## TOPIC 1. CREATING A CLIENT-LAWYER RELATIONSHIP

Introductory Note

**Section**



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**Introductory Note:** This Topic addresses creation of a relationship of lawyer and client (§ 14) and the duties a lawyer owes to a prospective client (see § 15). A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not. Prospective and former clients receive certain protections, but not all those due to clients.

### § 14. Formation of a Client-Lawyer Relationship

**A relationship of client and lawyer arises when:**

**(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either**

**(a) the lawyer manifests to the person consent to do so; or**

**(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or**

**(2) a tribunal with power to do so appoints the lawyer to provide the services.**

**Comment:**

*a. Scope and cross-references.* This Section sets forth a standard for determining when a client-lawyer relationship begins. Nonetheless, the various duties of lawyers and clients do not always arise simultaneously. Even if no relationship ensues, a lawyer may owe a prospective client certain duties (see § 15; § 60 & Comment *d* thereto). A lawyer representing a client may perform services also benefiting another person, for example arguing a motion for two litigants, without owing the nonclient litigant all the duties ordinarily owed to a client (see § 19(1)). Even if a relationship ensues, the client may not owe the lawyer a fee (see § 17 & Comment *b* thereto; § 38 &

Comment *c* thereto; Restatement Second, Agency § 16). When a fee is due, the person owing it is not necessarily a client (see § 134). Moreover, a client-lawyer relationship may be more readily found in some situations (for example, when a person has a reasonable belief that a lawyer was protecting that person's interests; see Comment *d* hereto) than in others (for example, when a person seeks to compel a lawyer to provide onerous services). In some situations—for example, when a lawyer agrees to represent a defendant without knowing that the lawyer's partner represents the plaintiff—a lawyer is forbidden to perform some duties for the client (continuing the representation) while nevertheless remaining subject to other duties (keeping the client's confidential information secret from others, including from the lawyer's own partner).

When a client-lawyer relationship arises, its scope is subject to the principles set forth in § 19(1), and its termination is governed by §§ 31 and 32. Agency and contract law are also applicable, except when inconsistent with special rules applicable to lawyers. The scope of responsibilities may change during the representation.

*b. Rationale.* The client-lawyer relationship ordinarily is a consensual one (see Restatement Second, Agency § 15). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services. The consent requirement, however, is not symmetrical. The client may at any time end the relationship by withdrawing consent (see §§ 31, 32, & 40), while the lawyer may properly withdraw only under specified conditions (see §§ 31 & 32). A lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship (see Comment *e*), and a court may direct the lawyer to represent the client by appointment (see Comment *g*). Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant. Agreement between client and lawyer likewise defines the scope of the representation, for example, determining whether it encompasses a single matter or is continuing (see § 19(1); § 31(2)(e) & Comment *h*). Even when a representation is continuing, the lawyer is ordinarily free to reject new matters.

*c. The client's intent.* A client's manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer to write a will. The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the

lawyer. The client may hire the lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer's acts, for example when a friend asks a lawyer to represent an imprisoned person who later manifests acceptance of the lawyer's services. The client's intent may be communicated by someone acting for the client, such as a relative or secretary. (The power of such a representative to act on behalf of the client is determined by the law of agency.) No written contract is required in order to establish the relationship, although a writing may be required by disciplinary or procedural standards (see § 38, Comment *b*). The client need not necessarily pay or agree to pay the lawyer; and paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 134).

The client-lawyer relationship contemplates legal services from the lawyer, not, for example, real-estate-brokerage services or expert-witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services. A client-lawyer relationship is not created, however, by the fact of receiving some benefit of the lawyer's service, for example when the lawyer represents a co-party. Finally, a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.

A client-lawyer relationship can arise even if the client's consent to enter into the relationship is not fully informed. The lawyer should, however, consult with the client about such matters as the benefits and disadvantages of the proposed representation and conflicts of interest. On consultation in general, see § 20. A lawyer who fails to disclose such matters may be subject to fee forfeiture, professional discipline, malpractice liability, and other sanctions (see §§ 15, 20, 37, 48, 121, & 122).

*d. Clients with diminished capacity.* Individuals who are legally incompetent, for example some minors or persons with diminished mental capacity, often require representation to which they are personally incapable of giving consent (see Restatement Second, Agency § 20). A guardian for such an individual may retain counsel for the incapacitated person, subject in some instances to court approval. A court also may appoint counsel to represent an incompetent party without the party's consent. A person of diminished capacity nevertheless may be able to consent to representation, and to become liable to pay counsel, under the doctrine of "necessaries" (see § 31, Comment *e*; § 39; Restatement Second, Contracts § 12, Comment *f*). Representing a client of diminished capacity is considered in § 24 (see also § 31,

Comment *e* (client's incompetence does not automatically end lawyer's authority)).

*e. The lawyer's consent or failure to object.* Like a client, a lawyer may manifest consent to creating a client-lawyer relationship in many ways. The lawyer may explicitly agree to represent the client or may indicate consent by action, for example by performing services requested by the client. An agent for the lawyer may communicate consent, for example, a secretary or paralegal with express, implied, or apparent authority to act for the lawyer in undertaking a representation.

A lawyer's consent may be conditioned on the successful completion of a conflict-of-interest check or on the negotiation of a fee arrangement. The lawyer's consent may sometimes precede the client's manifestation of intent, for example when an insurer designates a lawyer to represent an insured (see § 134, Comment *f*) who then accepts the representation. Although this Section treats separately the required communications of the client and the lawyer, the acts of each often illuminate those of the other.

**Illustrations:**

1. Client telephones Lawyer, who has previously represented Client, stating that Client wishes Lawyer to handle a pending antitrust investigation and asking Lawyer to come to Client's headquarters to explore the appropriate strategy for Client to follow. Lawyer comes to the headquarters and spends a day discussing strategy, without stating then or promptly thereafter that Lawyer has not yet decided whether to represent Client. Lawyer has communicated willingness to represent Client by so doing. Had Client simply asked Lawyer to discuss the possibility of representing Client, no client-lawyer relationship would result.

2. As part of a bar-association peer-support program, lawyer A consults lawyer B in confidence about an issue relating to lawyer A's representation of a client. This does not create a client-lawyer relationship between A's client and B. Whether a client-lawyer relationship exists between A and B depends on the foregoing and additional circumstances, including the nature of the program, the subject matter of the consultation, and the nature of prior dealings, if any, between them.

Even when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer,

who reasonably should know of this reliance, does not inform the person that the lawyer will not do so (see § 14(1)(b); see also § 51(2)). In many such instances, the lawyer's conduct constitutes implied assent. In others, the lawyer's duty arises from the principle of promissory estoppel, under which promises inducing reasonable reliance may be enforced to avoid injustice (see Restatement Second, Contracts § 90). In appraising whether the person's reliance was reasonable, courts consider that lawyers ordinarily have superior knowledge of what representation entails and that lawyers often encourage clients and potential clients to rely on them. The rules governing when a lawyer may withdraw from a representation (see § 32) apply to representations arising from implied assent or promissory estoppel.

**Illustrations:**

3. Claimant writes to Lawyer, describing a medical-malpractice suit that Claimant wishes to bring and asking Lawyer to represent Claimant. Lawyer does not answer the letter. A year later, the statute of limitations applicable to the suit expires. Claimant then sues Lawyer for legal malpractice for not having filed the suit on time. Under this Section no client-lawyer relationship was created (see § 50, Comment *c*). Lawyer did not communicate willingness to represent Claimant, and Claimant could not reasonably have relied on Lawyer to do so. On a lawyer's duty to a prospective client, see § 15.

4. Defendant telephones Lawyer's office and tells Lawyer's Secretary that Defendant would like Lawyer to represent Defendant in an automobile-violation proceeding set for hearing in 10 days, this being a type of proceeding that Defendant knows Lawyer regularly handles. Secretary tells Defendant to send in the papers concerning the proceeding, not telling Defendant that Lawyer would then decide whether to take the case, and Defendant delivers the papers the next day. Lawyer does not communicate with Defendant until the day before the hearing, when Lawyer tells Defendant that Lawyer does not wish to take the case. A trier of fact could find that a client-lawyer relationship came into existence when Lawyer failed to communicate that Lawyer was not representing Defendant. Defendant relied on Lawyer by not seeking other counsel when that was still practicable. Defendant's reliance was reasonable because Lawyer regularly handled Defendant's type of case, because Lawyer's agent had responded to Defendant's request for help by asking Defendant to transfer papers needed for the proceeding, and because the

imminence of the hearing made it appropriate for Lawyer to inform Defendant and return the papers promptly if Lawyer decided not to take the case.

The principles of promissory estoppel do not bind prospective clients as readily as lawyers. Clients who are not sophisticated about how client-lawyer relationships arise should not be forced to accept unwanted representation or to pay lawyers for unwanted services. Nevertheless, promissory estoppel may bind a person who has not requested a lawyer's services. That may occur, for example, when a person has regularly retained a lawyer to prepare and file certain reports, knows that the lawyer is preparing and filing the next report, and accepts the benefit of the lawyer's services without warning the lawyer that they are unwanted. Also, a person's knowing acceptance of the benefits of a lawyer's representation, when the person could have chosen not to accept them, may constitute consent by ratification. If an employer, for example, notifies an employee that it has arranged for a lawyer to represent the employee in a prosecution arising out of the employment, and the employee confers with the lawyer and takes no action when the lawyer purports to speak for the employee in court, the employee has ratified the relationship. The client may end the relationship by discharging the lawyer (see §§ 32 & 40).

*f. Organizational, fiduciary, and class-action clients.* When the client is a corporation or other organization, the organization's structure and organic law determine whether a particular agent has authority to retain and direct the lawyer. Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonable expectations in the circumstances (see Subsection (1)). Where appropriate, due consideration should be given to the unreasonableness of a claimed expectation of entering into a co-client status when a significant and readily apparent conflict of interest exists between the organization or other client and the associated person or entity claimed to be a co-client (see § 131).

Under Subsection (1)(b), a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity (see Subsection (1)(b); see also § 103, Comment *b* (extent of a lawyer's duty

to warn an unrepresented person that the lawyer represents a client with conflicting interests)). Such clarification may be required, for example, with respect to an officer of an entity client such as a corporation, with respect to one or more partners in a client partnership or in the case of affiliated organizations such as a parent, subsidiary, or similar organization related to a client person or client entity. An implication that such a relationship exists is more likely to be found when the lawyer performs personal legal services for an individual as well or where the organization is small and characterized by extensive common ownership and management. But the lawyer does not enter into a client-lawyer relationship with a person associated with an organizational client solely because the person communicates with the lawyer on matters relevant to the organization that are also relevant to the personal situation of the person. In all events, the question is one of fact based on the reasonable and apparent expectations of the person or entity whose status as client is in question.

In trusts and estates practice a lawyer may have to clarify with those involved whether a trust, a trustee, its beneficiaries or groupings of some or all of them are clients and similarly whether the client is an executor, an estate, or its beneficiaries. In the absence of clarification the inference to be drawn may depend on the circumstances and on the law of the jurisdiction. Similar issues may arise when a lawyer represents other fiduciaries with respect to their fiduciary responsibilities, for example a pension-fund trustee or another lawyer.

Class actions may pose difficult questions of client identification. For many purposes, the named class representatives are the clients of the lawyer for the class. On conflict-of-interest issues, see § 125, Comment *f*. Yet class members who are not named representatives also have some characteristics of clients. For example, their confidential communications directly to the class lawyer may be privileged (compare § 70, Comment *c*), and opposing counsel may not be free to communicate with them directly (see § 99, Comment *l*).

