

Landmines in Litigation

The Attorney Client Relationship

BRAD CROCKETT



Wolff Hislop Crockett

Overview of Next 5 Hours

1. Overview of the Basic Rules - Who is the client?

Then Specific Applications as they relate to:

2. Death

3. Divorce

4. Business

5. Real Estate



Why Landmines?

1. Hidden nature
2. Cannot ignore it
3. Can cause severe damage

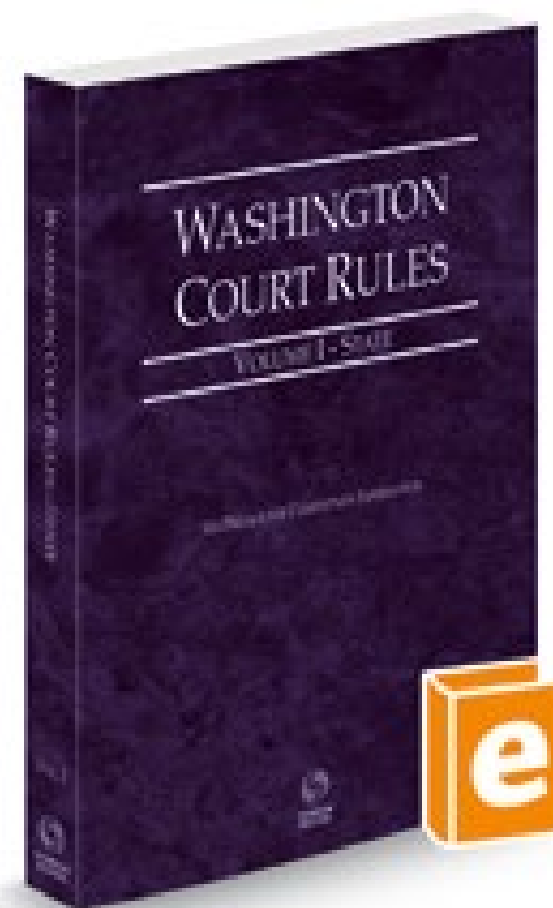
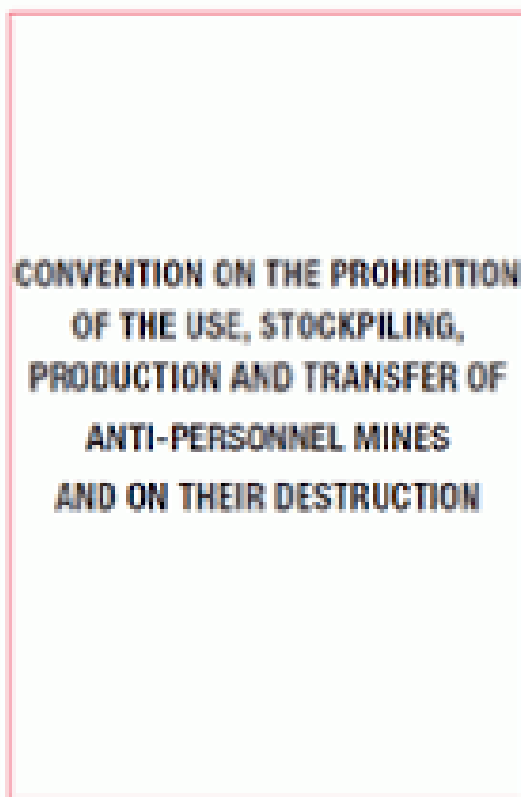
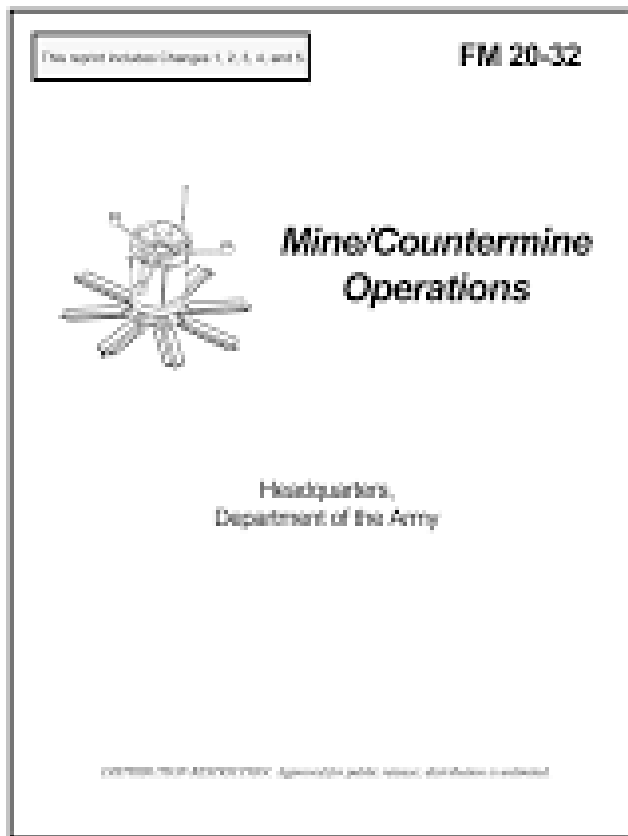


