Comment b. A lawyer's liability on contracts. For a lawyer's usual nonliability on a contract negotiated for a disclosed principal, see Riddle v. Lacey & Jones, 351 N.W.2d 916 (Mich.Ct.App.1984) (no promissory-estoppel liability); Burger v. Brookhaven Medical Arts Bldg., Inc., 516 N.Y.S.2d 705 (N.Y.App.Div.1987); Forbes Homes, Inc. v. Trimpi, 349 S.E.2d 852 (N.C.1986); Eppler, Guerin & Turner, Inc. v. Kasmir, 685 S.W.2d 737 (Tex.Civ.App.1985). For liability, see Weeden Eng'g Corp. v. Hale, 435 So.2d 1158 (La.Ct.App.1983) (lawyer liable for engineers' trial-preparation services when letter indicated that lawyer was hiring engineers); Schafer v. Fraser, 290 P.2d 190 (Or.1955) (lawyer liable on promissory-estoppel theory for promising that clients would share litigation costs without authority from clients); McNeill v. Appel, 197 A.2d 152 (D.C.1964) (lawyer liable to handwriting expert hired without disclosing client's identity).

For a lawyer's liability to persons supplying goods or services normally used by lawyers and normally dealing with lawyers rather than clients, see, e.g., Ingram v. Lupo, 726 S.W.2d 791 (Mo.Ct.App.1987) (court reporter); Urban Court Reporting Inc. v. Davis, 551 N.Y.S.2d 235 (N.Y.App.Div.1990) (same); Gualtieri v. Burleson, 353 S.E.2d 652 (N.C.Ct.App.1987) (expert witness); Theuerkauf v. Sutton, 306 N.W.2d 651 (Wis.1981) (accountant for divorce proceeding); N.M. Stat. Ann. § 36-2-13.1(A) (court reporter); Annot., 66 A.L.R. 4th 256 (1988) (collecting cases for and against the rule stated here). *Weeden Eng'g Corp. v. Hale* and *McNeill v. Appel*, both cited above, although decided on other grounds, are also susceptible to the same analysis.

TOPIC 5. ENDING A CLIENT-LAWYER RELATIONSHIP

Introductory Note

Section

Introductory Note: Clients have an interest in being able to change lawyers or terminate representation without great cost or hazard. Lawyers have an interest in rendering competent, ethical, and law-abiding service, and in being compensated for doing so. Third persons and tribunals have an interest in dealing with representatives whose authority is clear, without delaying intervals in representation.

The first Section of this Topic sets forth the circumstances in which lawyers lose actual and apparent authority to act on behalf of clients (see § 31). Section 32 describes the client's right to discharge a lawyer, the lawyer's right to withdraw when there is justification for doing so, and the situations in which the lawyer is required to

withdraw. Section 33 describes a lawyer's duty to protect a client's interests during termination and the lawyer's duties to a former client that survive the termination of the relationship.

§ 31. Termination of a Lawyer's Authority

(1) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue.

(2) Subject to Subsection (1) and § 33, a lawyer's actual authority to represent a client ends when:

(a) the client discharges the lawyer;

(b) the client dies or, in the case of a corporation or similar organization, loses its capacity to function as such;

(c) the lawyer withdraws;

(d) the lawyer dies or becomes physically or mentally incapable of providing representation, is disbarred or suspended from practicing law, or is ordered by a tribunal to cease representing a client; or

(e) the representation ends as provided by contract or because the lawyer has completed the contemplated services.

(3) A lawyer's apparent authority to act for a client with respect to another person ends when the other person knows or should know of facts from which it can be reasonably inferred that the lawyer lacks actual authority, including knowledge of any event described in Subsection (2).

Comment:

a. Scope and cross-references. This Section deals with the termination of a lawyer's authority to act for a client in dealings with third persons, including tribunals. Termination as between client and lawyer is considered in § 32. A lawyer who wrongfully fails to withdraw can continue to have authority, even though thereby becoming subject to disciplinary sanctions and malpractice liability. For a lawyer's duty to protect a client's interests when a representation ends, see § 33. For the effect of termination on a lawyer's compensation, see § 40.

b. Rationale. Just as mutual consent is usually a prerequisite to creating the client-lawyer relationship, the end of such consent usually

ends the relationship. Consent might end because client or lawyer withdraws consent or becomes incapable of giving a valid consent (but compare Comment *e*). Alternatively, the lawyer might have completed the representation or have become incapable of providing services to completion. However, a tribunal might in some circumstances deny a lawyer leave to withdraw. The rules stated in this Section also protect third persons who reasonably rely on a lawyer's apparent authority after the lawyer's actual authority has ended. For the rationale of the apparent-authority rules, see § 27, Comment *b*.

c. Court approval. Rules governing litigation typically require a lawyer to give notice or obtain court approval before withdrawing. In some situations the tribunal might require a lawyer to continue to serve even though the lawyer wishes to withdraw. If the tribunal improperly requires a lawyer to continue representation, the usual remedy for the lawyer or client is to appeal the order and obey it in the meantime. On violation of orders as a means of obtaining appellate review, see § 94, Comment *e*. A lawyer seeking leave of a tribunal to withdraw should avoid disclosure of confidential client information to the extent feasible.

Whether a lawyer may properly exercise the authority to represent a client after seeking leave to withdraw, but before the tribunal has acted, depends on the circumstances. If, for example, the client wishes the lawyer to continue the representation and doing so would require no improper behavior, the lawyer should ordinarily continue to act for the client until the tribunal has approved withdrawal. At the other extreme, if a client has discharged the lawyer, the lawyer ordinarily may act for the client only when essential to protect the client's interests (see § 33(1)). In any event, the tribunal might have continuing authority to provide notice to the client through the lawyer.

d. When a client discharges a lawyer. A principal can end an agent's actual authority by discharging the agent. Even if the discharge violates the contract between them, so that the principal is liable in damages to the agent, the agent's authority nonetheless terminates (see Restatement Second, Agency § 118). A client and lawyer cannot validly enter a contract forbidding the client to discharge the lawyer (see §§ 14 & 32).

e. A client's death or incompetence. A client's death terminates a lawyer's actual authority (see Restatement Second, Agency § 120). The rights of a deceased client pass to other persons—executors, for example—who can, if they wish, revive the representation. Procedural rules usually provide for substitution for the deceased client in actions to which the client was a party. The lawyer for the deceased client must cooperate in such a transition and seek to protect the deceased

client's property and other rights (see § 33). In extraordinary circumstances, the lawyer may exercise initiative, for example taking an appeal when the time for doing so would expire before a personal representative could be appointed (see § 33, Comment *b*).

The general rule of agency law that the insanity or incompetence of a principal similarly terminates an agent's authority (see Restatement Second, Agency § 122) may be inappropriate as applied to a lawyer's beneficial efforts to protect the rights of a client with diminished capacity. Such a client continues to have rights requiring protection and often will be able to participate to some extent in the representation (see § 24). If representation were terminated automatically, no one could act for the client until a guardian is appointed, even in pressing situations. Even if the client has been adjudicated to be incompetent, it might still be desirable for the representation to continue, for example to challenge the adjudication on appeal or to represent the client in other matters. Although a lawyer's authority therefore does not terminate automatically in such circumstances, the lawyer must act in accordance with the principles of § 24 in exercising continuing authority.

Bankruptcy, loss of corporate privileges, and similar events can also remove the capacity of an organization or similar entity to function (see Restatement Second, Agency §§ 114 & 122). With respect to the effect of termination of agency powers on actual and apparent authority, see id. § 124A.

f. A lawyer's withdrawal. A lawyer's withdrawal terminates authority, subject to the duties stated in § 33. The circumstances in which a lawyer may properly withdraw are stated in § 32. Withdrawal, whether proper or improper, terminates the lawyer's authority to act for the client (see Restatement Second, Agency § 118). The client is not bound by acts of a lawyer who refuses to represent the client, except when a tribunal that must authorize the withdrawal has not done so (see Comment *c*).

When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained (see § 14, Comment *h*). Hence, when a lawyer involved in a representation leaves the firm, the client can ordinarily choose whether to be represented by that lawyer, by lawyers remaining at the firm, by neither, or by both. In the absence of client direction, whether the departing lawyer continues to have authority to act for the client depends on the circumstances, including whether the client regarded the lawyer to be in charge of the matter, whether other lawyers working on the matter also leave, whether firm lawyers continue to represent the client in other matters, and whether the lawyer had filed

an appearance for the client with a tribunal. Similar principles apply when a firm dissolves. When a lawyer leaves a large firm, for example, it can usually be assumed that, absent contrary client instructions or previous contract, the firm continues to represent the client in pending representations and the lawyer does not.

g. A lawyer's death, disbarment, disqualification, or incapacity. A lawyer who is dead can provide no representation; one who is disbarred or suspended cannot provide proper representation. A lawyer can be ordered by a tribunal to cease representing a client before the tribunal, for example because of a conflict of interest (see § 121, Comment *e(ii)*). Those occurrences terminate the lawyer's authority (see Restatement Second, Agency §§ 121 & 122). Incapacity of a lawyer terminates the lawyer's authority only if the lawyer's incapacity is clear to persons dealing with the lawyer. Death or other incapacity of one lawyer does not ordinarily terminate the authority of other lawyers in the lawyer's firm (see Comment *f* hereto).

h. Termination by completion of contemplated services. A client and lawyer might agree that the representation will end at a given time or on the happening of a stated event (see Restatement Second, Agency §§ 105 & 107). Alternatively, the client and lawyer may contemplate a continuing relationship in which the lawyer will handle legal matters as they arise. Such a contract defines the scope or aims of the representation (see § 19(1)). On differentiation between ongoing and completed representations for purposes of conflicts of interest, see § 132, Comment *c*.

The lawyer's authority ordinarily ends when the lawyer has completed the contemplated services (see Restatement Second, Agency § 106). A lawyer who has been retained to represent a client in a divorce, for example, has no authority to negotiate subsequent modifications of support or custody agreements without new authorization from the client.

The course of dealing might not clearly indicate what services were contemplated in the representation or whether the lawyer has a continuing duty to advise the client. Such uncertainty could lead to clients assuming that they were still being represented. Because contracts with a client are to be construed from the client's viewpoint (see § 18), the client's reasonable understanding of the scope of the representation controls. The client's relative sophistication in employing lawyers or lack thereof is relevant.

i. The end of a lawyer's apparent authority. When a lawyer's actual authority ends, the lawyer must no longer purport to exercise authority and must notify persons who the lawyer reasonably should know are relying on continuing existence of the authority (see § 33).

Despite cessation of actual authority, a lawyer might nevertheless continue to act for a client. Third persons, including officers of tribunals, might rely on the lawyer's apparent authority. For most purposes, the lawyer's apparent authority (see § 27) therefore continues after termination until an affected third person has enough information to put a reasonable person on notice that inquiry into the lawyer's continuing authority is appropriate (see Restatement Second, Agency §§ 9, 124A–133, & 135–137). On the liability of a lawyer who acts without actual authority, see § 27, Comment *f*; § 30(3) and Comment *e* thereto.

The rule followed in the few decided cases is that a principal's death automatically ends an agent's apparent as well as actual authority to act for the client (see Restatement Second, Agency § 120, Comment *c*). Under that rule, when a client authorized a lawyer to accept a settlement proposal but died before the lawyer communicated the acceptance to the opposing party, the acceptance would create no obligation against the client's estate even if neither the lawyer nor the opposing party was aware of the death. The opposing party's only remedy, if any, would be against the lawyer (see § 30). That rule has been modified by statute in some jurisdictions and should not be followed. A third party who deals with a lawyer, reasonably relying on the lawyer's authority to bind a client, should be protected regardless of the unknown event responsible for the lawyer's loss of actual authority.

REPORTER'S NOTE

Comment c. Court approval. For requirements of court approval for a lawyer's withdrawal, see, e.g., N.J. Rules of General Application 1:11–2; Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss.1985), cert. denied, 479 U.S. 813, 107 S.Ct. 64, 93 L.Ed.2d 23 (1986) (court approval required even in absence of rule); see ABA Model Rules of Professional Conduct, Rule 1.16(c) (1983) (lawyer may not withdraw when ordered by tribunal to continue representation); ABA Model Code of Professional Responsibility, DR 2–110(A)(1) (1969) (lawyer may not withdraw without permission when tribunal's rules so provide). On the judge's discretion to deny a continuance for the retention of new counsel, see Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). On the impropriety of a court's requiring a lawyer to act after discharge by the client, see Meeker v. Gray, 492 N.E.2d 508 (Ill.App.Ct. 1981); Gersten v. Gersten, 521 N.Y.S.2d 242 (N.Y.App.Div.1987); Teegardin v. Noillim Enters., Inc., 385 N.W.2d 106 (S.D.1986). A lawyer who has not complied with withdrawal requirements of a court continues to represent the client and therefore is liable for malpractice. Lipton v. Boesky, 313 N.W.2d 163 (Mich.Ct. App.1981); Strauss v. Fost, 507 A.2d 1189 (N.J.Super.Ct.App.Div.1986).

Comment d. When a client discharges a lawyer. See McLaughlin v.

McLaughlin, 427 S.W.2d 767 (Mo.Ct. App.1968) (discharged lawyer may not prosecute in client's name claim for interim allowances, including payment for lawyer); § 32, Comment *b*, and Reporter's Note thereto; § 37, Comment *d*, and Reporter's Note thereto.

Comment c. A client's death or incompetence. For the effect of a client's death, see, e.g., United States v. Dwyer, 855 F.2d 144 (3d Cir.1988) (lawyer may not move to abate conviction of unsentenced dead client, but court should dismiss proceeding); Herring v. Peterson, 172 Cal.Rptr. 240 (Cal.Dist.Ct.App.1981) (lawyer of dead defendant could not move to dismiss suit for lack of prosecution); Bossert v. Ford Motor Co., 528 N.Y.S.2d 592 (N.Y.App.Div.1988) (lawyer for dead party could not enter stipulation); Campbell v. Campbell, 878 P.2d 1037, 1043 (Okla.1994) (lawyer's on-record suggestion of client's death did not start running of period within which client's successor must be substituted); Note, Does the Death of a Client Necessarily Terminate an Attorney-Client Relationship?, 4 J. Leg. Prof. 243 (1979); see Fed. R. Civ. P. 25(a) (substitution of proper party when party dies).

As to the incompetence of a client, compare Donnelly v. Parker, 486 F.2d 402 (D.C.Cir.1973) (incompetence of client ends authority of lawyer, but court should appoint guardian ad litem), with Graham v. Graham, 240 P.2d 564 (Wash.1952) (party can defend by counsel against appointment of guardian ad litem); § 24, Comment *c*, and Reporter's Note thereto (role of counsel in defending civil commitment proceeding); § 14, Comment *c*, and Reporter's Note thereto (doctrine of necessaries as applied to lawyers); see E. Wood, Fee Contracts of Lawyers 229–231 (1936).

As to the analogous rule involving termination of a lawyer's authority on dissolution of a corporation or partnership represented by the lawyer, see Darrow v. Van Buskirk, 110 P.2d 216, 218 (Ariz.1941); Fessler v. Weiss, 107 N.E.2d 795, 798 (Ill.App.Ct.1952); Sinnott v. Hanan, 141 N.Y.S. 505, 508 (N.Y.App.Div.1913), rev'd on other grounds, 108 N.E. 858 (N.Y.1915).

Comment f. A lawyer's withdrawal. On sanctions for improper withdrawal, see ABA Model Rules of Professional Conduct, Rule 1.16 (1983); ABA Model Code of Professional Responsibility, DR 2–110 (1969); Delesdernier v. Porterie, 666 F.2d 116 (5th Cir.), cert. denied, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982) (malpractice liability); Central Cab Co. v. Clarke, 270 A.2d 662 (Md.1970) (same); Greenstreet v. Ederer, 567 S.W.2d 54 (Tex.Civ.App.1978) (lawyer's threat to withdraw without ground can vitiate promissory note); § 40, Reporter's Note (effect on lawyer's fees). Although withdrawal clearly ends a lawyer's authority, assuming that rules requiring court approval or the like have been satisfied, no authority has been found so stating or considering the impact on a lawyer's authority of withdrawal from a firm. See E. Wood, Fee Contracts of Lawyers 178–181, 220–221 (1936) (effect on representation when one lawyer in firm departs or dies or firm dissolves).

Comment g. A lawyer's death, disbarment, disqualification, or incapacity. See Lovato v. Santa Fe Int'l Corp., 198 Cal.Rptr. 838 (Cal.Dist.Ct. App.1984) (service on suspended lawyer not notice to client); N.Y. C.P.L.R. § 321(c) (no further proceedings without leave of court if law-

yer dies, is incapacitated, or is removed or suspended); Note, The Death of a Lawyer, 56 Colum. L. Rev. 606 (1956); see Simpson v. James, 903 F.2d 372 (5th Cir.1990) (firm continued to represent client although original lawyer left firm, and no bills were sent); C. Wolfram, Modern Legal Ethics 130–131 (1986) (duties of suspended lawyer); Annot., 33 A.L.R.3d 1375 (1975) (effect of lawyer's death on fees); § 32, Comment *f*, and Reporter's Note thereto (duty of disabled lawyer to withdraw).