Lawyers in class actions must sometimes deal with disagreements within the class and breaches by the named parties of their duty to represent class members. Although class representatives must be approved by the court, they are often initially self-selected, selected by their lawyer, or even (when a plaintiff sues a class of defendants) selected by their adversary. Members of the class often lack the incentive or knowledge to monitor the performance of the class representatives. Although members may sometimes opt out of the class, they may have no practical alternative other than remaining in the class if they wish to enforce their rights. Lawyers in class actions thus have duties to the class as well as to the class representatives.

A class-action lawyer may therefore be privileged or obliged to oppose the views of the class representatives after having consulted with them. The lawyer may also propose that opposing positions within the class be separately represented, that sub-classes be created, or that other measures be taken to ensure broader class participation. Withdrawal may be an option (see § 32), but one that is often undesirable because it may leave the class without effective representation. The lawyer should act for the benefit of the class as its members would reasonably define that benefit.

*g. Nonconsensual relationship: appointed counsel.* A lawyer may be required to represent a client when appointed by a court or other tribunal with power to do so. A lawyer may discuss the proposed representation with the prospective client and may give the court reasons why appointment is inappropriate or should be terminated.

The appointment may be rejected by the prospective client, except for persons, such as young children, lacking capacity to make that decision. In the case of some parties, for example corporations and other entities, the party may appear in court only through a lawyer. A court may require a criminal defendant to choose between an unwelcome lawyer and self-representation, and in criminal cases standby or advisory counsel may be appointed when the defendant elects self-representation. When a court appoints a lawyer to represent a person, that person's consent may ordinarily be assumed absent the person's rejection of the lawyer's services.

*h. Client-lawyer relationships with law firms.* Many lawyers practice as partners, members, or associates of law firms (see § 9(1)). When a client retains a lawyer with such an affiliation, the lawyer's firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise. For example, the lawyer ordinarily may share the client's work and confidences with other lawyers in the firm (see § 61, Comment *d),* and the firm is liable to the client for the lawyer's negligence (see § 58). Should the lawyer leave the firm, the client may choose to be represented by the departing lawyer, the lawyer's former firm, neither, or both (see §§ 31 & 32; see also § 9(3)). On the other hand, a client's retention of a lawyer or firm ordinarily does not permit the lawyer or firm, without further authorization from the client, to retain a lawyer outside the firm at the client's expense to represent the client (see Restatement Second, Agency § 18). On imputation of conflicts of interest within a law office, see § 123.

*i. Others to whom lawyers owe duties.* In some situations, lawyers owe duties to nonclients resembling those owed to clients. Thus, a lawyer owes certain duties to members of a class in a class

action in which the lawyer appears as lawyer for the class (see Comment *f*) and to prospective clients who never become clients (see § 15). Duties may be owed to a liability-insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer, to trust beneficiaries by a lawyer representing the trustee, and to certain nonclients in other situations (see § 134, Comment *f*; see also Comment *f* hereto). What duties are owed can be determined only by close analysis of the circumstances and the relevant law and policies. A lawyer may also become subject to duties to a nonclient by becoming, for example, a trustee, or corporate director. On conflicts between such duties and duties the lawyer owes clients, see § 135; see also § 96. On civil liability to nonclients, see §§ 51 and 56.

## REPORTER'S NOTE

*Comment b. Rationale.* On continuing relationships, see, e.g., IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978); § 31, Comment *h*, and Reporter's Note thereto.

*Comment c. The client's intent.* See, e.g., Davis v. State Bar, 655 P.2d 1276 (Cal.1983) (client told lawyer client wanted to bring suit; lawyer asked for documents and wrote letters); Dawson v. Duncan, 494 N.E.2d 900 (Ill.App.Ct.1986) (retainer by agent); Zych v. Jones, 406 N.E.2d 70 (Ill.App.Ct.1980) (no relationship when lawyer filed appearance for party at third person's request and party said he would notify lawyer if party wanted lawyer's services but never so notified lawyer). On ratification by a client, see E. Wood, Fee Contracts of Lawyers 65–66 (1936); Annot., 78 A.L.R. 2d 318 (1961). On retention by an agent, see Randolph v. Resolution Trust Corp., 995 F.2d 611 (5th Cir. 1993). On nonlegal services, see Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir.1991) (lawyer provided investment advice, not legal services, to sophisticated client); In re Petrie, 742 P.2d 796 (Ariz.1987) (lawyer's unsuccessful assertion that lawyer was not to perform legal services); Otaka, Inc. v. Klein, 791 P.2d 713 (Hawaii 1990) (lawyer-broker who performed some legal services had client-lawyer relationship).

*Comment d. Clients with diminished capacity.* See Cook v. Connolly, 366 N.W.2d 287 (Minn.1985) (parent authorized by statute to retain lawyer for child); In re Sippy, 97 A.2d 455 (D.C.1953) (in mother's proceeding to commit disobedient minor daughter, lawyer retained by daughter, not lawyer retained by mother, represents daughter); Fed. R. Civ. P. 17(c) (representative, next friend, or guardian ad litem may sue or defend on behalf of infant or incompetent person); E. Wood, Fee Contracts of Lawyers 32–33, 61–65 (1936).

*Comment e. The lawyer's consent or failure to object.* E.g., Davis v. State Bar, 655 P.2d 1276 (Cal.1983); Morris v. Margulis, 718 N.E.2d 709 (Ill.App.Ct.1999) (firm declined to represent client, but later gave advice); De Vaux v. American Home Assurance Co., 444 N.E.2d 355 (Mass. 1983) (lawyer's secretary told would-be client to send letter, arranged medical examination, and told client

to write opposing party; jury could find real or apparent authority); George v. Caton, 600 P.2d 822 (N.M.Ct.App.), cert. quashed, 598 P.2d 215 (N.M.1979) (lawyer said he would handle case); In re McGlothlen, 663 P.2d 1330 (Wash.1983) (lawyer offered to answer questions and later gave advice). On promissory estoppel, see, e.g., Hacker v. Holland, 570 N.E.2d 951, 956 (Ind.Ct.App.1991) (lawyer promised only to protect interests, but without promising to represent client); Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977). A number of promissory-estoppel cases involve lawyers for one party to a transaction who offered to provide services for other parties, who reasonably relied on the lawyers and were allowed to recover for their negligence. Nelson v. Nationwide Mortgage Corp., 659 F.Supp. 611 (D.D.C. 1987) (lawyer volunteered to explain documents and answered questions); Simmerson v. Blanks, 254 S.E.2d 716 (Ga.Ct.App.1979) (lawyer offered to file financing statement); Stinson v. Brand, 738 S.W.2d 186 (Tenn.1987) (buyer's lawyer was also trustee under deed of trust). See also Rice v. Forestier, 415 S.W.2d 711 (Tex.Civ. App.1967) (client delivered papers in suit to lawyer representing client in other matters; lawyer did nothing). For esteppel of a client, see Freedman v. Horton, Schwartz & Perse, 383 So.2d 659 (Fla.Dist.Ct.App.1980) (client who knew but did not object when client's lawyer retained another lawyer is liable for second lawyer's fees); Citicorp Real Estate, Inc. v. Buchbinder & Elegant, P.A., 503 So.2d 385 (Fla.Dist.Ct.App.1987) (mortgagee liable for fee because was functional equivalent of owner, accepted lawyer's services, and asked for bill).

*Comment f. Organizational, fiduciary, and class-action clients.* See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978) (considering whether trade association or its members were clients); United States v. Walters, 913 F.2d 388 (7th Cir.1990) (in circumstances presented, corporate officers retained counsel in their individual capacities); Arctic Slope Native Assoc. v. Paul, 609 P.2d 32 (Alaska 1980) (retaining counsel for corporation before its incorporation); ABA Model Rules of Professional Conduct, Rule 1.13 (1983); Moore, Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations, 45 S.C. L. Rev. 659 (1994); Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Corn. L. Rev. 825 (1992); Pope, Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics, 68 Ore. L. Rev. 1 (1989).

On whether a person associated with an organization is a co-client along with the organization, see generally, e.g., Wick v. Eismann, 838 P.2d 301 (Idaho 1992) (whether lawyer for corporation owning motor speedway also represented minority shareholder for purposes of legal-malpractice liability); Doe v. Poe, 595 N.Y.S.2d 503 (N.Y.App.Div.1993) (trial court's denial of action to enjoin lawyers from disclosing to intra-corporate committee CEO's communications to it potentially harmful to him was supported by facts); ABA Formal Opin. 92-365, at 2-5 (1992) (whether lawyer for trade association also represents individual member is question of fact); ABA Formal Opin. 91-361, at

4 n.4 (1991) (whether lawyer for partnership represents any individual partner in addition to partnership as entity is question of fact concerning intent of parties, which may be implied from circumstances); compare, e.g., Hopper v. Frank, 16 F.3d 92 (5th Cir.1994) (on facts, no evidence that business partners who hired lawyer to represent limited partnership in sale of limited-partnership interests also represented individual partners); Rose v. Summers, Compton, Wells & Hamburg, 887 S.W.2d 683 (Mo.Ct. App.1994) (on facts, lawyer for limited partnership did not also represent limited partners, thus precluding their legal-malpractice suit); Bowen v. Smith, 838 P.2d 186 (Wyo.1992) (no evidence that lawyer for corporation, employed in the interest of majority shareholder, also represented minority shareholders, thus barring their legal-malpractice suit).

On the relevance of common ownership and management, compare, e.g., Meyer v. Mulligan, 889 P.2d 509 (Wyo.1995) (question of fact whether husband and wife, incorporators of corporation to own motel, were coclients with standing to sue lawyer for corporation for legal malpractice), with, e.g., Rice v. Strunk, 670 N.E.2d 1280 (Ind.1996) (on facts, no evidence that lawyer for partnership owning and operating apartments had client-lawyer relationship with general partner-operating manager sufficient to warrant malpractice suit by that person; court refuses to follow decisions holding that lawyer for general partnership always represents each general partner).

The general rule is that confidential communications between a lawyer for an organization and an employee or agent of the organization about a matter of interest to the organization does not thereby make the lawyer counsel for the associated person with respect to that person's own interests in the same matter. Thus, the organization may continue to employ the lawyer to oppose the person in the same or a substantially related matter. See, e.g., Kubin v. Miller, 801 F.Supp. 1101, 1116 (S.D.N.Y.1992); Ferranti Intern. plc v. Clark, 767 F.Supp. 670 (E.D.Pa.1991); Professional Serv. Indus., Inc. v. Kimbrell, 758 F.Supp. 676 (D.Kan.1991); Talvy v. American Red Cross, 618 N.Y.S.2d 25 (N.Y.App.Div.1994); see also § 103, Comment *e*, and Reporter's Note thereto. If, however, an officer or agent and the organization are coclients, the normal rules of conflicts of interest (see § 121, Comment *e(i)*) would preclude subsequent representation of the company against the officer or agent in a substantially related matter by the same firm. E.g., Cooke v. Laidlaw, Adams & Peck, 510 N.Y.S.2d 597 (N.Y.App.Div.1987) (even if no communications between officer and lawyer representing both company and officer, lawyer and firm disqualified from representing company adversely to office in substantially related matter). On the right of a lawyer for an organization to share confidential communications of an organization's agents with other agents of the organization, see § 131, Comment *e*, and Reporter's Note thereto.