Damage from Stepping on a Landmine

1. Loss of client / loss of reputation
2. Potential lawsuit;
3. Admonition;
4. Reprimand;
5. Suspension up to three years;
6. Disbarment;
7. Probation;
8. Restitution.



Resources



Detecting Landmines

1. Don't rush in
2. Look for Red Flags
3. Gather Intel
4. Recon - Get Eyes on the Ground



Potential Red Flags

1. Short timeline to respond
 - Answer is due
 - Statute of Limitations is about to run
 - Hearing is this week
2. Multiple prior attorneys
3. Multiple prior lawsuits



Gathering Intel

1. Google
2. Paid Database Search (LexisNexis, Westlaw People Search)
3. Social Media Search (Facebook, Instagram, TikTok, Twitter)
4. Business Search
 - Court records search
 - Secretary of State (Is the entity current)
 - Labor and Industries (licensed and bonded, prior complaints/suits/fines)
 - Better Business Bureau (prior complaints)
 - Angie's List, consumer world, Federal Consumer Information, FTC
 - Glass Door – Employment related matter
 - Dunn and Bradstreet
5. Professional License Search
 - Current license
 - Past Disciplinary Action



Reconnaissance – Get Eyes On

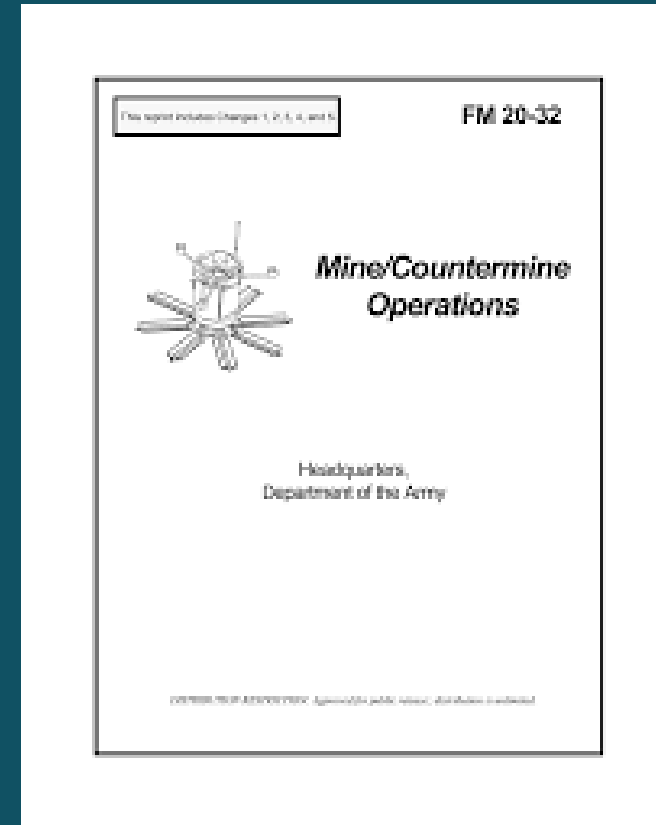
1. Meet with client at their office/home
 - Ice breaking conversation
 - What are the surroundings like
 - Where are files kept
 - Who is present/ has access
2. See property in dispute first hand