Comment h. Termination by completion of contemplated services. E.g., Chapman v. Sullivan, 411 N.W.2d 754 (Mich.Ct.App.1987) (statute of limitations for malpractice starts running when lawyer completes services relating to sale); La Rosa v. Grossman, Liepziger, Daniels & Freund, 481 N.Y.S.2d 165 (N.Y.App.Div.1984) (malpractice statute of limitations starts running at final judgment in suit in which lawyer represented client); Jordan v. Crew, 482 S.E.2d 735 (N.C.Ct.App.1997) (lawyer had no duty to correct wrongly drafted deed years later); Finck v. Finck, 354 N.W.2d 198 (S.D.1984) (service in garnishment proceeding may not be made on lawyer who represented client in previous alimony proceeding when client has absconded); E. Wood, Fee Contracts of Lawyers 196–98 (1936); see IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978) (client-lawyer relationship with steady client continues for purposes of applying concurrent-representation conflicts rules, although no matters are currently pending); Manoir–Electroalloys Corp. v. Amalloy Corp., 711 F.Supp. 188 (D.N.J.1989) (similar result where lawyer continued to send personal letters to client urging action); Mindscape, Inc. v. Media Depot, Inc., 973 F.Supp. 1130 (N.D.Cal.1997) (similar result where lawyer had patent-office power of attorney and was client's law firm of record in patent office); Lama Holding Co. v. Shearman & Sterling, 758 F.Supp. 159 (S.D.N.Y.1991) (for malpractice purposes, lawyer owes duty to otherwise former client if lawyer told client he would inform client of significant tax-law changes).

Comment i. The end of a lawyer's apparent authority. No authority has been found. Although Restatement Second, Agency § 120 follows the rule that a principal's death automatically terminates any agent's apparent authority, the Reporter's Note to that Section criticizes the rule, and cites 1943 Wis. Laws c. 49 as rejecting it. See Mubi v. Broomfield, 492 P.2d 700, 703 n.1 (Ariz.1972) (leaving open whether third persons dealing in good faith with lawyer would be protected).

§ 32. Discharge by a Client and Withdrawal by a Lawyer

(1) Subject to Subsection (5), a client may discharge a lawyer at any time.

(2) Subject to Subsection (5), a lawyer may not represent a client or, where representation has commenced, must withdraw from the representation of a client if:

(a) the representation will result in the lawyer's violating rules of professional conduct or other law;

(b) the lawyer's pbysical or mental condition materially impairs tbe lawyer's ability to represent the client; or

(c) the client discharges the lawyer.

(3) Subject to Subsections (4) and (5), a lawyer may withdraw from representing a client if:

(a) withdrawal can be accomplished without material adverse effect on the interests of the client;

(b) the lawyer reasonably believes withdrawal is required in circumstances stated in Subsection (2);

(c) the client gives informed consent;

(d) the client persists in a course of action involving the lawyer's services tbat the lawyer reasonably believes is criminal, fraudulent, or in breacb of the client's fiduciary duty;

(e) the lawyer reasonably believes tbe client has used or threatens to use tbe lawyer's services to perpetrate a crime or fraud;

(f) the client insists on taking action that the lawyer considers repugnant or imprudent;

(g) the client fails to fulfill a substantial financial or other obligation to tbe lawyer regarding the lawyer's services and the lawyer has given the client reasonable warning that the lawyer will withdraw unless the client fulfills the obligation;

(h) the representation has heen rendered unreasonably difficult by the client or hy the irreparable breakdown of tbe client-lawyer relationsbip; or

(i) other good cause for withdrawal exists.

(4) In the case of permissive withdrawal under Subsections (3)(f)-(i), a lawyer may not withdraw if the harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing.

(5) Notwithstanding Suhsections (1)-(4), a lawyer must comply witb applicable law requiring notice to or permission of a tribunal wben terminating a representation and with a valid order of a trihunal requiring the representation to continue.

Comment:

a. Scope and cross-references. This Section describes the right of a client to discharge a lawyer. Exercise of that right might have consequences for the lawyer's fee to be paid (see § 40). The Section also describes the discretion, and in some circumstances duty, of the lawyer to withdraw from the representation. The Section is related to the rules determining when the lawyer loses the authority to bind the client in dealings with third persons (see § 31, Comment *a*). A lawyer's duties to a client in the course of and after discharge or withdrawal are considered in § 33. On when a representation is established, see § 14 and § 31, Comment *h* (continuing representation). Concerning termination of a representation because of events other than the lawyer's discharge or withdrawal, for example because the client or lawyer dies, see § 31.

On withdrawal for the purpose of representing another client against the now-former client, see § 132, Comment *c*.

A lawyer who improperly fails to withdraw after being discharged or when withdrawal is otherwise required is, in general, subject to professional discipline and, in litigation matters, to sanctions imposed by the tribunal (see § 110, Comment *c*). The lawyer is also liable to the client for acting without authority or improperly failing to withdraw, except in circumstances in which the client is responsible for the failure (see § 27, Comment *f*, & § 33, Comment *g*). For example, a client who insists that a lawyer continue, although aware of the lawyer's illness and its implications, cannot subsequently recover from the lawyer on a claim that the lawyer should have withdrawn.

A lawyer who withdraws, or tries to withdraw, other than as allowed by this Section is subject to professional discipline (§ 5) and breaches a duty to the client (see § 50). The lawyer's duty or authority to withdraw is subject to the authority of a tribunal to require that the lawyer continue the representation (see Subsection (5) & Comment *d* hereto). A lawyer who withdraws must take reasonable steps to protect a client's interests as stated in § 33.

b. Discharge by a client. A client may always discharge a lawyer, regardless of cause and regardless of any agreement between them. A client is not forced to entrust matters to an unwanted lawyer. However, a client's discharge of a lawyer is not always without adverse consequence, for example when a tribunal declines to appoint new counsel for an indigent criminal defendant or denies a continuance for the client to seek new counsel.

A discharged lawyer loses actual authority to act (see § 31(1)(a)). The lawyer must also attempt to withdraw (see § 32(2)(c)), taking reasonable steps to protect the client's interests (see § 33(1)) and

complying with procedural rules governing withdrawal (see § 31, Comment *c*).

As stated in § 37, Comment *e*, when a lawyer is also an employee of a client (for example, a lawyer employed as inside legal counsel by a corporation or government agency), the client's right to discharge the lawyer does not abridge the lawyer's entitlement to salary and benefits already earned. A lawyer-employee also has the same rights as other employees under applicable law to recover for bad-faith discharge, for example if the client discharged the lawyer for refusing to perform an unlawful act. Because of the importance of such a lawyer's role in assuring law compliance, the public policy that supports a remedy for such discharges is at least as strong in the case of lawyers as it is for other employees (see § 23(1)). The power a client employer possesses over a lawyer-employee is substantial, compared to that of a client over an independent lawyer. Giving an employed lawyer a remedy for wrongful discharge does not significantly impair the client's choice of counsel.

c. Rationale for lawyer-withdrawal rules. Restrictions on the right of a lawyer to withdraw from a representation are based in part on contract law. Restrictions are appropriate even when ceasing representation would not constitute an actionable breach of contract. Particularly in view of the duties that lawyers have toward clients, a lawyer who undertakes a representation ordinarily should see it through to the contemplated end of the lawyer's services when failure to do so would inflict burdens on the client. Accordingly, the general rule is that a lawyer must persist despite unforeseen difficulties and carry through the representation to its intended conclusion, with the limited exceptions stated in Subsection (3). On the other hand, the interests of third persons and the public require lawyers to withdraw rather than assist unlawful acts (see § 23(2); see also § 94), or if another of the limited circumstances stated in Subsection (2) is present.

The rules governing withdrawal applied by tribunals have been largely drawn from the lawyer codes, with common-law corollaries. A client-lawyer contract complying with §§ 18 and 19 may modify the otherwise-applicable rules of permissive withdrawal. See also Comment *i* hereto.

d. Approval of a tribunal. Rules of tribunals typically require approval of the tribunal when a lawyer withdraws from a pending matter (see § 31, Comment *c*, & § 105). In applying to a tribunal for approval of withdrawal, a lawyer must observe the requirements of confidentiality (see § 60), unless an exception (see §§ 61–67) applies. In applying to withdraw under Subsection (3)(f), for example, it would

not be permissible for the lawyer to state that the client intended to pursue a repugnant objective. A lawyer therefore will often be limited to the statement that professional considerations motivate the application.

If a tribunal denies permission to withdraw, the lawyer must proceed with the representation in a manner best calculated to further lawful objectives of the client (see § 16). The lawyer is not thereby authorized to violate law or any rule of professional conduct in the representation, other than as necessitated in complying with the direct order of the tribunal (see § 105). Similarly, a lawyer is not required to carry out a client instruction that the lawyer reasonably believes to be unethical or otherwise objectionable (see § 21, Comment *d*).

In considering permissive withdrawal (Subsection (3)), a lawyer should take into account whether the tribunal may refuse permission. The tribunal may do so, for example, because of adverse effect on the court's docket.

e. A lawyer's reasonable belief. Even if a tribunal concludes that a lawyer was required to withdraw under this Section, the lawyer is not subject to professional discipline or liability to a client if the lawyer reasonably believed, based on adequate investigation and consideration of the relevant facts and law, that withdrawal was not required. Also, a lawyer is not subject to discipline or liability for withdrawing if the lawyer reasonably believed, after similar investigation and consideration, that cause existed. However, when a tribunal is determining whether to compel or allow withdrawal, its concern is not with the lawyer's reasonable belief (except under Subsections (3)(b), (d), & (e) and Subsection (4)) but with whether the requirements stated in the Section have in fact been satisfied.

f. Withdrawal to avoid involvement in unlawful acts. Subsection (2)(a) requires a lawyer to withdraw when the representation will result in the lawyer's violating rules of professional conduct or other law. A prominent example of a representation violating rules of professional conduct would be a representation prohibited by conflict-of-interest rules (see Chapter 8). On what acts are unlawful within the meaning of the Subsection, see § 23, Comment *c*. Disciplinary rules typically are interpreted to prohibit "knowing" unjustified withdrawal. Accordingly, a lawyer is not subject to discipline for withdrawing upon a reasonable belief that the representation will result in unlawful conduct, notwithstanding that it is later determined that the conduct would have been lawful (see Subsection (3)(b)).

Subsection (3)(d) permits withdrawal when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal, fraudulent, or in breach of a client's fiduciary

duty. A lawyer is not required to assist such a course even though the lawyer could do so without acting illegally (see § 23, Comment *c*, & § 94, Comment *c*). A lawyer has a personal interest in not being involved in criminal or fraudulent schemes or breach of fiduciary duty (see Comment *j* hereto). Withdrawal also protects the lawyer against the risk of criminal, civil, or disciplinary sanctions.

g. A lawyer's physical or mental disability. Under Subsection (2)(b), a lawyer must withdraw if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, even though the disability is not so extreme as to terminate the lawyer's authority automatically under § 31. In such a situation, a client may consent to the lawyer's continued representation in a role within the lawyer's continuing abilities so long as doing so provides adequate representation to the client (see § 19(1)). When there is any reasonable possibility that the lawyer should withdraw, the lawyer must inform and advise the client (see § 20) so that the client can decide whether the representation should continue. A client's informed consent ordinarily relieves the lawyer of any duty to withdraw (see Comment *i* hereto; compare § 122).

h(i). Permissive withdrawal—in general. The rules on lawyer withdrawal are derived primarily from lawyer codes, which list grounds for mandatory and permissive withdrawal. Read literally, those rules might appear to draw a line between permissive and prohibited withdrawal, suggesting that when a stated ground for permissive withdrawal exists, the lawyer may do so regardless of effect on the client. However, given the fiduciary nature of the client-lawyer relationship, in instances of permissive withdrawal under Subsections (3)(f)-(i), the lawyer may not withdraw when the lawyer reasonably holds the stated belief of a significant disproportion between the detrimental effects that would be imposed on the client by the contemplated withdrawal as against detrimental effects that would be imposed on the lawyer or others by continuing the representation. On a lawyer's reasonable belief, see Comment *e* hereto. On withdrawal with client consent, see Comment *i* hereto. On withdrawal for a client's failure to pay the lawyer, see Comment *k* hereto.

Before withdrawing a lawyer must seek to protect the interests of the client by communicating, if feasible, with the client concerning the basis for withdrawal and requesting any corrective action that the client might be able to take (see Comment *n* hereto). For example, before withdrawal for nonpayment of fees (see Comment *k* hereto), the lawyer must request payment and warn that nonfulfillment might lead to withdrawal. The lawyer must also secure the tribunal's approval when applicable law so requires (see Comment *d* hereto) and must protect the client's interests during and after withdrawal (see § 33).

h(ii). Permissive withdrawal in the absence of material adverse effect. Consistent with Comment *h(i)*, when withdrawal can be accomplished without material adverse effect on the interests of the client, the lawyer may withdraw even without any other justifying ground stated in Subsection (3). Although withdrawal in such circumstances can constitute breach of contract, the absence of material adverse effect renders any breach nominal. The same absence of harm to the client indicates there is no public interest in disciplining the lawyer.

Whether material adverse effect results is a question of fact. The client might have to expend time and expense searching for another lawyer. The successor lawyer might have to be paid what in effect are duplicated fees for becoming familiar with the matter. A lawyer wishing to withdraw can ameliorate those effects by assisting the client to obtain successor counsel and forgoing or refunding fees. But other material adverse effects might be beyond the withdrawing lawyer's power to mitigate. Delay necessitated by the change of counsel might materially prejudice the client's matter. An equally qualified lawyer might be unavailable or available only at material inconvenience to the client. In some circumstances, the nature of confidential information relevant to the representation might make the client reasonably reluctant to retain another lawyer.

If withdrawal would cause material adverse effect to the client, a lawyer may nonetheless withdraw if one or more of the grounds specified in Subsections (3)(b)-(i) exist, so long as the requirements stated in Comment *h(i)* are also satisfied. However, as indicated in ensuing Comments, the extent to which withdrawal would cause harm to the client may affect whether such grounds warrant withdrawal in a particular instance.

i. Withdrawal with a client's consent. The client-lawyer relationship can be ended by mutual consent, subject to the power of a tribunal to require the lawyer to serve a client willing to accept the lawyer's services (see Comment *d* hereto & § 31, Comment *c*). An agreement for withdrawal is subject to the requirements stated in § 18(1)(A) and to the requirement stated in Subsection (3)(c) that the client's consent be informed. In order to be informed, the client must understand the consequences of withdrawal, that the client need not agree to withdrawal, and that the lawyer is obliged to continue proper representation should the client refuse to consent. Determining the reasonableness of consent requires consideration of the lawyer's reasons, the client's sophistication in dealing with lawyers or lack thereof, and the impact of withdrawal on the client's rights and finances.

A lawyer may more readily withdraw when another lawyer is immediately available, for example another lawyer in the same firm. In

such a situation, an informed client's consent to the withdrawal ordinarily can be assumed if the client makes no objection. Nevertheless, the client may insist that any lawyer representing the client continue to do so unless the lawyer has cause for withdrawal or can withdraw without material adverse effect on the interests of the client under Subsection (3).

A client might also agree in advance to circumstances permitting the lawyer's withdrawal. Such arrangements may not, however, unreasonably impair the quality of the representation (see § 19(2) & § 31, Comment *h*). Moreover, withdrawal pursuant to such advance agreement is subject to the considerations stated in Comment *h(i)*.

j. A client's repugnant or imprudent course of conduct. As stated in Subsection (2), a lawyer must withdraw if a representation will result in the lawyer's violating a rule of professional conduct or other law (see Comment *f* hereto). In addition, if the client asks for action that the lawyer considers repugnant or imprudent, the lawyer may withdraw, subject to the permission of the tribunal in a litigated matter and subject to the considerations stated in Comment *h(i)*. A lawyer should use reasonable foresight in determining whether a proposed representation will involve client objectives or instructions that the lawyer considers repugnant or imprudent. If the lawyer would later wish to withdraw on such a ground, the lawyer should not undertake the representation. When the issue was not reasonably apparent at the outset, the lawyer should withdraw at an early opportunity if later withdrawal would place the client at materially greater disadvantage.