On decisions recognizing that even a long-standing personal relationship between the lawyer for an organization and a constituent does not by itself entail the relationship of client and lawyer, see, e.g., Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332 (Fed.Cir.1988) (lawyers who represented original patentee had no client-lawyer relationship with inventor, employee of patentee, and

thus were not precluded from seeking to invalidate patent now held by inventor's new employer); Ferranti Intern. plc v. Clark, 767 F.Supp. 670 (E.D.Pa.1991) (former in-house lawyer who originally hired outside law firm to conduct investigation could not object to outside law firm's representing corporation in suit against same former in-house lawyer for activities uncovered in investigation, where firm made clear that they did not represent any individual in investigation); Robertson v. Gaston Snow & Ely Bartlett, 536 N.E.2d 344 (Mass.), cert. denied, 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989) (despite fact that law firm provided estate-planning services for corporate officer and retained his will in office safe, insufficient proof that firm representing corporation in corporate reorganization also represented officer in that matter sufficient to create duty on part of law firm to protect his future employment with new corporation); Doe v. Poe, 595 N.Y.S.2d 503 (N.Y.App.Div.1993) (fact that chief executive officer and board chairman of bank hired law firm and directed their activities did not make officer personal client of law firm). On relationships with shareholders, see, e.g., Egan v. McNamara, 467 A.2d 733 (D.C.1983) (on facts, long-term lawyer for corporation had no client-lawyer relationship with majority shareholder); Felty v. Hartweg, 523 N.E.2d 555 (Ill.App.Ct.1988) (lawyer for corporation had no client-lawyer relationship with minority shareholder and thus no duty to disclose to shareholder misconduct of corporate officer). See also, e.g., ABA Formal Op. 91–361 (1991) (when scope of representation so provides, lawyer for partnership represents entity rather than the individual partners).

On the other hand, in particular circumstances and in the absence of warning from the lawyer, a constituent of an organizational client may reasonably rely on the lawyer's apparent willingness to provide legal services for the constituent in addition to the entity, thus creating an implied client-lawyer relationship. See, e.g., Rosman v. Shapiro, 653 F.Supp. 1441 (S.D.N.Y.1987) (50% shareholder in closely held corporation); E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D.Tex.1969) (officer of corporation, where officer was party to proceeding and lawyer appeared on officer's behalf); Cooke v. Laidlaw, Adams & Peck, Inc., 510 N.Y.S.2d 597 (N.Y.App.Div.1987) (corporate officer, where lawyer for corporation appeared in SEC proceeding on behalf of officer); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (driver of corporate employer, who allegedly gave incriminating statement to corporation's lawyer after lawyer's promise of confidentiality); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (general partners in limited partnership, where they reasonably believed lawyer for partnership was acting on their behalf).

Some decisions dealing with whether a person associated with an organization that is represented by counsel is a co-client of the same lawyer involve the question whether an officer of a corporation may invoke the attorney-client privilege concerning the officer's communications to the lawyer. Decision turns on whether the officer reasonably understood that the lawyer was representing the officer's personal interests as opposed to those of the organization. See, e.g., United States v. Keplinger, 776 F.2d 678 (7th Cir.1985) (subjective but un-

reasonable belief of corporate officer that company's lawyers represented him insufficient to establish client-lawyer relationship for purposes of attorney-client privilege); E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D.Tex.1969) (vice president of brokerage firm called to testify before SEC extensively discussed proposed testimony with company lawyers and was accompanied by lawyers to 2 hearings; lawyers and vice president gave conflicting testimony on whether he was told they represented only company; held: communications were privileged because at both hearings lawyers entered appearance for vice president and were referred to as personal counsel of vice president, which they did not refute, but lawyer could not assert privilege against corporation in subsequent adverse proceeding due to co-client exception to privilege).

A position contrary to that of the Section and Comment is that per se rules determine whether a lawyer for an organization also represents its members. E.g., Pucci v. Santi, 711 F.Supp. 916, 927 n.4 (N.D.Ill.1989), and authorities cited (lawyer for partnership always represents each general partner); Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31 (S.D.N.Y. 1954) (each member of unincorporated association is client of association's lawyer).

On the principle that whether a lawyer for an organization represents an affiliated organization is a question of fact to be determined under the principles stated in § 14, see, e.g., Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 265–66 (Minn.1992) (whether lawyer for pension trust also represented particular corporate member of trust is question of fact precluding summary judgment in legal-malpractice suit); ABA Formal Opin. 95–390 (1995) (whether conflict exists is question of fact whether affiliate is also client, whether understanding exists between lawyer and client-organization that lawyer will not represent adverse to affiliate or whether such representation would materially and adversely affect lawyer's ability to represent client-organization).

On trusts and estates practice, see Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir.1988), cert. denied, sub nom., Klepak v. Dole, 490 U.S. 1089, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989) (lawyer liable to pension plan for aiding trustee in breach of duties); Elam v. Hyatt Legal Services, 541 N.E.2d 616 (Ohio 1989) (lawyer representing executor liable for negligence to remainderpersons to whom executor owed fiduciary duty); Hazard, Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. J. Leg. Ethics 15 (1987).

On class-action lawyers, see In re Agent Orange Products Liability Litigation, 800 F.2d 14 (2d Cir.1986) (lawyer who has approved settlement may later represent dissenting class members on appeal); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir.1978) (decision to appeal taken in first instance by nominal plaintiffs, but lawyer may oppose their position); Greenfield v. Villager Indus., Inc., 483 F.2d 824 (3d Cir. 1973) (lawyer's duty to ensure that class members receive proper notice of proposed settlement); see Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1447–57 (1981).

*Comment g. Nonconsensual relationship: appointed counsel.* ABA Model Rules of Professional Conduct,

Rule 6.2 (1983) (lawyer may not seek to avoid appointment except for good cause); ABA Model Code of Professional Responsibility, EC 2–29 (1969) (similar). Compare Mallard v. U.S. District Court, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) (28 U.S.C. § 1915(d) does not authorize appointment of unwilling counsel for indigent in civil case).

For the right of a litigant to reject appointed counsel and proceed pro se, see Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (criminal prosecution); Knox Leasing v. Turner, 562 A.2d 168 (N.H.1989) (civil action); 28 U.S.C. § 1654. But compare McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (considering extent to which standby appointed counsel may participate in criminal trial over defendant's objection); Jones v. Niagara Frontier Transp. Author., 722 F.2d 20 (2d Cir.1983) (corporation may appear only through lawyer); Merco Constr. Engineers v. Municipal Court, 581 P.2d 636 (Cal.1978) (same); Tracy–Burke Assocs. v. Dept. of Employment Security, 699 P.2d 687 (Utah 1985) (same).

*Comment h. Client-lawyer relationships with law firms.* On the presumption that retaining one lawyer makes that lawyer's firm and its other lawyers subject to the responsibilities of a lawyer representing that client, see, e.g., Bossert Corp. v. City of Norwalk, 253 A.2d 39 (Conn.1968) (imputation of conflict of interest to retained lawyer); Saltzberg v. Fishman, 462 N.E.2d 901 (Ill.App.Ct.1984) (right of firm to collect fees); Staron v. Weinstein, 701 A.2d 1325 (N.J.Super.Ct.App.Civ.1997) (lawyer with of-counsel relationship to firm had apparent authority to bind firm to represent client); George v. Caton, 600 P.2d 822 (N.M.Ct.App.), cert. quashed, 598 P.2d 215 (N.M.1979) (malpractice liability); Harman v. La Crosse Tribune, 344 N.W.2d 536 (Wis.Ct.App.), cert. denied, 469 U.S. 803, 105 S.Ct. 58, 83 L.Ed.2d 9 (1984) (all lawyers in firm have duty of loyalty to client); E. Wood, Fee Contracts of Lawyers 178–81 (1936). On the division of fees when a lawyer leaves a firm or the firm dissolves, see generally R. Hillman, Lawyer Mobility (1994); Marks, Barefoot Shoemakers: An Uncompromising Approach to Policing the Morals of the Marketplace When Law Firms Split Up, 19 Ariz. St. L.J. 509 (1987). On a lawyer's usual lack of authority to retain another lawyer outside the firm without the client's consent, see Kiser v. Bailey, 400 N.Y.S.2d 312 (N.Y. Civ. Ct.1977); E. Wood, Fee Contracts of Lawyers 286–89 (1936).

## § 15. A Lawyer's Duties to a Prospective Client

**(1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:**

**(a) not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61–67;**

**(b) protect the person's property in the lawyer's custody as stated in §§ 44–46; and**

**(c) use reasonable care to the extent the lawyer provides the person legal services.**

**(2) A lawyer subject to Subsection (1) may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer or another lawyer whose disqualification is imputed to the lawyer under §§ 123 and 124 has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, except that such a representation is permissible if:**

**(a) (i) any personally probibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c); or**

**(b) both the affected client and the prospective client give informed consent to the representation under the limitations and conditions provided in § 122.**

**Comment:**

*a. Scope and cross-references.* This Section summarizes the duties of a lawyer to a person seeking legal services. Duties attach even when no client-lawyer relationship ensues. On application of the attorney-client privilege to communications with a prospective client, see § 72. Application of rules parallel to those of § 132(2) on former-client conflicts of interest and those of §§ 123–124 on imputation of conflicts is considered in Comment *c* hereto. Whether a person who consults a lawyer forms a client-lawyer relationship is determined under § 14. On duties owed by a lawyer to nonclients, see §§ 51 and 56.

*b. Rationale.* Prospective clients are like clients in that they often disclose confidential information to a lawyer, place documents or other property in the lawyer's custody, and rely on the lawyer's advice. But a lawyer's discussions with a prospective client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client's problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further. Hence,

prospective clients should receive some but not all of the protection afforded clients, as indicated in the Section and following Comments.

*c. Confidential information of a prospective client.* It is often necessary for a prospective client to reveal and for the lawyer to learn confidential information (see § 59) during an initial consultation prior to their decision about formation of a client-lawyer relationship. For that reason, the attorney-client privilege attaches to communications of a prospective client (see § 70, Comment *c*). The lawyer must often learn such information to determine whether a conflict of interest exists with an existing client of the lawyer or the lawyer's firm and whether the matter is one that the lawyer is willing to undertake. In all instances, the lawyer must treat that information as confidential in the interest of the prospective client, even if the client or lawyer decides not to proceed with the representation (see Subsection (1)(a); see also § 60(2)). The duty exists regardless of how brief the initial conference may be and regardless of whether screening is instituted under Subsection (2)(a)(ii). The exceptions to the principles of confidentiality and privilege apply to such communications (see §§ 61–67).

Subsection (2) states rules parallel to those governing former-client conflicts under § 132, but it relaxes two analogous former-client rules. First, personal disqualification of a lawyer who deals with a prospective client occurs only when the subsequent matter presents the opportunity to use information obtained from the former prospective client that would be "significantly harmful." In contrast, § 132 applies whenever there is a "substantial risk" of adverse use of the former client's confidential information, regardless of the degree of threatened harm. Second, screening is permitted under Subsection (2)(a) so long as the lawyer takes reasonable steps to limit his or her exposure to confidential information during the initial consultation. In contrast, screening under § 124(2)(a) is permissible only when information obtained in the earlier representation would not likely be of significance in the subsequent representation.

