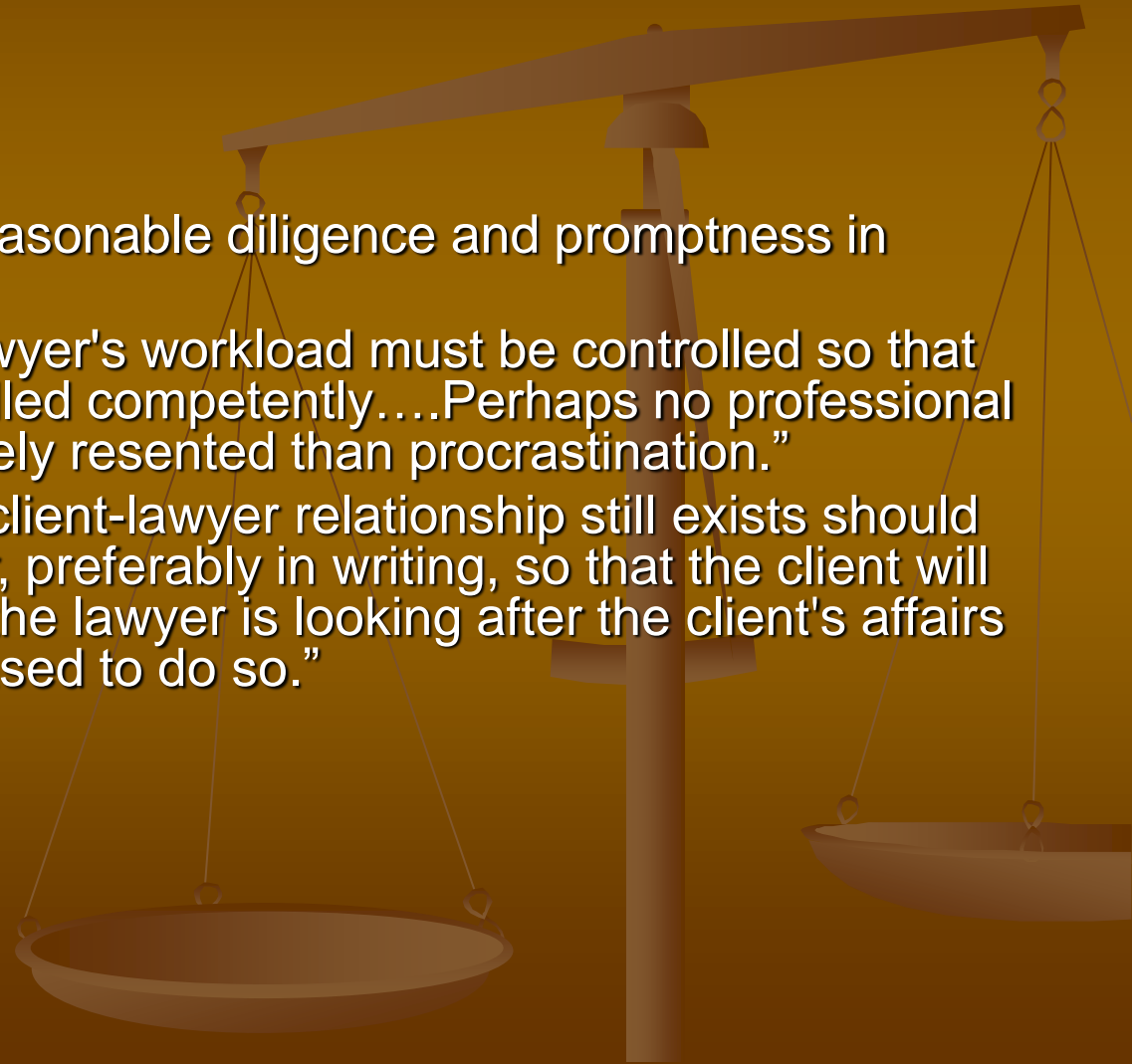
Best Practices/Risk Management Tips

- Keep the client properly informed and advised
- Document the file, copy client with all relevant documents related to representation, and provide periodic updates
- Communicate with client, respond to telephone calls/e-mails etc.
- Be careful what you say in an e-mails! Do not assume that it will remain confidential
- Don't sue the client, if possible



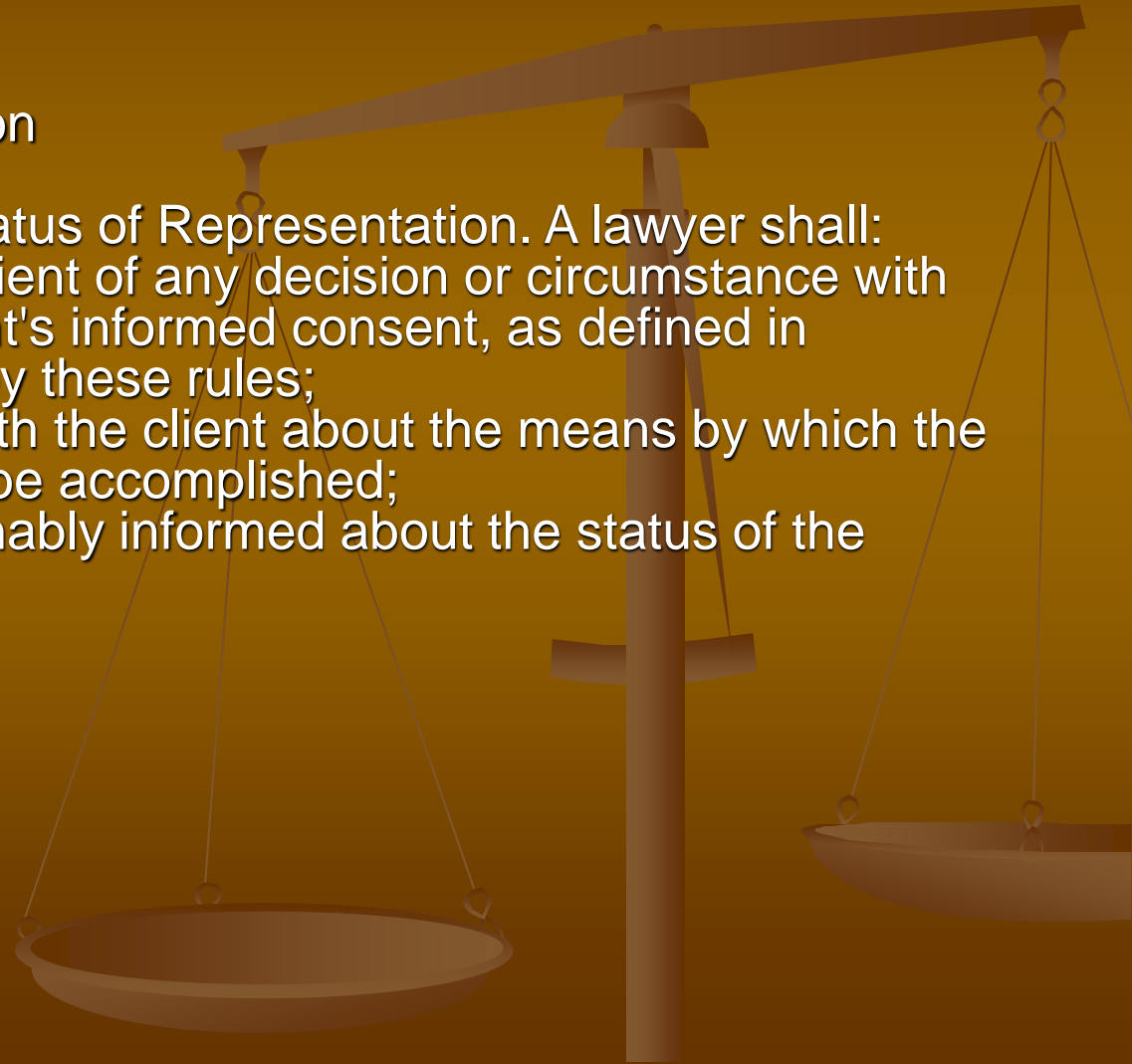
Practice and Risk Management: Client Representation Issues

- Common client issues:
- Procrastination/neglect
- *Rule 4-1.3 Diligence.*
- A lawyer shall act with reasonable diligence and promptness in representing a client.
- Comment to Rule: “A lawyer's workload must be controlled so that each matter can be handled competently....Perhaps no professional shortcoming is more widely resented than procrastination.”
- “Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.”



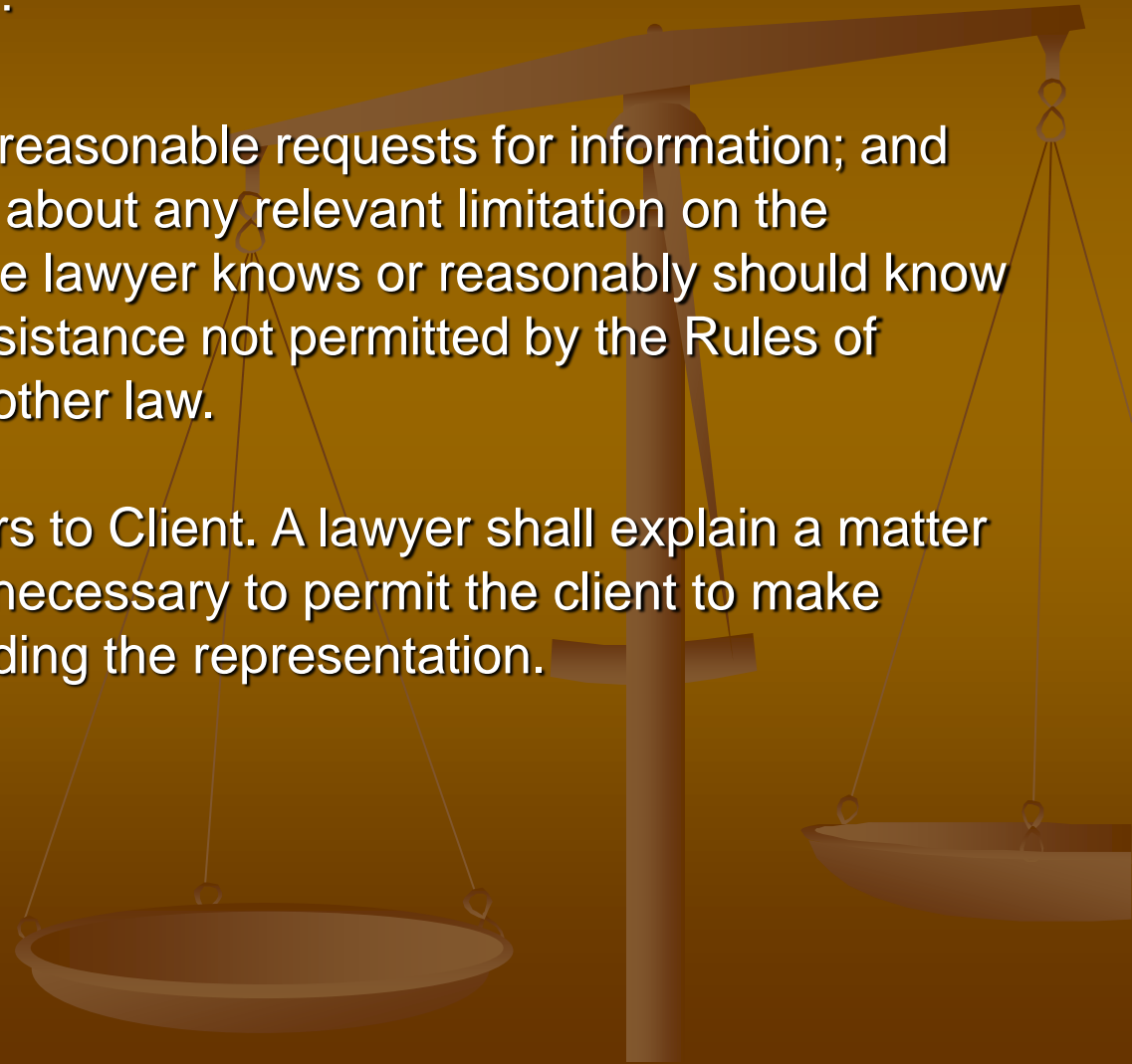
Practice and Risk Management: Client Representation Issues