An action is imprudent within the meaning of Subsection (3)(f) only if it is likely to be so detrimental to the client that a reasonable lawyer could not in good conscience assist it, after considering the extent (if any) to which withdrawal may cause harm to the client. A client's intended action is not imprudent simply because the lawyer disagrees with it. Because a client has the prerogative, for example, of accepting or rejecting a settlement proposal (see § 22(1)), a client's decision on settlement is imprudent only when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement. On giving the client notice of intent to withdraw and an opportunity to reconsider, see Comment *n*. On a lawyer's options other than withdrawal, see § 23, Comment *c*. On withdrawal when a lawyer learns that a client has used the lawyer's services to perpetrate a crime or fraud, see § 32(3)(d), § 66, Comment *g*, and § 67, Comment *j*. Withdrawal in the circumstance of client perjury is considered in § 120, Comment *k*.

k. A client's failure to pay a lawyer. A client's failure to perform a substantial obligation to the lawyer regarding the lawyer's services, such as a failure to pay a substantial amount of fees when due, may warrant the lawyer's withdrawal. A client's financial obligations to a lawyer are to pay for the lawyer's services, to indemnify the lawyer for certain costs, and to fulfill contractual undertakings (see § 17). Under contract law, material breach by one party excuses the other from further performance (see Restatement Second, Contracts §§ 237 & 241). For this purpose, materiality of a client's breach must take into account factors such as the client's willfulness in failing to fulfill an obligation and the relationship between the effect on the lawyer of nonperformance and the extent of prejudice to the client that would be caused by withdrawal (see Comment *h(i)*, above). On remedies available if the lawyer withdraws but the claimed fee is not actually due, see §§ 37 and 40 (fee forfeiture), Chapter 4 (malpractice damages), and § 5 (professional discipline). See also Comment *m* hereto.

l. Client obstruction and irreparable breakdown of the relationship. A lawyer may withdraw when a client renders the representation unreasonably difficult, for example, by refusing to communicate with the lawyer or persistently misrepresenting facts to the lawyer. The considerations stated in Comment *h(i)* are relevant in determining whether a client's course of conduct renders the representation unreasonably difficult. Irreparable breakdown of the client-lawyer relationship due to other causes is likewise a ground for withdrawal. However, withdrawal is not warranted simply because a client disagrees with a lawyer, expresses worry or suspicion, or refuses to accept the lawyer's advice about a decision that is to be made by the client (see §§ 21 & 22). Withdrawal is permissible, for example, if the client's refusal to disclose facts to the lawyer threatens to involve the lawyer in fraud or other unlawful acts (compare Comment *f* hereto), compromises the lawyer's professional reputation, or otherwise renders the representation unreasonably difficult.

m. Other good cause for withdrawal. Other grounds for withdrawal might exist, for example inability to work with co-counsel or the lawyer's retirement from law practice or appointment as a judge. In any such instance, the considerations stated in Comment *h(i)* apply.

Continuing to represent a client might impose on a lawyer an unreasonable financial burden unexpected by client and lawyer at the outset of the representation. That is relevant to good cause but not conclusive. Ordinarily, lawyers are better suited than clients to foresee and provide for the burdens of representation. The burdens of uncertainty should therefore ordinarily fall on lawyers rather than on clients unless they are attributable to client misconduct. That a representation will require more work than the lawyer contemplated when the

fee was fixed is not ground for withdrawal. However, some jurisdictions regard an unreasonable financial burden as itself good cause for withdrawal.

n. Consultation with a client before withdrawal. Consistent with the requirement stated in § 20, a lawyer may be required to consult with a client when a lawyer is considering permissive withdrawal under § 32(3). For example, a lawyer may receive an instruction of the client that the lawyer considers to render the representation unreasonably difficult (see § 32(3)(h)) or to propose a repugnant or imprudent course of conduct (see § 32(3)(f)). The lawyer must consult with the client about the instruction, if withdrawal can be accomplished only with material adverse effect on the client (compare § 32(3)(a)) and if it reasonably appears that reconsideration or other action by the client could, within a reasonable time, remove the basis for the withdrawal.

REPORTER'S NOTE

Comment a. Scope and cross-references. On discipline for failure to withdraw, see State v. Dickens, 519 P.2d 750 (Kan.1974) (lawyer continued to act after client's death); Comment *b* hereto. On sanctions for improper withdrawal, see § 31, Comment *f*, and Reporter's Note thereto.

Comment b. Discharge by a client. On a client's right to discharge a lawyer with or without cause, see ABA Model Rules of Professional Conduct, Rule 1.16, Comment ¶ [4] (1983); In re Succession of Wallace, 574 So.2d 348 (La.1991) (executor may discharge lawyer designated by testator despite statute purporting to make lawyer nondischargeable); Belli v. Shaw, 657 P.2d 315 (Wash.1983) (retaining new lawyer for retrial discharged previous lawyer, who had no right to fees); cf. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (constitutional right of criminal defendant to self-representation). Fee contracts improperly discouraging the exercise of this right have been set aside. Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994); AFLAC Inc. v. Williams, 444 S.E.2d 314 (Ga.1994); § 40, Comment *e*, Reporter's Note. Cf. Mass v. McClenahan, 893 F.Supp. 225 (S.D.N.Y.1995) (discharge of private-practice lawyer actionable when discriminatory under federal law). For the lawyer's duty to withdraw when discharged, see ABA Model Rules of Professional Conduct, Rule 1.16(a)(3) (1983); ABA Model Code of Professional Responsibility, DR 2–110(B)(4) (1969); Trulis v. Barton, 107 F.3d 685 (9th Cir.1995) (court sanctions for failure to withdraw); Attorney Grievance Comm'n v. Montgomery, 460 A.2d 597 (Md.1983) (discipline for failure to withdraw); Lake County Bar Ass'n v. Needham, 419 N.E.2d 1104 (Ohio 1981) (similar); In re Greenlee, 658 P.2d 1 (Wash.1983) (similar). Although a tribunal might not allow a discharged lawyer to continue to act as such (see § 31, Comment *c*, and Reporter's Note thereto), it has discretion to deny the client a continuance to obtain new counsel. E.g., Kashefi-Zihagh v. I.N.S., 791 F.2d

708 (9th Cir.1986); C. Wolfram, Modern Legal Ethics 797–798 (1986); cf. Ohntrup v. Firearms Center, Inc., 802 F.2d 676 (3d Cir.1986) (discharged lawyer required to stay in case to facilitate post-judgment communication with foreign defendant).

On the availability of retaliatory-discharge claims to lawyers who are employees, compare Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173 (3d Cir.1997) (upholding retaliatory-discharge and sex-discrimination claims); General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) (upholding public-policy and implied-contractual claims); GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (Mass.1995) (claim by lawyer discharged for conduct required by professional rules); Parker v. M & T Chem., Inc., 566 A.2d 215 (N.J.Super.Ct.App.Div.1989) (upholding statutory claim by lawyer constructively discharged for threatening to disclose unlawful acts); Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395 (Mich.Ct.App.1991) (upholding claim by lawyer where contract required just cause for discharge); Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn.1991) (similar); see Vaughn v. Edel, 918 F.2d 517 (5th Cir.1990) (upholding racial-discrimination claim of discharged inside legal counsel); Halbrook v. Reichhold Chemicals, Inc., 735 F.Supp. 121 (S.D.N.Y.1990) (sex discrimination), with Willy v. Coastal Corp., 647 F.Supp. 116 (S.D.Tex.1986) (no claim when lawyer discharged for insisting that employer comply with securities and environmental statutes); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991) (lawyer-manager had no claim for alleged wrongful discharge for objecting to sale of defective kidney-dialysis machine), compare, e.g., Crandon v. State, 897 P.2d 92 (Kan. 1995), cert. denied, 516 U.S. 1113, 116 S.Ct. 913, 133 L.Ed.2d 844 (1996) (lawyer-employee of state cannot recover for discharge for whistle-blowing when lawyer recklessly disregarded truth of disclosures). See Reynolds, Wrongful Discharge of Employed Counsel, 1 Geo. J. Leg. Eth. 553 (1988) (advocating recognition of retaliatory-discharge claims); Gillers, Protecting Lawyers Who Just Say No, 5 Ga. St. U. L. Rev. 1 (1988) (similar); § 37, Comment *e*, and Reporter's Note thereto (impact of discharge on employed lawyer's pay and benefits). On a client's liability for inducing a law firm to discharge a lawyer because of age, see Plessinger v. Castleman & Haskell, 838 F.Supp. 448 (N.D.Cal.1993).

Comment d. Approval of a tribunal. See § 31, Comment *c*, and Reporter's Note thereto.

Comment f. Withdrawal to avoid involvement in unlawful acts. Sections 32(2)(a) and 32(3)(c) and (d) are the same, with one change, as ABA Model Rules of Professional Conduct, Rules 1.16(a)(1) and 1.16(b)(1) and (b)(2) (1983). ABA Model Code of Professional Responsibility, DR 2–110(B)(1)-(2), (C)(1)(a)-(c), (C)(2) (1969), contains similar but not identical provisions. See, e.g., Lamborn v. Dittmer, 873 F.2d 522 (2d Cir.1989) (lawyer must withdraw to avoid disciplinary violation when lawyer is important witness against client on central issue); Leversen v. Superior Court, 668 P.2d 755 (Cal.1983) (tribunal should have allowed withdrawal of lawyer to avoid disciplinary violation when lawyer's firm had represented witness); Riley v. District Court, 507 P.2d 464 (Colo.1973) (lawyer must withdraw to avoid disciplinary violation when client is pressing inade-

quate-assistance-of-counsel claim involving lawyer); Bailey v. Martz, 488 N.E.2d 716 (Ind.Ct.App.1986) (proper for plaintiff's lawyer to avoid conflict by withdrawing when lawyer had failed to file suit within limitations period); Rindner v. Cannon Mills, Inc., 486 N.Y.S.2d 858 (N.Y.Sup.Ct. 1985) (lawyer may withdraw when convinced client's claim is baseless); In re Carter & Johnson, [1981] CCH Fed. Sec. L. Reports ¶ 82,847 (SEC 1981) (duties of lawyer whose services have been used in client fraud); Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 854–862 (1977) (withdrawal as an option when client insists on committing perjury); see § 121, Comment *e(ii)*, and Reporter's Note thereto and § 6, Comment *e*, and Reporter's Note thereto (disqualification remedy for conflicts of interest). See also § 67, Reporter's Note.

Comment g. A lawyer's physical or mental disability. ABA Model Rules of Professional Conduct, Rule 1.16(a)(2) (1983) (withdrawal required when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"); ABA Model Code of Professional Responsibility, DR 2–110(B)(3) (1969) (withdrawal required when lawyer's "mental or physical condition renders it difficult for him to carry out the employment effectively"). On discipline for failing to withdraw, see, e.g., Riccio v. Committee on Professional Standards, 426 N.Y.S.2d 887 (N.Y.App.Div.1980); In re Gudmundson, 556 P.2d 212 (Utah 1976); State v. Ledvina, 237 N.W.2d 683 (Wis. 1976); cf. Annot., 50 A.L.R.3d 1259 (1973) (disbarment or suspension for mental or emotional illness).

Comment h(i). Permissive withdrawal—in general. No authority directly in point has been found. The principle that harm to the client disproportionate to justification for the lawyer's withdrawal prevents permissive withdrawal flows from the fiduciary nature of the relationship as well as the requirement that the lawyer seek to protect the interests of the client in withdrawing. See Comment *n* and Reporter's Note thereto.

Comment h(ii). Permissive withdrawal in the absence of material adverse effect. On absence of harm to the client as a ground for withdrawal, compare ABA Model Code of Professional Responsibility, DR 2–110 (1969) (not recognizing that ground); C. Wolfram, Modern Legal Ethics 550–551 (1986) (approving ABA Model Code approach); Perillo, The Law of Lawyer's Contracts is Different, 67 Fordham L. Rev. 443, 449 (1998) (recognizing this ground is "startling departure from the general law of contract"), with ABA Model Rules of Professional Conduct, Rule 1.16(b) (1983) (allowing withdrawal that "can be accomplished without material adverse effect on the interests of the client"); Battani, Ltd. v. Bar–Car, Ltd., 299 N.Y.S.2d 629 (N.Y.Civ.Ct. 1969) (allowing such withdrawal; lawyer had waived fees). Permissive withdrawal on the ground of no material adverse effect on the client has been widely adopted in the states.

No authority directly supports the last paragraph of the Comment and the statement in each of the ensuing Comments indicating that the extent of adverse impact on the client may be relevant in determining whether adequate ground for withdrawal exists. The limitation seems consistent with the fiduciary nature of the relationship between lawyer and client and the concept of material breach in contract law. No authority is inconsistent with such a limitation.

Comment i. Withdrawal with a client's consent. ABA Model Code of Professional Responsibility, DR 2–110(C)(5) (1969) (withdrawal permitted when client "knowingly and freely assents to termination"); N.Y. Civ. Prac. L. & R. § 321(b) (court approval not needed for substitution of counsel when client and former counsel consent in writing); Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir.1985), cert. denied, 476 U.S. 1172, 106 S.Ct. 2896, 90 L.Ed.2d 983 (1986) (client could not object to allowance of lawyer's motion, prompted by client, to withdraw).

Comment j. A client's repugnant or imprudent course of conduct. ABA Model Rules of Professional Conduct, Rule 1.16(b)(3) (1983) (lawyer may withdraw when client "insists on pursuing an objective that the lawyer considers repugnant or imprudent"); ABA Model Code of Professional Responsibility, DR 2–110(C)(1)(e) (1969) (withdrawal permitted when client insists, "in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules").

Comment k. A client's failure to pay a lawyer. ABA Model Rules of Professional Conduct, Rule 1.16(b)(4) (1983) (withdrawal allowed when "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled"); ABA Model Code of Professional Responsibility, DR 2–110(C)(1)(f) (1969) (withdrawal allowed when client "deliberately disregards an agreement or obligation to the lawyer as to expenses and fees"); see, e.g., Atilus v. United States, 406 F.2d 694 (5th Cir.1969) (appeal reinstated when defendant's lawyer withdrew for nonpayment without notifying defendant or filing notice of appeal that defendant had requested); Reed Yates Farms, Inc. v. Yates, 526 N.E.2d 1115 (Ill.App. Ct.1988) (withdrawal allowed when lawyer had waited 4 months for pay); Holmes v. Y.J.A. Realty Corp., 513 N.Y.S.2d 415 (N.Y.App.Div.1987) (withdrawal allowed when client refused to pay for 5 years and no harm to client from withdrawal was foreseeable); In re Thomsen, 499 P.2d 815 (Or.1972) (lawyer disciplined for not appearing at hearing one day after client refused to pay additional fee that client denied was due); C. Wolfram, Modern Legal Ethics 549–550 (1986).

Comment l. Client obstruction and irreparable breakdown of the relationship. ABA Model Code of Professional Responsibility, DR 2–110(C)(1)(d) (1969) (withdrawal permitted if client "by other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively"); see ABA Model Rules of Professional Conduct, Rule 1.16(b)(6) (1983) (allowing withdrawal if "other good cause for withdrawal exists"). E.g., Whiting v. Lacara, 187 F.3d 317 (2d Cir.1999) (client threats to sue lawyer unless lawyer pursues claim dismissed by court); State v. Lee, 689 P.2d 153 (Ariz.1984) (if criminal defendant insists on calling witness when that would be unethical or against client's best interests, lawyer refuses, and significant antagonism results, lawyer may seek leave to withdraw); Ambrose v. Detroit Edison Co., 237 N.W.2d 520 (Mich.Ct. App.1975) (lawyer may withdraw without forfeiting fees when client entirely refuses to cooperate); Sharp v.

Melendez, 531 N.Y.S.2d 554 (N.Y.App.Div.1988) (lawyer representing another lawyer in disciplinary proceeding may withdraw when cannot locate client); Harris v. Wabaunsee, 593 P.2d 86 (Okla.1979) (proper to allow withdrawal when client left state and did not accept letters from lawyer). But compare Mekdeci v. Merrell Nat'l Lab., 711 F.2d 1510 (11th Cir.1983) (disagreement did not warrant withdrawal); § 40, Comment *b*, and Reporter's Note thereto (lawyer forfeits fees by withdrawing because client rejects settlement advice).

Comment m. Other good cause for withdrawal. ABA Model Rules of Professional Conduct, Rule 1.16(b)(6) (1983) and ABA Model Code of Professional Responsibility, DR 2–110(C)(6) (1969), both allow withdrawal when there is "other good cause for withdrawal." The ABA Model Code, DR 2-110(C)(3) allows withdrawal when a lawyer's "inability to work with co-counsel indicates that the best interests of the client will be served by withdrawal."

On withdrawal to avoid an unreasonable financial burden on the lawyer, compare ABA Model Rule 1.16(b)(5) (allowing such withdrawal); In re "Agent Orange" Product Liability Litigation, 571 F.Supp. 481 (E.D.N.Y.1983) (allowing substitution of class-action lead counsel because of enormous financial burden); Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820 (N.J.Super.Ct.App.Div.1993) (withdrawal of contingent-fee lawyer from representing plaintiffs in ground-breaking tobacco litigation could be granted if trial court finds that reasonably anticipated prospective costs of completion of litigation, measured against prospects of success, indicate "unreasonable financial burden"), with ABA Model Code, DR 2–110 (not recognizing that ground); Haines v. Liggett Group Inc., 814 F.Supp. 414 (D.N.J.1993) (lawyer cannot withdraw from contingent-fee cigarette suit because of probable unprofitability; lawyer assumed that risk); Kriegsman v. Kriegsman, 375 A.2d 1253 (N.J.Super.Ct.App.Div. 1977) (unexpected complications caused by opposing party's pro se obstructive defense do not warrant withdrawal even though client's funds to pay lawyer are exhausted); Suffolk Roadways, Inc. v. Minuse, 287 N.Y.S.2d 965 (N.Y.Sup.Ct.1968) (that case turns out less profitable than lawyer hoped because client refuses to accept settlement is no ground for withdrawal).

On the general irrelevance of withdrawal to pre-existing conflicts of interest, see § 132, Comment *c*.