Countermine Action

Have a system in place for dealing with landmines:

1. Pause to assess the situation;
2. List out the facts and assumptions
3. Review the Rules / Case law;
4. Generate options and evaluate;
5. Call in the experts;
6. Make a decision and communicate it;
7. Evaluate the results.



Countermine Action: Call in the Expert



Countermine Action: Call Ethics EOD

WSBA Ethics Hotline: 206-727-8284

- Attorneys may call with questions about their own prospective conduct and speak confidentially with the Bar's professional responsibility counsel.
- Advice is informal and nonbinding.
- Do your own research before calling.



Decide & Communicate

Clear and Detailed Client Communication

- Timely address issues with client face-to-face or via telephone.
- Follow up face-to-face meeting with detailed confirming letter.



Potential Landmine: “But you’re my attorney, right?”

Situation: You’ve met with a prospective client to discuss the case but before you formally accept the matter, you get notice of an impending action or deadline with a short suspense that the prospective client expects you to handle.

When does a potential client become an actual client

1. When they sign the fee agreement?;
2. When they pay the advance fee deposit?;



Creation of the Attorney-Client Relationship

- The date of a written agreement or receipt of funds does not necessarily dictate the beginning of an attorney-client relationship. Instead, The existence of the relationship “turns largely on the client's subjective belief that it exists”
- The essence of the attorney-client relationship is whether the attorney's advice or assistance is sought and received on legal matters.
 - See Fechner v. Volyn, 3 Wn. App. 2d 716, 722 (2018); Bohn v. Cody, 119 Wn. 2d 357, 363 (1992).



Countermine Action: Clear Commo

- Be clear in your verbal communication;
 - Use disclaimers on websites, chats, emails;
 - Train your staff on what to say during PNC calls;
 - During counsel's initial conversation, clearly state when a prospective client will become a client.
- Follow up with written confirmation.



Potential Landmine: “The Party Crasher”

Situation: After initial litigation in a matter for a new client, you learn that an existing or former client is implicated in the matter in some way.

Can you continue to represent the new client? Can you assist the old client?



RPC 1.7 Current Client Conflict

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding ...a concurrent conflict of interest...a lawyer may represent a client if:

- (1) ...reasonably believes able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).



RPC 1.7- Comment 2: Resolution of a conflict of interest

Rule 1.7 Requires a lawyer facing concurrent conflict to:

- 1) clearly identify the client or clients;
- 2) determine whether a conflict of interest exists;
- 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and
- 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.



Countermine Action: Gather Intel

1. Gather intel

- Run an initial conflict check;

- Conduct a detailed Internet search;

- Gather more information;

- Run any additional conflict checks as necessary.

2. If waivable– get informed consent confirmed in writing.



Potential Landmine: The Benefactor

Situation: Prospective client cannot afford the litigation, but his parents have indicated they will foot the bill.

What is the person paying the bills entitled to?

1. Updates/information?
2. Providing direction?



RPC 1.8 and RPC 1.7- Comment 13

A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents; and

the arrangement does not compromise lawyer's duty of loyalty or independent judgment; and
information relating to representation of a client is protected as required by Rule 1.6.

A conflict subject to Rule 1.7b arises If ...payment ...presents a significant risk of materially limiting the lawyer's representation of the client due to the lawyer's interest in accommodating the person paying the lawyer's fee.