In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information as reasonably appears necessary for that purpose. Where that information indicates that a conflict of interest or other reasons for nonrepresentation exists, the lawyer should so inform the prospective client or simply decline the representation. If the prospective client still wishes to retain the lawyer, and if consent is possible under § 122(1), consent from any other affected present or former client should be obtained before further confidential information is elicited. The lawyer may also condition conversations with the prospective client on the person's consent to the lawyer's representation of other clients (see § 122, Comment *d*)

or on the prospective client's agreement that any information disclosed during the consultation is not to be treated as confidential (see § 62). The prospective client's informed consent to such an agreement frees the lawyer to represent a client in a matter and to use in that matter, but only if the agreement so provides, confidential information received from the prospective client. A prospective client may also consent to a representation in other ways applicable to a client under § 122.

Even in the absence of such an agreement, when a consultation with a prospective client does not lead to a lawyer's retention the lawyer is not always prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter. A prospective client's assurance of confidentiality through prophylactic prohibition as broad as that required in the case of a former client under § 132 must yield to a reasonable degree to the need of the legal system and to the interests of the lawyer and of other clients, including the need of a lawyer to obtain information needed to determine whether the lawyer may properly accept the representation without undue risk of prohibitions if no representation ensues. Thus, under Subsection (2), prohibition exists only when the lawyer has received from the prospective client information that could be significantly harmful to the prospective client in the matter. In such an instance and absent the prospective client's consent, the lawyer must withdraw from a substantially related representation commenced before the prospective client communicated with the lawyer and must not represent a client in such a matter in the future, including a client the lawyer ordinarily represents on a continuing basis.

When a tribunal is asked to disqualify a lawyer based on prior dealings with a former prospective client, that person bears the burden of persuading the tribunal that the lawyer received such information. The prohibition is imputed to other lawyers as provided in § 123, but may be avoided if all personally prohibited lawyers are screened as stated in § 124(2)(b) and (2)(c) (see Subsection (2)(a)). In that situation, screening avoids imputation even when the requirements of § 124(2)(a) have not been met. In deciding whether to exercise discretion to require disqualification, a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purpose of preventing the lawyer or the lawyer's firm from representing an adverse party rather than in a good-faith endeavor to determine whether to retain the lawyer. The tribunal may also consider whether the disclosure of significantly harmful confidential information resulted from the failure of the lawyer or the prospective client to take precautions reasonable in the circumstances. In

addition to screening, Subsection (2)(b) permits representation if both the former prospective client and any affected present client consent.

**Illustrations:**

1. Person makes an appointment with Lawyer to discuss obtaining a divorce from Person's Spouse. During the initial consultation, Lawyer makes no effort to limit the conversation or obtain any agreement on Person's part to nonconfidentiality. During the course of the one-hour discussion, Person discusses his reasons for seeking a divorce and the nature and extent of his and Spouse's property interests. Because Person considers Lawyer's suggested fee too high, Person retains other counsel. Thereafter, Spouse seeks Lawyer's assistance in defending against Person's divorce action. Lawyer may not accept the representation of Spouse. If Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).

2. The President of Company A makes an appointment with Lawyer, who had not formerly had dealings with Company A. At the outset of the meeting, Lawyer informs President that it will first be necessary to obtain information about Company A and its affiliates and about the general nature of the legal matter to perform a conflicts check pursuant to procedures followed in Lawyer's firm. President supplies that information in a 15–minute meeting, including the information that the matter involves a contract dispute with Company B. The ensuing conflicts check reveals a conflict of interest with another Client of the firm (other than Company B), and Lawyer accordingly declines the representation. Lawyer and the other firm lawyers may continue representing Client (see Subsection (2)(a)).

3. Same facts as Illustration 2, except that Lawyer is later approached by Company B to represent it in its contract dispute with Company A. Both Lawyer and other firm lawyers may accept the representation unless Company A had disclosed to Lawyer confidential information that could be significantly harmful to Company A in the contract dispute. Even if such a disclosure had been made, if Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).

4. Same facts as Illustration 2, except that President wishes their first meeting both to discuss conflicts facts and to review Lawyer's preliminary thoughts on the merits of the contract

dispute. Lawyer states willingness to do so only if Company A agrees that Lawyer would not be required to keep confidential information revealed during the preliminary discussion. President agrees, and the preliminary discussion ranges over several aspects of the dispute. Lawyer later declines the representation because of a conflict involving another firm client. Thereafter, Lawyer is approached by Company B to represent it in its contract dispute with Company A. Lawyer may accept the representation. Because of President's agreement, Lawyer is not required to keep confidential from Company B information learned during the initial consultation.

*d. Protecting a prospective client's property.* When prospective clients confide valuables or papers to a lawyer's care, the lawyer is under a duty to safeguard them in the same way as valuables or papers of any person that are in the lawyer's possession as the result of a professional relationship (see §§ 44–46). Ordinarily, if no client-lawyer relationship ensues, the lawyer must promptly return all material received from the prospective client.

*e. A lawyer's duty of reasonable care to a prospective client.* When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it. The lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake the representation. What care is reasonable depends on the circumstances, including the lawyer's expertise and the time available for consideration (see § 52).

If a lawyer provides advice that is intended to be only tentative or preliminary, the lawyer should so inform the prospective client. Depending on the circumstances, the burden of removing ambiguities rests with the lawyer, particularly as to disclaiming conclusions that the client reasonably assumed from their discussion, for example whether the client has a good claim.

*f. Other duties to a prospective client.* In addition to duties of confidentiality and care, the lawyer is subject to general law in dealing with a prospective client. The lawyer, for example, may not give the

prospective client harmful advice calculated to benefit another client (see §§ 51(2) & 56).

*g. Compensation of a lawyer for consultation with a prospective client.* In the absence of circumstances indicating otherwise, prospective clients would ordinarily not expect to pay for preliminary discussions with a lawyer. When a client-lawyer relationship does not result, a lawyer is not entitled to be compensated unless that has been expressly agreed or it is otherwise clear from the circumstances that payment will be required.

## REPORTER'S NOTE

*Comment c. Confidential information of a prospective client.* See § 72, Comment *d*, and Reporter's Note thereto. The position in the Comment is in most respects consistent with the position in ABA Formal Opin. 90–358 (1990). Few cases address explicitly the question of the later disqualifying effect of having learned the minimum information necessary to decide whether or not the lawyer would have a conflict of interest taking a case. The position taken in the Comment follows from the principles of this Section and § 132 on former-client conflicts of interest. See also, e.g., Poly Software Int'l, Inc. v. Su, 880 F.Supp. 1487 (D.Utah.1995) (no disqualification when lawyer avoided learning details of case in half-hour consultation with opposing party); Bennett Silvershein Assoc. v. Furman, 776 F.Supp. 800 (S.D.N.Y.1991) (no disqualification warranted by brief consultation 10 years earlier about tenuously related matter); B.F. Goodrich Co. v. Formosa Plastics Corp., 638 F.Supp. 1050 (S.D.Tex. 1986) (no disqualification where prospective client held one-day discussion of case with lawyer as part of "beauty contest" but client's inside legal counsel regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client); INA Underwriters Insurance Co. v. Rubin, 635 F.Supp. 1 (E.D.Pa.1983) (no disqualification where lawyer held only preliminary discussion with prospective client, and lawyer was screened); Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F.Supp. 663 (N.D.Ill. 1983) (similar); Derrickson v. Derrickson, 541 A.2d 149 (D.C.1988) (husband had sought unsuccessfully to retain lawyer in divorce case 8 years earlier; lawyer permitted to take wife's later case arising out of same facts); Cummin v. Cummin, 695 N.Y.S.2d 346 (N.Y.App.Div.1999) (no disqualification when firm lawyer spoke briefly to opposing party 6 years earlier and was screened from present representation); State ex rel. DeFrances v. Bedell, 446 S.E.2d 906 (W.Va.1994). But see Bridge Prods. Inc. v. Quantum Chemical Corp., 1990 WL 70857 (N.D.Ill.1990) (disqualification required when lawyer did not seek waiver and potential client, in one-hour discussion as part of "beauty contest," disclosed its settlement terms and strategic advice of its other lawyers, despite screening instituted by lawyer's firm); Bays v. Theran, 639 N.E.2d 720 (Mass.1994) (telephone conversation about possibility of representation, including discussion of merits, created lawyer-client

relationship barring representation of adverse party); Desbiens v. Ford Motor Co., 439 N.Y.S.2d 452 (N.Y.App. Div.1981) (firm reviewed plaintiff's file in auto accident and decided not to represent him; access to plaintiff's information now bars firm from handling defense of products-liability claim arising out of same facts); Lovell v. Winchester, 941 S.W.2d 466 (Ky.1997) (consultation with parties who expected lawyer to represent them bars later representation of opposing party). On the relevance of a prospective client's disclosures allegedly intended to produce disqualification, see In re American Airlines, Inc., 972 F.2d 605, 613 (5th Cir.1992).

*Comment d. Protecting a prospective client's property.* See § 44, Comment *b*, and Reporter's Note thereto; ABA Model Rules of Professional Conduct, Rule 1.15 (1983) (referring to "property of clients or third persons").

*Comment e. A lawyer's duty of reasonable care to a prospective client.* Meighan v. Shore, 40 Cal. Rptr.2d 744 (Cal.Ct.App.1995) (lawyer who speaks to wife and injured husband but represents only husband should advise wife of existence of loss-of-consortium claim); Miller v. Metzinger, 154 Cal.Rptr. 22 (Cal.Ct. App.1979) (lawyer who advises potential client must mention statute-of-limitations expiration); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn.1980) (lawyer who tells prospective client that client has no claim is liable for negligence in that opinion); Procanik v. Cillo, 543 A.2d 985 (N.J.Super.Ct.App.Div.1988) (lawyer who states reasons for declining case must be professionally reasonable in those reasons, but need not disclose lawyer's opinion on how likely it is that courts will overrule adverse precedent); compare Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994) (after initially interviewing prospective client, lawyer determined from conflict check within firm that intended defendant in suit was present firm client; no duty to inform prospective client to file suit within limitations period).

*Comment g. Compensation of a lawyer for consultation with a prospective client.* No authority on point has been found.

## TOPIC 2. SUMMARY OF THE DUTIES UNDER A CLIENT-LAWYER RELATIONSHIP

Introductory Note

**Section**



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**Introductory Note:** This Topic outlines the duties of lawyers to clients (§ 16) and of clients to lawyers (§ 17), the rules for the validity

and construction of client-lawyer contracts (§ 18), and the extent to which lawyers and clients can agree to limit their duties (§ 19). The Topic also summarizes more detailed expositions stated elsewhere in this Restatement; those more detailed expositions control to the extent that they differ from statements in this Topic.

## § 16. A Lawyer's Duties to a Client—In General

**To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:**

**(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;**

**(2) act with reasonable competence and diligence;**

**(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and**

**(4) fulfill valid contractual obligations to the client.**

**Comment:**

*a. Scope and cross-references.* This Section presupposes that a client-lawyer relationship has come into existence (see §§ 14 & 15) and has not been terminated (see §§ 31–33). The duties summarized here may be enforced by appropriate remedies, including disciplinary proceedings (see § 5) and suits by the client for damages, restitution, or injunctive relief (see § 6 & Chapter 4). Lawyers also owe clients duties prescribed by general law. A lawyer, for example, may not defame a client (see § 56). Other, more specific duties are specified elsewhere, for example, the duty to communicate with a client (see § 20).

*b. Rationale.* A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital. Lawyers often deal with matters most confidential and vital to the client. A lawyer's work is sometimes complex and technical, often is performed in the

client's absence, and often cannot properly be evaluated simply by observing the results. Special safeguards are therefore necessary.

