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ble person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

The division in the Model Penal Code between principal liability and accomplice liability is that drawn by § 2.06(1) and (2)(a)-(b) (guilt as principal), on the one hand, on the other, §§ 2.06(2)(c) and 2.06(3)-(4) and (6)-(7) (guilt as accomplice). On guilt as an accomplice, see Comment *e*.

Illustration 1 is based on the facts and holding in United States v. Knoll, 16 F.3d 1313, 1323 (2d Cir.), cert. denied, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994) (lawyer, who knowingly prepared materially false document, guilty as principal for offense of submitting false answer on Department of Justice financial statement where evidence showed that client innocently relied on lawyer's judgment whether to include particular account as asset).

e. Responsibility as an accomplice. See Model Penal Code § 2.06(2)(c)-(3); e.g., In re McBride, 642 A.2d 1270 (D.C.1994) (discipline of lawyer following conviction of aiding and abetting client in possession and use of identification document to obtain passport through fraud); In re Levine, 571 N.Y.S.2d 696 (N.Y.App. Div.1991) (discipline of lawyer following conviction for aiding and abetting client in filing false corporate income-tax return based on lawyer's awareness at time of preparing return that supporting purchase invoices were fictitious); In re Siegel, 504 N.Y.S.2d 117, 119 (N.Y.App.Div.1986) (repeatedly giving client legal and personal advice and references and performing legal services for him in knowing aid of client who was fugitive from justice). See also § 94, Comment *c*, Reporter's Note.

On termination of the lawyer's role as accomplice, the Comment is a close paraphrase of ALI Model Penal Code § 2.06(6).

TOPIC 5. LAW-FIRM STRUCTURE AND OPERATION

Introductory Note

TITLE A. ASSOCIATION OF LAWYERS IN LAW ORGANIZATIONS

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Section

9. Law-Practice Organizations—In General

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Introductory Note

10. Limitations on Nonlawyer Involvement in a Law Firm

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11. A Lawyer's Duty of Supervision
12. Duty of a Lawyer Subject to Supervision

TITLE D. RESTRICTIONS ON THE RIGHT TO PRACTICE LAW

Introductory Note
13. Restrictions on the Right to Practice Law

Introductory Note: This Topic addresses the organization and operation of law firms in providing legal services. The traditional form of providing legal services in private practice is the law firm, consisting of a single lawyer (solo practitioner) or two or more lawyers practicing together in an office. The structure and operation of such firms is examined in Title A. Until the middle of the 20th century, aggregations of such lawyers were invariably partnerships, but, as considered in Title A, recent legislation has provided alternative forms of partnerships and corporations in which lawyers may permissibly practice law in most jurisdictions. Title A also addresses the basic rules governing the relationships between lawyers practicing together. Title B considers the legal rules constraining the extent to which nonlawyers may participate in owning or operating a law firm. Title C addresses the nature and extent of supervision that must be maintained within a law firm, both with respect to nonlawyers and with respect to other lawyers in the firm.

TITLE A. ASSOCIATION OF LAWYERS IN LAW ORGANIZATIONS

Introductory Note

Section

9. Law-Practice Organizations—In General

Introductory Note: Lawyers in private practice in the United States have traditionally practiced in one of three forms. Historically, the majority of lawyers have been solo practitioners, with only nonlaw-

yer assistants. While the percentage of solo practitioners has decreased in the last half of the 20th century, their number remains significant. Many such lawyers have practiced in shared offices with other lawyers, but with no financial association beyond sharing rent and perhaps other overhead expenses such as nonlawyer office personnel and a law library. Second, some lawyers have practiced in partnership with other lawyers. In each of those two forms, a lawyer might also have served as the employee of another lawyer or of a partnership. Third, in the latter part of the 20th century, acceptable legal forms of law practice have proliferated, with most states now accepting practice in professional corporations, limited-liability partnerships, or similar entities. The following Title considers the general legal rules that determine the establishment of different forms of law practice, their governance, the comings and goings of lawyers to and from them, and their dissolution.

§ 9. Law-Practice Organizations—In General

(1) A lawyer may practice as a solo practitioner, as an employee of another lawyer or law firm, or as a member of a law firm constituted as a partnership, professional corporation, or similar entity.

(2) A lawyer employed by an entity described in Subsection (1) is subject to applicable law governing the creation, operation, management, and dissolution of the entity.

(3) Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients:

(a) prior to leaving the firm:

(i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and

(ii) only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose; and

(b) after ceasing employment in the firm, to the same extent as any other nonfirm lawyer.

Comment:

a. Scope and cross-references. This Section considers generally the various forms in which lawyers practice law, as well as particular issues relating to soliciting firm clients by a departing lawyer and to

agreements restricting future law practice. Most questions of organizational structure and operation are determined by reference to law that applies generally to lawyers and others who practice in the particular form, such as a partnership or professional corporation. The Section assumes compatibility between the rights and obligations that are defined by general law and the rights and obligations of lawyers and clients under applicable lawyer-code provisions. The Section and Comments also consider instances in which lawyer-code provisions require different rules governing the structure or operation of a law firm. See, e.g., Comments *b* and *i*.

On duties of supervision and the duty to follow instructions within a firm, see generally §§ 11–12. On the extent of vicarious liability for acts of another lawyer, see § 58.

b. Forms of private law-practice organizations and the law regulating them. A law firm established as a partnership is generally subject to partnership law with respect to questions concerning creation, operation, management, and dissolution of the firm. Originally in order to achieve certain tax savings, law firms were permitted in most states to constitute themselves as professional corporations. Most such laws permitted that form to be elected even by solo practitioners or by one or more lawyers who, through their professional corporation, became partners in a law partnership. Pursuant to amendments to the partnership law in many states in the early 1990s, associated lawyers may elect to constitute the organization as a limited-liability partnership, with significant limitations on the personal liability of firm partners for liability for acts for which they are not personally responsible (see Comment *c*). Correspondingly, some states permit lawyers to form limited-liability companies. Lawyers who are members of professional corporations or limited-liability companies are subject to statutory and court rules applicable to such organizations set up to practice law.

Among the questions determined by law generally applicable to the particular legal form in which the firm is constituted or attempted to be constituted are those specifying such matters as the following: the means by which the firm is to be constituted; who within the organization is authorized to govern the firm and to enter into contracts or otherwise incur liability on its behalf; the consequences of acts of any owner or nonowner employee of the firm causing injury to persons outside the organization (see § 58); the responsibility of the firm under laws governing employee rights; who within the firm is authorized to participate in managing the firm; what powers and rights exist in owners of the firm in the absence of controlling provisions in the firm agreement; the means by which an interest in the firm may be transferred and similar questions of succession to an

interest in the firm; what events cause dissolution and what consequences follow from dissolution; and by what means the affairs of the firm are to be wound up on dissolution. With respect to any such issue, a provision of an applicable lawyer code bearing on the issue should control absent clear indication that valid different regulations governing structures of the kind involved are to control.