- Failure to communicate
- Rule 4-1.4 Communication
 - (a) Informing Client of Status of Representation. 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 terminology, 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;



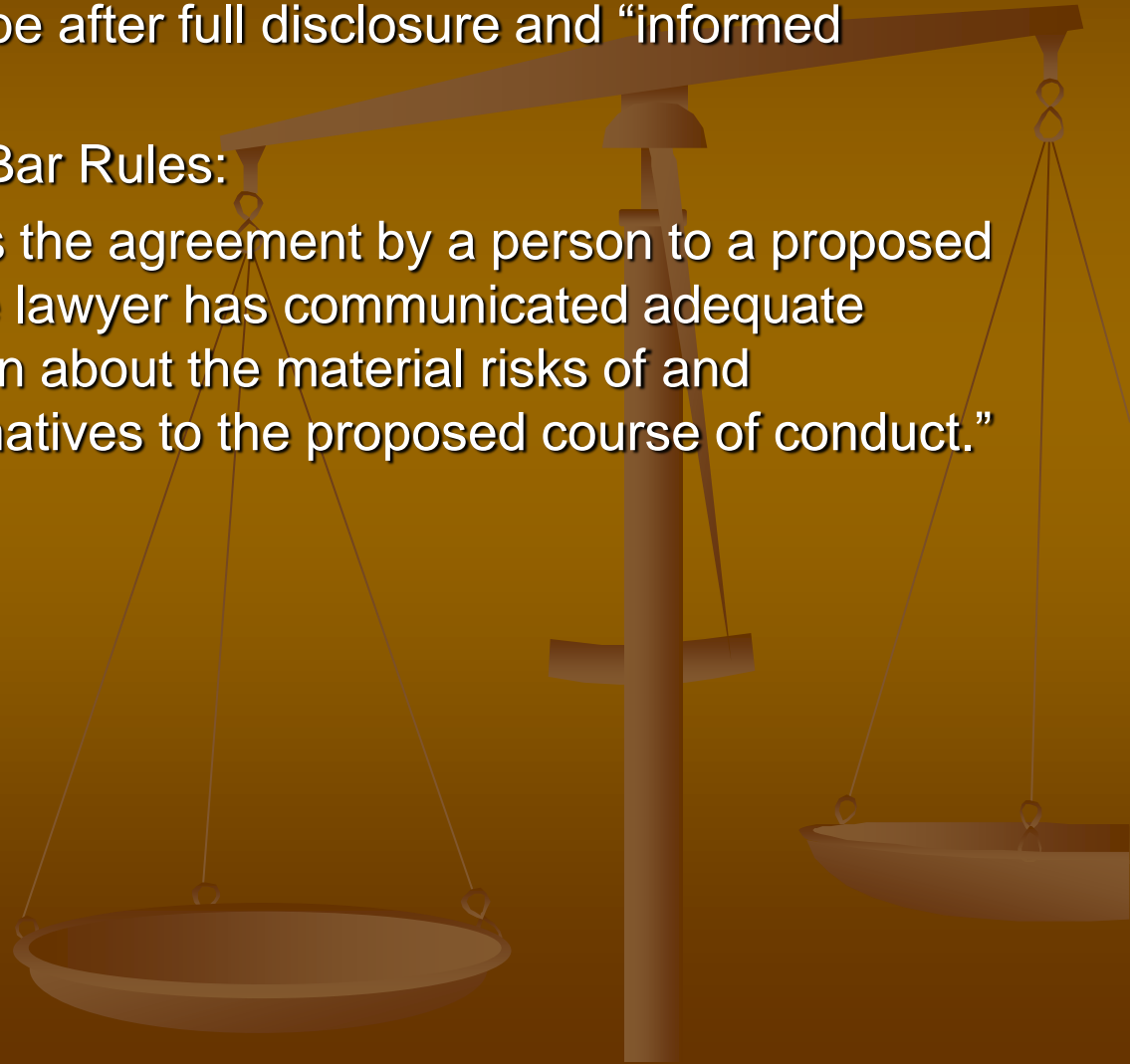
Practice and Risk Management: Client Representation Issues

- Rule 4-1.4(a) continued...
 - A lawyer shall:
 - (4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



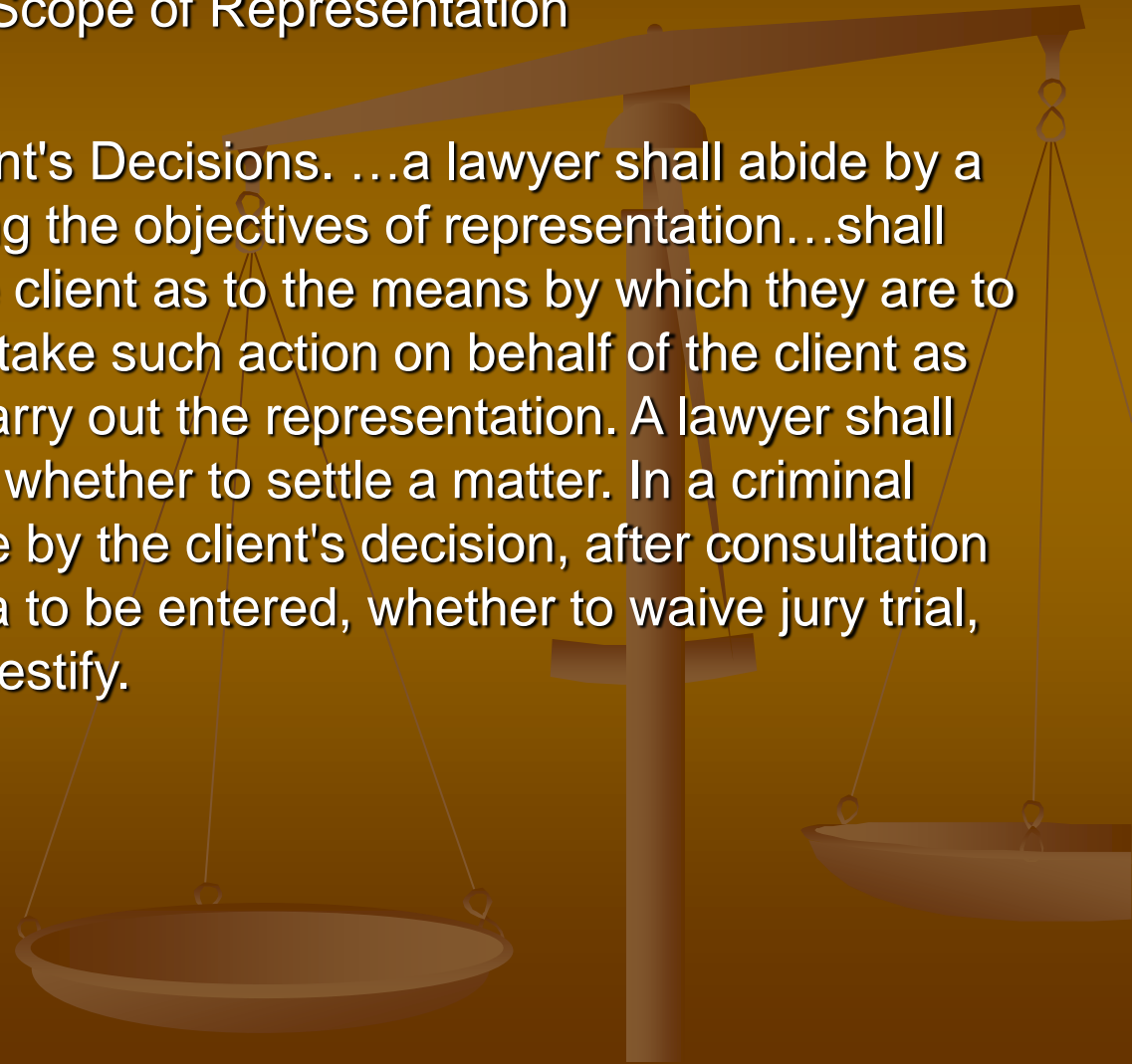
Practice and Risk Management: Client Representation Issues

- Waivers of Conflicts must be after full disclosure and “informed consent” in writing
- Preamble to Chapter 4 of Bar Rules:
- "Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."



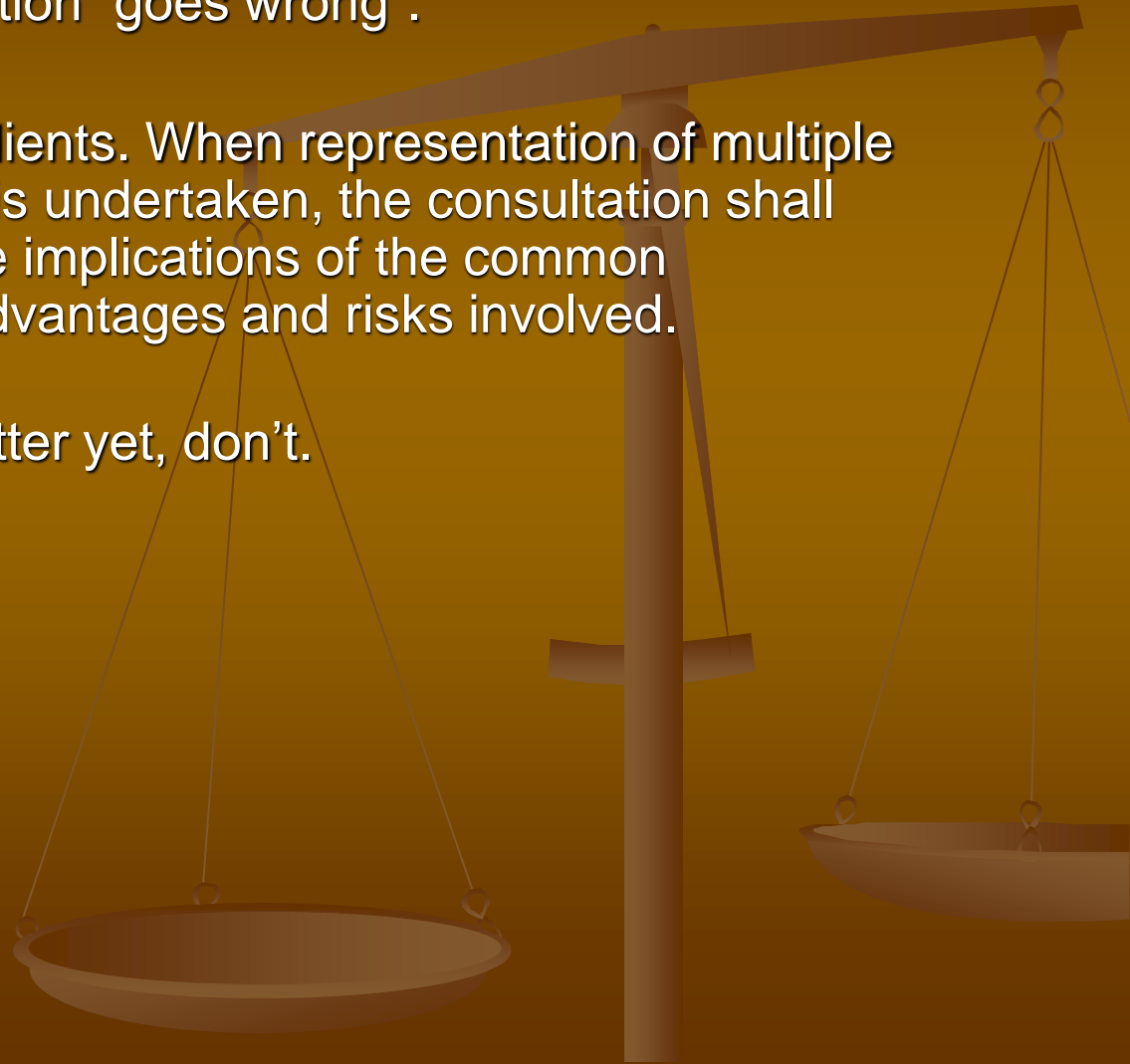
Practice and Risk Management: Client Representation Issues

- Rule 4-1.2 Objectives and Scope of Representation
- (a) Lawyer to Abide by Client's Decisions. ...a lawyer shall abide by a client's decisions concerning the objectives of representation...shall reasonably 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 decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.