Correlatively, adequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help. The law encourages clients to consult lawyers and limits the liability to third persons of lawyers who act vigorously for their clients (see §§ 51 & 56). Requiring lawyers to protect their clients' interests with competence, diligence, and loyalty furthers those goals.

A lawyer is not required to accept a client, to undertake representation without pay (except when a court has appointed the lawyer), or to remain in a representation when withdrawal is permissible (see §§ 14, 32, 34, & 35). By undertaking a representation, a lawyer does not guarantee success in it, unless the lawyer makes extraordinary representations or warranties or unless the matter is routine and any reasonably competent lawyer could achieve the client's objectives (for example, drafting a deed or setting up a corporation). Lawyers may have duties to others that limit those owed to a client (see Comment *c* hereto).

*c. Goals of a representation.* The lawyer's efforts in a representation must be for the benefit of the client (see Restatement Second, Agency § 387). A client-lawyer relationship is thus different from a partnership entered into for mutual profit; the lawyer may hope to further the lawyer's professional reputation and income through a representation, but may do so only as a by-product of promoting the client's success.

Individual clients define their objectives differently. One litigant might seek the greatest possible personal recovery, another an amicable or speedy resolution of the case, and a third a precedent implementing the client's view of the public interest. The client, not the lawyer, determines the goals to be pursued, subject to the lawyer's duty not to do or assist an unlawful act (see § 94). The lawyer must keep the client informed and consult with the client as is reasonably appropriate to learn the client's decisions (see § 20) and must follow a client's instructions (see § 21(2)). On a lawyer's decisions in the representation, see §§ 22–24.

The lawyer's duties are ordinarily limited to matters covered by the representation. A lawyer who has agreed to write a contract is not required to litigate its validity, even though the client's general objectives may ultimately be aided by resort to litigation (see §§ 14 & 19). Ordinarily the lawyer may not act beyond the scope of contemplated representation without additional authorization from the client (see

§ 27, Comment *e*). Nevertheless, some of the lawyer's duties survive termination of the representation (see § 33).

The lawyer's legal duties to other persons also limit duties to the client. On the rules governing conflicts of interest, see Chapter 8. A lawyer owes duties to the court or legal system and to an opposing party in litigation (see Chapters 6 & 7) and may owe duties to certain nonclients who might be injured by the lawyer's acts (see § 51). Sometimes a client's duties to other persons, for example as a trustee or class representative, may impose on the lawyer similar consequential duties (see § 14, Comment *f*). A lawyer may not do or assist an unlawful act on behalf of a client (see §§ 23, 32, & 94). Circumstances also exist in which a lawyer may refrain from pursuing the client's goals through means that the lawyer considers lawful but repugnant (see § 23, Comment *c*; § 32).

*d. Duties of competence and diligence.* In pursuing a client's objectives, a lawyer must use reasonable care (see § 52; see also Restatement Second, Agency § 379). The lawyer must be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications. The lawyer must use those capacities diligently, not letting the matter languish but proceeding to perform the services called for by the client's objectives, including appropriate factual research, legal analysis, and exercise of professional judgment. On delay in litigated matters, see § 110. The law seeks to elicit competent and diligent representation through civil liability (see Chapter 4), disciplinary sanctions (see § 5), and such other means as educational and examination requirements for admission to the bar and programs of continued legal education and peer review. Other remedies may be available, such as a new trial in a criminal prosecution because of ineffective assistance of counsel (see § 6).

The Preamble to the ABA Model Rules of Professional Conduct (1983) (see id. ¶ [2]) and EC 7-1 of the ABA Model Code of Professional Responsibility (1969) refer to a lawyer's duty to act "zealously" for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.

*e. Duties of loyalty.* The responsibilities entailed in promoting the objectives of the client may be broadly classified as duties of loyalty, but their fulfillment also requires skill in gathering and analyzing information and acting appropriately. In general, they prohibit the lawyer from harming the client. Those duties are enforceable in appropriate circumstances by remedies, such as disqualification, to

enforce rules governing conflicts of interest (see § 121, Comment *f*), civil liability (see §§ 50 & 55), and professional discipline (§ 5).

A lawyer may not use or disclose sensitive information about the client, except in appropriate circumstances (see Chapter 5). Likewise, the lawyer must take reasonable measures to safeguard the client's property and papers that come into the lawyer's possession (see §§ 44–46). The rules forbidding conflicts of interest (see Chapter 8) likewise protect against the abuse of client information.

A lawyer must be honest with a client. A lawyer may not obtain unfair contracts or gifts (see §§ 126 & 127) or enter a sexual relationship with a client when that would undermine the client's case, abuse the client's dependence on the lawyer, or create risk to the lawyer's independent judgment, for example when the lawyer represents the client in divorce proceedings (see also, e.g., § 41 (abusive fee-collection methods); see generally Restatement Second, Agency §§ 387–398). A lawyer may not knowingly make false statements to a client and must make disclosures to a client necessary to avoid misleading the client. However, a lawyer's duty of confidentiality to another client may prohibit some disclosures. On the general duty voluntarily to disclose facts to a client, see § 20.

The duties of loyalty are subject to exceptions described elsewhere in this Restatement. Those exceptions typically protect the concerns of third persons and the public or satisfy the practical necessities of the legal system.

*f. Duties defined by contract.* Contracts generally create or define the duties the lawyer owes the client (see Restatement Second, Agency § 376). One or more contracts between client and lawyer may specify the services the lawyer is being retained to provide, the services the lawyer is not obliged to provide, and the goals of the representation. They may address such matters as which lawyers in a law firm will provide the services; what reports are to be provided to the client; whether the lawyer will present a detailed budget for the representation; what arrangements will be made for billing statements for legal services and disbursements; what decisions will be made by the lawyer and what matters decided by the client; and what alternative-dispute-resolution methods the lawyer will explore. Such matters may also be handled by client instructions during the representation (see Topic 3). Various requirements govern client-lawyer contracts (e.g., §§ 18, 19, 22–23, 34–46, 121, & 126–127). A lawyer's intentional failure to fulfill a valid contract may in appropriate circumstances subject the lawyer to professional discipline as well as to contractual remedies.

With respect to contracts between lawyer and client involving business other than fees and disbursements for professional services, see § 126.

## REPORTER'S NOTE

*Comment b. Rationale.* See Frankel, Fiduciary Law, 71 Calif. L. Rev. 795 (1983); Clark, Agency Costs Versus Fiduciary Duties, in Principals and Agents: The Structure of Business 55 (J. Pratt & R. Zeckhouser ed. 1985); C. Wolfram, Modern Legal Ethics 145–48 (1986); Cooter & Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U. L. Rev. 1045 (1991).

*Comment c. Goals of a representation.* See ABA Model Rules of Professional Conduct, Rule 1.2 (1983) (client to decide objectives of representation); ABA Model Code of Professional Responsibility, DR 7–101(A)(1) (1969) (lawyer must seek client's lawful objectives); Institute of Judicial Administration—ABA, Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 3.1(b)(ii) (1980) (counsel ordinarily bound by client's definition of client's interests); ABA Standards Relating to the Administration of Criminal Justice, Standards 4–1.6 (2d cd.1980) (lawyer should represent client's legitimate interests); Commission on Professional Responsibility, The Roscoe Pound—American Trial Lawyers Foundation, The American Lawyer's Code of Conduct 2.1 (rev. draft 1982) (lawyer must be faithful to client's interests as perceived by client); see D. Rosenthal, Lawyer and Client: Who's in Charge? (1974).

*Comment d. Duties of competence and diligence.* See ABA Model Rules of Professional Conduct, Rules 1.1 & 1.3 (1983) (duties of competence); Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 Geo. L.J. 705 (1981); Reporter's Notes to Chapter 4.

*Comment e. Duties of loyalty.* See Reporter's Notes to §§ 32, 41, 44–46, 50, 59, 60, and 121–133. On honesty to clients, see ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983) (forbidding "conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA Model Code of Professional Responsibility DR 1–102(A)(4) (1969) (similar); Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659 (1990); § 20, Reporter's Note. On sexual relationships between lawyer and client, see, e.g., McDaniel v. Gile, 281 Cal. Rptr. 242 (Cal.Ct.App.1991); Iowa State Bar Ass'n Comm. on Prof. Ethics v. Hill, 436 N.W.2d 57 (1989); In re Gibson, 369 N.W.2d 695 (Wis. 1985); Office of Disciplinary Counsel v. Ressing, 559 N.E.2d 1359 (Ohio 1990); Cal. R. Prof. Conduct, Rule 3–120; Minn. R. Prof. Conduct, Rule 1.8(k). See also ABA Canons of Legal Ethics, Canon 11 (1908) (lawyer "should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client").

*Comment f. Duties defined by contract.* ABA Model Code of Professional Responsibility, DR 7–101(A)(2) (1969) (discipline for intentionally failing to carry out contract of employment); In re Burns, 679 P.2d 510 (Ariz.1984) (discipline for charging

fee larger than agreed on); Attorney Grievance Comm'n v. Kerpelman, 438 A.2d 501 (Md.1981) (same); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup. Ct.1978) (liability for breach of contract to incorporate client's business).

## § 17. A Client's Duties to a Lawyer

**Subject to the other provisions of this Restatement, in matters covered by the representation a client must:**

**(1) compensate a lawyer for services and expenses as stated in Chapter 3;**

**(2) indemnify the lawyer for liability to which the client has exposed the lawyer without the lawyer's fault; and**

**(3) fulfill any valid contractual obligations to the lawyer.**

**Comment:**

*a. Scope and cross-references.* This Section presupposes that a client-lawyer relationship exists (see § 14). Some duties arising from that relationship are defined in more detail elsewhere in this Restatement. This Section does not set forth all the duties of a client to a lawyer, for clients also generally owe lawyers the same duties they owe third persons, such as the duty to avoid actionable misrepresentation. A client who converts a lawyer's property, for example, is liable for that wrong (see Restatement Second, Agency § 470). Moreover, a client's deception of or failure to cooperate with a lawyer may provide a defense to the client's later claim of civil liability (see § 54) or inadequate assistance of counsel. On a lawyer's right to withdraw from a representation when the client fails substantially to fulfill an obligation to the lawyer, see § 32(3)(g). On remedies for the recovery of compensation by a lawyer, see § 41.

The duties of clients to lawyers are less extensive than those of lawyers to clients. Lawyers owe special duties because clients entrust them with important and sensitive matters, and because the legal system requires diligent and devoted performance of that trust (see § 16, Comment *b*).

*b. Compensation.* A lawyer normally has a legally enforceable right to compensation for the lawyer's services (see Restatement Second, Agency § 441). The lawyer may recover the fair value of the services from the client (see § 39), unless they have validly agreed to another measure of compensation (see §§ 18 & 38). The lawyer may agree to serve without compensation (see § 38, Comment *c*) and may also lose the right to compensation for misconduct (see §§ 37, 40, &

41). The lawyer also may be entitled to recover certain sums disbursed for the client's benefit. For other related subjects, see Chapter 3.

*c. Client indemnity of a lawyer.* Generally, a principal must indemnify an agent for liabilities and expenses incurred by the agent through acts authorized by the principal (see Restatement Second, Agency §§ 438 & 439). Lawyers are not typical agents, for their unusual knowledge and responsibility gives them a greater ability to avoid acts giving rise to liability, and a lawyer may have a duty to avoid acts having that effect. Sometimes, moreover, no liability falls on the lawyer to begin with. A lawyer, for example, cannot be held liable to an opposing party for otherwise defamatory statements in a pleading (see § 57). Sometimes, however, a lawyer is held liable through fault or in place of the client, and the lawyer can therefore claim indemnity. For example, when a lawyer has made proper expenditures for the benefit of the client such as the payment of a court reporter (see § 30(2)), the client must indemnify the lawyer unless the contract between them contemplates otherwise (see § 38, Comment *e*).