Comment n. Consultation with a client before withdrawal. No authority directly on point has been found, but the principle of the Comment follows from the requirements of consultation in general. See § 20, Reporter's Note. The only mention of prewithdrawal consultation in the ABA Model Rules of Professional Conduct (1983) is that found in Rule 1.16(b)(4), quoted in Reporter's Note to Comment *k* hereto, supra, in connection with a client's failure to make a scheduled fee payment. That specific reference to prewithdrawal consultation is not taken to be in derogation of the existence of the requirement more generally.

§ 33. A Lawyer's Duties When a Representation Terminates

(1) In terminating a representation, a lawyer must take steps to the extent reasonably practicable to protect

the client's interests, such as giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee the lawyer has not earned.

(2) Following termination of a representation, a lawyer must:

(a) observe obligations to a former client such as those dealing with client confidences (see Chapter 5), conflicts of interest (see Chapter 8), client property and documents (see §§ 44–46), and fee collection (see § 41);

(b) take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client;

(c) take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation; and

(d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.

Comment:

a. Scope and cross-references. This Section describes the duties of a lawyer during (see § 33(1)) and after (see § 33(2)) the termination of a client-lawyer relationship. The Section applies regardless of whether client or lawyer initiates the termination or whether termination occurs prematurely or when contemplated. Grounds for termination are set forth in §§ 31 and 32. Former clients owe the duty discussed in Chapter 3 to compensate for services rendered.

b. Protecting a client's interests when a representation ends. Ending a representation before a lawyer has completed a matter usually poses special problems for a client. Beyond consultation required before withdrawal (see § 32, Comment *n*), in the process of withdrawal itself a lawyer might be required to consult with the client and engage in other protective measures. New counsel must be found, papers and property retrieved or transferred, imminent deadlines extended, and tribunals and opposing parties notified to deal with new counsel. Lawyers must therefore take reasonably appropriate and

practicable measures to protect clients when representation terminates.

What efforts are appropriate and practicable depends on the circumstances, including the subsisting relationship between client and lawyer. The lawyer must ordinarily advise the client of the implications of termination, assist in finding a new lawyer, and devote reasonable efforts to transferring responsibility for the matter. The lawyer must make the client's property and papers available to the client or the client's new lawyer, except to the extent that the lawyer is entitled to retain them. If the client is threatened with an imminent deadline that will expire before new counsel can act, the lawyer must take reasonable steps either to extend the deadline or comply with it (see § 31, Comment *e*). Failure to take such steps can give rise to disciplinary sanctions and malpractice liability. In some situations, the lawyer will be considered still to be the client's representative. Fewer measures usually are required when other lawyers representing the client in the same matter continue to do so (see § 32, Comment *h(ii)*).

c. Client confidences. A lawyer's obligation to protect the confidences of a client, addressed in detail in Chapter 5, continues after the representation ends.

d. Former-client conflicts of interest. Following termination, the former-client conflict-of-interest rules apply (see § 132). On consent, see Comment *i* hereto and § 122. On a former government lawyer, see § 133.

e. A former client's property and documents. The duties of a lawyer to protect and deliver a client's property and documents (see §§ 44–46) continue after the representation ends. Termination entails special duties to deliver to the client property (see § 45, Comment *b*) and documents or copies (see § 46(2)). The lawyer may not keep the client's property or documents in order to secure payment of compensation, except when the lawyer has a valid lien (see § 43) or when the client has not paid for the lawyer's work product (see § 46(3)).

f. Collecting compensation and returning unearned fees. The lawyer's efforts to collect compensation are governed by the requirements stated in Chapter 3.

g. The duty not to act for a former client. When representation ends a lawyer loses actual authority to act on behalf of the client (see § 31). Purporting to do so subjects the lawyer to discipline and can make the lawyer liable to the former client (see § 27, Comment *f*, & Chapter 4; Restatement Second, Agency § 386) or to third persons who have relied on the lawyer's claimed authority (see § 30(4) & Comment *c* thereto). However the lawyer retains authority to take steps protecting the client's interests (see Comment *b* hereto). The

former client can also authorize the lawyer to act, for example by asking the lawyer to convey a request for additional time to opposing counsel.

h. Conveying communications to a former client. After termination a lawyer might receive a notice, letter, or other communication intended for a former client. The lawyer must use reasonable efforts to forward the communication. The lawyer ordinarily must also inform the source of the communication that the lawyer no longer represents the former client (see Comment *g* hereto). The lawyer must likewise notify a former client if a third person seeks to obtain material relating to the representation that is still in the lawyer's custody.

A lawyer has no general continuing obligation to pass on to a former client information relating to the former representation. The lawyer might, however, have such an obligation if the lawyer continues to represent the client in other matters or under a continuing relationship. Whether such an obligation exists regarding particular information depends on such factors as the client's reasonable expectations; the scope, magnitude, and duration of the client-lawyer relationship; the evident significance of the information to the client; the burden on the lawyer in making disclosure; and the likelihood that the client will receive the information from another source.

i. The duty not to take unfair advantage of a former client. A lawyer may not take unfair advantage of a former client by abusing knowledge or trust acquired through the representation (see §§ 41 & 43; Restatement Second, Agency § 396(d)). For example, a lawyer seeking a former client's consent to a conflict of interest (see § 132) must make adequate disclosure of facts that the former client should know in order to consider whether to consent (see § 122, Comment *c(i)*).

REPORTER'S NOTE

Comment b. Protecting a client's interests when a representation ends. Section 33(1) is drawn, with clarifying stylistic changes, from ABA Model Rules of Professional Conduct, Rule 1.16(d) (1983), and ABA Model Code of Professional Responsibility, DR 2-110(A)(2) (1969). On required protective measures, see Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir.1986) (malpractice claim for failure of lawyer to have client's arbitration award confirmed or notify client clearly of withdrawal); Olguin v. State Bar, 616 P.2d 858 (1980) (discipline for not answering substitute lawyer's inquiries or providing files); Academy of California Optometrists, Inc. v. Superior Court, 124 Cal.Rptr. 668 (Cal.Dist.Ct. App.1975) (former lawyer ordered to turn over files); People v. Archuleta, 638 P.2d 255 (Colo.1981) (discipline for leaving practice without arranging for substitute counsel); People v. Gel-

lenthien, 621 P.2d 328 (Colo.1981) (discipline for failing to refund unearned fees when hospitalization required withdrawal); Central Cab Co. v. Clarke, 270 A.2d 662 (Md.1970) (malpractice liability for not notifying client of withdrawal, leading to default judgment against client); Matter of Schwartz, 493 A.2d 1248 (N.J.1985) (discipline for withdrawing without notice to client); Dayton Bar Ass'n v. Weiner, 317 N.E.2d 783 (Ohio 1974) (discipline for refusing to file divorce decree until paid); § 45, Comment *b*, and Reporter's Note thereto (returning unearned fees); § 46, Comment *c* (returning files).

A lawyer who does not perform the duties attendant on withdrawal, especially notifying the client, might be deemed not to have withdrawn and therefore be subject to malpractice liability. E.g., Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir.1986); § 31, Comment *c*, and Reporter's Note thereto; see North Carolina State Bar v. Sheffield, 326 S.E.2d 320 (N.C.Ct. App.1985), cert. denied, 332 S.E.2d 482 (N.C.), cert. denied, 474 U.S. 981, 106 S.Ct. 385, 88 L.Ed.2d 338 (1985) (discipline for neglect). Similarly, failure to notify a law firm's client that a lawyer is leaving the firm or the firm is dissolving might result in the lawyer's continuing to be liable for subsequent negligence of other firm lawyers involving that client. Palomba v. Barish, 626 F.Supp. 722 (E.D.Pa. 1985); Redman v. Walters, 152 Cal. Rptr. 42 (Cal.Dist.Ct.App.1979); Staron v. Weinstein, 701 A.2d 1325 (N.J.Super.Ct.App.Div.1997); Vollgraff v. Block, 458 N.Y.S.2d 437 (N.Y.Sup.Ct.1982).

Comment c. Client confidences. See § 59, Comment *c*, and Reporter's Note thereto; § 69, Comment *b*; § 90, Comment *c* (work product).

Comment d. Former-client conflicts of interest. See §§ 132 and 133, Reporter's Notes.

Comment e. A former client's property and documents. See § 45, Comment *b*, and Reporter's Note thereto; § 46, Comment *d*, and Reporter's Note thereto.

Comment f. Collecting compensation and returning unearned fees. See § 41, Reporter's Note; § 42, Comment *b*, and Reporter's Note thereto; see also §§ 40 and 43.

Comment g. The duty not to act for a former client. See Sterling v. Jones, 233 So.2d 537 (1970) (client entitled to relief from default judgment entered when lawyer withdrew and then purported to cancel pleadings filed for client); State v. Dickens, 519 P.2d 750 (Kan.1974) (discipline for acting after client's death); In re Collins, 271 S.E.2d 473 (Ga.1980) (discipline for failure of lawyer to withdraw after discharge); § 32, Comment *b*, and Reporter's Note thereto (similar). On a lawyer's liability for acting without authority, see § 27, Comment *f*, and Reporter's Note thereto; § 30, Comment *e*, and Reporter's Note thereto.

Comment h. Conveying communications to a former client. Decisions conflict on whether an opposing party can give notice of a proceeding to modify or enforce a child-support decree by notifying the lawyer who formerly represented a party in the original proceeding. Compare Griffith v. Griffith, 247 S.E.2d 30 (N.C.Ct. App.1978) (notice adequate), with Guthrie v. Guthrie, 429 S.W.2d 32 (Ky.1968) (notice invalid), with Jarvis v. Jarvis, 664 S.W.2d 694 (Tenn.Ct. App.1983) (whether notice adequate depends on facts); see Annot., 62 A.L.R.2d 544 (1958). Compare IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.

1978) (client with continuing relationship considered current client for current-client conflicts purposes although no matters were pending). See also, e.g., Okla. Stat. tit. 12, § 2005.1 (1991) (service of post-judgment motions in divorce case on former lawyer).

No authority on point has been found on post-representation duties to inform a present client about material developments relating to a formerly completed and different matter. The rule stated is believed to follow from the fiduciary duties inherent in the ongoing client-lawyer relationship.

Comment i. The duty not to take unfair advantage of a former client. See §§ 16(3), 41, 43, and 132, Reporter's Notes.

CHAPTER 3

CLIENT AND LAWYER: THE FINANCIAL AND PROPERTY RELATIONSHIP

Introductory Note: This Chapter concerns the law governing fee arrangements between clients and lawyers. It also deals with certain property aspects of their relationship, including such matters as a lawyer's duties to safeguard and deliver a client's property and papers.

Those matters are in practice intertwined with fee issues, often being governed by the same contracts, and with the balance of economic power between clients and lawyers. The Chapter does not consider, except when relevant to other topics, rights to recover attorney-fee awards from opposing parties under fee-shifting rules.

This Chapter begins by delineating the rules banning unreasonably large fees, prohibiting certain fee and other financial arrangements between lawyers and clients, and denying the right of compensation to lawyers who engage in certain misconduct. Subject to those rules, clients and lawyers may enter into contracts governing fees. The Chapter considers the construction of such contracts, a lawyer's fee in the absence of contract, and the effect of a lawyer's discharge on a fee contract. Additional rules govern abusive fee-collection practices and attorney liens protecting lawyers' compensation claims.

Tension between freedom of contract and regulation pervades the subjects of this Chapter. Lawyers and clients can enter into a range of contracts specifying the size of the lawyer's fee, the method of calculating it, and related matters. Yet there are at least three constraints on that freedom. First, general principles of contract law impose requirements for the creation and enforcement of contractual obligations. Second, general principles applicable to lawyers and other agents protect clients against hazards that might arise when a client as a principal entrusts important matters to a lawyer as agent, an agent whom the client cannot control closely and who might be motivated to profit at the principal's expense. Third, there are rules applicable only to lawyers, reflecting concerns about clients' lack of sophistication in legal matters, the difficulty of specifying in advance the appropriate quantity and value of legal services, and the public interest in promoting access to the legal system.

The rules stated in this Chapter seek to promote the traditional ideal that lawyers should moderate their own interests in order to further the effective representation of their clients, while maintaining the right to compensation essential to the existence of a private bar.

TOPIC 1. LEGAL CONTROLS ON ATTORNEY FEES

Introductory Note: This Topic sets forth the law limiting the freedom of lawyers to contract with clients for fees. It covers the general requirement that all fees must be reasonable (see § 34), regulation of certain compensation arrangements thought to raise particular dangers (see § 35), regulation of ancillary financial arrangements between lawyer and client (see § 36), and forfeiture of attorney compensation because of a lawyer's misconduct (see § 37).

§ 34. Reasonable and Lawful Fees

A lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law.

Comment:

a. Scope and cross-references. This Section forbids unlawful fees and unreasonably large fees, while leaving clients and lawyers free to negotiate a broad range of compensation terms. It does not forbid lawyers to serve for low fees or without charge; such service is often in the public interest (see § 38, Comment *c*). Nor does the Section render unenforceable all fee arrangements that might be considered objectionable by some persons, for example, a lawyer's insistence that a needy client pay for the lawyer's services at the lawyer's usual rates. The prohibition on unreasonable payment arrangements is not limited to fees in a narrow sense. It applies also to excessive disbursement or interest charges or improper security interests (see § 43).

The Section applies in two different contexts. First, in fee disputes between lawyer and client, a fee will not be approved to the extent that it violates this Section even though the parties had agreed to the fee. This Section thus applies in proceedings such as suits by lawyers for fees, suits by clients to recover fees already paid, and fee-arbitration proceedings (see § 42). If the parties have not agreed (whether before, during, or after the representation; see § 18) to the basis or amount of the fee, the tribunal will set a fee compensating the lawyer for the fair value of services rendered (see § 39). The fair-value fee will usually be at the lower range of reasonable fees and thus less than a fee for the same services that would be upheld as reasonable if the parties had agreed upon it.

Second, this Section applies when courts or other disciplinary authorities seek to discipline a lawyer for charging unreasonably high fees (see Comment *f* hereto & § 5). In many jurisdictions, authorities have been reluctant to discipline lawyers on such grounds. For a

variety of reasons, discipline might be withheld for charging a fee that would nevertheless be set aside as unreasonable in a fee-dispute proceeding. It is therefore important to distinguish between applying this Section in fee disputes (see Comments *b* through *e* hereto) and applying it in disciplinary proceedings (see Comment *f* hereto).

A contract otherwise in compliance with this Section will nevertheless be unenforceable if it violates other restrictions (see §§ 35, 36, & 47), or if the lawyer's misconduct leads to forfeiture of the contractual fee (see §§ 37, 40, & 41). On the lawyer's duty to inform a client of the basis or rate of the fee, see § 38(1).

b. Rationale. In general, clients and lawyers are free to contract for the fee that client is to pay (see §§ 18 & 38). Many client-lawyer fee arrangements operate entirely without official scrutiny. A client-lawyer fee arrangement will be set aside when its provisions are unreasonable as to the client (compare Restatement Second, Contracts § 208 (unconscionable contracts)). Courts are concerned to protect clients, particularly those who are unsophisticated in matters of lawyers' compensation, when a lawyer has overreached. Information about fees for legal services is often difficult for prospective clients to obtain. Many clients do not bargain effectively because of their need and inexperience. The services required are often unclear beforehand and difficult to monitor as a lawyer provides them. Lawyers usually encourage their clients to trust them. Lawyers, therefore, owe their clients greater duties than are owed under the general law of contracts.

Moreover, the availability of legal services is often essential if people of limited means are to enjoy legal rights. Those seeking to vindicate their rights through the private bar should not be deterred by the risk of unwarranted fee burdens.

c. Unenforceable fee contracts. This Section is typically applied in cases where a client and lawyer agreed on a fee before the lawyer's service began, and the client later challenges that fee. If a fee contract was reached after the lawyer began to serve, it will be enforceable only if it satisfies the standards of § 18. If a tribunal agrees that the fee satisfies those standards, the fee will fall within the range of reasonableness allowed by this Section. If the contract was reached after the services were complete, its validity depends primarily on the circumstances in which the contract was reached (see § 18(1)(b)). In the absence of a fee contract, the tribunal will apply § 39 (see Comment *a* hereto). When a court awards to a prevailing litigant attorney fees payable by an opposing party or out of a common fund, different standards might be used for determining the amount of the fee.

The lawyer codes state factors bearing on the reasonableness of fee arrangements. ABA Model Rules of Professional Conduct, Rule 1.5(a) (1983), and ABA Model Code of Professional Responsibility, DR 2–106(B) (1969), enumerate the following factors: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." Other factors might also be relevant, such as the client's sophistication, the disclosures made to the client, and the client's ability to pay.

Those factors might be viewed as responding to three questions. First, when the contract was made, did the lawyer afford the client a free and informed choice? Relevant circumstances include whether the client was sophisticated in entering into such arrangements, whether the client was a fiduciary whose beneficiary deserves special protection, whether the client had a reasonable opportunity to seek another lawyer, whether the lawyer adequately explained the probable cost and other implications of the proposed fee contract (see § 38), whether the client understood the alternatives available from this lawyer and others, and whether the lawyer explained the benefits and drawbacks of the proposed legal services without misleading intimations. Fees agreed to by clients sophisticated in entering into such arrangements (such as a fee contract made by inside legal counsel in behalf of a corporation) should almost invariably be found reasonable.