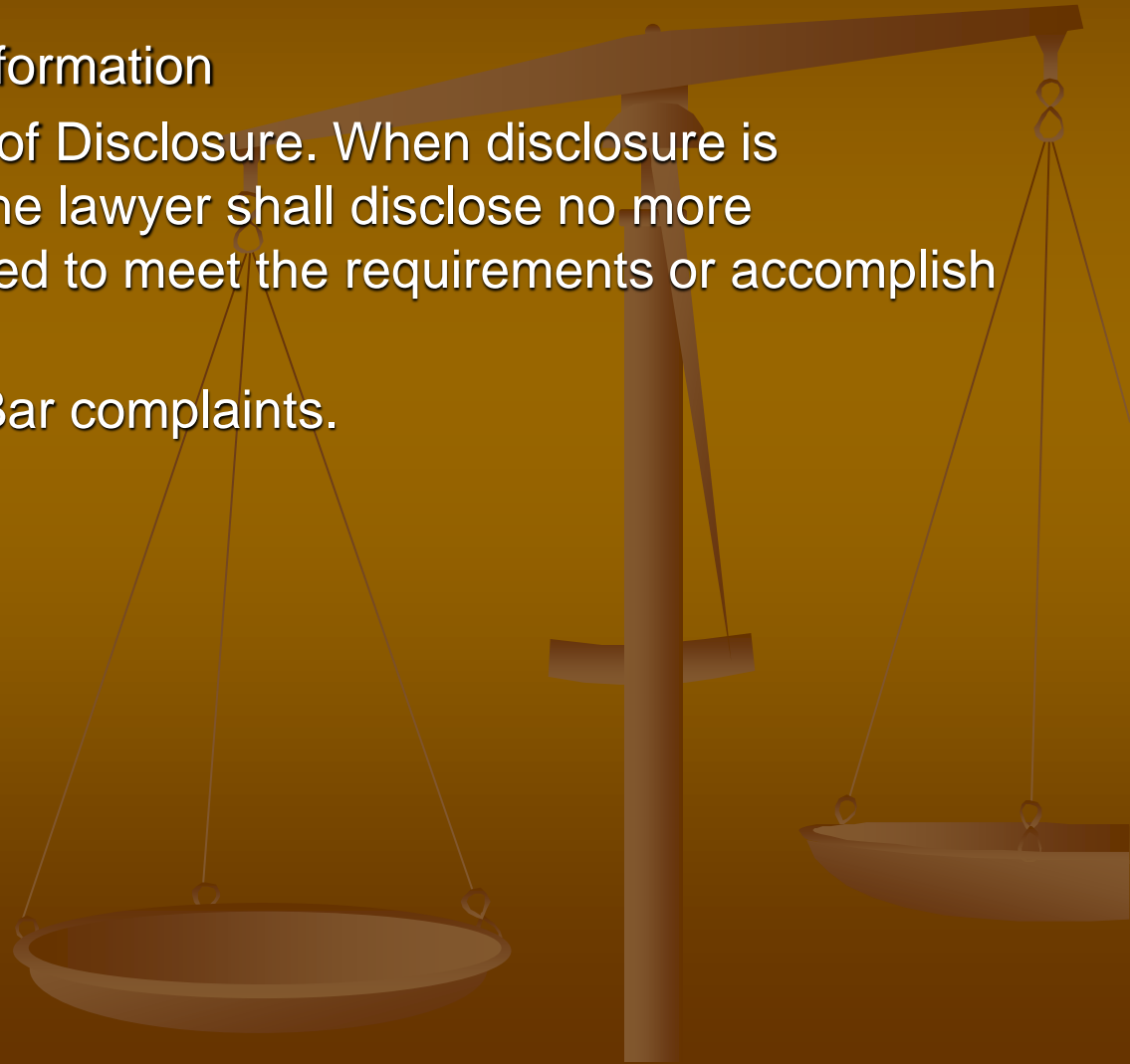
Practice and Risk Management: Client Representation Issues

- Multiple client representation “goes wrong”.
- 4-1.7(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
- Think before you do it-better yet, don't.



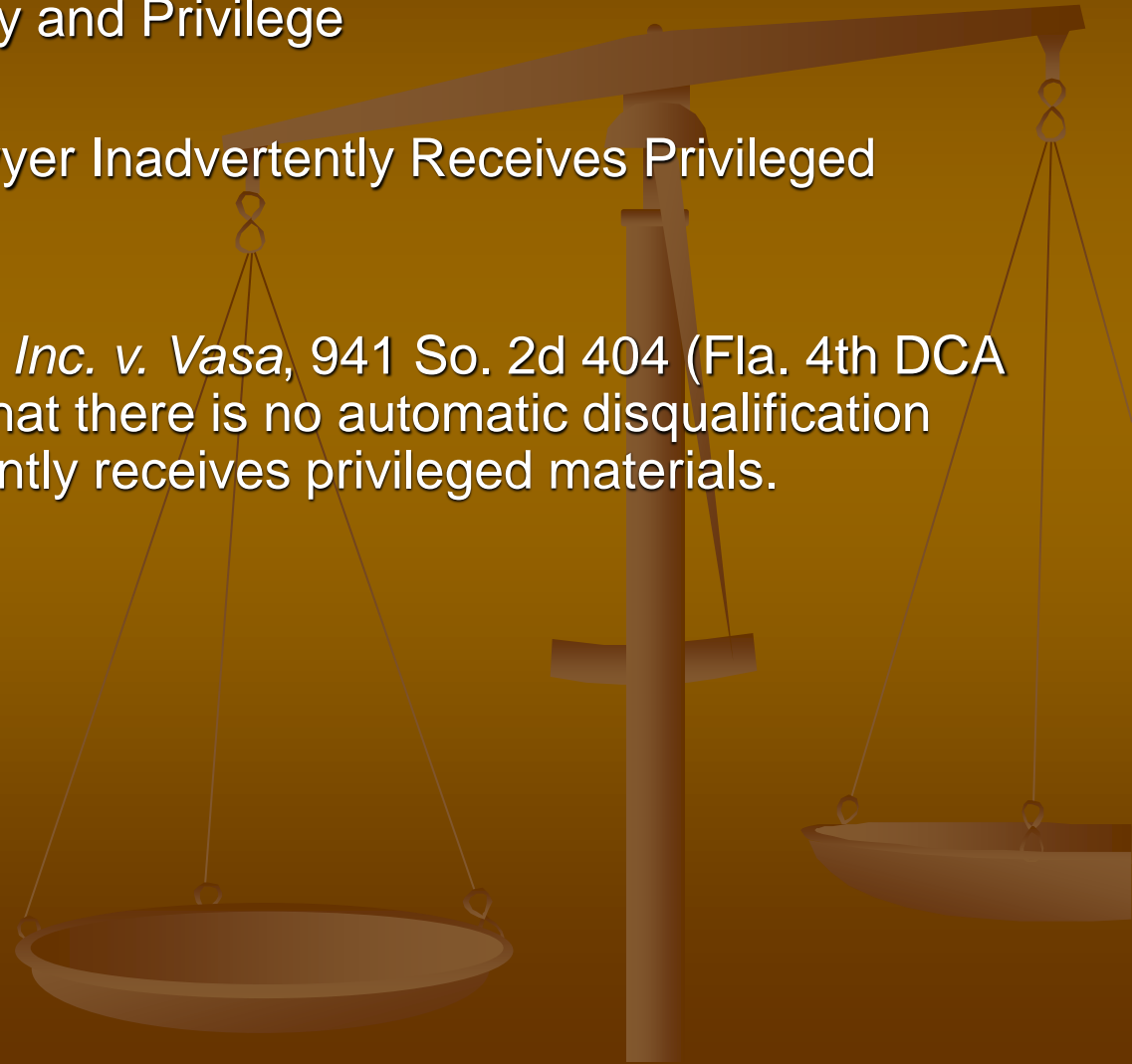
Practice and Risk Management: Client Representation Issues

- 4-1.6 Confidentiality of Information
- (e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.
- Applies to responses to Bar complaints.



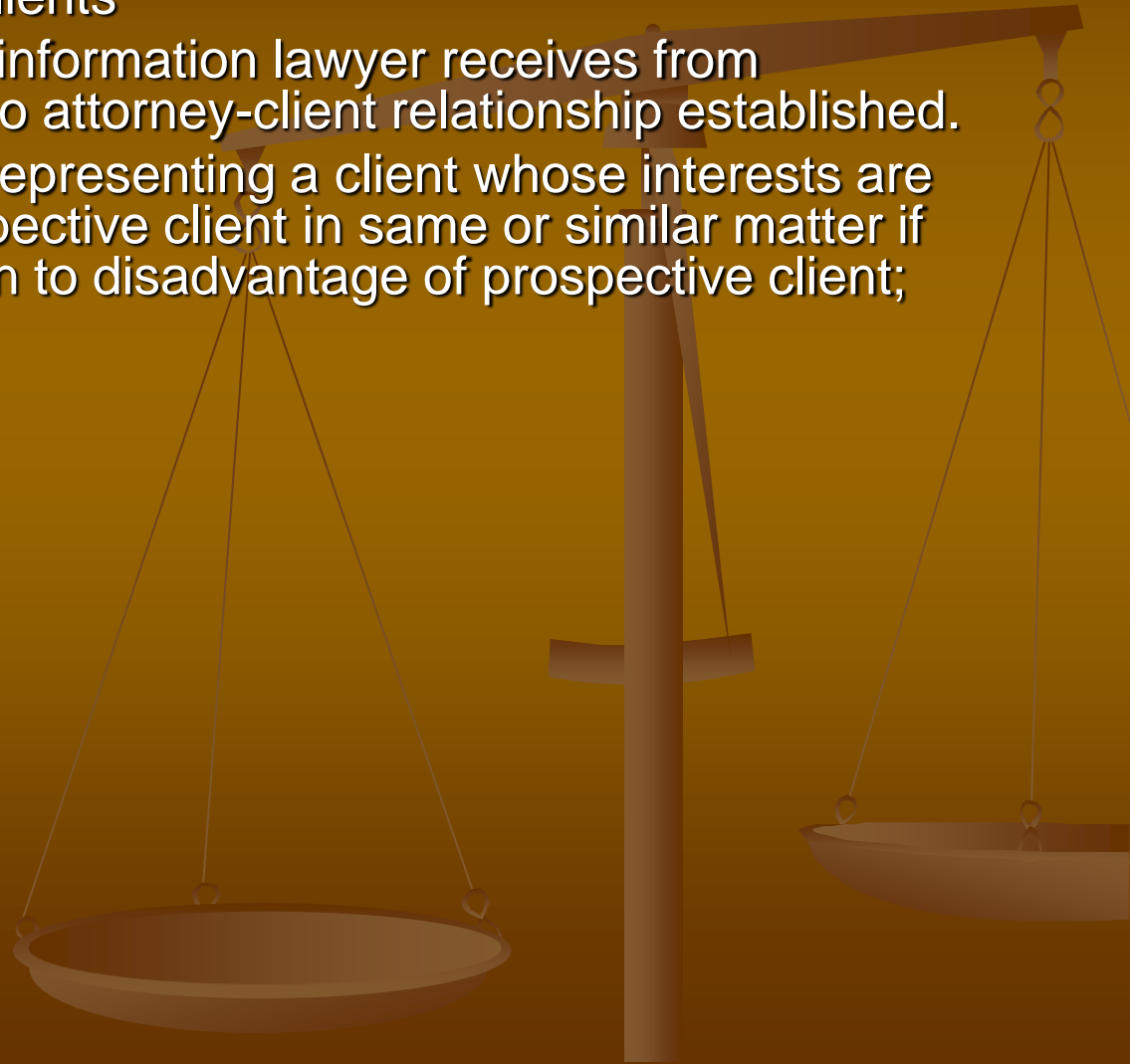
Practice and Risk Management: Client Representation Issues