Both generally applicable law and lawyer-code provisions give lawyers considerable latitude in defining their relationship within the firm through their firm agreement. Documents establishing and regulating a law-firm partnership, professional corporation, or similar entity should be interpreted, to the extent reasonably possible, in a manner that would make them consistent with the duties provided in the lawyer code of the applicable jurisdiction. (Such a document is referred to herein as the "firm agreement.") Lawyer codes may in some instances require specific structural arrangements, as with the prohibition against firm agreements restricting the freedom of clients to choose counsel (see Comment *i*). If rights or duties specified in a firm agreement or reasonably inferable from it are consistent with the applicable lawyer code, relationships among firm lawyers are controlled by the agreement, subject to controlling provisions of other law imposing rights and duties beyond those specified in the agreement. Absent a firm agreement validly redefining such duties, lawyers functioning in the same firm owe the firm and each other certain duties. Those duties are imposed by law and do not require a specification of the duty in a firm agreement. For example, lawyers within a firm bear toward each other and the firm a duty not to misappropriate law-firm funds or property. Thus, unless other specific provision is made by agreement, a lawyer could not arrange with a firm client to have a fee payment made directly to the lawyer rather than to the firm. Similarly, a lawyer could not make an unauthorized withdrawal of firm funds for personal use.

c. A lawyer-employee of a government. A lawyer employed by a governmental organization may function in several different capacities and may or may not have a client-lawyer relationship with the employing governmental agency. For example, a lawyer may function as the governmental equivalent of inside legal counsel in a private organization (see Comment *d* hereto; cf. § 96, Comment *b*), as the equivalent of a lawyer in private practice with a client-lawyer relationship only with persons represented as in a legal-services organization (see § 97, Comment *c*), or as having the prerogatives of a client because law confers on the lawyer powers of decision normally exercised by a client such as in the office of prosecutor (see § 97, Comment *g*). The powers and duties of such a lawyer, as both employee and as

lawyer representing clients, are defined by otherwise applicable law in ways appropriate to the lawyer's particular role.

d. A lawyer-employee of a nongovernmental organization. A lawyer may be an employee of a client, such as a lawyer employed by an organization as inside legal counsel. Such a lawyer-employee generally functions pursuant to the usual rules regulating lawyers (e.g., § 72, Comment *c*, & § 73, Comment *i* (inside legal counsel and attorney-client privilege); but cf. § 32, Comment *b* (availability of retaliatory-discharge and similar claims on part of lawyer-employees)). A lawyer-employee of a client organization is subject to the terms of the lawyer's employment, provided there is no violation of an applicable lawyer code or other law. As an aspect of employment, a lawyer-employee is subject to the terms of an organizational client's regulations with respect to such matters as supervision, channels of communication, assignment and delegation of responsibility, extent of managerial powers, and the like. Similarly, the ability of the lawyer to act as agent of the client-employer is determined under the law generally applicable to such questions of agency on the part of persons connected with an organization.

e. A law-firm lawyer. Lawyers within a traditionally operated law firm have varying interests and responsibilities within the firm, with senior lawyers (partners in a partnership or principals or members in a law corporation or similar entity) having greater managerial power and responsibility over matters defined in the firm agreement. Regardless of such status, a lawyer may have supervisory responsibility with respect to other lawyers or nonlawyer personnel (see § 11), or a lawyer may be supervised in providing legal services by one or more senior firm lawyers (see § 12).

A lawyer may function as an employee of a solo practitioner or of a law partnership, professional corporation, limited-liability firm, or corporate or government law office (cf. Comments *c* & *d* hereto). Associates in a law firm are typical of such lawyers. Under some firm agreements, certain classifications of "partner" (sometimes referred to as nonequity partners) may have no managerial power or participation in firm profits and thus be similar in some respects to senior employees. Even senior partners may not have ultimate management power with respect to firm-wide matters, which may be delegated in the firm agreement to a managing partner or management or similar committee. The rights and powers of any such nonmanagerial lawyer are determined generally under the law applicable to the firm under the firm agreement.

f. Of-counsel relationships to law firms. Traditionally, some lawyers have maintained "of counsel" relationships with a private-

practice law firm. By customary usage, the term suggests that the lawyer is associated with the firm on a substantial, although part-time, basis because semi-retired or because of extensive duties in another organization not involved in the practice of law (such as a corporation or law school). The term "of counsel" may also refer to lawyers newly arrived at the firm, as on a trial basis. Other firms employ other terminology, such as "special counsel," to refer to one of the foregoing. Such relationships are significant primarily to reflect firm culture and practices, for purposes of advertising and to determine the imputation of conflicts of interest. In some jurisdictions, holding oneself out as of counsel requires that the lawyer maintain a continuous and substantial relationship with the law firm (although likely with reduced duties). For purposes other than advertising, the legal significance of the relationship can vary depending on the purpose for which the question is posed. On whether an of-counsel lawyer is subject to or causes imputed disqualification, see § 123, Comment *c(ii)*.

g. Temporary, contract, or consulting lawyers. A lawyer, law firm, or law department of an organization may contract to obtain the services of a temporary lawyer, either for a particular project or for a relatively short period. The nature of the association in all events is such that the lawyer has no assured expectation of long-term employment with the firm. The lawyer's employment rights and obligations are determined by the terms of the lawyer's contract with the hiring firm. Whether the lawyer is considered an employee of the law firm or an independent contractor is determined under the law generally applicable to employment.

A contract or temporary lawyer who performs legal services for or on behalf of clients of the firm is subject to duties to the firm's clients similar to those of lawyers generally, such as those of competence and diligence (see § 16(2)) and confidentiality (see § 60 and following). On the extent to which imputation of conflicts of interest occurs, see § 123, Comment *c(i)*.

A lawyer who does not regularly practice with a law firm may be retained by it as outside legal counsel to provide legal services to the firm as a client. Such a lawyer has all of the applicable rights and duties of a lawyer in a client-lawyer relationship (see generally Chapters 2 and 3).

A lawyer may be retained by a law firm as an expert consultant or expert witness (see § 123, Comment *c(iii)*) for the purpose of reviewing a matter and possibly providing expert testimony on behalf of a firm client, the firm itself, or a lawyer associated with it. In general, such a lawyer-consultant owes the firm and the firm's client duties consistent with the lawyer's specific role.

h. Associated lawyers. Lawyers in separate law firms or practicing solo may collaborate on a single matter or series of matters for the purpose of representing a single client or a series of clients with related matters. Their powers, rights, and obligations with respect to each other (including their respective rights to receive fees earned in the matter, to withdraw from the matter, and to insist that other lawyers with whom they are associated share in the work or fees) are determined under the express or implied terms of their particular agreement of association and the law applicable to the form of association that they thus elect. That form may be, for example, a joint venture, a principal-agent relationship, or a common-law partnership. On fee-splitting, see § 47.

i. Departure of a firm lawyer to compete. A lawyer's departure from a law firm with firm clients, lawyers, or employees, unless done pursuant to agreement, can raise difficult legal issues. Departing a firm or planning to do so consistently with valid provisions of the firm agreement is not itself a breach of duty to remaining firm members. Thus, a lawyer planning a departure to set up a competing law practice may make such predeparture arrangements as leasing space, printing a new letterhead, and obtaining financing. It is also not a breach of duty to a former firm for a lawyer who has departed the firm to continue to represent former firm clients who choose such representation, so long as the lawyer has complied with the rules of Subsection (3). Delineating what other steps may permissibly be taken consistent with such duties requires consideration of the nature of the duties of the departing lawyer to the firm, the duty of the firm to the departing lawyer such as under the firm agreement, as well as the interests of clients in continued competent representation, in freely choosing counsel, and in receiving accurate and fair information from both the departing lawyer and the firm on which to base such a choice. On a client's choice whether to remain with the firm or to follow the departing lawyer, see § 13, Comment *b*; § 31, Comment *f*; § 32, Comment *i*; § 33, Comment *b*; compare § 32(1) (client's right to discharge lawyer at any time). As a matter of the law of advertising and solicitation, under most lawyer codes in-person or telephonic contact with persons whom the lawyer has been or was formerly actively representing is not impermissible. Under decisions of the United States Supreme Court, direct-mail solicitation is constitutionally protected against an attempt by the state generally to outlaw it.

However, as a matter of the departing lawyer's duties to the law firm, the client is considered to be a client of the firm (see § 14, Comment *h*). The departing lawyer generally may not employ firm resources to solicit the client, may not employ nonpublic confidential information of the firm against the interests of the firm in seeking to

be retained by a firm client (when not privileged to do so, for example to protect the interests of the client), must provide accurate and reasonably complete information to the client, and must provide the client with a choice of counsel. As stated in Subsection (3), a departing lawyer accordingly may not solicit clients with whom the lawyer actually worked until the lawyer has either left the firm (Subsection (3)(b)) or adequately informed the firm of the lawyer's intent to contact firm clients for that purpose (Subsection (3)(a)). Such notice must give the firm a reasonable opportunity to make its own fair and accurate presentation to relevant clients. In either event, the lawyer and the firm are in positions to communicate their interest in providing representation to the client on fair and equal terms. If a lawyer and firm agree that the lawyer is free to solicit existing firm clients more extensively than as provided in Subsection (3), their relationship is controlled by such agreement. For example, it might be agreed that a departing lawyer may seek to represent some clients as an individual practitioner or as a member of another firm. On limitations on agreements that have the effect of restricting a departing lawyer's law practice, and hence the ability of clients to obtain counsel, see § 13.