Second, does the contract provide for a fee within the range commonly charged by other lawyers in similar representations? To the extent competition for legal services exists among lawyers in the relevant community, a tribunal can assume that the competition has produced an appropriate level of fee charges. A stated hourly rate, for example, should be compared with the hourly rates charged by lawyers of comparable qualifications for comparable services, and the number of hours claimed should be compared with those commonly invested in similar representations. The percentage in a contingent-fee contract should be compared to percentages commonly used in similar representations for similar services (for example, preparing and trying a novel products-liability claim). Whatever the fee basis, it is also relevant whether accepting the case was likely to foreclose other work or to attract it and whether pursuing the matter at the usual fee was

reasonable in light of the client's needs and resources. See § 39, Comment *b*, which discusses the fair-value standard applied in quantum meruit cases and possible defects of a market standard.

Third, was there a subsequent change in circumstances that made the fee contract unreasonable? Although reasonableness is usually assessed as of the time the contract was entered into, later events might be relevant. Some fee contracts make the fee turn on later events. Accordingly, the reasonableness of a fee due under an hourly rate contract, for example, depends on whether the number of hours the lawyer worked was reasonable in light of the matter and client. It is also relevant whether the lawyer provided poor service, such as might make unreasonable a fee that would be appropriate for better services, or services that were better or more successful than normally would have been expected (compare §§ 37 & 40 concerning forfeiture of fees). Finally, events not known or contemplated when the contract was made can render the contract unreasonably favorable to the lawyer or, occasionally, to the client. Compare Restatement Second, Contracts §§ 152–154 and 261–265 (doctrines of mistake, supervening impracticality, supervening frustration). To determine what events client and lawyer contemplated, their contract must be construed in light of its goals and circumstances and in light of the possibilities discussed with the client (see id. §§ 294 & 50). A contingent-fee contract, for example, allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial fee. Events within that range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made.

Illustration:

1. Bank Clerk is charged with criminal embezzlement and retains Lawyer to defend against the charges for a $15,000 flat fee. The next day another employee confesses to having taken the money, and the prosecutor (not knowing of Lawyer's retention by Bank Clerk) immediately drops the charges against Bank Clerk. Lawyer has done nothing on the case beyond speaking with Bank Clerk. In the absence of special circumstances, such as prior discussion of this possibility or the lawyer having rejected another representation offering a comparable fee in reliance on this engagement, it would be unreasonable for Lawyer to be paid $15,000 for doing so little. Client must pay the fair value of Lawyer's services (see § 39), but more than that is not due and the lawyer must refund the excess if already paid (see § 42). If, however, the prosecutor dropped the charges as the result of a plea bargain

negotiated by Lawyer, the rapid disposition would not render unreasonable an otherwise proper $15,000 flat fee. A negotiated disposition without trial is a common event that parties are assumed to contemplate when they agree that the lawyer will receive a flat fee.

d. Reasonable contingent fees; percentage fees. On reasonable contingent fees, see § 35.

Fees based on a percentage of the value of the property involved in a decedent's estate or in a real-estate transaction often are predicated on an assumption by the lawyer of the risk that more work than usual will be required. The same might be true of a lump-sum fee. Such fees should therefore be judged in light of the range of lawyer time that matters of the sort and size in question are likely to take. However, unlike contingent fees, percentage fees in such matters usually do not require the lawyer to forgo compensation when the result is unfavorable to the client. If the lawyer does not bear the risk of not being paid, compensation for such a risk is irrelevant in assessing the reasonableness of the fee.

e. Retainer fees. The term "retainer" has been employed to describe different fee arrangements. As used in this Restatement, an "engagement retainer fee" is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment *g*). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed. In some jurisdictions, an engagement retainer is referred to as a "general" or "special" retainer. On the effect of premature termination of the representation on an engagement-retainer fee, see § 40.

An engagement-retainer fee satisfies the requirements of this Section if it bears a reasonable relationship to the income the lawyer sacrifices or expense the lawyer incurs by accepting it, including such costs as turning away other clients (for reasons of time or due to conflicts of interest), hiring new associates so as to be able to take the client's matter, keeping up with the relevant field, and the like. When a client experienced in retaining and compensating lawyers agrees to pay an engagement-retainer fee, the fee will almost invariably be found to fall within the range of reasonableness. Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and

that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees (see § 38, Comment *g*, & § 40, Illustrations 2A & 2B). In some circumstances, large engagement-retainer fees constitute unenforceable liquidated-damage clauses (see Restatement Second, Contracts § 356(1)) or are subject to challenge in the client's bankruptcy proceeding.

f. The standard for lawyer discipline. The standards that apply when fees are challenged as unreasonable in fee disputes are also relevant in the discipline of lawyers for charging unreasonably high fees. If a fee would not be set aside in a fee dispute, disciplinary authorities can be expected to find that receiving or charging such a fee does not warrant sanctions for unreasonableness. Disciplinary authorities likewise rely on the list of factors (see Comment *d* hereto) that tribunals refer to in fee disputes. Discipline is also appropriate if the lawyer overreached by deceiving the client, failed to provide all the services in question, or unjustifiably demanded a fee larger than the contract provided. Discipline may also be appropriate if the clear unreasonableness of the fee is demonstrated by other circumstances, including what other lawyers handling such matters charge, the facial unreasonableness of any express fee agreement, limits imposed by statutes, rules, and judicial precedents, previous warnings to the lawyer, evidence that the fee is uniformly deemed to be clearly excessive by responsible practitioners, or other evidence demonstrating the lawyer's gross insensitivity to broadly accepted billing standards.

A lawyer can be disciplined for unreasonably making a large fee claim even though the fee was not collected. In a fee dispute, however, the tribunal is concerned primarily with the reasonableness of the fee the lawyer actually seeks before the tribunal rather than the reasonableness of earlier fee claims made between the parties. On the extent to which a lawyer's abusive fee-collection methods affects the lawyer's entitlement to a fee, see § 41.

g. Unlawful fees. A fee that violates a statute or rule regulating the size of fees is impermissible under this Section. General principles governing the enforceability of contracts that violate legal requirements are set forth in Restatement Second, Contracts §§ 178–185. Statutes or rules in some jurisdictions control the percentage of a contingent fee, generally or in particular categories such as worker-compensation claims or medical-malpractice litigation. Other common legislation limits the fees chargeable in proceedings against the government, forbids contingent fees for legislative lobbying, prohibits public defenders or defense counsel paid by the government from accepting payment from their clients, and prohibits lawyers representing wards of the court from accepting payments not approved by the

court. A fee for a service a lawyer may not lawfully perform, such as questioning jurors after a trial where that is forbidden (see § 115), is likewise unlawful regardless of the size of the fee (see Restatement Second, Contracts §§ 192 & 193). A lawyer may not require a client to pay a fee larger than that contracted for, unless the client validly agrees to the increase.

That a fee contract violates some legal requirement does not necessarily render it unenforceable. The requirement might be one not meant to protect clients or one for which refusal to enforce is an inappropriate sanction. For example, when a lawyer violates a lawyer-code requirement that a fee contract be in writing but the client does not dispute the amount owed under it, that violation alone should not make the contract unenforceable. When only certain parts of a contract between client and lawyer contravene the law, moreover, the lawful parts remain enforceable, except where the lawyer should forfeit the whole fee (see § 37).

REPORTER'S NOTE

Comment a. Scope and cross-references. The Section is based on ABA Model Rules of Professional Conduct, Rule 1.5 (1983) ("A lawyer's fee shall be reasonable."). The rule is formulated in the Section to make clear that the law does not regard a single amount as reasonable but only fees outside a range of reasonableness and that unreasonably high fees are prohibited but not unreasonably low ones. See also ABA Model Code of Professional Responsibility, DR 2–106 (1969) ("A lawyer shall not enter an agreement for, charge, or collect an illegal or clearly excessive fee.") and DR 2-106(B) ("A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.") (The factors stated in those rules are set forth in Comment *d* hereto.) For the application of the unreasonableness test in fee litigation between client and lawyer, see, e.g., Dunn v. H.K. Porter Co., 602 F.2d 1105 (3d Cir.1979); Newman v. Silver, 553 F.Supp. 485 (S.D.N.Y.1982), aff'd in this respect, 713 F.2d 14 (2d Cir.1983); Brillhart v. Hudson, 455 P.2d 878 (Colo.1969).

Comment c. Unenforceable fee contracts. On the client's free and informed choice, see, e.g., Dunn v. H.K. Porter Co., 602 F.2d 1105 (3d Cir. 1979) (unsophisticated class members); Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir.1979) (large corporation with inside legal counsel); Jenkins v. District Court, 676 P.2d 1201 (Colo.1984) (lawyer must show client was advised of all pertinent facts); In re Williams, 23 A.2d 7 (Md.1941) (client was not informed of terms of fee contract); Citizens Bank v. C. & H. Constr. & Paving Co., 600 P.2d 1212 (N.M.Ct.App. 1979) (sophisticated client); Jacobson v. Sassower, 489 N.E.2d 1283 (N.Y. 1985) (lawyer did not explain meaning of clause concerning nonrefundable engagement retainer to client in divorce representation); Calif. R. Prof.

Conduct, Rule 4–200(B)(2) (client's sophistication is relevant factor).

On the importance of fees customarily charged, see, e.g., Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890, 896 (1st Cir.1985) (upholding fee lower than usual percentage); In re Kutner, 399 N.E.2d 963 (Ill.1979); In re Marine, 264 N.W.2d 285 (Wis.1978) (relying on usual hourly fee). On reasonableness in light of the client's wealth, needs, and sophistication, compare Bushman v. State Bar, 522 P.2d 312 (Cal.1974) (discipline for charging poor client large fee), with Brobeck, Phleger & Harrison v. Telex Corp., supra (enforcing contract of large corporation to pay large fee for important case).

On the impact of developments after the contract, see, e.g., Anderson v. Kenelly, 547 P.2d 260 (Colo.Ct. App.1975) (lawyer learned that insurance company's refusal to pay was based on readily demonstrable factual error); In re Kutner, 399 N.E.2d 963 (Ill.1979) (flat fee of $5,000 in criminal-defense representation unreasonable under DR 2–106 when prosecuting witness asked for and got dismissal of criminal prosecution at first court hearing); In re Sullivan, 494 S.W.2d 329 (Mo.1973) (lawyer learned that charges against client had been dismissed before lawyer was retained); Wade v. Clemmons, 377 N.Y.S.2d 415 (N.Y.Sup.Ct.1975) (when obtaining client's consent to settlement, lawyer did not disclose that, because of lawyer's fee and hospital lien, client would receive nothing); Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (W.Va.1988) (50% contingent fee in personal-injury case excessive when lawyer advised accepting first settlement offer); see generally McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, after remand, 823 F.2d 43 (3d Cir.1987); Krause v. Rhodes, 640 F.2d 214 (6th Cir.), cert. denied, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981). But see California Rules of Professional Conduct, Rule 4–200(B) (reasonableness determined as of time of fee contract, unless parties contemplated that later events would affect fee).

On the amount and allocation of fees in situations in which a court awards a fee as a part of damages recovered by the client, see, e.g., Cambridge Trust Co. v. Hanify & King, P.C., 721 N.E.2d 1 (Mass.1999) (enforcing contingent-fee agreement that expressly provided for percentage of client's total recovery, including damages and amount awarded as fees).

Comment d. Reasonable contingent fees; percentage fees. See § 35, Reporter's Note. On the lower ceiling for percentage fees in real-estate transactions and the like posing little risk of nonpayment, see Brillhart v. Hudson, 455 P.2d 878 (Colo.1969) (arranging property sale); Thomton, Sperry & Jensen, Ltd. v. Anderson, 352 N.W.2d 467 (Minn.Ct.App.1984) (realty partition). On funds received as engagement retainers, see § 38, Comment *g*, and Reporter's Note thereto.

Comment e. Retainer fees. On reasonable engagement-retainer fees, see, e.g., Brickman & Cunningham, Nonrefundable Retainers Revisited, 72 N.C. L. Rev. 1 (1993); Lubet, The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers, 73 N.C. L. Rev. 271 (1994); Brickman & Cunningham, Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law, 57 Fordham L. Rev. 149 (1988). Several courts have held that

an engagement-retainer fee that is nonrefundable is unenforceable. E.g., Wong v. Kennedy, 853 F.Supp. 73 (E.D.N.Y.1994) (summary judgment for client); In re Cooperman, 633 N.E.2d 1069 (N.Y.1994) (matrimonial lawyer disciplined for routine charging of $5,000 nonrefundable retainer); Cuyahoga Cty. Bar Ass'n v. Okocha, 697 N.E.2d 594 (Ohio 1998) (lawyer disbarred; nonrefundable retainers appropriate only when used to make lawyer available or preclude lawyer from providing services to client's competitor); Wright v. Arnold, 877 P.2d 616 (Okla.Ct.App.1994) (invalidating in client's fee suit); see also, e.g., FSLIC v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.1988) (law firms' attempt to keep retainer as nonrefundable violates federal policy permitting banking agency to disaffirm contracts of insolvent bank); AFLAC, Inc. v. Williams, 444 S.E.2d 314 (Ga.1994) ("damages" clause of retainer contract providing monetary penalty in event that client prematurely terminated multiyear retainer invalid as unreasonable estimate of lawyer's damages); Jennings v. Backmeyer, 569 N.E.2d 689 (Ind.Ct.App. 1991) (lawyer under nonrefundable retainer to represent client against potential criminal charges entitled to only reasonable value of services after death of client); compare, e.g., Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210 (3d Cir.1999) (million-dollar nonrefundable general-retainer agreement sustained, despite sophisticated corporate client's dismissal of firm 10 weeks later, when client known for not paying lawyers insisted on it and lawyer gave fee concessions); Bunker v. Meshbesher, 147 F.3d 691 (8th Cir.1998) (upholding nonrefundable lump-sum fee); Wright v. Arnold, 877 P.2d 616 (Okla. Ct.App.1994) (retainer may not be nonrefundable, but representations foregone by lawyer through accepting representation of client relevant to quantum meruit assessment).

The courts in *Kim Cheung Wong* and in *Cooperman* both distinguished an impermissible nonrefundable engagement-retainer fee (termed a "special retainer") from a (permissible) nonrefundable fee paid in exchange for the lawyer's promise to be available to perform, at an agreed-upon price, any legal service that arose during a specified period and which was not made nonrefundable regardless of level of services. See 853 F.Supp. at 79–80; 633 N.E.2d at 1074; see also, e.g., Cohen v. Radio–Electronics Officers Union, 679 A.2d 1188 (N.J.1996) (provision of retainer agreement requiring client to give 6 months' notice of termination unreasonable and unenforceable, but lawyer may recover agreed retainer compensation for 1 additional month; 3–day notice provided by client was unreasonable in circumstances). In all events, the burden is on the lawyer who drafts a contract with a client to inform the client adequately concerning the nature of the charge. E.g., Jacobson v. Sassower, 489 N.E.2d 1283 (N.Y.1985) (lawyer bears burden of making nonrefundable clause clear and explaining it to client).

Comment f. The standard for lawyer discipline. On the generally more stringent standards in disciplinary cases than in fee disputes, see, e.g., McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir.1985); In re Greer, 61 Wash.2d 741, 380 P.2d 482 (1963); Committee on Legal Ethics v. Coleman, 377 S.E.2d 485 (W.Va.1988). On discipline of a lawyer for claiming, but not collecting, an unreasonably large fee, see, e.g., Cal. R. Prof. Conduct, Rule 4–200(A); Dixon v. State

Bar, 702 P.2d 590 (Cal.1985); Att'y Grievance Comm'n v. Kerpelman, 438 A.2d 501 (Md.1981). Cases imposing discipline when abusive lawyer behavior aggravated the overcharge include Florida Bar v. Morales, 366 So.2d 431 (Fla.1978) (lawyer intimated he would pay bribe); In re Harris, 50 N.E.2d 441 (Ill.1943) (lawyer used threat of disclosure to enlist clients); Louisiana State Bar Assoc. v. McGovern, 481 So.2d 574 (La.1986) (lawyer failed to provide services); In re Sullivan, 494 S.W.2d 329 (Mo.1973) (lawyer did not disclose that charge against client had been dropped before lawyer was retained).