- Case Law: Confidentiality and Privilege
- Disqualification After Lawyer Inadvertently Receives Privileged Materials.
- *Applied Digital Solutions, Inc. v. Vasa*, 941 So. 2d 404 (Fla. 4th DCA 2006). 4th DCA opines that there is no automatic disqualification when a lawyer inadvertently receives privileged materials.

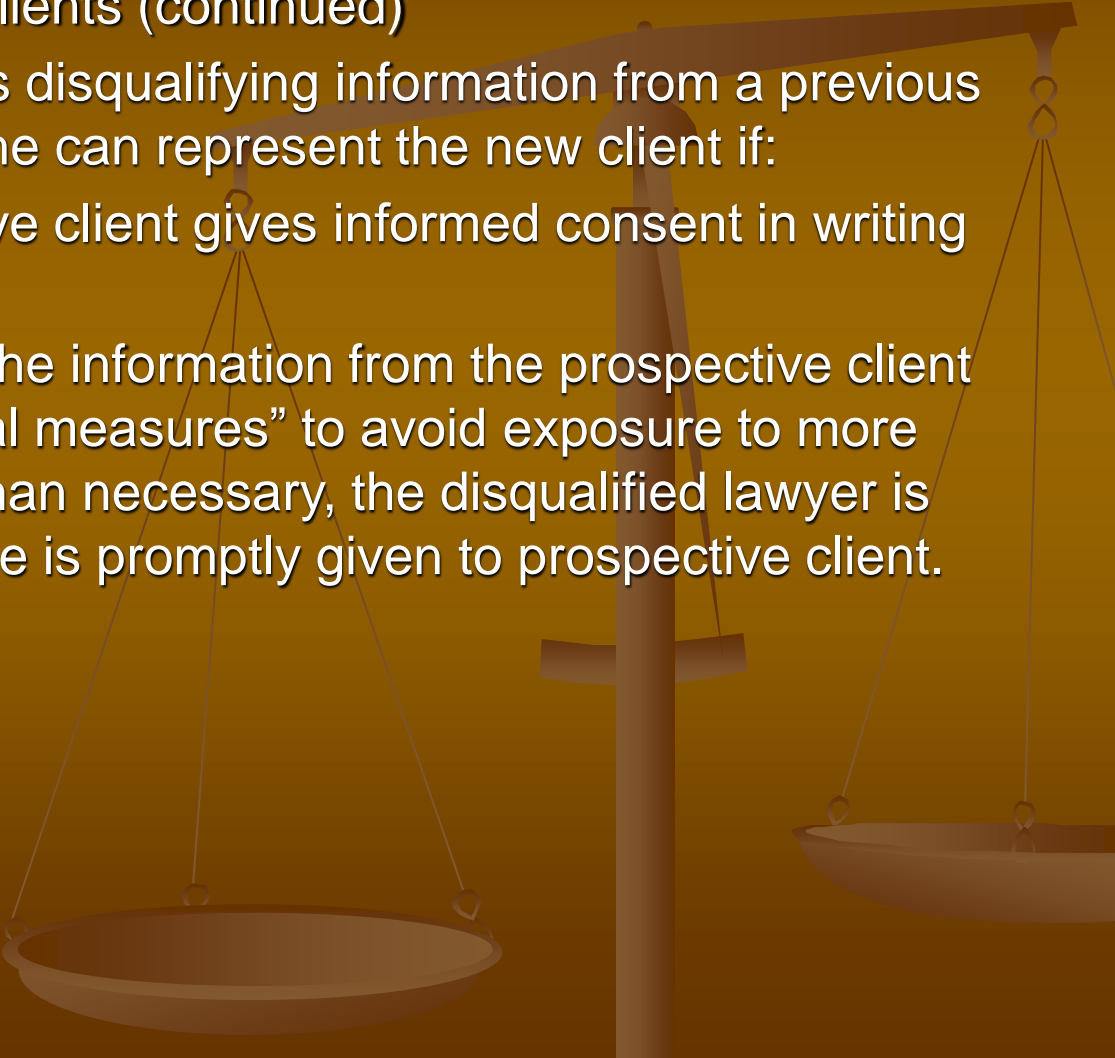


Practice and Risk Management: Client Representation Issues

- Rule 4-1.18 Prospective Clients
- Confidentiality attaches to information lawyer receives from prospective client even if no attorney-client relationship established.
- Lawyer is prohibited from representing a client whose interests are materially adverse to prospective client in same or similar matter if lawyer received information to disadvantage of prospective client; however,