*d. Contractual obligations.* The client's duty to compensate a lawyer for services rendered is often controlled by a written or oral fee contract (see §§ 18 & 38). A contract may also create or expand a duty to indemnify the lawyer for expenses resulting from the representation. That allocation of responsibility is subject to limits set by public policy, such as the power of a court to specify that a sanction on the lawyer's misconduct shall not be passed on to the client (see §§ 29 & 30). On the inability of a lawyer to limit or avoid legal malpractice liability to a client by a contract in advance, see § 54. On limitations on client-lawyer business dealings, see § 126. A contract might require a client to provide valuable assistance to a lawyer—free transportation, for example—and, if the client did not perform, the lawyer would be entitled to the appropriate remedies for breach.

Contracts purporting to impose duties on clients must be read in light of the purposes of the client-lawyer relationship and public policies relating to it. Thus, if a client lies to a lawyer or fails to honor an expressed or implied provision of a client-lawyer contract requiring cooperation with the lawyer, withdrawal by the lawyer may be authorized (see § 32(3)(f) & (g)), and the client's misrepresentation may constitute a defense to the client's malpractice claim (see § 54, Comment *d*), modify the lawyer's duty of confidentiality (see §§ 64 & 67), or entitle the lawyer to indemnity if the client's conduct exposes the lawyer to liability to a third person without the lawyer's fault (see Comment *c* hereto). Such consequences can be predicated on client conduct such as misleading a lawyer concerning important facts, even where there is no explicit contract by the client to cooperate. Dealing with suspected client misrepresentation is a matter of delicacy. In

determining whether a client misrepresentation constitutes an actionable wrong against a lawyer, it should be noted that the lawyer may be in a better position than nonprofessionals to assess the strength or weakness of a client's initial story and the client should be accorded wide discretion in determining how much of a possibly embarrassing or otherwise sensitive account to share with the lawyer. On a lawyer's right to withdraw, despite material harm to the client, when the client's failure to provide essential facts renders the representation unreasonably difficult, see § 32, Comment *l*.

### REPORTER'S NOTE

*Comment b. Compensation.* See Reporter's Notes to §§ 30(2), 38, and 39.

*Comment c. Client indemnity of a lawyer.* E.g., Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir.1985) (indemnity for lawyer's expenses in successful defense of suit against lawyer for actions representing client); Crownover v. Schonfeld, 214 So.2d 499 (Fla.Dist.Ct.App.1968) (indemnity for expenses resulting from lawyer's signing bond enabling client to keep appliance); Roberts, Walsh & Co. v. Trugman, 264 A.2d 237 (N.J.Dist.Ct. 1970) (lawyer liable to court reporter but could obtain indemnity from client); E. Wood, Fee Contracts of Lawyers 281 (1936); § 30, Comment *b*, and Reporter's Note thereto; § 38, Comment *e*, and Reporter's Note thereto.

*Comment d. Contractual obligations.* See § 18, Reporter's Note; § 38, Reporter's Note; E. Wood, Fee Contracts of Lawyers, supra. For the power of a court to specify that sanctions will not be paid by a client, see, e.g., Associated Radio Serv. Co. v. Page Airways, 73 F.R.D. 633 (N.D.Tex.1977); Golleher v. Horton, 583 P.2d 260 (Ariz.Ct.App.1978). On the use of a client's failure to inform a lawyer of relevant facts as a defense to a malpractice suit, see Bank of Anacortes v. Cook, 517 P.2d 633 (Wash.Ct.App.1974); Rapuzzi v. Stetson, 145 N.Y.S. 455 (N.Y.App.Div. 1914). On contributory negligence and related defenses, see § 54, Reporter's Note. On a possible client duty of good faith, see Hagans, Brown & Gibbs v. First Nat'l Bank, 783 P.2d 1164 (Alaska 1989). On obligations under general law, see Morganroth & Morganroth v. DeLorean, 123 F.3d 374 (6th Cir.1997), cert. denied, 523 U.S. 1094, 118 S.Ct. 1561, 140 L.Ed.2d 793 (1998) (liability for defrauding lawyer); Mass v. McClenahan, 893 F.Supp. 225 (S.D.N.Y. 1995) (liability for discriminatory discharge of lawyer).

## § 18. Client–Lawyer Contracts

**(1) A contract between a lawyer and client concerning the client-lawyer relationship, including a contract modifying an existing contract, may be enforced by either party if the contract meets other applicable requirements, except that:**

**(a) if the contract or modification is made beyond a reasonable time after the lawyer has begun to represent the client in the matter (see § 38(1)), the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client; and**

**(b) if the contract is made after the lawyer has finished providing services, the client may avoid it if the client was not informed of facts needed to evaluate the appropriateness of the lawyer's compensation or other benefits conferred on the lawyer by the contract.**

**(2) A tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.**

**Comment:**

*a. Scope and cross-references.* This Section sets forth general rules concerning the validity and construction of client-lawyer contracts. The rules concern both fee arrangements (see § 38) and other matters. Other provisions of this Restatement state more particular requirements for the validity of such contracts, for example, provisions concerning limits on client rights (see § 19), attorney fees (see §§ 34–36 & 43), malpractice-liability waivers (see § 54), the client's right to discharge the lawyer (see § 32(1)), and conflicts of interest (see §§ 121 & 125–131). See especially § 38, on the validity and construction of fee contracts.

On business and financial transactions between a lawyer and a client, see § 126. Section 126, however, concerns only business and financial transactions. The Section does not apply to the payment for legal services in money by clients. Some forms of payment, such as those involving security interests on client property or payment in a corporate client's stock, are subject to § 126 (see § 43).

*b. Rationale.* The provisions of this Section protect clients against unfair contracts and interpretations of them, for reasons set forth below (see Comments *c* and *h* hereto; see also § 16, Comment *b*).

*c. Contracts meeting other applicable requirements.* Contracts between lawyer and client may concern not only fees but other terms as well, such as the extent of the lawyer's services or the identity of the lawyers in a firm who are to do the work. The contract may be in writing or oral or evidenced by the circumstances, as when a client proceeds with a lawyer after having been informed of the lawyer's fees.

**Illustration:**

1. Client reads Lawyer's newspaper advertisement stating that Lawyer writes simple wills for $200. Lawyer has not previously represented Client. Client telephones Lawyer and asks Lawyer to write a simple will. Lawyer agrees to do so. Neither party mentions the advertisement or discusses Lawyer's fees. The parties have entered an implicit contract under which Lawyer is to write the will and Client is to pay $200. However, no such contract concerning the fee would exist if Client had not read or learned of the advertisement, and Lawyer's right to a fee would then be based on § 39. In that event, Lawyer's advertisement could be introduced in evidence by Client to show Lawyer's opinion of the fair value of Lawyer's services.

This Section requires that, to be enforceable, a contract must meet applicable requirements imposed by other sources of law, including aspects of contract law such as the consideration requirement and the Statute of Frauds. The applicable requirements also include those imposed by professional regulations, such as the rule in many jurisdictions that contingent-fee contracts be in writing (see § 38, Comment *b*). Client-lawyer contracts are subject to many other rules (see Comment *a* hereto), for example, the rule requiring that legal fees be reasonable in the circumstances (see § 34). Similarly, the contract remedies available to the lawyer are modified by other applicable law, such as the rule allowing a client to discharge a lawyer without cause (see §§ 32 & 40).

*d. Contracts at the outset of a representation.* This Section does not independently limit the enforceability of client-lawyer contracts made at the outset of a representation, but other law protects clients who enter into such contracts (see Restatement Second, Agency § 390, Comment *e*). In entering a contract at the outset of a representation, the lawyer must explain the basis and rate of the fee (see § 38(1)) and advise the client of such matters as conflicts of interest, the scope of the representation, and the contract's implications for the client (see, e.g., §§ 15, 20, & 121–122). The contract may not provide for unreasonable fees (see § 34) or unreasonable waivers of client rights (see § 19), and is subject to other prohibitions (see Comment *a* hereto). The contract is construed according to the principles set forth in this Section (see also § 38).

*e. Contracts entered into during a representation.* Client-lawyer fee contracts entered into after the matter in question is under way

are subject to special scrutiny (cf. Restatement Second, Contracts § 89(a) (promise modifying contractual duty is binding if fair and equitable in view of circumstances unanticipated when contract was made)). A client might accept such a contract because it is burdensome to change lawyers during a representation. A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good. A lawyer, on the other hand, usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter. A lawyer is also required to give the client at least minimal information about the fee at the outset (see § 38(1)).

The client's option under this Section to avoid the contract may be exercised during or after the representation. In particular it may be exercised during litigation about the lawyer's fee, because that is when the former client is most likely to seek new counsel and learn the facts relating to the fairness of the contract. The client may exercise the option informally, for example, by protesting against the lawyer's request for payment under the contract. A client who avoids the contract as stated here cannot then enforce its favorable terms against the lawyer, and the client is liable to the lawyer for the fair value of the lawyer's services (see § 39). A client may lose the right to avoid a contract by knowingly reaffirming it when not subject to pressure, for example after the representation concludes. If the client does not choose to avoid the contract, it remains in effect for both parties.

The lawyer may enforce the contract by persuading the tribunal that the contract was fair and reasonable to the client under the circumstances in which it was entered. The showing of fairness and reasonableness must encompass two elements. First, the lawyer must show that the client was adequately aware of the effects and any material disadvantages of the proposed contract, including, if applicable, circumstances concerning the need for modification. The more experienced the client is in such dealings with lawyers, the less the lawyer need inform the client. Likewise, less disclosure is required when an independent lawyer is advising the client about the proposed contract. It will also be relevant to sustaining the contract if the client initiated the request for the modification, such as when a client who is facing unexpected financial difficulty requests that the lawyer change an hourly fee contract to one involving a contingent fee.

Second, the lawyer must show that the client was not pressured to accede in order to avoid the problems of changing counsel, alienating the lawyer, missing a deadline or losing a significant opportunity in the

matter, or because a new lawyer would have to repeat significant work for which the client owed or had paid the first lawyer. A test sometimes used has been that an agreement is voidable only if reached after the lawyer has started to perform the services. However, a contract made after the lawyer has been retained but has performed no services could be unfair because of the difficulty of obtaining other counsel in the circumstances. In general, the lawyer must show that a reasonable client might have chosen to accept the late contract, typically because it benefited the client in some substantial way (other than by relieving the client from having to find a new lawyer). Although fairness and reasonableness to the client is the issue, the strength and legitimacy of the lawyer's need for the terms of the late contract are relevant to that issue.

If the client and lawyer made an initial contract and the postinception contract in question is a modification of that contract, the client may avoid the contract unless the lawyer makes the showings indicated in Subsection (1)(a). Postinception modification beneficial to a lawyer, although justifiable in some instances, raises questions why the original contract was not itself sufficiently fair and reasonable. Yet, the scope of the representation and the relationship between client and lawyer cannot always be foreseen at the time of an initial contract. Both client and lawyer might sometimes benefit from adjusting their terms of dealing. Sometimes, indeed, a new contract may be unavoidable, as when a client asks a lawyer to expand the scope of the representation.