RPC 1.7 & Insureds

An attorney representing an insured under a reservation of the insurer's rights must represent the interests of the insured, not the insurer, and must disclose to the insured conflicts of interest under **RPC 1.7**, all information relevant to the insured's defense, and all offers of settlement as they are presented.

Johnson v. Continental Casualty Co. (1990) 57 Wn. App. 359, 788 P.2d 598.



Countermine Action: Clear Commo

Specifically advise the benefactor of what they can expect

Prepare a written agreement that details the understanding that the attorney, client and benefactor all sign.



Potential Landmine: Joint Representation

Situation: An existing client asks for assistance for him and another individual in a matter involving a third party. When you first raise the potential conflict, he says “Don’t worry, we are on the same page in this matter.”



RPC 1.7- Comment 29 – Common or Joint Representation

- If representing multiple clients in the same matter, a lawyer should inform the clients of the risk that their interests may later become irreconcilably adverse and the subsequent consequences.
- Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.
- Typically prohibited if contentious litigation or negotiations between them are imminent or contemplated.
- Lawyer must be impartial between commonly represented clients.
- Other relevant factors: whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.



Countermine: Clear Commo

1. Have a frank conversation with both parties before representation;
2. Obtain Informed consent, confirmed in writing;
3. Identify how you will communicate during the case including how direction will be provided.



Potential Landmine: Alternative Compensation

Situation: An existing client runs out of funds in the course of litigation and says “I don’t have cash, but the company is going to be worth a lot– can I pay you in stock?”

Is this permitted?



RPC 1.8 – Prohibited Conduct

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms ...are fair and reasonable.. and... fully disclosed...in writing that can be reasonably understood by the client;
- (2) the client is advised in writing and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and
- (3) client gives informed consent, confirmed in writing



RPC 1.8 – Prohibited Conduct

(e) A lawyer shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.



RPC 1.8 – Prohibited Conduct

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.



RPC 1.8 Business transactions with Clients

Comments 1-4

- The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation
- Paragraph (a) applies to lawyers purchasing property from estates they represent and when accepting interest in client business or other nonmonetary property as payment for legal services.
- Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of an independent lawyer and be afforded reasonable time to consult.
- The lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction



RPC 1.8 Financial Assistance to Clients

Comments 10 & 21

- Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.



Countermine: Require Outside Counsel

1. While the RPC requires you to advise the client to get outside counsel, you can refuse to do the transaction unless the client obtains other counsel to review any proposed transaction;



Potential Landmine: Representing Business

Situation: The CEO of a local company contacts you to represent the company in a lawsuit against it based on claims of sexual harassment made by a former employee. During the course of the representation, the CEO wants you to bury evidence.



RPC 1.13

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.



RPC 1.13

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.



RPC 1.13

(c) Except as provided in paragraph (d), if
(1) despite the lawyer's efforts ...the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Exception– when lawyer represents organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.



RPC 1.13

(e) A lawyer ...discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.



RPC 1.13 and Comment 10 – Clarifying the Lawyer's Role to Constituents

(f) In dealing with an organization's [affiliates] 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.

(g) [Dual representation of organization and affiliates is authorized], subject to ...Rule 1.7. If the organization's consent ...is required, the consent shall be given by an appropriate official ...other than the individual who is to be represented, or by the shareholders.

- There are times when the organization's interest may be or become adverse to those of one or more of its constituents.
- The lawyer should advise any such constituent that the lawyer cannot represent them, and that discussions between the lawyer for the organization and the individual may not be privileged, and that such person may wish to obtain independent representation.



Comment 3 – Lawyer's Scope of Expertise

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province.

However, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.

As defined in Rule 1.0A(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.



Comment 14 – Derivative Actions

Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit.

However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board.



RPC 1.13 – Government Unit as client

(h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or (2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.



Potential Landmine: Client with Diminished Capacity

Situation: Adult child brings an aging parent in to your office to deal with a litigation problem. Adult child indicates parent has some cognitive issues and says that the child will be the point of contact for the action.