With respect to other firm lawyers and employees, a lawyer may plan mutual or serial departures from their law firm with such persons, so long as the lawyers and personnel do nothing prohibited to either of them (including impermissibly soliciting clients, as above) and so long as they do not misuse firm resources (such as copying files or client lists without permission or unlawfully removing firm property from its premises) or take other action detrimental to the interests of the firm or of clients, aside from whatever detriment may befall the firm due to their departure.

On departure of a firm lawyer, client property and files are to be disposed of in accordance with the rules stated in §§ 45(1) and 46(3). If a client elects to follow the departing lawyer, the old firm must similarly forward any requested part of the client's file remaining at the firm, subject to any right the firm may have under § 43.

j. Dissolution and winding up of a law firm. In general, the circumstances that cause dissolution of a firm and other issues attendant on dissolution are prescribed by the firm agreement and, in default of a valid term of such an agreement, by the partnership, corporate, or other law regulating the firm.

REPORTER'S NOTE

Comment b. Forms of private law-practice organizations and the law regulating them. Combination of forms, such as the presence of a law-

yer incorporated as a professional corporation that, in turn, is a partner in a law firm constituted as a partnership, can give rise to difficulties in determining the extent of liability. See, e.g., Monon Corp. v. Townsend, Yosha, Cline & Price, 678 N.E.2d 807 (Ind.Ct.App.1997) (issue of fact whether partners in partnership containing one professional corporation were merely employees of professional corporation and thus not vicariously liable, or whether firm operated as partnership, in which case they were).

On the general proposition that the duties of law-firm partners among each other are fixed by the partnership or other firm agreement, see, e.g., Dawson v. White & Case, 672 N.E.2d 589 (N.Y.1996) (rights of departing lawyer and former firm controlled by provision in partnership agreement denying recovery of value of goodwill in firm to withdrawing, retiring, or deceased partner). On the requirement that the firm agreement comply with applicable lawyer-code requirements, see, e.g., Meehan v. Shaughnessy, 535 N.E.2d 1255, 1262 (Mass.1989) (while firm agreement specifically addressed only one aspect of division of unfinished business, provision would be interpreted as applicable to all unfinished business in light of lawyer-code prohibition against restrictive covenants); see also Comment *i* hereto and Reporter's Note thereto.

On theft or similar defalcation of funds from a law firm, see, e.g., In re Leon, 524 N.W.2d 723 (Minn.1994) (discipline for circumventing firm billing and accounting procedures to appropriate funds belonging to client and firm); Florida Bar v. Ward, 599 So.2d 650 (Fla.1992) (discipline for harming law firm by misuse of expense account draw to make personal purchases); Committee on Professional Ethics v. McClintock, 442 N.W.2d 607 (Iowa 1989) (discipline for illegal conduct involving moral turpitude by appropriating fee that should have been shared with firm); Tucker v. Mississippi St. Bar, 577 So.2d 844 (Miss.1991) (discipline for arranging for client to pay fees into lawyer's personal account without reporting fees to law firm); In re Hardy, 568 N.Y.S.2d 463 (N.Y.App.Div.1991) (discipline for converting funds representing fees due law firm); Committee on Legal Ethics v. Hess, 413 S.E.2d 169 (W.Va.1991) (discipline for converting law-firm funds to own use), citing authority. On converting client funds from a firm account, see, e.g., People v. Sachs, 732 P.2d 633 (Colo.1987) (discipline of managing partner of law firm).

Comment c. A lawyer-employee of a government. See generally § 97, Reporter's Note; see also § 123, Comments *d(ii)-(iv)*, and Reporter's Note thereto.

Comment d. A lawyer-employee of a nongovernmental organization. See generally § 123, Comments *d(i)* and *d(v)*, and Reporter's Note thereto.

Comment e. A law-firm lawyer. Cf. generally Restatement Second, Agency § 14, Comment *a* (" ... [T]he agent is subject to a duty not to act contrary to the principal's directions, although the principal has agreed not to give such directions.... "); see also id. § 33 (agent authorized to do only what is reasonable to infer principal desires done by agent). On the duty to follow a supervising lawyer's reasonable interpretation of professional duty, see § 12, Reporter's Note.

On a firm's delegation of supervisory authority over firm-wide financial

and similar issues to a managing or similar committee, cf. generally Restatement Second, Agency § 14, Comment *a* ("The right of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times. The principal's right to control is continuous and continues as long as the agency relation exists, even though the principal agreed that he would not exercise it...."). On supervisory duties, see § 11, Reporter's Note.

Comment f. Of-counsel relationships to law firms. See generally § 123, Comment *c(ii)*, and Reporter's Note thereto.

Comment g. Temporary or contract lawyers. On whether and how the presence of a temporary or contract lawyer in a firm affects questions of imputed-disqualification for purposes of conflicts of interest, see § 123, Comment *c(i)*, and Reporter's Note thereto. On a lawyer-expert witness retained by another law firm, see ABA Formal Opin. 97–407 (1997). On conflicts of interest created by representation of a lawyer or firm by a lawyer in another firm, see ABA Formal Opin. 97–406 (1997).

Comment h. Associated lawyers. See generally § 123, Comments *c(iii)* and *e*, and Reporter's Note thereto. See also, e.g., Cazares v. Saenz, 256 Cal.Rptr. 209 (Cal.Ct.App.1989) (when lawyer in 2-member law firm withdrew from law practice on accepting judicial appointment, remaining member could not insist that another lawyer, with whom judge had formed association for purpose of prosecuting personal-injury case, continue association with him where unwritten association agreement clearly contemplated that judge was to perform role of lead attorney).

Comment i. Departure of a firm lawyer to compete. See generally R. Hillman, Lawyer Mobility (1994); Gilson & Mnookin, Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, 37 Stan. L. Rev. 313 (1985). On the problem of soliciting clients of a former firm by a laterally moving lawyer, see, e.g., Johnson, Solicitation of Law Firm Clients by Departing Attorneys: Tort, Fiduciary, and Disciplinary Liability, 50 U. Pitt. L. Rev. 1 (1988); Terry, Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups, 61 Temple L. Rev. 1055 (1988); ABA Formal Opin. 99–414 (1999) (lawyer planning to leave firm should notify promptly those clients with active matters for whose representation lawyer is responsible or in which lawyer plays principal role); ABA Informal Opin. 1457 (1980) (permissible for lawyer, postdeparture, to notify those clients that lawyer actively served of lawyer's departure and willingness to continue to provide service); see also, e.g., Restatement Second, Agency § 396(b) (agent may permissibly compete with principal after termination); id. § 393, Comment *e* (permissible for agent to take pretermination steps in preparation to compete, but may not employ confidential information of principal or begin to solicit customers).

On decisions, see, e.g., Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358 (Ill. 1998) (law firm pleaded recoverable claim for tortious interference with prospective economic advantage in alleging that departing members took various predeparture steps to induce existing clients to follow them to new firm); Mechan v.