Comment g. Unlawful fees. On unlawful fees, see, e.g., N.J. Ct. R. 1:21–7 (limiting size of contingent fees); American Home Assurance Co. v. Golomb, 606 N.E.2d 793 (Ill.App.Ct. 1992) (fee forfeiture because of fee contract violating statute); Willcher v. United States, 408 A.2d 67 (D.C.1979) (statute prohibiting appointed criminal-defense counsel from accepting additional fee from client); D. Strickland, Limitations on Attorneys' Fees Under Federal Law (1961); C. Wolfram, Modern Legal Ethics § 9.3.2, at 523–24 (1986) (prohibitions on fees not approved by court for wards of court and other vulnerable parties). See also Walters v. Nat'l Assoc. of Radiation Survivors, 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) (upholding statutory limit on what lawyer may charge client in certain proceedings against government). On fees illegal because in excess of a valid client-lawyer contract, see, e.g., In re Burns, 679 P.2d 510 (Ariz.1984); Grossman v. State Bar, 664 P.2d 542 (Cal.1983); Maryland Attorney Grievance Comm'n v. Hess, 722 A.2d 905 (Md.1999); In re Kerlinsky, 546 N.E.2d 150 (Mass.1989), cert. denied, 498 U.S. 1027, 111 S.Ct. 678, 112 L.Ed.2d 670 (1991); cf. United States v. Myerson, 18 F.3d 153 (2d Cir.), cert. denied, 513 U.S. 855, 115 S.Ct. 159, 130 L.Ed.2d 97 (1994) (criminal-fraud conviction). On fees for performing an unlawful act, see, e.g., In re Connaghan, 613 S.W.2d 626 (Mo. 1981) (legislative bribe); Note, Out of State Attorney Fee Forfeiture, 8 Cardozo L. Rev. 1191 (1987) (criticizing rule that lawyer may not recover fees for services in a jurisdiction where lawyer is not admitted to practice). On the enforceability of an agreement that violates a lawyer code, compare, e.g., Harvard Farms, Inc. v. National Cas. Co., 617 So.2d 400 (Fla.Dist.Ct. App.1993) (oral contingent-fee agreement enforceable despite noncompliance with lawyer-code requirement of writing), with, e.g., Silver v. Jacobs, 682 A.2d 551 (Conn.Ct.App.1996) (no compensation when fee agreement violates lawyer code), with, e.g., United States v. 36.06 Acres of Land, 70 F.Supp.2d 1272 (D.N.M.1999) (failure to put contingent-fee agreement in writing makes agreement unenforceable, but law firm entitled to recover quantum meruit).

§ 35. Contingent–Fee Arrangements

(1) A lawyer may contract with a client for a fee the size or payment of which is contingent on the outcome of a matter, unless the contract violates § 34 or another provision of this Restatement or the size or payment of the fee is:

(a) contingent on success in prosecuting or defending a criminal proceeding; or

(b) contingent on a specified result in a divorce proceeding or a proceeding concerning custody of a child.

(2) Unless the contract construed in the circumstances indicates otherwise, when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment.

Comment:

a. Scope and cross-references. This Section complements the general prohibition of unlawful and unreasonably high fees set forth in § 34 and the restrictions on certain other financial arrangements between clients and lawyers set forth in § 36. On a lawyer's duty to inform a client concerning the basis and rate of a fee, see § 38, Comment *b*.

A contingent-fee contract is one providing for a fee the size or payment of which is conditioned on some measure of the client's success. Examples include a contract that a lawyer will receive one-third of a client's recovery and a contract that the lawyer will be paid by the hour but receive a bonus should a stated favorable result occur (see § 34, Comment *a*, & § 35).

b. Rationale. Contingent-fee arrangements perform three valuable functions. First, they enable persons who could not otherwise afford counsel to assert their rights, paying their lawyers only if the assertion succeeds. Second, contingent fees give lawyers an additional incentive to seek their clients' success and to encourage only those clients with claims having a substantial likelihood of succeeding. Third, such fees enable a client to share the risk of losing with a lawyer, who is usually better able to assess the risk and to bear it by undertaking similar arrangements in other cases (cf. Restatement Second, Agency § 445).

Although contingent fees were formerly prohibited in the United States and are still prohibited in many other nations, the prohibition reflects circumstances not present in the contemporary United States. Many other nations routinely award attorney fees to the winning party and often have relatively low, standardized and regulated attorney fees, thus providing an alternative means of access to the legal system, which is not generally available here. Those nations might also regard civil litigation as more of an evil and less of an opportunity for the protection of rights than do lawmakers here. Contingent fees are thus

criticized there as stirring up litigation and fostering overzealous advocacy.

While many of those criticisms of contingent fees are inapposite in the United States, it remains true that contingent-fee clients are often unsophisticated and inexperienced users of legal services, and their financial position might leave them little choice but to accept whatever contingent-fee arrangements prevail in the locality. It is often difficult even for a careful client or lawyer to estimate in advance how likely it is that a claim will prevail, what the recovery will be, and how much lawyer time will be needed. Finally, standardized contingent-fee arrangements might not take proper account of cases with low risks or high recoveries. Accordingly, courts scrutinize contingent fees with care in determining whether they are reasonable.

The Section forbids contingent-fee arrangements creating certain conflicts of interest that might induce the lawyer to disserve the client's interest or certain public interests. Some such conflicts exist in all fee arrangements. However, some arrangements have been prohibited because their dangers are thought to outweigh their benefits.

c. Reasonable contingent fees. A contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation. A contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk. Nor is a contingent fee necessarily unreasonable because the lawyer devoted relatively little time to a representation, for the customary terms of such arrangements commit the lawyer to provide necessary effort without extra pay if a relatively large expenditure of the lawyer's time were entailed. However, large fees unearned by either effort or a significant period of risk are unreasonable (see § 34, Comment *c*, & Illustration 1 thereto).

A tribunal will find a contingent fee unreasonable due to a defect in the calculation of risk in two kinds of cases in particular: those in which there was a high likelihood of substantial recovery by trial or settlement, so that the lawyer bore little risk of nonpayment; and those in which the client's recovery was likely to be so large that the lawyer's fee would clearly exceed the sum appropriate to pay for services performed and risks assumed. A lawyer's failure to disclose to the client the general likelihood of recovery, the approximate probable size of any recovery, or the availability of alternative fee systems can also bear upon whether the fee is reasonable.

Illustration:

1. Client seeks Lawyer's help in collecting life-insurance benefits under a $15,000 policy on Client's spouse and agrees to

pay a one-third contingent fee. There is no reasonable ground to contest that the benefits are due, the claim has not been contested by the insurer, and when Lawyer presents it the insurer pays without dispute. The $5,000 fee provided by the client-lawyer contract is not reasonable.

d. Reasonable rate and basis of a contingent fee. In addition to unreasonableness due to lack of risk, a contingent fee can also be unreasonable because either the percentage rate is excessive or the base against which the percentage is applied is excessive or otherwise unreasonable. If different from the customary base—the plaintiff's recovery—a contingent base will be unreasonable if it is an inappropriate measure of the lawyer's work and risk and the benefit the client derived from the lawyer's services. Contingent-fee contracts typically contemplate that the client, if successful, will receive a lump-sum award, a stated percentage of which will constitute the lawyer's fees. A client entering a contingent-fee contract reasonably expects that the lawyer will be paid only if and to the extent that the client recovers. For example, when a judgment for the client is entered but not collected, no fee is due unless the contract so provides.

The rule stated in Subsection (2) also requires that, unless the contract indicates otherwise, a contingent-fee lawyer is to receive the specified share of the client's actual-damages recovery. For that purpose, recovery includes damages, restitution, back pay, similar equitable payments, and amounts received in settlement. Unless the contract with the client indicates otherwise, the lawyer is not entitled to the specified percentage of items such as costs and attorney fees that are not usually considered damages. In the absence of prior agreement to the contrary, the amount of the client's recovery is computed net of any offset, such as a recovery by an opposing party on a counterclaim.

Illustrations:

2. Client agrees to pay Lawyer "35 percent of the recovery" in a suit. The court awards Client $20,000 in damages, $500 in costs for disbursements, and $1,000 in attorney fees because of the defendant's discovery abuses. Lawyer is entitled to receive a contingent fee of $7,000 (35% of $20,000), but not 35 percent of the costs' payments. If Lawyer advanced the $500 costs in question, Client must reimburse Lawyer unless their contract validly provides to the contrary (see § 38, Comment *e*). Whether Lawyer is entitled to recover a portion of the $1,000 attorney-fee award

requires both interpretation of the fee contract and consideration of the nature of the fee-shifting award (see § 38(3)(b) & Comment *f* thereto).

3. Same facts as in Illustration 2, except that Lawyer has also expended $1,500 in disbursements not recoverable from the opposing party as costs but recoverable from Client (see § 38(3)(a) & Comment *e* thereto). Unless their contract construed in its circumstances provides otherwise, Lawyer is entitled to reimbursement of the $1,500 out of the $20,000 award and to a contingent fee of $6,475, that is, 35 percent of $18,500, the balance of the award.

e. Contingent fees in structured settlements. Under "structured settlements" and some legislation, a claimant will receive regular payments over the claimant's lifetime or some other period rather than receiving a lump sum. If so, under the rule of this Section the lawyer is entitled to receive the stated share of each such payment if and when it is made to the client or (when so provided) for the client's benefit, unless the client-lawyer contract provides otherwise. When a contingent-fee contract provides that the fee is to be paid at once if there is a structured settlement and provides no other method of calculation, the fee should be calculated only on the present value of the settlement.

Illustration:

4. Lawyer brings a personal-injury suit for Client against Defendant under a fee contract stating that, if the suit is settled before trial, Lawyer is to receive a fee equaling "thirty percent of the recovery." Client and Defendant enter a structured settlement under which Defendant is to pay Client $100,000 at once and to buy an annuity (which will in fact cost Defendant $200,000) entitling Client to monthly payments of $1,500 until Client dies. In the absence of a contrary agreement, lawyer is entitled to receive $30,000 when the $100,000 payment is made and $450 (30% of $1,500) if and when each $1,500 payment is made.

f(i). Contingent fees in criminal cases—defense counsel. Contingent fees for defending criminal cases have traditionally been prohibited. The prohibition applies only to representations in a criminal proceeding. It does not forbid a contingent fee for legal work that forestalls a criminal proceeding or work that partly relates to a criminal matter and partly to a noncriminal matter. A lawyer may thus

contract for a contingent fee to persuade an administrative agency to terminate an investigation that might have led to civil as well as criminal proceedings or to bring a police-brutality damages suit in which the settlement includes dismissal of criminal charges against the plaintiff.

f(ii). Contingent fees in criminal cases—prosecuting counsel. Fees contingent on success in prosecuting a criminal case violate public policy. Thus, for example, a lawyer in private practice retained to prosecute a criminal contempt should not be compensated contingent on success in the prosecution. A prosecutor whose pay depends on securing a conviction might be tempted to seek convictions more than justice (see § 97). The government does not generally need contingent fees to afford counsel or to transfer to counsel the risk of loss.

g. Contingent fees in divorce or custody cases. Most jurisdictions continue to prohibit fees contingent on securing divorce or child custody. The traditional grounds of the prohibition in divorce cases are that such a fee creates incentives inducing lawyers to discourage reconciliation and encourages bitter and wounding court battles (cf. Restatement Second, Contracts § 190(2)). Since the passage of no-fault divorce legislation, however, public policy does not clearly favor the continuation of a marriage that one spouse wishes to end. Furthermore, in practice, once one spouse retains a lawyer to seek a divorce, a divorce will follow in most cases regardless of the basis of the fee. The principal dispute is likely to be a financial one. The prohibition might hence make it more difficult for the poorer spouse to secure vigorous representation, at least in the relatively rare instances in which law does not provide fee-shifting for the benefit of that client.

The other argument for the prohibition in divorce cases, and the ground for prohibition in custody cases, is that such a fee arrangement is usually unnecessary in order to secure an attorney in a divorce proceeding or custody dispute. The issue usually arises when one or the other spouse has assets, because otherwise there would be no means of paying a contingent fee. If the spouse retaining counsel has assets, no contingent fee is necessary. If it is the other spouse that has assets, the courts will usually require that spouse to pay the first spouse reasonable attorney fees. Again, no contingent fee is necessary.

When either of the two policies supporting the prohibition is inapplicable, the Section should not apply. If, for example, a divorce or custody order has already been finally approved when the fee contract is entered into, there can be little concern that a contingent fee based on the size of the property settlement or child-support payments will discourage reconciliation or custody compromises. (On limitations on

post-inception fee contracts, see § 18(1)(a).) In such a situation, the fee is not contingent upon the securing of a divorce or custody order, and this Section does not apply, just as it does not apply to a contingent fee in a property dispute between nondivorcing or already divorced spouses. The prohibition would, however, apply to a contract with a client who is then married that provides for a fee contingent on the amount of the alimony, property disposition, or child-support award but that does not explicitly condition the fee on the grant of a divorce.

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Comment b. Rationale. See F. Mackinnon, Contingent Fees (1964); C. Wolfram, Modern Legal Ethics 526–42 (1986); Clermont & Currivan, Improving on the Contingent Fee, 63 Cornell L. Rev. 529 (1978); Kritzer, et al., The Impact of Fee Arrangement on Lawyer Effort, 19 L. & Soc'y Rev. 251 (1985). Two economic analyses of contingent-fee contracts offer theoretical support for the position that they do not encourage frivolous lawsuits. Miceli, Do Contingent Fees Promote Excessive Litigation?, 23 J. Leg. Studies 211 (1994); Dana & Spier, Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation, 9 J. L. Econ. & Organ. 349 (1993). On close scrutiny of contingent fees, see, e.g., Dunn v. H.K. Porter Co., 602 F.2d 1105 (3d Cir.1979); Thomton, Sperry & Jensen, Ltd. v. Anderson, 352 N.W.2d 467 (Minn.Ct.App.1984); ABA Canons of Professional Ethics, Canon 13 (1908); see §§ 35 and 36.

Comment c. Reasonable contingent fees. On circumstances in which contingent fees may properly be larger than hourly fees, see, e.g., McKenzie Constr., Inc. v. Maynard, 823 F.2d 43 (3d Cir.1987) (when case turned out to need few hours, lawyer could receive $790 per hour); Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981); Jay, The Dilemmas of Attorney Contingent Fees, 2 Georgetown J. Leg. Eth. 813 (1989).

Contingency fees may not be used when the lawyer bears little risk of nonpayment and the fee is otherwise unreasonable in amount when measured on a noncontingent basis, e.g., Redevelopment Comm'n v. Hyder, 201 S.E.2d 236 (N.C.Ct.App.1973); In re Hanna, 362 S.E.2d 632 (S.C.1987); Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107 (W.Va.1986), the client is not offered alternative fee arrangements, see In re Reisdorf, 403 A.2d 873 (N.J.1979); Wis. Stat. Ann. § 655.013(2), the fee percentage is high, see Int'l Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1277–78 (8th Cir.1980); 1 S. Speiser, Attorneys' Fees 93–94 (1973), or the base does not fairly measure the lawyer's work, e.g., In re Mercer, 614 P.2d 816 (Ariz.1980) (item of recovery for which lawyer did no work); People v. Nutt, 696 P.2d 242 (Colo.1984) (client's royalties). See generally Brickman, Contingent Fees Without Contingencies: *Hamlet* Without the Prince of Denmark?, 37 UCLA L. Rev. 29 (1989); cf. ABA Model Rules of Professional Conduct, Rule 1.5 Comment ¶ [5] (1983) (" ... When there is doubt whether a contingent fee is consistent with the client's best interests, the

lawyer should offer the client alternative bases for the fee and explain their implications.... "); see also ABA Formal Op. 94–389 (1994) (permissible to charge and collect contingent fee on portion of claim that was not in dispute if overall amount of fee is reasonable in circumstances); Rohan v. Rosenblatt, 1999 WL 643501 (Conn.Super.Ct.1999) (in client's suit for excessive fee, entire fee ordered returned where lawyer charged 1/3 contingent fee after forecasting "horrendous" litigation but then obtaining, with minimal effort, entire proceeds due on life-insurance policy on client's wife).

As a corollary of the rule that a lawyer is not entitled to a contingent fee unless the client actually receives a favorable disposition of a matter, a lawyer is not entitled to additional fees for efforts in collecting a judgment, in the absence of a specific agreement to that effect. See Dardovitch v. Haltzman, 190 F.3d 125 (3d Cir.1999).

Contingent-fee contracts are most commonly used when representing claimants. If reasonable and entered into by a fully informed client, such a contract may also be appropriate when defending a client against a civil claim. See C. Wolfram, Modern Legal Ethics § 9.4.2, at 533 (1986), and authority cited; Comment, Toward a Valid Defense Contingent Fee Contract: A Comparative Analysis, 67 Iowa L. Rev. 350 (1982); ABA Formal Opin. 93–373 (1993).

Comment d. Reasonable rate and basis of a contingent fee. For the principle that, unless the contract clearly states otherwise, a lawyer is entitled to a contingent fee only when the client's judgment is paid, see, e.g., Byrd v. Clark, 153 S.E. 737 (Ga.1930); Cox v. Cooper, 510 S.W.2d 530, 538 (Ky.1974); 1 S. Speiser, Attorneys' Fees § 2:14 (1973). Illustration 3 is supported by Lowe v. Pate Stevedoring Co., 595 F.2d 256 (5th Cir.1979); Russo v. State of New York, 515 F.Supp. 470 (S.D.N.Y.1981). Contra, Aetna Casualty & Surety Co. v. Taff, 502 S.W.2d 903 (Tex.Civ.App.1973). For Illustration 4, see N.J. Rule 1:21–7 (percentage calculated on net sum recovered after deducting disbursements).

Comment e. Contingent fees in structured settlements. Illustration 5 exemplifies the principle of cases such as Wyatt v. United States, 783 F.2d 45 (6th Cir.1986); In re Chow, 656 P.2d 105 (Haw.Ct.App.1982); Cardenas v. Ramsey County, 322 N.W.2d 191 (Minn.1982).