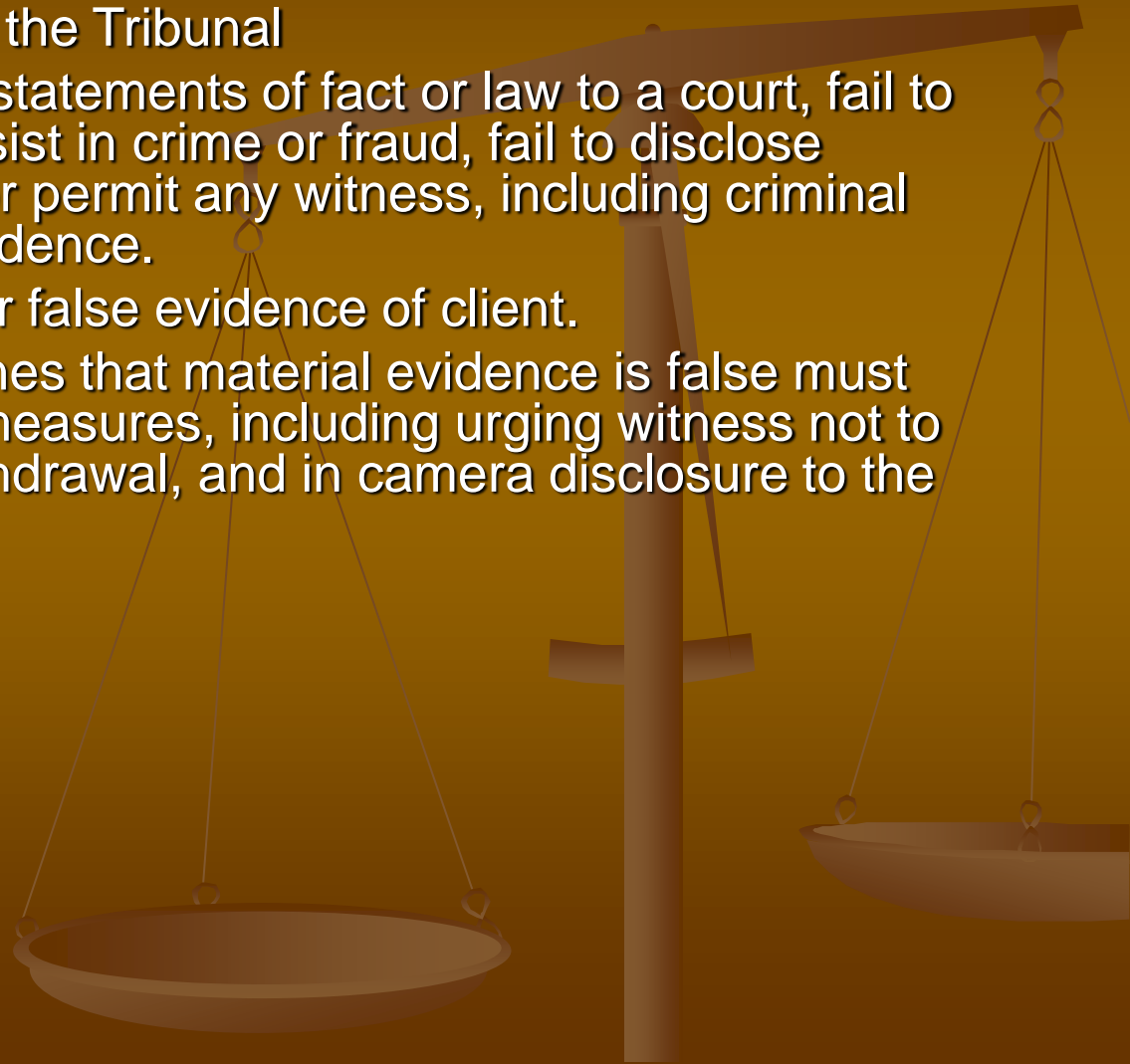


Practice and Risk Management: Client Representation Issues

- Rule 4-1.18 Prospective Clients (continued)
 - Even if the lawyer receives disqualifying information from a previous prospective client, he or she can represent the new client if:
 - 1) the “affected” prospective client gives informed consent in writing or;
 - 2) a lawyer who received the information from the prospective client takes “reasonable remedial measures” to avoid exposure to more disqualifying information than necessary, the disqualified lawyer is screened and written notice is promptly given to prospective client.
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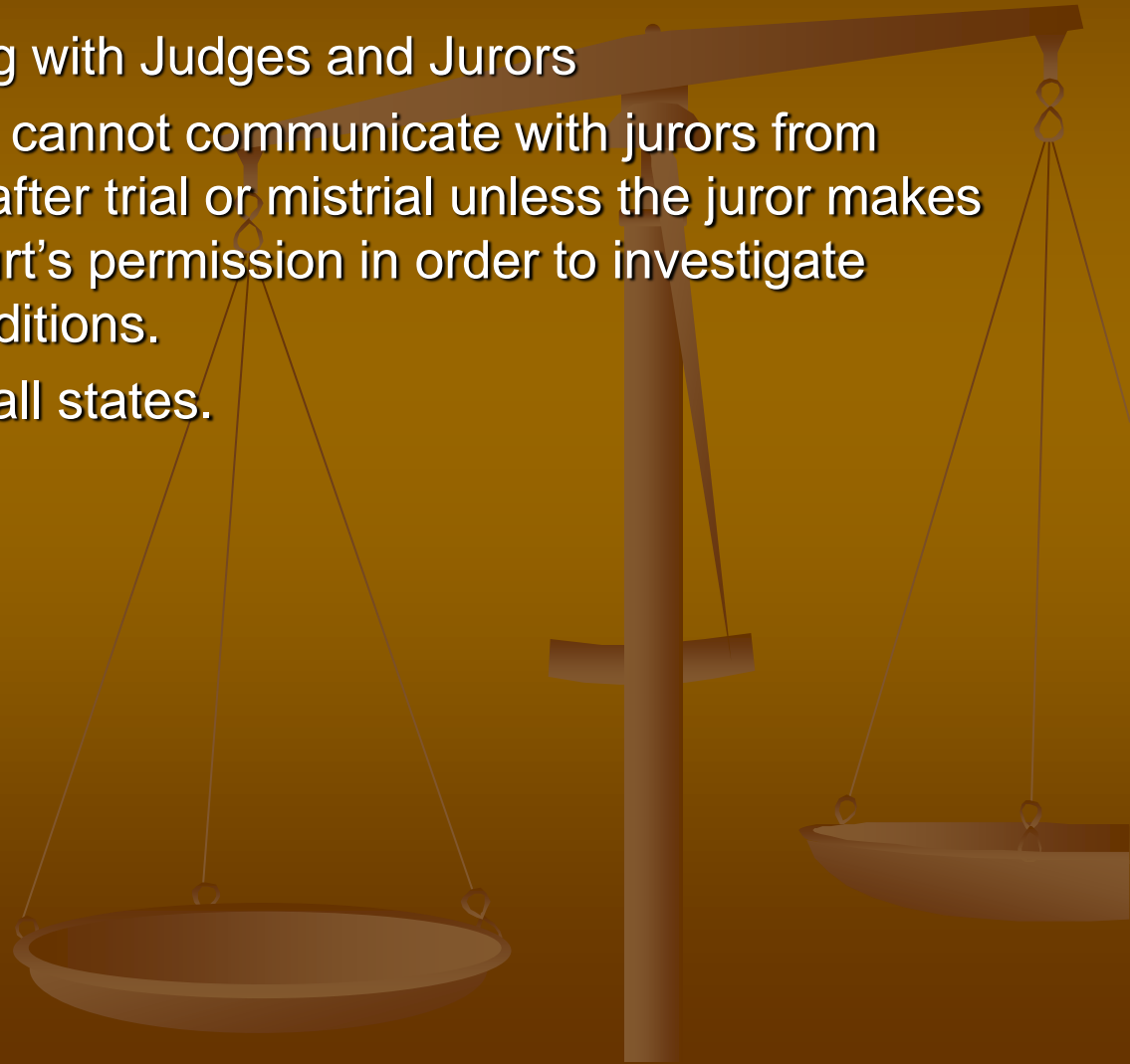
Practice and Risk Management: Client Representation Issues

- Rule 4-3.3 Candor Toward the Tribunal
- Lawyer cannot make false statements of fact or law to a court, fail to disclose a material fact, assist in crime or fraud, fail to disclose controlling legal authority, or permit any witness, including criminal defendant, to offer false evidence.
- A lawyer may refuse to offer false evidence of client.
- A lawyer who later determines that material evidence is false must take reasonable remedial measures, including urging witness not to present false evidence, withdrawal, and in camera disclosure to the court.



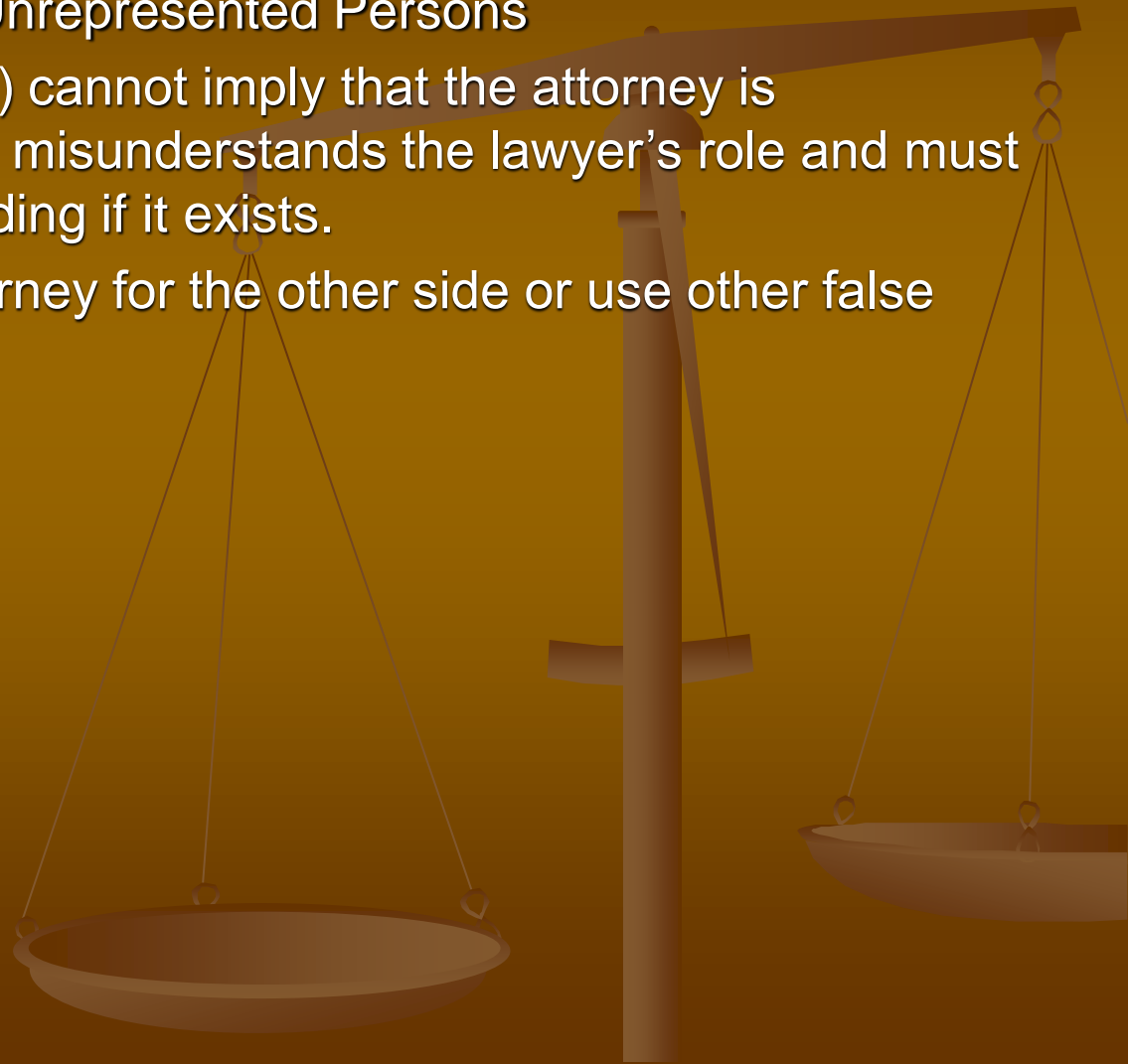
Practice and Risk Management: Client Representation Issues

- Rule 4-3.5 Communicating with Judges and Jurors
- Lawyer (or lawyer's agent) cannot communicate with jurors from beginning of voir dire and after trial or mistrial unless the juror makes first contact or with the court's permission in order to investigate juror fraud under strict conditions.
- This rule does not exist in all states.



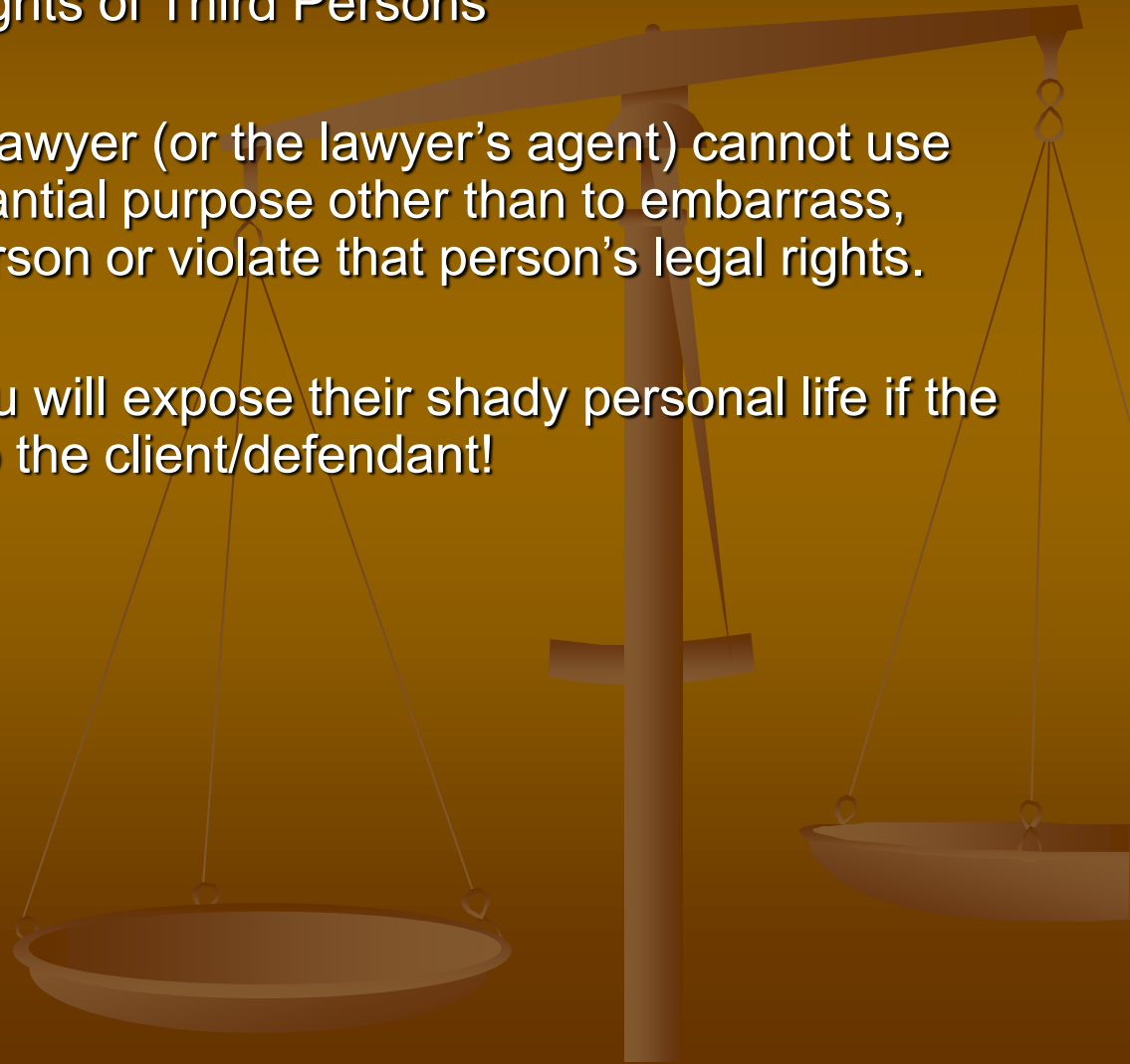
Practice and Risk Management: Client Representation Issues

- Rule 4-4.3 Dealing with Unrepresented Persons
- Lawyer (or lawyer's agent) cannot imply that the attorney is disinterested if the person misunderstands the lawyer's role and must correct any misunderstanding if it exists.
- Can't say you are the attorney for the other side or use other false pretenses.