Shaughnessy, 535 N.E.2d 1255 (Mass.1989) (adopting approach of ABA Informal Opinion 1457, supra, departing lawyers violated fiduciary duty to remaining partners by rushing one-sided notice of departure to clients without providing partners effective opportunity to present their services as alternative); Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179 (N.Y.1995) (predeparture solicitation of firm clients to commit to be represented by departing lawyer at new firm constituted breach of lawyer's fiduciary duty to firm); Bray v. Squires, 702 S.W.2d 266 (Tex.Ct.App.1985) (permissible for former associates of firm to make postdeparture solicitation of financial-institution client, on whose matters they had actively worked, in competition with former firm); contra, e.g., Pratt, P.C. v. Blunt, 488 N.E.2d 1062 (Ill.App.Ct.1986) (semble) (postdeparture solicitation, only some of which was disparaging of former firm, enjoined as tortious interference with former firm's relationship with existing clients); Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853 (Ohio 1999) (fact issues precluded summary judgment on claim of misappropriation of trade secrets for firm to which departing lawyer had, postdeparture, used telephone numbers of clients formerly represented at old firm, where lawyer made phone list at old firm); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa.1978), cert. denied, 442 U.S. 907, 99 S.Ct. 2817, 61 L.Ed.2d 272 (1979) (postdeparture solicitation of firm clients on whose matters departing associates had worked constituted tortious interference with existing contractual relationship between old firm and existing clients). Distinguishable are instances in which the departing lawyer deals unfairly, as by disparaging the old firm, misleading clients, or engaging in other wrongdoing, see Shein v. Myers, 576 A.2d 985 (Pa.Super.Ct.1990), appeal denied, 617 A.2d 1274 (Pa.1991), or, as apparently all decisions agree, by predeparture solicitation of clients without notice to the firm, see In re Silverberg, 438 N.Y.S.2d 143 (N.Y.App.Div.1981).

On limitations on the use of financial disincentives in law-firm agreements to prevent postdeparture competition by a former firm lawyer, see § 13, Reporter's Note.

As a matter of the law of advertising and solicitation, either in-person or direct-mail contact with clients whom the lawyer has actively represented is consistent with the lawyer codes regulating solicitation because it is contact with a client or former client. See ABA Model Rules of Professional Conduct, Rule 7.3(a) (as amended 1989) (existence of "prior professional relationship" as exception to general prohibition against in-person solicitation); ABA Model Code of Professional Responsibility, DR 2-104(A)(1) (1969) (exception to prohibition against solicitation for "former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client").

Comment j. Dissolution and winding up of a law firm. Under general partnership law, withdrawal or death of a partner causes dissolution of the partnership. See Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989), but a partnership agreement providing for nondissolution on withdrawal controls and, to the extent it so provides, prevents dissolution. E.g., Bonner v. Showa Denko, K.K., 518 N.W.2d 616, 620 (Minn.Ct.App.

1994); Cowan v. Maddin, 786 S.W.2d 647 (Tenn.Ct.App.1989). In general, postdissolution fees received for matters that were work in progress of the partnership at the time of dissolution are also distributed pursuant to the partnership agreement, regardless of which partner performs the work postdissolution, see, e.g., Young v. Delaney, 647 A.2d 784 (D.C.1994); Grossman v. Davis, 34 Cal.Rptr.2d 355 (Cal.Ct.App.1994); Rothman v. Dolin, 24 Cal.Rptr.2d 571 (Cal.Ct. App.1993); see also Fox v. Abrams, 210 Cal.Rptr. 260 (Cal.Ct.App.1985) (same rule applied to dissolution of law corporation); Hurwitz v. Padden, 581 N.W.2d 359 (Minn.Ct.App.1998) (same); see generally R. Hillman, Lawyer Mobility § 2.3.1.3 (1994).

TITLE B. LIMITATIONS ON NONLAWYER INVOLVEMENT IN A LAW FIRM

Introductory Note

Section

10. Limitations on Nonlawyer Involvement in a Law Firm

Introductory Note: Traditionally, lawyer codes have strictly limited the extent to which a nonlawyer could participate in law practice. For the general prohibition against law practice by nonlawyers and its exceptions, see § 4. Nonlawyers have traditionally played a role in providing legal services as assistants to lawyers. Traditional rules have, however, prohibited a nonlawyer from owning an interest in a law practice, splitting fees with lawyers, or in other ways becoming involved directly and substantially in the services or their profits. The latter limitations are addressed in this Title.

§ 10. Limitations on Nonlawyer Involvement in a Law Firm

(1) A nonlawyer may not own any interest in a law firm, and a nonlawyer may not be empowered to or actually direct or control the professional activities of a lawyer in the firm.

(2) A lawyer may not form a partnership or other business enterprise with a nonlawyer if any of the activities of the enterprise consist of the practice of law.

(3) A lawyer or law firm may not share legal fees with a person not admitted to practice as a lawyer, except that:

(a) an agreement by a lawyer with the lawyer's firm or another lawyer in the firm may provide for

payment, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(b) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer a portion of the total compensation that fairly represents services rendered hy the deceased lawyer; and

(c) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

Comment:

a. Scope and cross-references. This Section states several interrelated limitations on the extent to which nonlawyers may own or exercise managerial responsibility in a law firm or share in its fee income and on the correlative extent to which a lawyer may be involved in non-law-firm endeavors, including endeavors some of the activities of which consist of the practice of law. On limitations on the extent to which a nonclient may direct a lawyer's provision of legal services to a client, see § 134. On limitations on fee-splitting among lawyers, see § 47.

b. Rationale. This Section is based on lawyer-code limitations on law-firm structure and practices. Those limitations are prophylactic and are designed to safeguard the professional independence of lawyers. A person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could lead to inadequate legal services. The Section should be construed so as to prevent nonlawyer control over lawyers' services, not to implement other goals such as preventing new and useful ways of providing legal services or making sure that nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons.

The prohibition of Subsection (3) has no application when a person, such as a spouse, advances an otherwise valid claim on the lawyer's income, net worth, including good will in a law practice, or other wealth (see Principles of the Law of Family Dissolution: Analysis and Recommendations § 4.07) (Proposed Final Draft, Part I, 1997). Jurisdictions disagree as to the permissibility of a sale of the practice of a deceased or retired lawyer and, if permitted, how it may be accomplished.

As indicated in Subsection (3)(a), postdeath distributions to nonlawyers, such as a deceased firm member's spouse or estate, are permissible. Such a distribution may be based on the firm agreement, but it may also be made gratuitously.

c. Nonlawyer ownership or management power in a law firm. As reflected in Subsection (1), the lawyer codes have traditionally prohibited arrangements under which a nonlawyer owns an interest in a law firm or exercises managerial responsibility in a law firm on how legal services are provided. In applying that prohibition, certain areas of nonapplication are recognized. Plainly, a nonlawyer may direct the activities of lawyers when the nonlawyer is a client or an agent of a client in the matter (see § 21(2)), such as a nonlawyer officer of a corporation who directs the activities of a lawyer in the office of inside legal counsel of the organization (see § 96, Comment *d*). A lawyer undertaking to complete unfinished business of a deceased lawyer may agree to pay to the deceased lawyer's estate total compensation that fairly represents the services rendered by that lawyer (see Subsection (3)(b)). Under pension-plan and similar retirement arrangements, it is permissible for nonlawyer personnel of a law firm to share in firm profits (see Subsection (3)(c)).

As with other instances of fee-splitting with a nonlawyer (see Comment *b*), the traditional set of restrictions is intended to protect the professional independence of lawyers. Here also the concern is that permitting such ownership or direction would induce or require lawyers to violate the mandates of the lawyer codes, such as by subjecting the lawyer to the goals and interests of the nonlawyer in ways adverse to the lawyer's duties to a client. As a result, for example, statutes and court rules providing for establishing a law firm as a partnership or professional corporation commonly provide that no principal or partner may be admitted to the partnership or own stock in the corporation who is not a lawyer.