Comment f(i). Contingent fees in criminal cases—defense counsel. The prohibition against contingent fees for defending criminal cases is found in ABA Model Rules of Professional Conduct, Rule 1.5(d)(2) (1983) ("[a] lawyer shall not enter into an arrangement for, charge, or collect ... (2) a contingent fee for representing a defendant in a criminal case"), and ABA Model Code of Professional Responsibility, DR 2–106(C) (1969); Restatement of Contracts § 542(2). On the history of contingent fees, see § 36, Comment *b*, and its Reporter's Note. A criminal defendant represented on a contingent-fee basis is not automatically entitled to have a conviction set aside. E.g., Winkler v. Keane, 7 F.3d 304 (2d Cir.1993), cert. denied, 511 U.S. 1022, 114 S.Ct. 1407, 128 L.Ed.2d 79 (1994); People v. Winkler, 523 N.E.2d 485 (N.Y.1988). The Reporters believe that the prohibition of criminal contingent fees should be relaxed, but no jurisdiction has yet done this.

The prohibition of contingent fees for defending criminal cases has been criticized. See C. Wolfram, Modern Legal Ethics § 9.4.3 (1986) and authorities cited; Lushing, The Fall and Rise of the Criminal Contingent Fee, 82 J. Crim. L. R. 498 (1991); Karlan, Contingent Fees and Criminal Cases, 93 Colum. L. Rev. 595 (1993) (suggesting limited relaxation of ban, particularly for white-collar criminal defendants). A fee arrangement giving lawyers a direct financial incentive to seek their clients' acquittal or favorable plea would increase client choice and promote effective assistance of counsel and might be no more likely to induce misconduct due to overzealousness than a contingent fee in civil cases. Presumably many such contracts, if permissible, would link the size of the fee to the length of the client's sentence, if any, so that lawyers would be encouraged to plea bargain or go to trial, whichever would lead to the most favorable outcome. In any event, the prohibition of criminal contingent fees remains in effect. No authority supports extending the contingent fee to criminal-defense representations. On the interpretation of terms in a defense-representation agreement claimed to be unlawfully contingent, see, e.g., Fogarty v. State, 513 S.E.2d 493 (Ga.), cert. denied ___ U.S. ___, 120 S.Ct. 131, 145 L.Ed.2d 111 (1999) (promise to refund $15,000 of $25,000 fee if charges dismissed before trial constituted valid two-tiered fee scale).

Comment f(ii). Contingent fees in criminal cases—prosecuting counsel. People ex rel. Clancy v. Superior Court, 705 P.2d 347 (Cal.1985) (city may not hire lawyer on contingent-fee basis to prosecute nuisance cases); Baca v. Padilla, 190 P. 730 (N.M.1920). Cf. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (due to conflict of interest between goal of disinterested prosecution and interests of private litigant, lawyer for party obtaining injunction should not be appointed as special prosecutor to prosecute defendants for contempt of injunction).

Comment g. Contingent fees in divorce or custody cases. For the basic prohibition, see ABA Model Rules of Professional Conduct, Rule 1.5(d)(1) (1983) (prohibiting fee contingent on securing divorce or on amount of alimony, support, or property settlement); 1 S. Speiser, Attorneys' Fees § 2.6 (1973) (citing cases). ABA Model Code of Professional Responsibility, EC 2–20 (1969), stated that "contingent fee arrangements in domestic relations cases are rarely justifiable" but the Code did not prohibit them, and they are allowed in Texas and the District of Columbia. See also Va. Sup. Ct. Prof. Resp. Rule 1.5(d)(1) (allowed "in rare instances"); Alexander v. Inman, 974 S.W.2d 689 (Tenn. 1998) (upholding fee with percentage minimum and maximum amounts). They are, however, improper under the law of most American jurisdictions. See C. Wolfram, Modern Legal Ethics § 9.4.4. (1986).

There is some support for contingent fees when a divorce has already been obtained and the only dispute is financial. E.g., Salter v. St. Jean, 170 So.2d 94 (Fla.Dist.Ct.App.1964); Roberds v. Sweitzer, 733 S.W.2d 444 (Mo.1987); Ill. R. Prof. Conduct, Rule 1.5(d); Ky. R. Prof. Conduct, Rule 1.5(d); S. Car. R. Prof. Conduct, Rule 1.5(d); Wis. R. Prof. Conduct, Rule 1.5(d) (past-due support payments). Contra, e.g., ABA Model Rule 1.5(d)(1); Meyers v. Handlon, 479 N.E.2d 106 (Ind.Ct.App.1985). Some

courts allow such fees when the fee contract and lawsuit are limited to the financial dispute, although the client is simultaneously seeking a divorce. Olivier v. Doga, 384 So.2d 330 (La.1979); Burns v. Stewart, 188 N.W.2d 760 (Minn.1971); In re Cooper, 344 S.E.2d 27 (N.C.Ct.App.1986); cf. Krieger v. Bulpitt, 251 P.2d 673 (Cal.1953) (defendant in divorce suit may contract to pay contingent fee based on property defendant preserves, since lawyer has no incentive to discourage reconciliation).

This Section's acceptance of contingent fees for a spouse without another way to hire counsel, although far from the majority view, derives support from Gross v. Lamb, 437 N.E.2d 309 (Ohio Ct.App.1980). See also Olivier v. Doga, 384 So.2d 330 (La.1979) (public policy favors contingent fee that helps spouse protect her rights in suit brought after judicial separation but before divorce); In re Cooper, 344 S.E.2d 27 (N.C.Ct.App.1986) (relying on lack of provision for court-awarded fees to justify contingent fee in property-division suit accompanying divorce suit). On fees awarded by a court against an opposing spouse, see 3 A. Rutkin, et al., Family Law and Practice 39–5 (1989); 2 J. McCahey et al., Child Custody and Visitation Law and Practice 9–6, 9–11 (1983) (noting that some statutes do not allow fee awards in proceedings to modify custody decrees).

§ 36. Forbidden Client–Lawyer Financial Arrangements

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

(a) acquire a lien as provided by § 43 to secure the lawyer's fee or expenses; and

(b) contract with a client for a contingent fee in a civil case except when prohibited as stated in § 35.

(2) A lawyer may not make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client, except that the lawyer may make or guarantee a loan covering court costs and expenses of litigation, the repayment of which to the lawyer may be contingent on the outcome of the matter.

(3) A lawyer may not, before the lawyer ceases to represent a client, make an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Comment:

a. Scope and cross-references. This Section deals with prohibited or regulated financial arrangements between a client and a lawyer that

are closely related to the lawyer's compensation. Section 126 governs client-lawyer business transactions but does not apply to aspects of fee arrangements such as ordinary hourly, contingent, or lump-sum fees. See also § 43, Comment *h* (security arrangements for fee payment); § 126, Comment *b* (taking interest in client business as fee payment). On the limited application of § 126 to advancement of court costs and litigation expenses, see Comment *c* hereto.

This Section is ancillary to §§ 34 and 35, which regulate lawyers in fee contracts and restrain certain conflicts of interest that tend to distract lawyers from promoting their clients' interests. This Section in turn relies on other provisions. The liens allowed by § 36(1)(a) must meet the requirements of § 43.

Restrictions on fee splitting—the sharing of fees by a lawyer with another lawyer or a nonlawyer—are set forth in §§ 47 and 10. The rules governing payment of a lawyer's fee by a nonclient are set forth in § 134.

b. Buying legal claims. The rule in § 36(1) prohibiting acquisition of a proprietary interest in a claim the lawyer is litigating developed from restrictions on purchasing claims under the common law of champerty and maintenance. Such purchases were thought to breed needless litigation and to foster the prosecution of claims by powerful and unscrupulous persons. Contingent fees, however, permit lawyers to obtain a substantial economic share of a claim in return for their services (see § 34, Comment *c*, & § 35, Comments *b*, *c*, & *d*). The economic effect of the rule set forth in this Section is thus limited to prohibiting a lawyer from acquiring too large a share of a claim and from acquiring rights and powers of ownership through an otherwise proper contingent fee. It does not forbid a lawyer from taking an assignment of the whole claim and then pressing it in the lawyer's own behalf, so long as the lawyer has not represented the claim's original owner in asserting the claim. Such a purchase is subject to the requirements of §§ 18 and 126 when the buyer is the seller's lawyer. The arrangement must also be consistent with law concerning the assignment of claims and with champerty prohibitions that still exist in some states.

The justification for the rule in its present form is that a lawyer's ownership gives the lawyer an economic basis for claiming to control the prosecution and settlement of the claim and provides an incentive to the lawyer to relegate the client to a subordinate position (compare §§ 16 & 21–23 (client control over a representation)). The risk in such an arrangement is greater than it would be with a contingent fee; a contingent fee—in addition to being limited in most cases to well less than half of the recovery—is clearly designated as payment for the

lawyer's services rendered for the client. The rule also prevents a lawyer from disguising an unreasonably large fee, violative of § 34, by buying part of the claim for a low price.

The Section applies to administrative as well as court litigation but does not reach nonlitigation services such as the incorporation of a business in return for payment in stock (compare § 126 (standard for business transactions with clients)). The Section does not bar a lawyer from owning stock or a similar ownership interest in an enterprise that retains a lawyer to conduct a litigation.

The prohibition of the Section is limited to matters in litigation. Thus, subject to § 126 (business transactions with a client), a lawyer may acquire an ownership or other proprietary interest in a client's patent when retained to file a patent application, while under this Section the lawyer could not acquire such an interest if retained to bring a patent-infringement suit. The difference in treatment is largely historical.

c. Financial assistance to a client. A lawyer may provide financial assistance to a client as stated in Subsection (2). Lawyer loans to clients are regulated because a loan gives the lawyer the conflicting role of a creditor and could induce the lawyer to conduct the litigation so as to protect the lawyer's interests rather than the client's. This danger does not warrant a rule prohibiting a lawyer from lending a client court costs and litigation expenses such as ordinary- and expert-witness fees, court-reporter fees, and investigator fees, whether the duty to repay is absolute or conditioned on the client's success. Allowing lawyers to advance those expenses is indistinguishable in substance from allowing contingent fees and has similar justifications (see § 35, Comment *c*), notably enabling poor clients to assert their rights. Requiring the client to refund such expenses regardless of success would have a particularly crippling effect on class actions, where the named plaintiffs often have financial stakes much smaller than the litigation expenses.

With respect to a loan to a client under Subsection (2)(a), the requirements of § 126 do not apply to a client's undertaking to repay the loan out of the proceeds of a recovery. Any more extensive obligation of a client—for example, to pay interest or to provide security beyond that provided under § 43—is subject to § 126.

Loans for purposes other than financing litigation expenses are forbidden in most jurisdictions and under this Section. That prohibition precludes attempts to solicit clients by offering living-expenses loans or similar financial assistance. A few jurisdictions permit such payments, limiting them to basic living and similar expenses and sometimes with the restriction that they not be discussed prior to the

lawyer's retention. Such permission is usually based on a policy of enabling clients to avoid being forced to abandon meritorious claims or to agree to inadequate settlements.

d. Publication-rights contracts. Client-lawyer contracts in which the lawyer acquires the right to sell or share in future profits from descriptions of events covered by the representation are likely to harm clients. Such interests could be created directly, such as by assigning the lawyer all or a part interest in such rights, or indirectly, by giving the lawyer a lien on any income received by the client from such a description. Such contracts, however, give the lawyer a financial incentive to conduct the representation so as to increase the entertainment value of the resulting book or show. For example, a criminal-defense lawyer's book about a case might be more valuable if the trial is suspenseful. That might not help the client. Publication also requires the disclosure of information that the lawyer has acquired through the representation, which is prohibited without client consent (see §§ 60(1) & 62). Often, especially in criminal cases, disclosure could harm the client. The client is in a poor position to predict the harm when the publication contract is made at the outset of the case.

This Section does not prohibit a publication, with the client's consent, that is for the client's benefit and does not result in profit for the lawyer. For restrictions on lawyer comment on a pending matter in litigation, see § 109.

The prohibition does not prevent an informed client from signing a publication contract after the lawyer's services have been performed (see § 31). As a transaction between a former client and lawyer arising out of the representation, such a contract is subject to § 126.

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Comment b. Buying legal claims. The black-letter formulation follows, with minor changes, ABA Model Rules of Professional Conduct, Rule 1.8(j) (1983), and ABA Model Code of Professional Responsibility, DR 5–103(A) (1969) (see also EC 5–7); see also Restatement of Contracts § 540(2); see generally F. MacKinnon, Contingent Fees for Legal Services (1964); Radin, Maintenance by Champerty, 24 Calif. L. Rev. 48 (1935). Cases upholding lawyer purchases of claims for proper consideration include Eikelberger v. Tolotti, 611 P.2d 1086 (Nev.1980) (purchase of judgment after representation ended); Mohr v. Harris, 348 N.W.2d 599 (Wis.Ct.App.1984) (assignment of contempt judgment and cross-appeal rights to lawyer in payment of fees due in main action was lawful if in good faith); see also C. Wolfram, Modern Legal Ethics 491–92 (1986). In some states, champerty statutes and doctrines forbid lawyers to buy claims for the primary purpose of bringing suit. E.g., Louisiana Civil Code art. 2447; Sprung v. Jaffe, 147 N.E.2d 6 (N.Y.1957).

Comment c. Financial assistance to a client. See generally ABA Model Rules of Professional Conduct, Rule 1.8(e) (1983) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client"); ABA Model Code of Professional Responsibility, DR 5–103(B) (1969) ("While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liahle for such expenses"). On remedies, see, e.g., Shade v. Great Lakes Dredge & Dock Co., 72 F.Supp.2d 518 (E.D.Pa.1999) (even if lawyer code violated by allowing client and family to live rent-free in lawyer-owned apartment while awaiting retrial after original award of substantial damages set aside for evidentiary error, unwarranted to disqualify lawyer from second trial).

Lawyer gifts to clients are allowed in some circumstances hy ABA Model Rule 1.8(e)(2) and are not prohibited by the ABA Model Code, DR 5–103(B). See also Florida Bar v. Taylor, 648 So.2d 1190 (Fla.1994); In re Gilman's Administratrix, 167 N.E. 437 (N.Y.1929) (Cardozo, C.J.) (dictum); Commission on Professional Responsibility, Roscoe Pound–American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, Rule 5.6(b), (c) (1980).

ABA Model Rule 1.8(e)(2) allows a lawyer to advance court costs and litigation expenses, even if repayment by the client is contingent on success in the suit. So does some case authority. Van Gieson v. Magoon, 20 Haw. 146 (1910); Smits v. Hogan, 77 P. 390 (Wash.1904); see Clancy v. Kelly, 166 N.W. 583 (Iowa 1918). The ABA Model Code, in DR 5–103(B), and, at least in part, many cases have allowed such advances only if the client's duty to repay is unconditional. See Annot., 8 A.L.R.3d 1155 (1966); but cf. Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991) (DR 5–103(B) may not be applied to federal class action).

The great majority of jurisdictions bar lawyers from making any loan for nonlitigation expenses, such as for living expenses. E.g., In re Minor Child K. A. H., 967 P.2d 91 (Alaska 1998), cert. denied, ___ U.S. ___, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999); State ex rel. Okla. Bar Assoc. v. Smolen, 837 P.2d 894 (Okla.1992) (over dissent); 1 G. Hazard & W. Hodes, The Law of Lawyering 274–75 (2d ed.1990). A small minority of jurisdictions allows lawyers to advance living expenses to their clients so long as that is not done or promised before the lawyer is retained. E.g., Louisiana State Bar Assoc. v. Edwins, 329 So.2d 437 (La. 1976); Ala. Rules of Prof. Conduct, Rule 1.8; California Rules of Professional Conduct, Rule 4–210(A)(2) (lawyer may lend to client); D.C. Rules of Prof. Conduct, Rule 1.8(d)(2); Minn. Rules of Professional Conduct, Rule 1.8(e)(3); Miss. Rules of Prof. Conduct, Rule 1.8(e); see also Mont. Rules of Prof. Conduct, Rule 1.8(e)(3) (lawyer may guarantee loan reasonably needed to enable client to

withstand delay in litigation if client remains ultimately liable to repay); N.D. Rules of Prof. Conduct, Rule 1.8(e) (as amended 1996) (similar); Vt. Code of Prof. Responsibility, DR 5–103(B) (similar). Prior to enactment of the modern lawyer codes, some jurisdictions also allowed such advances by judicial decision. E.g., People v. McCallum, 173 N.E. 827 (Ill. 1930); Johnson v. Great Northern Ry., 151 N.W. 125 (Minn.1915). See also Texas Code of Professional Responsibility, DR 5–103 (omitting all prohibitions of advances to client); Commission on Professional Responsibility, Roscoe Pound–American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, Rule 5.6(a) (1980) (allowing advances to client on any terms that are fair). The Reporters support the minority position, but that position was not accepted by the Institute.

Comment d. Publication-rights contracts. ABA Model Rules of Professional Conduct, Rule 1.8(d) (1983); ABA Model Code of Professional Responsibility, DR 5–104(B) (1969). But cf. Maxwell v. Superior Court, 639 P.2d 248 (Cal.1982) (lawyer not disqualified when client voluntarily entered publication-rights contract). For problems arising from a post-representation publication contract, see In re von Bulow, 828 F.2d 94 (2d Cir.1987).