Practice and Risk Management: Client Representation Issues

- Rule 4-4.4 Respect for Rights of Third Persons
- In representing a client, a lawyer (or the lawyer's agent) cannot use means that have no substantial purpose other than to embarrass, delay, or burden a third person or violate that person's legal rights.
- Can't tell a witness that you will expose their shady personal life if the testimony isn't favorable to the client/defendant!



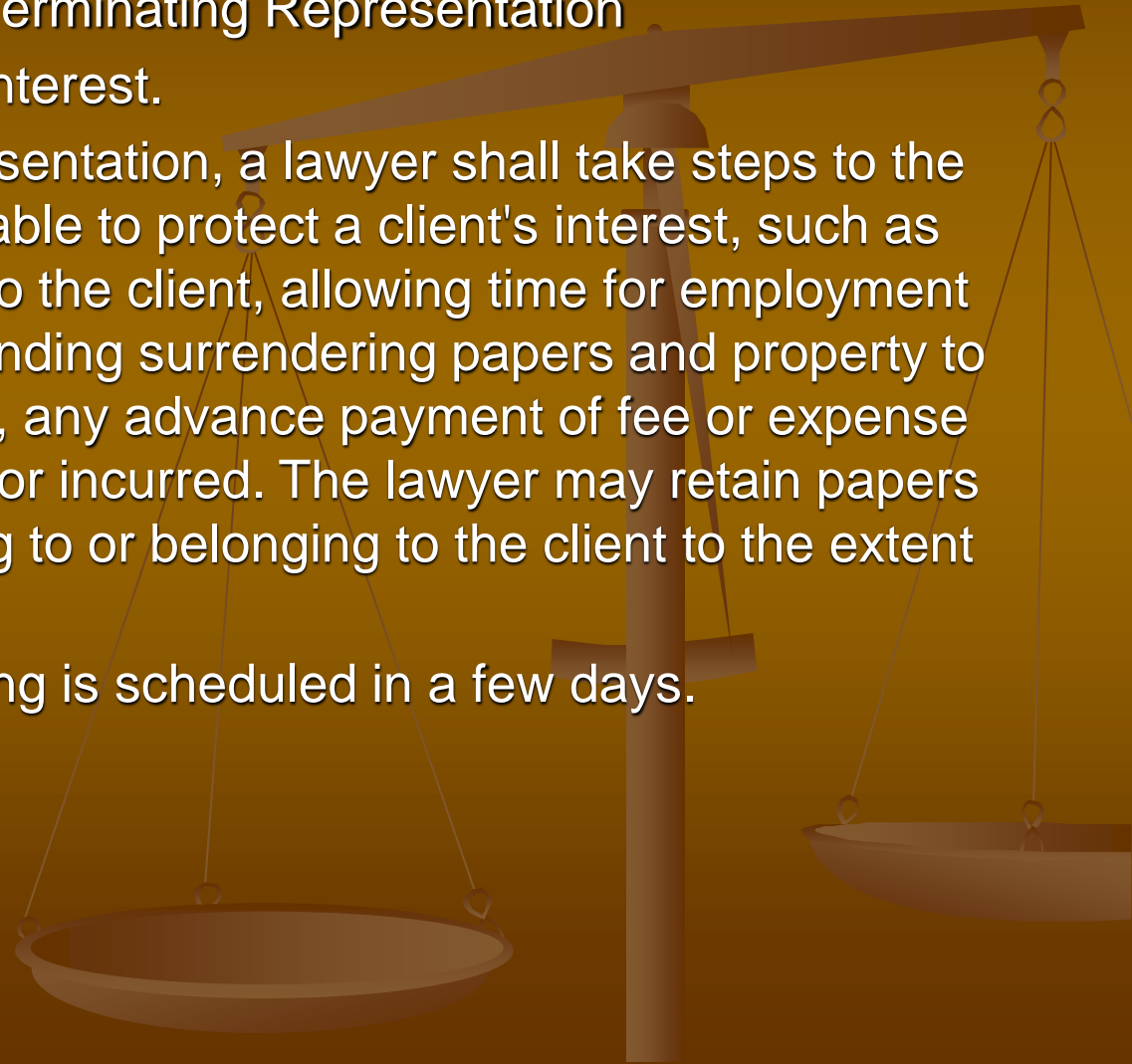
Practice and Risk Management: Client Representation Issues

- Rule 4-1.16 Declining or Terminating Representation

- (d) Protection of Client's Interest.

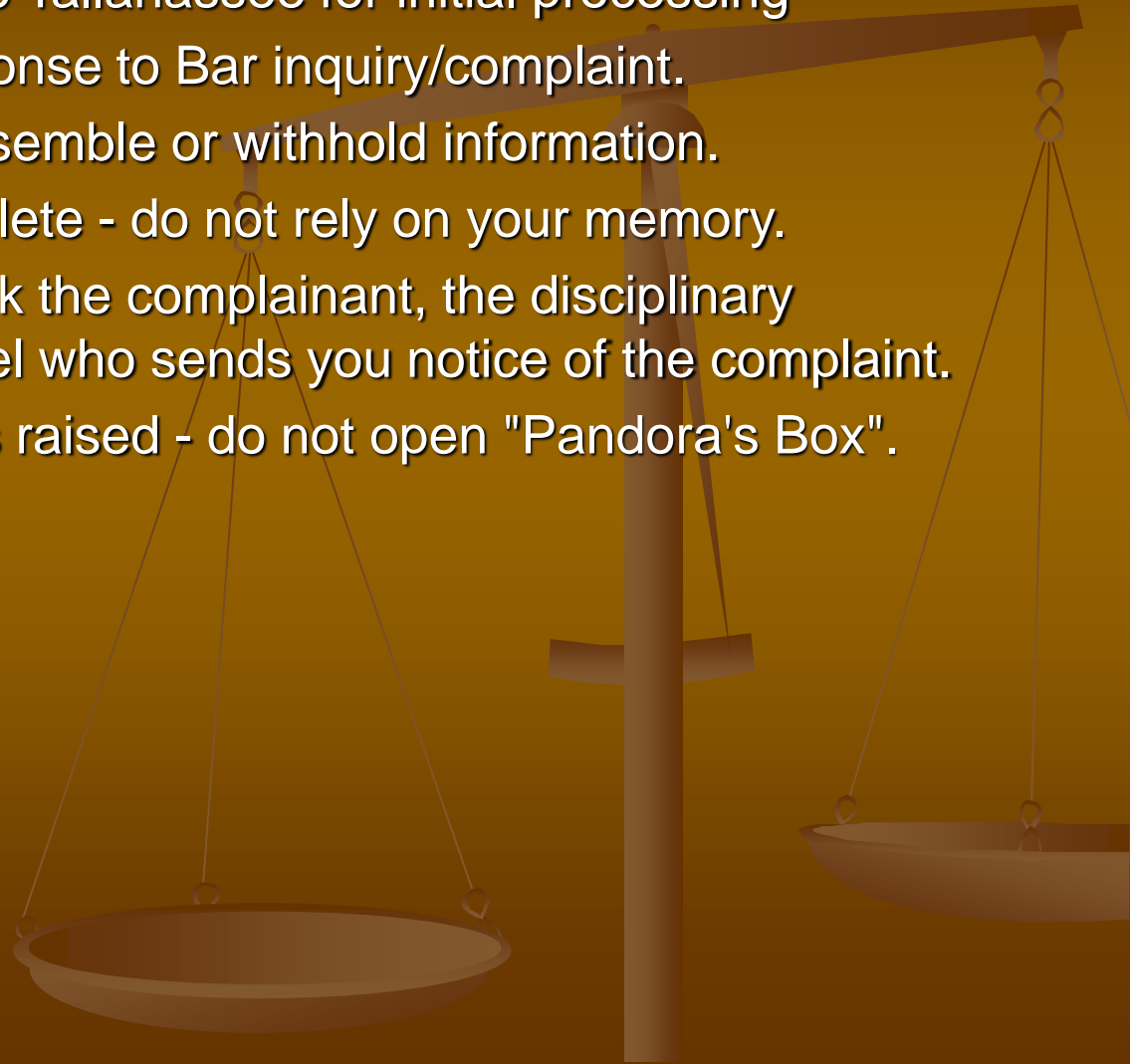
Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, and refunding surrendering papers and property to which the client is entitled, any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

- Must turn over file if hearing is scheduled in a few days.



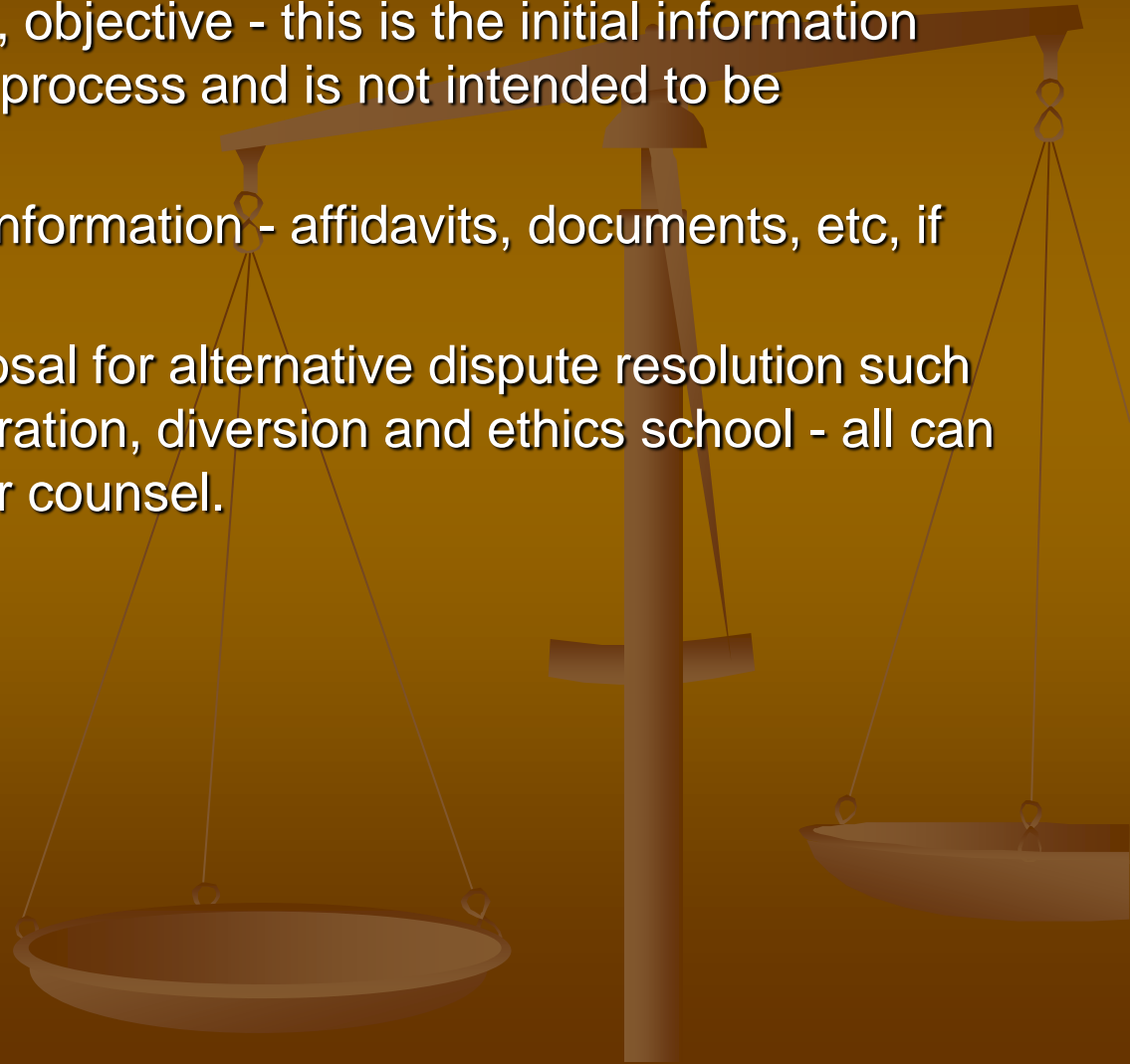
HANDLING BAR GRIEVANCES

- Initial Response to Bar Grievance
- ACAP- all inquiries to Tallahassee for initial processing
- Rules require a response to Bar inquiry/complaint.
 - be truthful - do not dissemble or withhold information.
 - be accurate and complete - do not rely on your memory.
 - resist the urge to attack the complainant, the disciplinary process, or bar counsel who sends you notice of the complaint.
 - respond only to issues raised - do not open "Pandora's Box".