**Illustration:**

2. Client retains Lawyer to conduct a business litigation, agreeing to pay a specified hourly fee, due when the suit is over. After the suit has been brought, the defendant unexpectedly impleads a third party, and the proceedings threaten to require much more of Lawyer's time than the parties had originally expected. Lawyer and Client agree to shift to a contingent-fee arrangement, after Lawyer explains to Client that Lawyer is willing to continue on an hourly fee and points out in reasonable detail the payments by the client and incentives for the lawyer that each arrangement would give rise to in different circumstances. Soon after the contract, the defendant unexpectedly makes and Client accepts a large settlement offer. Lawyer is entitled to recover a contingent fee under the contract, even though hindsight shows that Client would have paid much less under the original hourly fee arrangement.

*f. Contracts after a representation ends.* Once a lawyer has finished performing legal services, the lawyer's proposal of a fee due is less coercive, although the client may remain influenced by trust that the lawyer will be fair. Such a contract will be enforced if the requirements of Subsection (1)(b) are satisfied, subject to the limits on fees discussed in Comments *a* and *d* hereto and to restrictions on abusive fee collection (see § 41; see also § 54 (limitations on contracts concerning a lawyer's liability for malpractice)).

When a lawyer submits and a client pays a postrepresentation bill that simply implements a previous valid fee contract, the submission and payment do not constitute a new contract subject to Subsection (1)(b). However, there is a new contract and that Subsection applies when the submission and payment modify a previous contract or when the parties have not previously reached such a contract.

What disclosure is needed to permit a client to evaluate the appropriateness of a postrepresentation contract depends on the circumstances. The amount of information the lawyer should provide varies with the sophistication of the client, the size of the fee, and the client's means. If a lawyer bases a fee on a number of factors, those factors and the subjective nature of that assessment must be disclosed. In any event, the lawyer must respond to questions reasonably raised by the client and must disclose aspects of the calculation of the fee that are subject to reasonable dispute.

Assuming adequate disclosure has been made, the client may accept the validity of a final bill or other postrepresentation fee proposal by paying or agreeing to pay it. If the disclosure requirements of Subsection (1)(b) have been met, the client may not argue that the fee would not have been awarded under § 39 had there been no valid contract. If the requirements of this Section have not been met, the client is not precluded by payment of a final bill from contending that the fee was unreasonably large (see § 34) or otherwise unlawful, although the client's acceptance of the bill may be admissible as evidence to controvert such a challenge (see § 42). The lawyer in such a case may still recover whatever fee is due under a valid previous contract or on the basis of quantum meruit (see § 39).

**Illustration:**

3. Lawyer and Client validly agree that Client will pay Lawyer $100 per hour. When the matter is resolved, Lawyer sends a bill for $1,800 which Client pays. Later, Client learns that six of the 18 hours for which Lawyer charged were devoted to writing a memo that Lawyer wrote both for Client's matter and

for another matter for another client (who was also charged for the six hours). Although the contract contains a provision that might be read to allow such double charging, the contract might also reasonably be construed to provide that Client should pay for only half of the six hours (see also § 38, Comment *d*). Client's acceptance and payment of the bill does not bar Client from challenging the amount of Lawyer's bill.

*g. Contracts between a lawyer and a third person.* This Section concerns contracts between a client and lawyer. It also applies in situations where a lawyer renders services to two clients and one of them agrees to pay fees for both. Whether rules similar to those of this Section apply when a nonclient, such as a parent or spouse of a client, agrees with a lawyer to pay the fee of the lawyer's client depends on general principles of law. To the extent the nonclient is subject to the same pressures as a client, application of rules similar to those of this Section may be warranted.

*h. Construction of client-lawyer contracts.* Under this Section, contracts between clients and lawyers are to be construed from the standpoint of a reasonable person in the client's circumstances. The lawyer thus bears the burden of ensuring that the contract states any terms diverging from a reasonable client's expectations. The principle applies to fee terms (see § 38) as well as other terms. It requires, for example, that a lawyer's contract to represent a client in "your suit" be construed to include representation in appropriate appeals if the lawyer had not stated that appeals were excluded.

Three reasons support this rule. First, lawyers almost always write such contracts (or state them, in the case of oral contracts) and a contract traditionally is interpreted against its author (see Restatement Second, Contracts § 206). Second, lawyers are more able than most clients to detect and repair omissions in client-lawyer contracts. Third, many lawyers consider it important to inform clients about the risks to the client that might arise from the representation, including risks unresolved by a client-lawyer contract.

Many tribunals have expressed the principle as a rule that ambiguities in client-lawyer contracts should be resolved against lawyers. That formulation can be taken to mean that the principle comes into play only when other means of interpreting the contract have been unsuccessful. Under this Section, the principle that the contract is construed as a reasonable client would understand it governs the construction of the contract in the first instance. However, this Section does not preclude reliance on the usual resources of contractual interpretation such as the language of the contract, the circumstances

in which it was made, and the client's sophistication and experience in retaining and compensating lawyers or lack thereof. The contract is to be construed in light of the circumstances in which it was made, the parties' past practice and contracts, and whether it was truly negotiated. When the reasons supporting the principle are inapplicable—for example, because the client had the help of its own inside legal counsel or another lawyer in drafting the contract—the principle should be correspondingly relaxed.

**Illustration:**

4. Corporation, a small business without inside legal counsel, retains Lawyer to provide services relating to its miscellaneous transactions, under a contract providing that Lawyer will charge a stated hourly fee, to be billed and paid monthly. State law does not entitle successful plaintiffs to recover prejudgment interest in a suit to recover such fees, absent an express or implied contractual provision for interest on late payments. Lawyer may not charge for interest even if there was a local custom that lawyers did charge interest on late payments unless Corporation knew of the custom. This Section requires Lawyer to explain the interest charge to Corporation.

## REPORTER'S NOTE

*Comment c. Contracts meeting other applicable requirements.* See C. Wolfram, Modern Legal Ethics 501–504 (1986); E. Wood, Fee Contracts of Lawyers 23–33, 255 (1936) (discussing consent, mistake, consideration, and other issues).

*Comment d. Contracts at the outset of a representation.* For conflicting authority as to whether client-lawyer contracts reached before a representation should be treated as arms-length transactions not subject to special judicial scrutiny, see Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 U.C.L.A. L. Rev. 29, 54–70 (1989); § 42, Comment c, and Reporter's Note thereto.

*Comment e. Contracts entered into during a representation.* For the principle that contracts during a representation may be rejected by the client unless the lawyer proves them to be fair and reasonable, see, e.g., Vaughn v. King, 167 F.3d 347 (7th Cir.1999); Maksym v. Loesch, 937 F.2d 1237 (7th Cir.1991) (discussing when principle begins to operate); Jo B. Gardner, Inc. v. Beanland, 611 S.W.2d 317 (Mo.Ct.App.1980); Terzis v. Estate of Whalen, 489 A.2d 608 (N.H.1985); compare Brundage, The Profits of the Law: Legal Fees of University-Trained Advocates, 32 Am. J. Leg. Hist. 1, 5, 7 (1988) (similar principle in 13th century). For authority on what contracts may be upheld under that principle, compare

Drake v. Becker, 303 N.E.2d 212 (Ill. App.Ct.1973) (contract procured by threat of withdrawal invalid); Griffin v. Rainer, 186 S.E.2d 10 (Va.1972) (similar); Ward v. Richards & Rossano, Inc., P.S., 754 P.2d 120 (Wash.Ct. App.1988) (client may retrieve 10% fee to handle appeal when lawyer did not disclose that existing contingent-fee contract would be construed to exclude representation on appeal) with Volsky v. Lone Star Airways, 618 F.Supp. 733 (D.D.C.1985) (new contract proper when business client gave lawyer new matters); Rock v. Ballou, 209 S.E.2d 476 (N.C.1974) (similar); Tidball v. Hetrick, 363 N.W.2d 414 (S.D.1985) (proper to switch to contingent-fee contract when client could not pay agreed-on hourly fee). See generally Annot., 13 A.L.R.3d 701 (1967).

*Comment f. Contracts after a representation ends.* Compare Gleason v. Klamer, 163 Cal.Rptr. 483 (Cal.Ct. App.1980) (valid contract formed when client had new lawyer, discussed bill with accountant, and explicitly accepted it); Santora, McKay & Ranieri v. Franklin, 339 S.E.2d 799 (N.C.Ct.App.1986) (jury could find valid contract when client did not object to bills and wrote letter indicating intent to pay), with Mar Oil, S.A. v. Morrissey, 982 F.2d 830 (2d Cir. 1993) (no valid contract when client did not understand import of language); Roehrdanz v. Schlink, 368 N.W.2d 409 (Minn.Ct.App.1985) (no valid contract when client was not told of change in hourly rate and bill did not itemize charges for services); Epstein, Reiss & Goodman v. Greenfield, 476 N.Y.S.2d 885 (N.Y.App.Div. 1984) (failure to object to bill did not create valid contract when there was no explanation of services performed and some services were arguably unauthorized); Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan, 988 P.2d 467 (Wash.Ct.App.1999) (accord and satisfaction unenforceable if client not informed of billing rates); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994) (client's payment guaranty unenforceable when signed in exchange for release of file); see Shea, Rogal & Assoc., Ltd. v. Leslie Volkswagen, Inc., 576 N.E.2d 209 (Ill. App.Ct.1991) (law firm bound when its manager endorsed and deposited check stated by client to be payment in full where sum due was disputed). Payment of or assent to bills sent during a representation could create a valid contract only if it met the standards for contracts during a representation. Nilsson, Robbins v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir.1988); Tucker v. Dudley, 164 A.2d 891 (Md.1960) (contract after client won case but before client received proceeds treated as contract during the representation); see Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff, 638 F.Supp. 714 (S.D.N.Y. 1986) (sophisticated business client who made partial payment on bills bound when no claim of fraud, mistake, or overreaching).

*Comment g. Contracts between a lawyer and a third person.* See In re "Agent Orange" Product Liability Litigation, 818 F.2d 216 (2d Cir.), cert. denied, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987) (striking down, because of conflicts of interest, contract by which some class-action lawyers advanced funds, to be repaid threefold out of any attorney-fee award). The issue most often litigated in fee suits involving nonclients is whether the nonclient, the client, or both are liable for the lawyer's fees. E.g., In re A.H. Robins Co., 846 F.2d

267 (4th Cir.1988) (when insurer retains lawyer to represent insured, only insurer liable); Collins v. Martin, 276 S.E.2d 102 (Ga.Ct.App.1981) (husband who hired lawyer for wife without her authority liable); Becnel v. Arnouville, 425 So.2d 972 (La.Ct. App.1983) (when father hired lawyer for comatose son, later contract of lawyer and son discharged father).

*Comment h. Construction of client-lawyer contracts.* E.g., Dardovitch v. Haltzman, 190 F.3d 125 (3d Cir.1999) (contingent-fee contract did not entitle lawyer to extra payment for collecting settlement); Severson, Werson, Berke & Melchior v. Bolinger, 1 Cal.Rptr.2d 531 (Cal.Ct.App.1991) (contract to charge firm's "regular hourly rates" means rates in effect at start of representation); Lawrence v. Walzer & Gabrielson, 256 Cal.Rptr. 6 (Cal.Ct.App.1989) (client-lawyer arbitration clause construed not to require arbitration of malpractice claim); Beatty v. NP Corp., 581 N.E.2d 1311 (Mass.App.Ct.1991) (principles that doubtful contracts are construed against drafter "counts double when the drafter is a lawyer"); Luna v. Gillingham, 789 P.2d 801 (Wash.Ct.App.1990) (fee contract construed to permit client to use amount of court-awarded fee as credit against contingent-fee amount); § 38, Reporter's Note (applying rule of construction to fee issues). For the construction of contingent-fee contracts, in the absence of contrary language, to require the lawyer to handle any appeal, see, e.g., Carmichael v. Iowa State Highway Comm'n, 219 N.W.2d 658 (Iowa 1974); Attorney Grievance Comm'n v. Korotki, 569 A.2d 1224 (Md.1990); Ward v. Richards & Rossano, Inc., P.S., 754 P.2d 120 (Wash. Ct.App.1988); Annot., 13 A.L.R.3d 673 (1967); cf. Shaw v. Manufacturers Hanover Trust Co., 499 N.E.2d 864 (N.Y.1986) (contract read to exclude appeal when that construction helped client).