Such restrictions, however, impose costs. One cost is that any kind of capital infusion that would entail granting an ownership or security interest in the law firm itself (as distinguished from its assets) to a nonlawyer investor is prohibited. Perhaps as much as any other constraint, such practical barriers to infusion of capital into law firms significantly limit the ability of law firms to attain what its lawyers may consider to be a more optimal size at which to provide higher-quality and lower-price services to clients. They may also deter law firms from more effectively competing with established law firms and with nonlawyer organizations, such as consulting companies, investment bankers, and accounting firms, to whom clients may turn for more cost-effective law-related services. Further, unlike other persons in many (but not all) occupations, lawyers are unable to realize the

present economic value of their reputations, which otherwise could be obtained through sale to investors of stock or other ownership interest.

d. Referral arrangements. Under the rule of Subsection (3), a lawyer may not pay or agree to pay a nonlawyer for referring a client to the lawyer. Such arrangements would give the nonlawyer an incentive to refer to lawyers who will pay the highest referral fee, rather than to lawyers who can provide the most effective services. They also would give the nonlawyer referring person the power and an incentive to influence the lawyer's representation by an explicit or implicit threat to refer no additional clients or by appealing to the lawyer's sense of gratitude for the referral already made. That incentive is not present when the referral comes from a nonprofit referral service. Moreover, a lawyer may pay an advertising, marketing, or similar service for providing professional services in connection with the lawyer's own permissible efforts to advertise for clients. Fee-splitting with a lawyer admitted only in another jurisdiction is subject to § 47 but not to Subsection (3) hereof.

e. Compensation of nonlawyer employees. This Section, of course, does not prohibit a lawyer from providing compensation to secretaries, nonlawyer professionals, and other permanent or temporary employees. That is so even though their compensation indirectly comes from the lawyer's fees and the employees hence have some interest in maximizing the lawyer's fee income. Compare § 47, Comment *b*; on the duty to supervise all such nonlawyer personnel, see § 11. Such compensation may be a percentage of or otherwise contingent on the lawyer's income, so long as the compensation is not contingent on the lawyer's revenue in an individual matter. Thus, under Subsection (3)(c), nonlawyer employees may join in a profit-sharing plan for compensation or retirement. Under tax regulations certain kinds of retirement and similar plans must often be made available to all employees on specified terms of equality.

A lawyer may have business relationships with nonlawyers in non-law practice matters. Thus, a lawyer may serve as co-trustee of a trust or co-executor of an estate and share fees earned for such functions with a nonlawyer co-fiduciary.

f. Nontraditional forms of law practice. The rule against splitting fees with nonlawyers has been one ground for the prohibition of partnerships between lawyers and nonlawyers when the practice of law is an activity of the partnership and for the prohibition of profit-making professional law corporations with stock owned by nonlawyers. This Section does not prohibit a law firm from cooperating with a legally separate partnership or other organization of nonlawyers in providing multi-disciplinary services to clients. The Section allows a

lawyer employed and compensated by a nonprofit public-interest organization or a union to remit court-awarded fees to the employing organization, provided that the organization uses the funds only for legal services.

g. Lawyer involvement in ancillary business activities. Ancillary business activities of lawyers can be conducted consistent with the Section and with other applicable requirements. A lawyer may, for example, operate a real-estate agency, insurance agency, title-insurance company, consulting enterprise, or similar business, along with a law practice. So long as each enterprise bills separately and so long as the ancillary enterprise does not engage in the practice of law, involvement of both the lawyer's law practice and the lawyer's ancillary business enterprise in the same matter does not constitute impermissible fee-splitting with a nonlawyer, even if nonlawyers have ownership interests or exercise management powers in the ancillary enterprise.

However, a lawyer's dual practice of law and the ancillary enterprise must be conducted in accordance with applicable legal restrictions, including those of the lawyer codes. Among other things, the lawyer's self-interest in promoting the enterprise must not distort the lawyer's judgment in the provision of legal services to a client, including in making recommendations of the lawyer's own ancillary service. To avoid misleading the client, a lawyer must reveal the lawyer's interest in the ancillary enterprise when it should be reasonably apparent that the client would wish to or should assess that information in determining whether to engage the services of the other business. The lawyer must also, of course, avoid representing a client (or do so only with informed client consent) in a matter in which the ancillary enterprise has an adverse interest of such a kind that it would materially and adversely affect the lawyer's representation of the client (see § 125). The lawyer must also disclose to the client, unless the client is already sufficiently aware, that the client will not have a client-lawyer relationship with the ancillary business and the significance of that fact. Other disclosures may be required in the course of the matter. For example, when circumstances indicate the need to do so to protect an important interest of the client, the lawyer must disclose to the client that the client's communications with personnel of the ancillary enterprise—unlike communications with personnel in the lawyer's law office (see § 70, Comment *g*)—are not protected under the attorney-client privilege. If relevant, the lawyer should also disclose to the client that the ancillary business is not subject to conflict-of-interest rules (see generally Chapter 8) similar to those applicable to law practice.

A lawyer's provision of services to a client through an ancillary business may in some circumstances constitute the rendition of legal services under an applicable lawyer code. As a consequence, the possibly more stringent requirements of the code may control the provision of the ancillary services, such as with respect to the reasonableness of fee charges (§ 34) or confidentiality obligations (§ 60 and following). When those services are distinct and the client understands the significance of the distinction, the ancillary service should not be considered as the rendition of legal services. When those conditions are not met, the lawyer is subject to the lawyer code with respect to all services provided. Whether the services are distinct depends on the client's reasonably apparent understanding concerning such considerations as the nature of the respective ancillary-business and legal services, the physical location at which the services are provided, and the identities and affiliations of lawyer and nonlawyer personnel working on the matter.

h. Sanctions; enforceability of improper agreements. A lawyer who enters a fee-splitting arrangement violating this Section is subject to professional discipline (see § 5) and fee forfeiture (see § 37). Tribunals will not assist such a lawyer to enforce such an arrangement. Whether a nonlawyer may enforce a fee-splitting agreement with a lawyer depends on whether the jurisdiction limits its regnlation to lawyers or subjects nonlawyers who enter such agreements to criminal or civil sanctions. With respect to the nonlawyer, a violation of the prohibition of Subsection (2) may constitute unauthorized practice of law, incurring the sanctions applicable to such activity (see § 4).

REPORTER'S NOTE

Comment b. Rationale. See generally ABA Model Rules of Professional Conduct, Rule 5.4(a); ABA Model Code of Professional Responsibility, DR 3–102 (1969); C. Wolfram, Modern Legal Ethics 510 (1986); e.g., Infante v. Gottesman, 558 A.2d 1338 (N.J.Super.Ct.App.Div.1989) (partnership agreement between lawyer and claims investigator invalid and unenforceable). Only the District of Columbia (D.C. Rules of Professional Conduct, Rule 5.4(a)), which permits nonlawyers to participate in ownership of businesses ancillary to a law practice (id., Rule 5.4(b)), significantly varies from the ABA models. See ABA/BNA Law. Manual Prof. Conduct § 41:802 (1990).

The rule, uniformly followed until recently, was that a lawyer or the lawyer's estate could not sell the lawyer's interest in a law practice. See 1 G. Hazard & W. Hodes, Law of Lawyering § 1.17:102 (2d ed. 1990); C. Wolfram, Modern Legal Ethics § 16.2.1, at 879–80 (1986); Schoenwald, Model Rule 1.17 and the Ethical Sale of Law Practices: A Critical Analysis, 7 Geo. J. Legal Ethics 395, 399–401 (1993). The ABA amended its ABA Model Rules in 1990, adding Rule 1.17, to permit the sale of a law

practice on the selling lawyer's cessation of practice in the jurisdiction. The rule was based on California Rules of Prof. Conduct, Rule 2–300. In the absence of such a rule, the fact that a law firm may pay the estate of a deceased lawyer an amount measured by earnings from the deceased lawyer's former clients has been held not to permit the estate of a sole practitioner to make the same arrangement with another lawyer or firm. E.g., Geffen v. Moss, 125 Cal. Rptr. 687, 693 (Cal.Ct.App.1975); O'Hara v. Ahlgren, Blumenfeld & Kempster, 537 N.E.2d 730 (Ill.1989).

Jurisdictions that have addressed the issue are divided over whether "good will" in a law firm is capable of being valued, for example for purposes of distribution on marital dissolution or as an asset of a partnership in an accounting. Compare, e.g., Landau v. Bailey, 629 N.E.2d 264 (Ind.Ct. App.1994) (cause of action stated by former client against lawyer who had represented her in divorce action against former husband-lawyer for negligent failure to assert claim to one-half of good-will value of husband's law practice); Dugan v. Dugan, 457 A.2d 1 (N.J.1983) (lawyer's good will in law practice subject te equitable distribution on divorce), with, e.g., Prahinski v. Prahinski, 582 A.2d 784 (Md.1990) (no good will in law practice subject to equitable distribution). See also, e.g., Dawson v. White & Case, 672 N.E.2d 589, 593 (N.Y.1996) (dicta) (good will of law firm can be valued as distributable asset in appropriate case, but here, in action by former partner's accounting action against law firm, partnership agreement and course of dealings precluded such treatment).