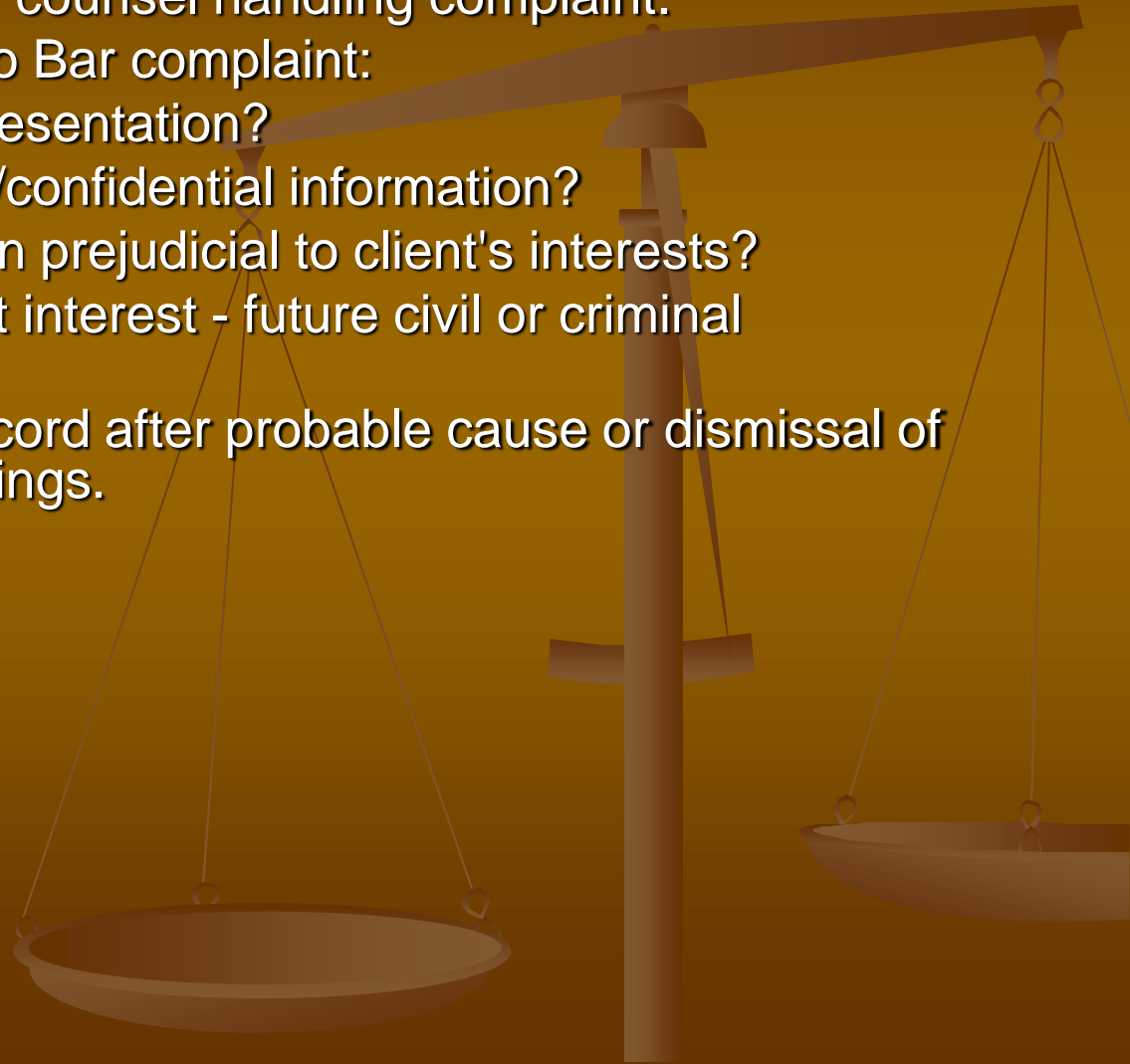
HANDLING BAR GRIEVANCES

- Initial Response to Bar Grievance
- Be non-argumentative, objective - this is the initial information gathering stage of the process and is not intended to be adversarial.
- include corroborative information - affidavits, documents, etc, if necessary and helpful
- consider making proposal for alternative dispute resolution such as mediation, fee arbitration, diversion and ethics school - all can be implemented by bar counsel.



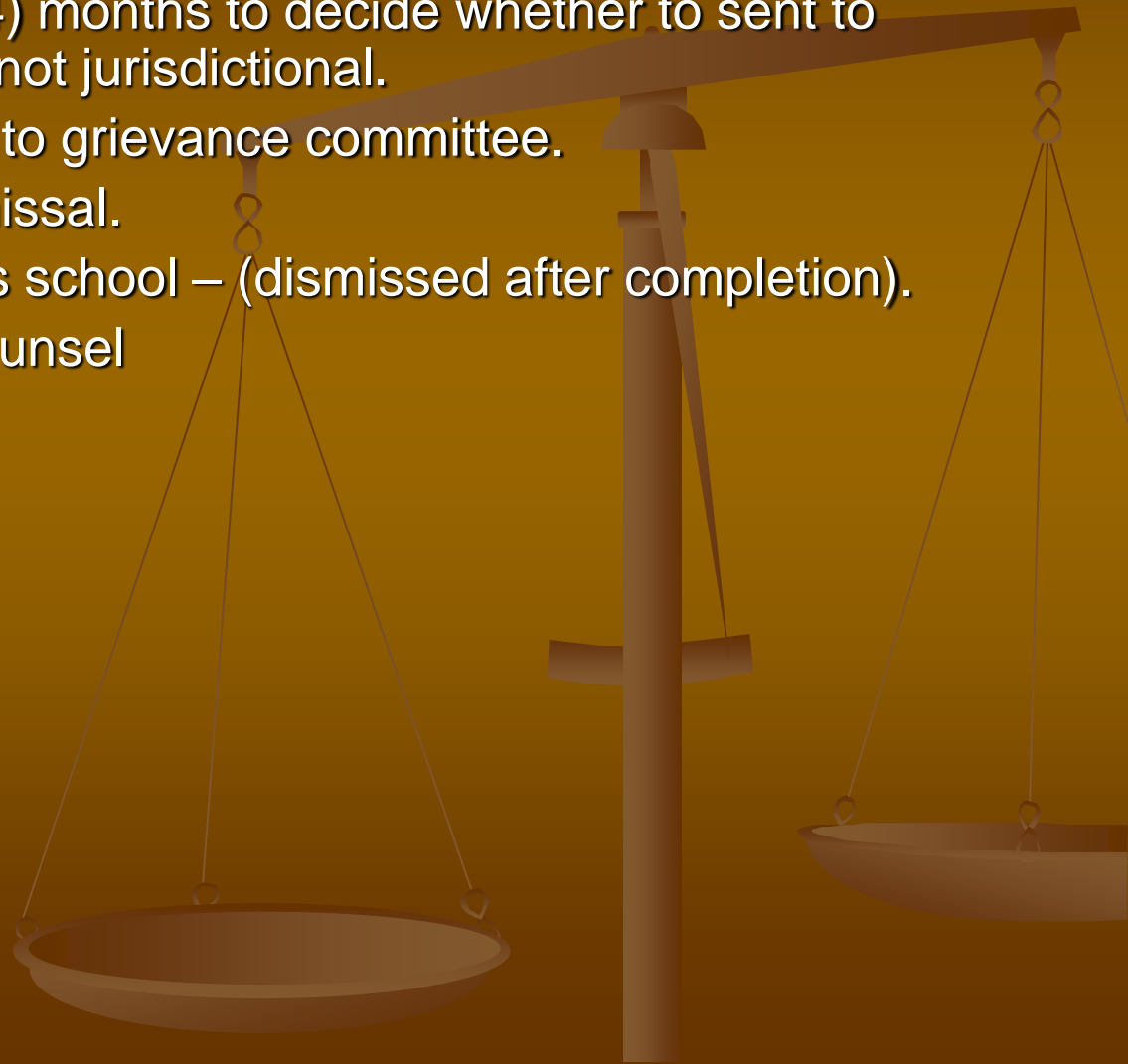
HANDLING BAR GRIEVANCES

- Initial Response to Bar Grievance
- Communicate with bar counsel handling complaint.
- Issues in responding to Bar complaint:
 - withdraw from representation?
 - disclose privileged/confidential information?
 - disclose information prejudicial to client's interests?
 - admissions against interest - future civil or criminal proceedings.
 - becomes public record after probable cause or dismissal of grievance proceedings.