Is this permitted?



RPC 1.14 – Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.



RPC 1.14 – Comment 1

- There are no “one size fits all” capacity rules.
- The severity of a person’s diminished capacity, or age, alters the lawyer’s approach to representation.
- Each client should be assessed upon individual findings from the lawyer in order to understand how each person should be represented and to what degree.



RPC 1.14 – Comment 3: Family Members

- When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.
- Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), *must to look to the client, and not family members*, to make decisions on the client's behalf



RPC 1.14 – Comment [7] - When should a lawyer seek appointment of a guardian, conservator or guardian ad litem?

- Client is at risk of substantial physical, financial or other harm and the client lacks sufficient capacity to communicate or make adequately considered decisions in connection with the representation.
- “The lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.”



Countermine: Client with Diminished Capacity

1. Properly assess client's capacity;
2. Document assessment of capacity;
3. Determine whether someone else has authority to act on behalf of client;
4. Develop a written plan for pursuing the case;
5. Continuously evaluate whether a change is required.



Landmine Treaty

Entered in Oslo, 18 September 1997 by 164 Nations. Requires signatories to destroy their stockpile of antipersonnel landmines within 4 years of entry into effect.

Parties that have not entered the treaty:

1. China
2. Egypt
3. Israel
4. Pakistan
5. Russia
6. United States
7. Your clients
8. Opposing parties

**CONVENTION ON THE PROHIBITION
OF THE USE, STOCKPILING,
PRODUCTION AND TRANSFER OF
ANTI-PERSONNEL MINES
AND ON THEIR DESTRUCTION**



ICRC

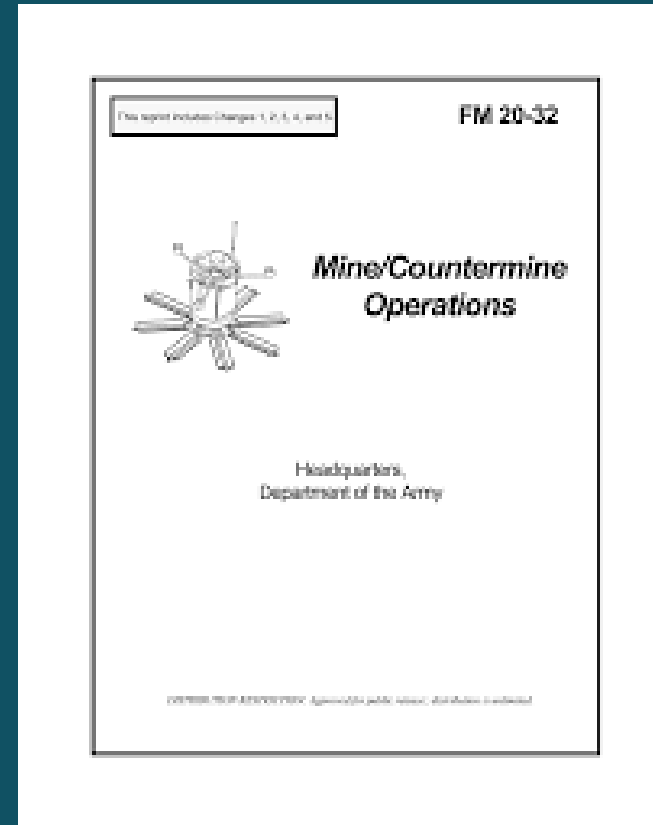
Countermine Action

Develop System to Avoid Landmines

1. Do not Rush
2. Gather Intel
3. Do a Recon– Get Eye's On
4. Communicate Agreement/Expectations in multiple ways– confirmed in writing.

Develop system to defeat Landmines:

1. Pause to assess the situation;
2. List out the facts and assumptions
3. Review the Rules / Case law;
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5. Call in the experts;
6. Make a decision and communicate it;
7. Evaluate the results.



Questions?

Phone: (509) 927-9700

Email: bcrockett@whc-attorneys.com