On publication for the client's benefit, see Stern, The Right of the Accused to a Public Defense, 18 Harv. C.R.-C.L. L. Rev. 53 (1983). On the effect of a publication-rights contract on the client's criminal conviction, see United States v. Hearst, 638 F.2d 1190 (9th Cir.1980), cert. denied, 451 U.S. 938, 101 S.Ct. 2018, 68 L.Ed.2d 325 (1981); Ray v. Rose, 491 F.2d 285 (6th Cir.1974); People v. Corona, 145 Cal.Rptr. 894 (Cal.Ct.App.1978); compare, e.g., Zamora v. Dugger, 834 F.2d 956, 960 (11th Cir.1987) (media-rights conflicts tested under more exacting standard for conflicts of interest in criminal representation); United States v. Marrera, 768 F.2d 201 (7th Cir.1985) (same), with Beets v. Scott, 65 F.3d 1258 (5th Cir.1995), cert. denied, 517 U.S. 1157, 116 S.Ct. 1547, 134 L.Ed.2d 650 (1996) (media-rights conflicts tested under less-exacting standard for ineffective-assistance claims). Many state statutes entitle victims of crime to the proceeds of a publication about the crime by its perpetrator. See Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (invalidating one such statute).

§ 37. Partial or Complete Forfeiture of a Lawyer's Compensation

A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

Comment:

a. Scope and cross-references; relation to other doctrines. Even if a fee is otherwise reasonable (see § 34) and complies with the other requirements of this Chapter, this Section can in some circumstances lead to forfeiture. See also § 41, on abusive fee-collection methods, and § 43, Comments *f* and *g*, discussing the discharge of attorney liens. A client who has already paid a fee subject to forfeiture can sue to recover it (see §§ 33(1) & 42).

A lawyer's improper conduct can reduce or eliminate the fee that the lawyer may reasonably charge under § 34 (see Comment *c* thereof). A lawyer is not entitled to be paid for services rendered in violation of the lawyer's duty to a client or for services needed to alleviate the consequences of the lawyer's misconduct. See Restatement Second, Agency § 469 (agent entitled to no compensation for conduct which is disobedient or breach of duty of loyalty to principal). A tribunal will also consider misconduct more broadly, as evidence of the lawyer's lack of competence and loyalty, and hence of the value of the lawyer's services.

Illustration:

1. Lawyer has been retained at an hourly rate to negotiate a contract for Client. Lawyer assures the other parties that Client has consented to a given term, knowing this to be incorrect. Lawyer devotes five hours to working out the details of the term. When Client insists that the term be stricken (see § 22), Lawyer devotes four more hours to explaining to the other parties that Lawyer's lack of authority and Client's rejection of the term requires further negotiations. Lawyer is not entitled to compensation for any of those nine hours of time under either § 34 or § 39. The tribunal, moreover, may properly consider the incident if it bears on the value of such of Lawyer's other time as is otherwise reasonably compensable.

Second, under contract law a lawyer's conduct can render unenforceable the lawyer's fee contract with a client. Thus under contract law the misconduct could constitute a material breach of contract (see § 40) or vitiate the formation of the contract (as in the case of misrepresentations concerning the lawyer's credentials). Alternatively, the contract can be unenforceable because it contains an unlawful provision (see Restatement Second, Contracts §§ 163, 164, 184, 237, 241, & 374; Restatement Second, Agency § 467). In some cases, although the contract is unenforceable on its own terms, the lawyer

will still be able to recover the fair value of services rendered (see § 39, Comment *e*).

Third, a lawyer's misconduct can constitute malpractice rendering the lawyer liable for any resulting damage to the client under the common law or, in some jurisdictions, a consumer-protection statute (see § 41, Comment *b*). Malpractice damages can be greater or smaller than the forfeited fees. Conduct constituting malpractice is not always the same as conduct warranting fee forfeiture. A lawyer's negligent legal research, for example, might constitute malpractice, but will not necessarily lead to fee forfeiture. On malpractice liability and measures of damages generally, see § 53. On the duty of an agent to recompense a principal for loss caused by the agent's breach of duty, see Restatement Second, Agency § 401.

b. Rationale. The remedy of fee forfeiture presupposes that a lawyer's clear and serious violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation. See Restatement Second, Trusts § 243 (court has discretion to deny or reduce compensation of trustee who commits breach of trust); cf. Restatement Second, Agency § 456(b) (willful and deliberate breach disentitles agent to recover in quantum meruit when agency contract does not apportion compensation). Forfeiture is also a deterrent. The damage that misconduct causes is often difficult to assess. In addition, a tribunal often can determine a forfeiture sanction more easily than a right to compensating damages.

Forfeiture of fees, however, is not justified in each instance in which a lawyer violates a legal duty, nor is total forfeiture always appropriate. Some violations are inadvertent or do not significantly harm the client. Some can be adequately dealt with by the remedies described in Comment *a* or by a partial forfeiture (see Comment *e*). Denying the lawyer all compensation would sometimes be an excessive sanction, giving a windfall to a client. The remedy of this Section should hence be applied with discretion.

c. Violation of a duty to a client. This Section provides for forfeiture when a lawyer engages in a clear and serious violation (see Comment *d* hereto) of a duty to the client. The source of the duty can be civil or criminal law, including, for example, the requirements of an applicable lawyer code or the law of malpractice. The misconduct might have occurred when the lawyer was retained, during the representation, or during attempts to collect a fee (see § 41). On improper withdrawal as a ground for forfeiture, see § 40, Comment *e*.

The Section refers only to duties that a lawyer owes to a client, not to those owed to other persons. That a lawyer, for example,

harassed an opponent in litigation without harming the client does not warrant relieving the client of any duty to pay the lawyer. On other remedies in such situations, see § 110. But sometimes harassing a nonclient will also violate the lawyer's duty to the client, perhaps exposing the client to demands for sanctions or making the client's cause less likely to prevail. Forfeiture will then be appropriate unless the client is primarily responsible for the breach of duty to a nonclient.

d. A clear and serious violation—relevant factors. A lawyer's violation of duty to a client warrants fee forfeiture only if the lawyer's violation was clear. A violation is clear if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful. The sanction of fee forfeiture should not be applied to a lawyer who could not have been expected to know that conduct was forbidden, for example when the lawyer followed one reasonable interpretation of a client-lawyer contract and another interpretation was later held correct.

To warrant fee forfeiture a lawyer's violation must also be serious. Minor violations do not justify leaving the lawyer entirely unpaid for valuable services rendered to a client, although some such violations will reduce the size of the fee or render the lawyer liable to the client for any harm caused (see Comment *a* hereto).

In approaching the ultimate issue of whether violation of duty warrants fee forfeiture, several factors are relevant. The extent of the misconduct is one factor. Normally, forfeiture is more appropriate for repeated or continuing violations than for a single incident. Whether the breach involved knowing violation or conscious disloyalty to a client is also relevant. See Restatement Second, Agency § 469 (forfeiture for willful and deliberate breach). Forfeiture is generally inappropriate when the lawyer has not done anything willfully blameworthy, for example, when a conflict of interest arises during a representation because of the unexpected act of a client or third person.

Forfeiture should be proportionate to the seriousness of the offense. For example, a lawyer's failure to keep a client's funds segregated in a separate account (see § 44) should not result in forfeiture if the funds are preserved undiminished for the client. But forfeiture is justified for a flagrant violation even though no harm can be proved.

The adequacy of other remedies is also relevant. If, for example, a lawyer improperly withdraws from a representation and is consequently limited to a quantum meruit recovery significantly smaller than the fee contract provided (see § 40), it might be unnecessary to forfeit the quantum meruit recovery as well.

e. Extent of forfeiture. Ordinarily, forfeiture extends to all fees for the matter for which the lawyer was retained, such as defending a criminal prosecution or incorporating a corporation. (For a possibly more limited loss of fees under other rules, see Comment *a* hereto.) See § 42 (client's suit for refund of fees already paid). Forfeiture does not extend to a disbursement made by the lawyer to the extent it has conferred a benefit on the client (see § 40, Comment *d*).

Sometimes forfeiture for the entire matter is inappropriate, for example when a lawyer performed valuable services before the misconduct began, and the misconduct was not so grave as to require forfeiture of the fee for all services. Ultimately the question is one of fairness in view of the seriousness of the lawyer's violation and considering the special duties imposed on lawyers, the gravity, timing, and likely consequences to the client of the lawyer's misbehavior, and the connection between the various services performed by the lawyer.

When a lawyer-employee of a client is discharged for misconduct, except in an extreme instance this Section does not warrant forfeiture of all earned salary and pension entitlements otherwise due. The lawyer's loss of employment will itself often be a penalty graver than would be the loss of a fee for a single matter for a nonemployee lawyer. Employers, moreover, are often in a better position to protect themselves against misconduct of their lawyer-employees through supervision and other means. See Comment *a* hereto; Restatement Second, Agency § 401. For an employer's liability for unjust discharge of a lawyer employee, see § 32, Comment *b*.

REPORTER'S NOTE

Comment a. Scope and cross-references; relation to other doctrines. For reduction of what is otherwise a reasonable fee due to a lawyer's derelictions, see, e.g., Newman v. Silver, 553 F.Supp. 485 (S.D.N.Y.1982), aff'd in relevant part, 713 F.2d 14 (2d Cir. 1983); Murphy v. Stringer, 285 So.2d 340 (La.Ct.App.1973); 1 R. Mallen & J. Smith, Legal Malpractice § 11.24 (3d ed.1989). For misconduct that renders a fee contract unenforceable but allows recovery of the fair value of the lawyer's services, see, e.g., In re Rosenman & Colin, 850 F.2d 57 (2d Cir.1988) (failure to send monthly bills in breach of contract); In re Kamerman, 278 F.2d 411 (2d Cir. 1960) (champertous contract); Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F.Supp. 910 (E.D.Pa.1981) (contract requiring lawyer's consent to settlement); Anderson v. Anchor Organization, 654 N.E.2d 675 (Ill.App.Ct.1995) (court has discretion to allow quantum meruit recovery when contract provides for contingent fee larger than allowed by statute). For the application of some consumer-protection statutes to lawyers, see § 41, Comment *b*, and Reporter's Note thereto.

Comment b. Rationale. See generally Perillo, The Law of Lawyer's

Contract is Different, 67 Fordham L. Rev. 443, 446–49 (1998) (criticizing the Section as "lawyer friendly" compared to general contracts law).

Comment c. Violation of a duty to a client. For examples of breaches justifying fee forfeiture, see, e.g., Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir.) (L. Hand, C.J.), cert. denied, 340 U.S. 813, 71 S.Ct. 40, 95 L.Ed. 597 (1950) ("Certainly by the beginning of the Seventeenth Century it had become a commonplace that an attorney must not represent opposed interests, and the usual consequence has been that he is debarred from receiving any fee from either, no matter how successful his labors."); Crawford & Lewis v. Boatmen's Trust Co., 1 S.W.3d 417 (Ark. 1999) (conflict of interests); Jeffry v. Pounds, 136 Cal.Rptr. 373 (Cal.Ct. App.1977) (forfeiture for agreeing to represent client's wife in divorce); Jackson v. Griffith, 421 So.2d 677 (Fla.Dist.Ct.App.1982) (coercing client into contract); Sanders v. Townsend, 509 N.E.2d 860 (Ind.Ct. App.1987), aff'd in part, vacated in part, 582 N.E.2d 355 (Ind.1991) (coercing client to accept poor settlement); Rice v. Perl, 320 N.W.2d 407 (Minn.1982) (not disclosing to client that lawyer's firm employs opposing party's adjuster in other matters); Ranta v. McCarney, 391 N.W.2d 161 (N.D.1986) (practicing in state where not admitted); Crawford v. Logan, 656 S.W.2d 360 (Tenn.1983) (failing to return former client's papers); Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999) (following Restatement approach). Compare In re Rosenman & Colin, 850 F.2d 57 (2d Cir.1988) (breach of contract barred recovery on contract, but did not forfeit all compensation); Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 629 So.2d 947 (Fla.Dist.Ct. App.1993) (court has discretion as to forfeiture when lawyer pressured client to change fee contract).

On breach of duty to nonclients, compare, e.g., Blick v. Marks, Stokes & Harrison, 360 S.E.2d 345 (Va.1987) (no forfeiture when lawyer helped represent client after hearing part of case as parttime judge, because client not harmed), with, e.g., Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 458 A.2d 545 (Pa.Super.Ct.1983) (lawyer whose advice to commit perjury led to client's conviction must refund fee).

Comment d. A clear and serious violation—relevant factors. Some courts have refused to hold fees forfeited when the client was not harmed. E.g., Frank v. Bloom, 634 F.2d 1245 (10th Cir.1980) (lawyer was disobedient); Brillhart v. Hudson, 455 P.2d 878 (Colo.1969) (no forfeiture when contingent-fee contract held grossly unreasonable); Crawford v. Logan, 656 S.W.2d 360 (Tenn.1983) (fees forfeited for failure to return evidence to client when representation ended, unless lawyer shows no prejudice); Burk v. Burzynski, 672 P.2d 419 (Wyo.1983) (lawyer disclosed confidences that a client had already revealed); compare Jackson v. Griffith, 421 So.2d 677 (Fla.Dist.Ct.App. 1982) (forfeiture when fee contract obtained by coercion), with Guenard v. Burke, 443 N.E.2d 892 (Mass.1982) (no forfeiture when lawyer violated court rule by not signing contract). On impalpable and improbable harm, see, e.g., Hendry v. Pelland, 73 F.3d 397 (D.C.Cir.1996) (forfeiture for conflict of interest regardless of lack of harm); In re Eastern Sugar Antitrust Litigation, 697 F.2d 524 (3d Cir.1982) (forfeiture for failure of law firm representing a class to disclose to court

merger negotiations with opposing party's law firm); Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 921 (2d Cir.) (L. Hand, C.J.), cert. denied, 340 U.S. 813, 71 S.Ct. 40, 95 L.Ed. 597 (1950) (dictum) (lawyer with conflict of interests may not avoid forfeiture solely by showing no actual harm); Rice v. Perl, 320 N.W.2d 407 (Minn.1982) (lawyer forfeits fees for failure to disclose to client lawyer's firm's employment of opposing party's adjuster in other matters; no proof of actual harm required); Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965) (lawyer not admitted to practice in state where services performed not entitled to fee); Burrow v. Arce, 997 S.W.2d 229 (Tex.1999) (client need not demonstrate harm); Eriks v. Denver, 824 P.2d 1207 (Wash.1992) (court may require fee refund for conflict of interest without showing of harm).

On the relevance of the lawyer's intent, compare, e.g., Moses v. McGarvey, 614 P.2d 1363 (Alaska 1980) (former corporate counsel who brought derivative suit forfeits fees regardless of absence of improper motive); Jeffry v. Pounds, 136 Cal. Rptr. 373 (Cal.Ct.App.1977) (lawyer who brought suit for one client against another client in unrelated matter forfeits fee although lawyer did not realize this was forbidden), with Hill v. Douglass, 271 So.2d 1 (Fla.1972) (no forfeiture of fees for services rendered before lawyer should have known he would probably be witness); E. Wood, Fee Contracts of Lawyers 237–45 (1936) (forfeiture for negligent misbehavior); Note, Toward a Uniform System of Attorney Fee Forfeiture, 9 Cardozo L. Rev. 1859 (1988). On nonrecoverability of fees for services performed in a jurisdiction where the lawyer was not admitted to practice, see Note, Out-of-State Attorney Fee Forfeiture, 8 Cardozo L. Rev. 1191 (1987). For norms whose breach warrants forfeiture, see Reporter's Note to Comment *c* hereto.

Comment c. Extent of forfeiture. See In re Eastern Sugar Antitrust Litigation, 697 F.2d 524 (3d Cir.1982) (no forfeiture for services rendered before lawyer's violation, unless need to discipline and deter egregious violation outweighs other concerns); In re Brandon, 902 P.2d 1299, 1317 (Alaska 1995) (conflict of interest warrants forfeiture; whether automatic or proportionate by weighing all factors to be decided on review following remand for full development of facts); Hill v. Douglass, 271 So.2d 1 (Fla.1972) (no forfeiture for services before lawyer should have known he would be witness); Bryan v. Granade, 357 S.E.2d 92 (Ga.1987) (lawyer did not forfeit fee for having will set aside by later plundering estate as administrator); Gilchrist v. Perl, 387 N.W.2d 412 (Minn.1986) (forfeiture usually total; but when there was no fraud, bad faith, or actual harm to clients and many potential plaintiffs, courts should use punitive-damages standards to determine how large a forfeiture is appropriate); Davis v. Taylor, 344 S.E.2d 19 (N.C.Ct.App.1986) (lawyer forfeits fee for period during which improper divorce contingent-fee contract was in effect); Burrow v. Arce, 997 S.W.2d 229 (Tex.1999) (judicial discretion); see § 40, Reporter's Note to Comment *d*. Compare Dewey v. R. J. Reynolds Tobacco Co., 536 A.2d 243 (N.J.1988) (firm with conflict of interest must remain in case but serve without compensation).

On nonforfeiture of the salary of a lawyer employee, see Schwartz v. Leonard, 526 N.Y.S.2d 506 (N.Y.App.