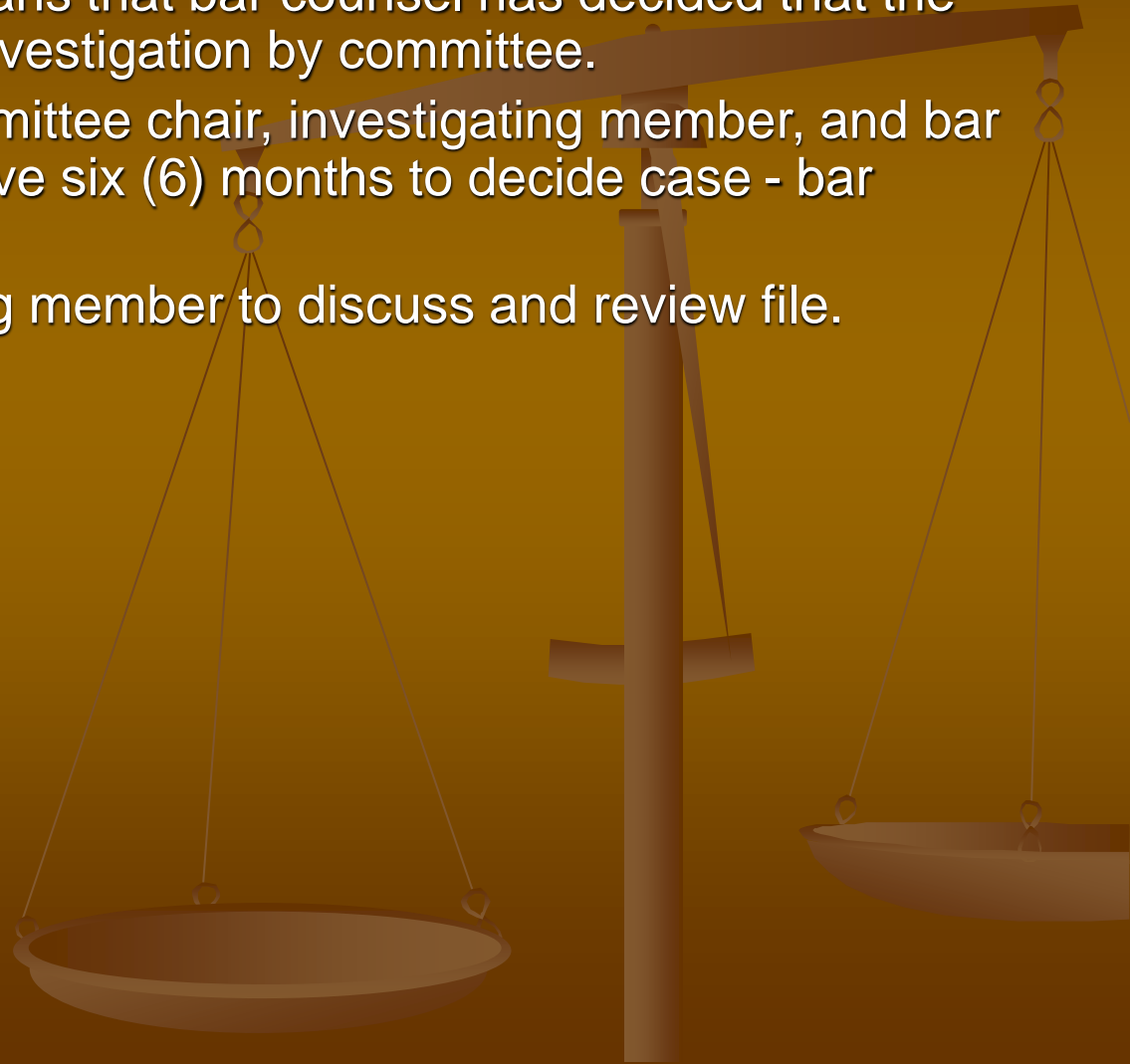
HANDLING BAR GRIEVANCES

- Initial Response to Bar Grievance (continued)
- Bar counsel has four (4) months to decide whether to send to grievance committee - not jurisdictional.
- Options before referral to grievance committee.
 - mediation and dismissal.
 - diversion and ethics school – (dismissed after completion).
 - dismissal by Bar counsel



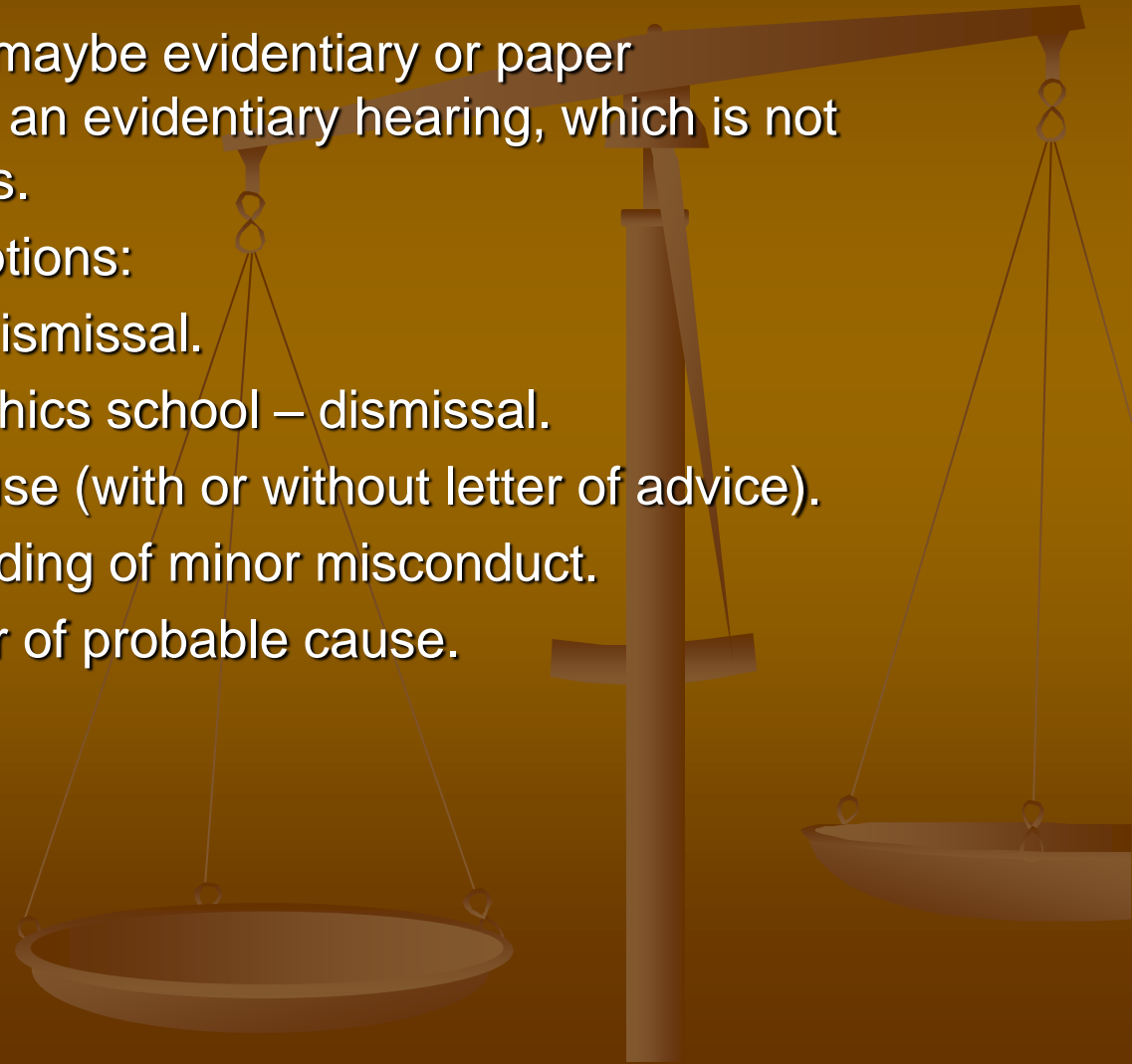
HANDLING BAR GRIEVANCES

- Referral to Grievance Committee
- not a finding of guilt - means that bar counsel has decided that the matter warrants further investigation by committee.
- communication with committee chair, investigating member, and bar counsel. Committees have six (6) months to decide case - bar policy, not jurisdictional.
- meeting with investigating member to discuss and review file.



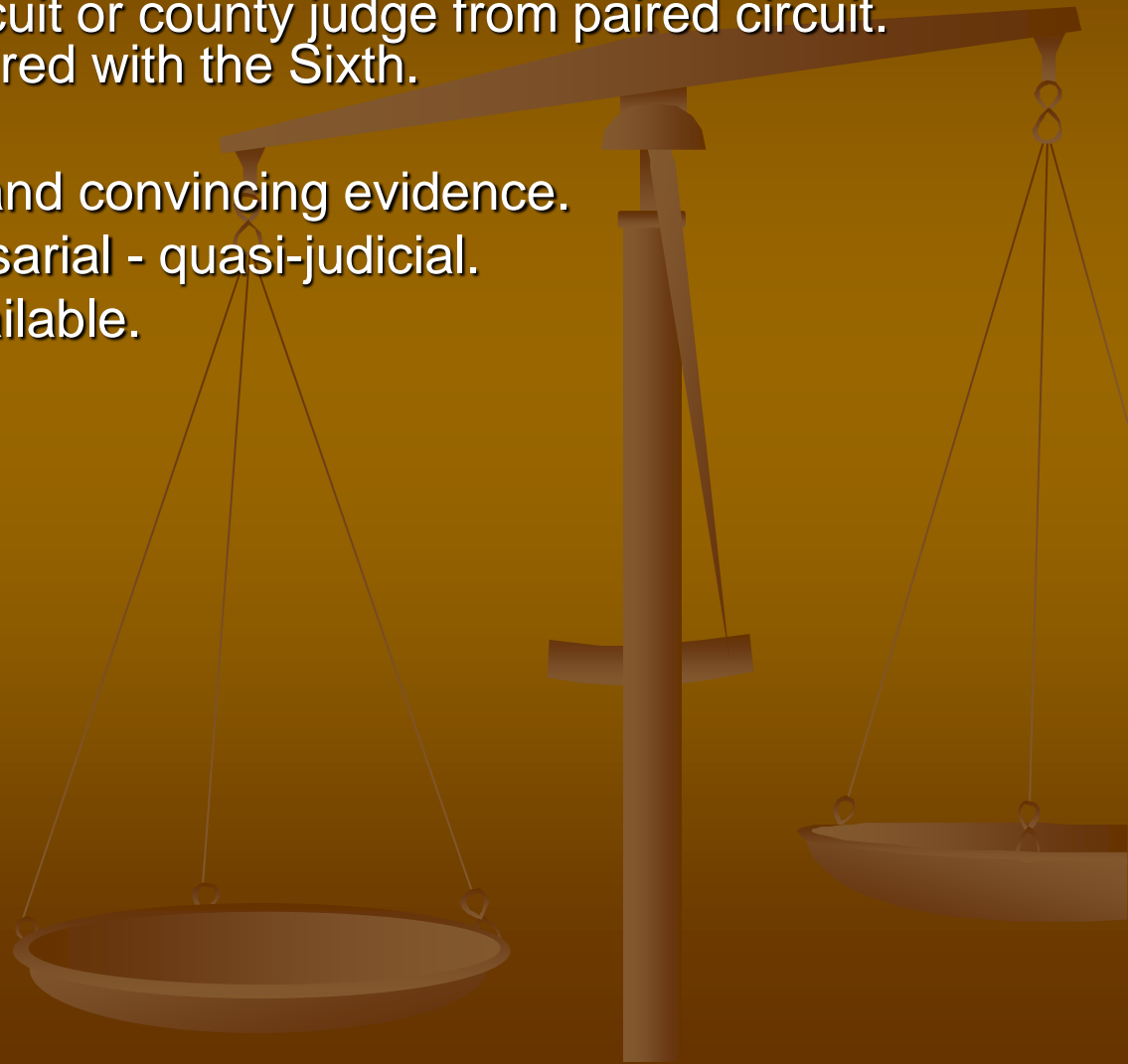
HANDLING BAR GRIEVANCES

- Referral to Grievance Committee
- if hearing scheduled, it maybe evidentiary or paper hearing - may request an evidentiary hearing, which is not required under Bar rules.
- grievance committee options:
 - mediation and dismissal.
 - diversion and ethics school – dismissal.
 - no probable cause (with or without letter of advice).
 - admission or finding of minor misconduct.
 - finding or waiver of probable cause.



HANDLING BAR GRIEVANCES

- Referee and Supreme Court
 - referee is assigned-circuit or county judge from paired circuit. Thirteenth Circuit is paired with the Sixth.
 - de novo proceeding.
 - burden of proof: clear and convincing evidence.
 - proceedings are adversarial - quasi-judicial.
 - limited discovery is available.



HANDLING BAR GRIEVANCES

- Referee and Supreme Court
 - Rules of evidence not strictly applied – hearsay admissible.
 - referee makes recommended findings of fact, conclusions of law, and recommends discipline, if found guilty.
 - Right to review of referee's findings and discipline - factual findings are presumed correct unless there is no support in record.
 - Supreme Court issues final opinion on discipline.