Comment d. Referral arrangements. The general prohibition against fee-splitting with nonlawyers is often applied to schemes for compensating a nonlawyer for referring clients (e.g., ABA Model Rules of Professional Conduct, Rule 5.4(a)), which is also directly prohibited by ABA Model Rule 7.2(c) (with exceptions, "a lawyer shall not give anything of value to a person for recommending the lawyer's services"). E.g., In re Weinroth, 495 A.2d 417 (N.J. 1985) (discipline for returning portion of fee to client knowing that client would pay amount to nonlawyer for recommending firm); In re Lebowitz, 414 N.Y.S.2d 735 (N.Y.App.Div.1979) (discipline for fee-splitting with nonlawyer as inducement for nonlawyer to refer criminal cases); Plumlee v. Paddock, 832 S.W.2d 757 (Tex.Ct. App.1992) (agreement with owner of ambulance service invalid and unenforceable). The prohibition applies equally to a referring person who is also a client. E.g., In re VanCura, 504 N.W.2d 610 (Wis.1993) (agreement with client consulting company to split fees as compensation for company's financing of product-liability litigation).

Comment e. Compensation of nonlawyer employees. The Section and Comment follow the standard treatment in the lawyer codes. See ABA Model Rules of Professional Conduct, Rule 5.4(a)(3) (1983) (same as § 10(c)(3)); ABA Model Code of Professional Responsibility, DR 3–102(A)(3) (1969); ABA Informal Opin. 1140 (1979); C. Wolfram, Modern Legal Ethics 510 (1986). On the very different proposal of the ABA's Kutak Commission, whose version of Rule 5.4 would have permitted nonlawyer ownership and exercise of managerial power in a law firm (subject to certain minimal limitations), see generally ABA Center for Profes-

sional Responsibility, Legislative History of the Model Rules of Professional Conduct 159 (1987).

The exception for nonlawyer employees has been stated to permit providing an annual or other bonus to such employees. See Tex. Disciplinary Rules of Prof. Conduct, Rule 5.04, Comment 3. On the other hand, compensating nonlawyer employees based on a percentage of the legal fees generated in the particular matters on which the nonlawyer worked has been held impermissible. E.g., Gassman v. State Bar, 553 P.2d 1147 (Cal.1976) (paralegal); In re Anonymous Member of State Bar, 367 S.E.2d 17 (S.C.1988) (per curiam) (investigators); State Bar v. Faubion, 821 S.W.2d 203 (Tex.Ct.App.1991) (paralegal-investigator).

Comment f. Nontraditional forms of law practice. See generally 1 G. Hazard & W. Hodes, Law of Lawyering § 5.4:201 (1994 Supp.). On a legal-services lawyer's undertaking to remit court-awarded fees to the nonprofit organization employing the lawyer, compare, e.g., Kean v. Stone, 966 F.2d 119 (3d Cir.1992) (upholding remittance to union which uses such fees only for legal services; citing other authority); ABA Formal Opin. 93–374 (1993) (arrangement does not violate ABA Model Rules of Professional Conduct, Rule 5.4), with, e.g., American Civil Liberties Union v. Miller, 803 S.W.2d 592 (Mo.), cert. denied, 500 U.S. 943, 111 S.Ct. 2239, 114 L.Ed.2d 481 (1991) (contrary result); compare ABA Formal Opin. 95–392 (1995) (corporate legal counsel providing services to third person for fee could not turn over to employing corporation amount in excess of reimbursement for cost of compensating lawyer to handle matter). See also, e.g., ABA Formal Opin. 87–355 (1987) (guidelines for permissible participation of lawyer in for-profit prepaid legal services plan); Simon, Fee Sharing Between Lawyers and Public Interest Groups, 98 Yale L.J. 1069 (1989).

In June, 1999, the American Bar Association Commission on Multi–Disciplinary Practices issued its Report and Recommendations to the ABA House of Delegates, urging significant revision of the ABA Model Rules of Professional Conduct (1983) in order to permit lawyers to practice together with nonlawyers in organizations that could provide clients with a wide range of professional services. For the similar proposal in Canada, see Canadian Bar Ass'n International Practice of Law Committee, MDPs–Striking a Balance (Aug.1999) (recommending even more sweeping changes).

Comment g. Lawyer involvement in ancillary business activities. See generally Schneyer, Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study, 35 Ariz. L. Rev. 363 (1993); Munneke, Dances with Nonlawyers: A New Perspective on Law Firm Diversification, 61 Fordham L. Rev. 559 (1992). On possible advantages of combining legal and nonlegal services in projects in which multiple disciplines are relevant, see, e.g., In re Harold & Williams Dev. Co., 977 F.2d 906 (4th Cir.1992) (trial court erred in dismissing application of lawyer-accountant to perform both services for bankrupt estate without assessing possible savings and other individual merits and disadvantages).

On the "strange and complicated" legislative history of what is now ABA Model Rules of Professional Conduct, Rule 5.7 (as adopted 1994),

on ancillary business practices of lawyers, see S. Gillers & R. Simon, Regulation of Lawyers: Statutes and Standards 312, 315–18 (1998); see also id. at 307–10. In brief, the ABA went from the quite permissive proposal of the Kutak Commission, to no regulation under the 1983 ABA Model Rules, to a highly prohibitory Rule 5.7 adopted by a narrow vote in 1991, to repeal of that rule in 1992 by an almost equally narrow vote, to adoption of the much more permissive present Rule 5.7 in 1994 by a siguificant majority. The 1994 version of Rule 5.7 provides as follows:

> Rule 5.7 Responsibilities Regarding Law-Related Services
>
> (A) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (B), if the law-related services are provided:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provislon of legal services to clients; or
>
> (2) in a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
>
> (B) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

As of June 1997, only Pennsylvania has adopted any of the ABA's several versions of a specific ancillary-business rule. Pennsylvania's Rule of Professional Conduct, Rule 5.7 is similar to, but not the same as, the 1994 version of the ABA Model Rules. One jurisdiction, the District of Columbia, provides in its Rules of Professional Conduct that a nonlawyer may own an interest in a law firm or exercise managerial authority in it, subject to certain conditions. See id. Rule 5.4(b) (effective Jan. 1, 1991). Among other things, there is no limitation on how many nonlawyers may be partners of a law firm. However, the rule applies only to a nonlawyer "who performs professional services which assist" the law firm in rendering legal services and thus does not permit nonlawyers to own an interest in a law firm passively as an investor (see also id. Comment [8]). Moreover, under D.C. Rule 5.4(b)(3), lawyer partners in the firm must have and exercise supervision over nonlawyer partners, and under D.C. Rule 5.4(b)(2) all nonlawyer partners must undertake to abide by the lawyer code. A fortiori, in the District of Columbia it is also permissible for a lawyer to engage in ancillary business activities in an entity distinct from the lawyer's firm. On the conflict-of-laws issues created by the potentially wide disparity between the District of Columbia rules and those obtaining elsewhere, particularly in the case of a multi-office law firm with an office in the District, see, e.g., ABA Formal Opin. 91–360 (1991) (lawyer in such firm admitted in both D.C. and another state may practice in D.C. office, but in no other office).

Under lawyer-code provisions and other legal rules, a lawyer who does not keep an ancillary business suffi-

ciently distinct from the lawyer's law practice may suffer various legal consequences. E.g., Avila v. Rubin, 84 F.3d 222 (7th Cir.1996) (lawyer who operated debt-collection service out of law office and mass-mailed collection notices on firm letterhead with facsimile of lawyer's signature violated federal Fair Debt Collection Act); In re Unnamed Attorney, 645 A.2d 69 (N.H.1994) (given strong nexus between lawyer's title-insurance company and law practice, lawyer-code requirement of audit by disciplinary authorities extended to both).