## § 19. Agreements Limiting Client or Lawyer Duties

**(1) Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if:**

**(a) the client is adequately informed and consents; and**

**(b) the terms of the limitation are reasonable in the circumstances.**

**(2) A lawyer may agree to waive a client's duty to pay or other duty owed to the lawyer.**

### Comment:

*a. Scope and cross-references.* This Section describes the extent to which lawyers and clients may limit the duties to each other summarized in §§ 16 and 17. It addresses not waivers and settlements of claims that have already arisen (see § 54), but specifications defining in advance the duties of a lawyer or client. For additional requirements applicable to contracts reached during a representation, see

§ 18. This Section does not deal with duties that lawyers and clients may owe to third persons, except as they may be affected by changes in the duties of lawyers and clients to each other. See, e.g., §§ 51 and 56 (right of certain nonclients to sue lawyer for negligence). The Section assumes that the client is legally competent (see § 24). Concerning the waiver by a client of duties owed by a lawyer to the client, see § 19(1).

This Section provides default rules that apply when no other, more specific rule of the Restatement applies. Thus, its rules are subject to other provisions, such as those that concern allowing, restricting, or forbidding client consent to the disclosure of confidential information (e.g., §§ 26(3) & 62), waiver of conflicts of interest (e.g., §§ 122 & 126), and arbitration of fee disputes (see § 42). The Section should be applied in view of the prohibition against advance waiver by the client of the lawyer's civil liability (see § 54). The separation between the Sections is indistinct at the margins. Any accepted limitation might serve to diminish the lawyer's legal-malpractice liability notwithstanding § 54 and therefore might be motivated in part by the objective of obtaining such diminution. The reasonableness requirement of § 19(1)(b) serves to limit such diminutions to those in which the client obtains reasonably valuable services in the circumstances (see Comment *c* hereto).

*b. Rationale.* Restrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others. On the one hand, for some clients the costs of more extensive services may outweigh their benefits. A client might reasonably choose to forgo some of the protection against conflicts of interest, for example, in order to get the help of an especially able or inexpensive lawyer or a lawyer already familiar to the client. The scope of a representation may properly change during a representation, and the lawyer may sometimes be obligated to bring changes of scope to a client's notice (see § 20). In some instances, such as an emergency, a restricted representation may be the only practical way to provide legal services (see Comments *c* and *d* hereto).

On the other hand, there are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers (see § 16, Comment *b*). Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly. Also, any attempt to assess the basis of a client's consent could force disclosure of the client's confidences. In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may

suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

*c. Limiting a representation.* Clients and lawyers may define in reasonable ways the services a lawyer is to provide (see § 16), for example to handle a trial but not any appeal, counsel a client on the tax aspects of a transaction but not other aspects, or advise a client about a representation in which the primary role has been entrusted to another lawyer. Such arrangements are not waivers of a client's right to more extensive services but a definition of the services to be performed. They are therefore treated separately under many lawyer codes as contracts limiting the objectives of the representation. Clients ordinarily understand the implications and possible costs of such arrangements. The scope of many such representations requires no explanation or disclaimer of broader involvement.

Some contracts limiting the scope or objectives of a representation may harm the client, for example if a lawyer insists on agreement that a proposed suit will not include a substantial claim that reasonably should be joined. Section 19(1) hence qualifies the power of client and lawyer to limit the representation. Taken together with requirements stated in other Sections, five safeguards apply.

First, a client must be informed of any significant problems a limitation might entail, and the client must consent (see § 19(1)(a)). For example, if the lawyer is to provide only tax advice, the client must be aware that the transaction may pose non-tax issues as well as being informed of any disadvantages involved in dividing the representation among several lawyers (see also §§ 15 & 20).

Second, any contract limiting the representation is construed from the standpoint of a reasonable client (see § 18(2)).

Third, the fee charged by the lawyer must remain reasonable in view of the limited representation (see § 34).

Fourth, any change made an unreasonably long time after the representation begins must meet the more stringent tests of § 18(1) for postinception contracts or modifications.

Fifth, the terms of the limitation must in all events be reasonable in the circumstances (§ 19(1)(b)). When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver—typically, a reduced legal fee or the ability to retain a particularly able lawyer—could reasonably be considered to outweigh

the potential risk posed by the limitation. It is also relevant whether there were special circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.

The extent to which alternatives are constrained by circumstances might bear on reasonableness. For example, a client who seeks assistance on a matter on which the statute of limitations is about to run would not reasonably expect extensive investigation and research before the case must be filed. A lawyer may be asked to assist a client concerning an unfamiliar area because other counsel are unavailable. If the lawyer knows or should know that the lawyer lacks competence necessary for the representation, the lawyer must limit assistance to that which the lawyer believes reasonably necessary to deal with the situation.

Reasonableness also requires that limits on a lawyer's work agreed to by client and lawyer not infringe on legal rights of third persons or legal institutions. Hence, a contract limiting a lawyer's role during trial may require the tribunal's approval.

**Illustrations:**

1. Corporation wishes to hire Law Firm to litigate a substantial suit, proposing a litigation budget. Law Firm explains to Corporation's inside legal counsel that it can litigate the case within that budget but only by conducting limited discovery, which could materially lessen the likelihood of success. Corporation may waive its right to more thorough representation. Corporation will benefit by gaining representation by counsel of its choice at limited expense and could readily have bargained for more thorough and expensive representation.

2. A legal clinic offers for a small fee to have one of its lawyers (a tax specialist) conduct a half-hour review of a client's income-tax return, telling the client of the dangers or opportunities that the review reveals. The tax lawyer makes clear at the outset that the review may fail to find important tax matters and that clients can have a more complete consideration of their returns only if they arrange for a second appointment and agree to pay more. The arrangement is reasonable and permissible. The clients' consent is free and adequately informed, and clients gain the benefit of an inexpensive but expert tax review of a matter that otherwise might well receive no expert review at all.

3. Lawyer offers to provide tax-law advice for an hourly fee lower than most tax lawyers charge. Lawyer has little knowledge of tax law and asks Lawyer's occasional tax clients to agree to waive the requirement of reasonable competence. Such a waiver is invalid, even if clients benefit to some extent from the low price and consent freely and on the basis of adequate information. Moreover, allowing such general waivers would seriously undermine competence requirements essential for protection of the public, with little compensating gain. On prohibitions against limitations of a lawyer's liability, see § 54.

*d. Lawyer waiver of a client's duties.* Lawyers generally are well positioned to appraise a waiver of a client's duties to them (see § 17). Waiver of the client's duty to pay for legal services had traditionally been encouraged when motivated by the client's inability to pay. The client's duty to indemnify the lawyer for certain losses attributable to the client (see § 17(2)) is based on an implied contract which is subject to waiver. Client waivers do not diminish the duties owed to third persons, such as the duty not to commit or assist crime or fraud.

*e. Contracts to increase a lawyer's duties.* The general principles set forth in this Section apply also to contracts calling for more onerous obligations on the lawyer's part. A lawyer or law firm might, for example, properly agree to provide the services of a tax expert, to make an unusually large number of lawyers available for a case, or to take unusual precautions to protect the confidentiality of papers. Such a contract may not infringe the rights of others, for example by binding a lawyer to aid an unlawful act (see § 23) or to use for one client another client's secrets in a manner forbidden by § 62. Nor could the contract contravene public policy, for example by forbidding a lawyer ever to represent a category of plaintiffs even were there no valid conflict-of-interest bar (see § 13) or by forbidding the lawyer to speak on matters of public concern whenever the client disapproves.

Clients too may sometimes agree to special obligations, for example to contribute work to a case, as by conducting witness interviews.

## REPORTER'S NOTE

*Comment c. Limiting a representation.* See generally ABA Model Rules of Professional Conduct, Rule 1.2(c) (1983) ("A lawyer may limit the objectives of the representation if the client consents after consultation."); Zacharias, Limited Performance Agreements: Should Clients Get What They Pay For?, 11 Geo. J. Leg. Ethics 915 (1998); e.g., Kane, Kane &

Kritzer, Inc. v. Altagen, 165 Cal.Rptr. 534 (Cal.Ct.App.1980) (lawyer retained by sophisticated client to send collection letters, but not to file or discuss suit unless requested); Johnson v. Jones, 652 P.2d 650 (Idaho 1982) (to draw up contract but not to advise on rights under it); Delta Equipment & Constr. Co. v. Royal Indem. Co., 186 So.2d 454 (La.Ct. App.1966) (to defend workers-compensation claim but not wage claim); Martini v. Leland, 455 N.Y.S.2d 354 (N.Y.Civ.Ct.1982) (to consult on pending suit but not conduct the litigation); Greenwich v. Markhoff, 650 N.Y.S.2d 704 (N.Y.App.Div.1996) (to bring worker-compensation claims; lawyer liable for not informing client of possible negligence claim). For regulations prohibiting certain limited tax-shelter opinions, see Treasury Dept. Circular No. 230, 31 C.F.R. § 10.33; C. Wolfram, Modern Legal Ethics 700–01 (1986).

On limited representation in an emergency, see, e.g., ABA Model Rules of Professional Conduct, Rule 1.1, Comment ¶ [3] (1983) ("In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest"); Tex. Discipl. R. Prof. Conduct, R. 1.01(a)(2) (lawyer may accept or continue representation in matter which lawyer knows is beyond lawyer's competence "in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances").

On limitation of lawyer duties, see, e.g., United States v. Roth, 860 F.2d 1382 (7th Cir.1988), cert. denied, 490 U.S. 1080, 109 S.Ct. 2099, 104 L.Ed.2d 661 (1989) (criminal defendant who was a lawyer agreed, inter alia, that expert defense counsel would not engage in plea bargaining, in order to avoid conflicts of interest); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F.Supp. 193 (N.D.Ohio 1976) (city agreed that firm would help it in issuing bonds without ceasing to represent corporation in adversarial dealings with city), aff'd, 573 F.2d 1310 (6th Cir.1977), cert. denied, 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978); Griffith v. Taylor, 937 P.2d 297 (Alaska 1997) (agreement that lawyer would perform only "scrivener" function of preparing quit-claim deed based entirely on statutory form); Maxwell v. Superior Court, 639 P.2d 248 (Cal.1982) (criminal defendant agreed that lawyer could write book about case); In re Harris, 514 N.E.2d 462 (Ill.1987) (client who could not find other counsel agreed that lawyer could take long time recovering escheated funds). On the procedural requirements for such waivers, see, e.g., Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir.1981) (consent upheld when client discussed question with inside legal counsel); IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978) (consent inadequate when conflict cursorily mentioned to inside legal counsel, even though other inside legal counsel knew of conflicting case); Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir.1984) (cursory disclosure of conflict inadequate); Maxwell v. Superior Court, supra (consent of criminal defendant to publication-