On required disclosures to clients when a lawyer recommends to clients an ancillary business in which the lawyer has an interest or provides services to a client though such a business, see, e.g., In re Pappas, 768 P.2d 1161 (Ariz.1988) (in lawyer-discipline case, because lawyer performed investment-advisory services for persons for whom he also performed legal services in circumstances such that they reasonably believed he was their lawyer with respect to all services, lawyer is held to lawyer-code conflict standards with respect to all services); In re Leaf, 476 N.W.2d 13 (Wis.1991) (discipline for referring clients to "life-style management" business in which lawyer had interest without disclosing interest to clients misrepresenting employment status of nonlawyer employee of business); Florida Bar v. Slater, 512 So.2d 191 (Fla.1987) (discipline for referring clients to lawyer-owned physical-therapy clinic without knowledge of clients or firm).

Comment h. Sanctions; enforceability of improper agreements. For professional discipline, see, e.g., Committee on Professional Ethics v. Lawler, 342 N.W.2d 486 (Iowa 1984); In re Block, 496 So.2d 133 (Fla.1986); In re Quintana, 724 P.2d 220 (N.M. 1986); Annot., 6 A.L.R.3d 1446 (1966). On enforcement by a nonlawyer, compare, e.g., Irwin v. Curie, 64 N.E. 161 (N.Y.1902) (allowing suit where state did not sanction nonlawyer); Danzig v. Danzig, 904 P.2d 312 (Wash.Ct. App.1995) (similar), with Van Bergh v. Simons, 286 F.2d 325 (2d Cir.1961) (disallowing suit because New York statute extended prohibition to nonlawyers); Dugas v. Summers, 339 So.2d 934 (La.Ct.App.1976) (similar); Plumlee v. Paddock, 832 S.W.2d 757 (Tex.Ct.App.1992) (similar); but see Trotter v. Nelson, 684 N.E.2d 1150 (Ind.1997) (nonlawyer may not enforce arrangement even though prohibition is found only in lawyer code and sanctions only lawyers); see also Son v. Margolius, Mallios, Davis, Rider & Tomar, 709 A.2d 112 (Md.1998) (client's possible recovery of referral fee paid by lawyer).

TITLE C. SUPERVISION OF LAWYERS AND NONLAWYERS WITHIN AN ORGANIZATION

Introductory Note

Section

11. A Lawyer's Duty of Supervision
12. Duty of a Lawyer Subject to Supervision

Introductory Note: Neither lawyers nor nonlawyer personnel within a law firm operate as free agents in their work relating to the representation of clients. The same is true of lawyers in non-law-firm organizations, such as the law department of a corporation or government agency or a lawyer who practices as a sole proprietor with lawyer or nonlawyer assistants. For convenience, any such organization of lawyers or lawyer and one or more nonlawyer assistants will sometimes be referred to in the Title as a law firm. Whether by customary practice, under the terms of a firm agreement, or by force of law, some person within even a two-person law practice or a solo practice will have responsibility to see to it that the firm runs smoothly in providing legal services. This Title considers questions of law-firm supervision in terms of both the duties of lawyers who have supervisory responsibility (§ 11) and the duties and powers of lawyers subject to supervision (§ 12).

§ 11. A Lawyer's Duty of Supervision

(1) A lawyer who is a partner in a law-firm partnership or a principal in a law firm organized as a corporation or similar entity is subject to professional discipline for failing to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to applicable lawyer-code requirements.

(2) A lawyer who has direct supervisory authority over another lawyer is subject to professional discipline for failing to make reasonable efforts to ensure that the other lawyer conforms to applicable lawyer-code requirements.

(3) A lawyer is subject to professional discipline for another lawyer's violation of the rules of professional conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or principal in the law firm, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial measures.

(4) With respect to a nonlawyer employee of a law firm, the lawyer is subject to professional discipline if either:

(a) the lawyer fails to make reasonable efforts to ensure:

(i) that the firm in which the lawyer practices has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(ii) that conduct of a nonlawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer; or

(b) the nonlawyer's conduct would be a violation of the applicable lawyer code if engaged in by a lawyer, and

(i) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct; or

(ii) the lawyer is a partner or principal in the law firm, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial measures.

Comment:

a. Scope and cross-references. On a lawyer subject to supervision, see § 12. On the nature of vicarious civil liability of a lawyer for harms caused by associated lawyers, see § 58. On the duty of a lawyer to report wrongdoing by another lawyer, including another lawyer in the same firm, see § 5(3) and Comment *i* thereto.

The rules of this Section are stated in terms of the remedy of professional discipline, and they are a close paraphrase of Rules 5.1 and 5.2 of the ABA Model Rules of Professional Conduct (1983). With respect to remedies other than professional discipline, under § 58, a lawyer is not vicariously liable for the wrongful acts of another lawyer in a firm qualifying as a limited-liability enterprise. Failure to supervise, however, may in an appropriate instance constitute a violation of the duty of care that the individual lawyer with supervisory responsibility owes to a firm client. Whether violation of a lawyer-code provision is relevant to a question of breach of duty is determined under § 52(2)(c) (relevance of evidence of violation of lawyer-code provision in determining lawyer's standard of care).

b. Rationale. Supervision is a general responsibility of a principal (see Restatement Second, Agency § 503, Comment *f*, & id. §§ 507 & 510). A partner in a law firm or a lawyer with authority to direct the activities of another lawyer or nonlawyer employee of the firm is such a principal. Appropriate exercise of responsibility over those carrying out the tasks of law practice is particularly important given the duties of lawyers to protect the interests of clients (see § 16) and in view of the privileged powers conferred on lawyers by law (see § 1, Comment *b*). Moreover, the requirement of supervision recognizes the reality that lawyers of greater experience and skill will often be able to identify areas of professional concern not apparent either to less-experienced lawyers or to nonlawyers. The supervisory duty, in effect, requires that such additional experience and skill be deployed in reasonably diligent fashion.

c. Exercising supervisory authority. Lack of awareness of misconduct by another person, either lawyer or nonlawyer, under a lawyer's supervision does not excuse a violation of this Section. To ensure that supervised persons comply with professional standards, a supervisory lawyer is required to take reasonable measures, given the level and extent of responsibility that the lawyer possesses. Those measures, such as an informal program of instructing or monitoring another person, must often assume the likelihood that a particular lawyer or nonlawyer employee may not yet have received adequate preparation for carrying out that person's own responsibilities.

d. Delegating supervisory duties. A lawyer may delegate responsibility to supervise another lawyer or a nonlawyer to a person whom the lawyer reasonably believes to have appropriate capacity to exercise such responsibility under this Section. If information indicates to the lawyer that the delegated person is not appropriately providing supervision, the lawyer must take reasonable remedial measures.

Similarly, a partner in a law firm may reasonably delegate responsibility under § 11(1) to a management committee or similar body of appropriate capacity to put in place and implement particular firm measures. Such a partner remains responsible to take corrective steps if the lawyer reasonably should know that the delegated body or person is not providing or implementing measures as described in the Section.

e. Responsibility for directly supervised lawyers; for other lawyers. A lawyer has at least one and, in the case of partners, two general areas of supervisory responsibility with respect to other firm lawyers. Under Subsection (2), a supervising lawyer must actively ensure that a directly supervised lawyer conforms to rules of an applicable lawyer code. That responsibility is borne by all lawyers,

whatever their rank otherwise in the firm hierarchy, but only applies with respect to other lawyers over whom they have direct supervisory authority. More broadly, a lawyer who is a partner in a law firm (including an owner of an interest in a professional corporation or similar organization) has a further responsibility under Subsection (3)(b). The partner must take reasonable remedial measures if the partner knows of another firm lawyer's violation of rules of the lawyer code. Such an obligation attaches even if the partner has no direct supervisory authority over the other lawyer. The obligation is not only to prevent such violations (although it includes that), but extends to taking reasonable steps to remedy or mitigate the consequences of the violation. While such a response might include a report of wrongdoing under § 5(3), the requirement of taking reasonable remedial action extends to all known violations and not only those covered by an applicable reporting obligation and in any event may not be sufficiently satisfied through reporting if other reasonably available measures (such as informing a client that a supervised lawyer has wrongfully taken the client's funds) exist.

The Section also contains in Subsection (3)(a) a kind of accessorial liability. No firm lawyer may order or, with knowledge of the specific conduct, ratify a violation of the lawyer code on the part of any other firm lawyer.

f. Responsibility for nonlawyers in a law firm. Duties corresponding to those of a lawyer with respect to other firm lawyers exist with respect to supervising nonlawyers in a law firm. On vicarious liability for acts of such nonlawyers, see § 58, Comments *c* and *e*. Supervision of a nonlawyer must often be more extensive and detailed than of a supervised lawyer because of the presumed lack of training of many nonlawyers on legal matters generally and on such important duties as those on dealing properly with confidential client information (see § 60, Comment *d*) and with client funds and other property (see § 44), which may be different from duties generally imposed in nonlaw practices and businesses. A lawyer's nonlawyer employees and agents must be properly supervised by the lawyer with respect to such activities as interviewing clients to assure that any advice given is appropriate. If done under appropriate supervision to assure that any inappropriate advice is detected and corrected, such nonlawyer dealings with clients are permissible.

In several important senses, all lawyers within a law firm bear direct responsibility for nonlawyer personnel. First, as stated in Subsections (4)(a)(i) and (4)(a)(ii), every lawyer in the firm must take reasonable steps to ensure that the firm has in effect measures giving reasonable assurance that the conduct of all nonlawyers in the firm is compatible with the professional obligations of the lawyer. This obli-

gation is broader than the corresponding obligation for general measures ensuring appropriate lawyer conduct, which only applies to partners in the firm (see Subsection (1)). Second, each lawyer must make reasonable supervisory efforts with respect to the particular nonlawyers over whom the lawyer has direct supervisory authority. Again, those measures must ensure that the nonlawyer's conduct conforms to the professional obligations of the lawyer. Because the lawyer is the direct supervisor, the lawyer's obligations for the conduct of such directly supervised nonlawyers are greater than for the conduct of other nonlawyer firm personnel. The fact that a lawyer is busy or distracted in other critically important work, such as the work of providing legal services to clients or generating a high percentage of the firm's fee revenue, does not excuse neglecting supervisory responsibilities or ignoring inappropriate conduct on the part of a supervised nonlawyer. Because the obligation is to make reasonable efforts, lack of knowledge on the part of the lawyer will not constitute a defense if under the circumstances the lawyer either failed to ensure the presence of measures to prevent misconduct or failed to make reasonable efforts to see that a supervised nonlawyer complied with those measures and otherwise conformed the person's conduct to the professional obligations of the lawyer.

Even if a lawyer has no general or specific supervisory responsibility as described above, a lawyer may nonetheless be responsible under Subsection (4)(b)(i) for certain acts of nonlawyers in the firm if the lawyer orders the conduct or ratifies it with the described knowledge. The nonlawyer's acts come within that Subsection if, had they been committed by a lawyer, they would have violated the lawyer's duties under the applicable lawyer code. Thus, asking a secretary in the law firm to make a phone call that violates the confidentiality obligations owed to a firm client would be as impermissible as if the lawyer made the call personally. Also, under Subsection (4)(b)(ii) every partner in a law firm and every nonpartner who has direct supervisory authority over the nonlawyer who so acts is personally responsible for such an act if the lawyer knows of the conduct at a time when the lawyer could prevent it or mitigate its consequences but fails to take reasonable remedial measures. The nature of such measures must be determined on the basis of facts that could reasonably be known by the lawyer after an appropriate investigation, the seriousness of the conduct, the extent of harm, the identity of a victim (if any) of the conduct, the nature of the lawyer's level of responsibility within the firm, the response of other responsible persons within the firm, the firm's reasonable policies on such matters, and possible involvement of law-enforcement or regulatory agencies.

g. Responsibility for law-firm policies and practices. A lawyer affiliated for the purpose of law practice with other lawyers in a law firm is not privileged to attend only to his or her own activities and those of lawyers (see Comment *d*) and nonlawyers (see Comment *e*) directly under the lawyer's supervision, while ignoring the activities of others within the firm. To the contrary, such a lawyer, if a partner in the firm, has a duty stated in Subsection (1) to ensure that the firm has in place measures giving reasonable assurance that all lawyers in the firm conform to the applicable lawyer code. A similar general supervisory duty of partners exists under Subsection (4)(a)(i) with respect to nonlawyer employees. The extent of that duty corresponds to the lawyer's practical ability to know matters and effect appropriate changes within the firm. A partner with full voting power properly has a more extensive duty than an associate or a lawyer associated only of counsel. On delegation of supervisory duties, see Comment *d*.

For the purposes of the Section, the responsibility of a lawyer extends to the work of the law-practice organization with which the lawyer practices, including a law firm in private practice (whether structured as a sole proprietorship or as a partnership, professional corporation, limited-liability partnership, or similar entity), an office of inside legal counsel in a corporation or similar enterprise, and a legal office of a government agency or an independent government legal agency such as a prosecutor's office or office of an attorney general. Appropriate measures for a particular firm must take account of the particular firm's size, structure, nature of practice, and legal constraints, as well as the foreseeability of particular kinds of supervisory issues arising. Policies and practices of a solo practitioner with a single experienced nonlawyer assistant may be entirely informal, but the policies and practices for a much larger firm with many lawyer and nonlawyer employees must be correspondingly more encompassing. In carrying out those responsibilities, many law firms' policies provide for continuing professional education for both lawyers and nonlawyers.

Either as a matter of firm-wide policy or as matter of effective delegation, a firm must have in place reasonable measures to ensure that lawyer and nonlawyer personnel are reasonably competent for their intended responsibilities and thereafter receive appropriate training, supervision, and support allowing them to recognize and carry out their responsibilities. Reasonable measures must also be taken to ensure that such persons operate under appropriate procedures to avoid conflicts of interest and to prevent conversion or other inappropriate dealing with client funds, fraudulent or otherwise improper billing to clients, and neglect of deadlines important in representing clients.

REPORTER'S NOTE

Comment a. Scope and cross-references. The Section follows and is a close paraphrase, with some reorganization, of ABA Model Rules of Professional Conduct, Rule 5.1 (1983) (responsibilities of a partner or supervisory lawyer) and id. Rule 5.3 (responsibilities regarding nonlawyer assistants); see also, e.g., N.Y. Code of Professional Responsibility, DR 4–104 (as amended 1996) (placing supervisory responsibility on law firm as well as on firm lawyers individually).

Comment b. Rationale. See generally 2 G. Hazard & W. Hodes, Law of Lawyering § 5.1:101 et seq. and § 5.3:101 et seq. (2d ed.1990); C. Wolfram, Modern Legal Ethics § 16.3.1 (1986). On the rationale drawn from agency law, see, e.g., Florida Bar v. Rogowski, 399 So.2d 1390, 1391 (Fla. 1981); State v. Barrett, 483 P.2d 1106, 1111 (Kan.1971); State ex rel. Oklahoma Bar Ass'n v. Braswell, 663 P.2d 1228, 1231–32 (Okla.1983). On the requirement of exercising additional insight gained from experience and skill, see, e.g., Gadda v. State Bar, 787 P.2d 95, 100 (Cal.1990) (rejecting contention that supervising lawyer only as blameworthy as associate being supervised).

Comment c. Exercising supervisory authority. See, e.g., In re Galbasini, 786 P.2d 971 (Ariz.1990) (citing what is now 2 G. Hazard & W. Hodes, Law of Lawyering § 5.3:100–03, at 784–85 (2d ed. 1990 & supp. 1994)) (lawyer who takes no precautionary steps violates lawyer code, regardless of absence of subsequent misstep by employee); In re Bonanno, 617 N.Y.S.2d 584 (N.Y.App.Div.1994) (censure of lawyer for failing to supervise nonlawyer employee who, unknown to lawyer, held self out as lawyer, represented clients, and embezzled client funds); In re Morin, 878 P.2d 393, 401 (Or.1994) (lawyer responsible for unauthorized practice of law by paralegal where, following lawyer's initial warning to paralegal, lawyer took no further steps to enforce instruction or to test employee's ability to identify inappropriate activities).

With respect to civil liability of a supervising lawyer, see generally § 52, Comment *f* and Reporter's Note thereto; § 58, Comment *c* and Reporter's Note thereto; see, e.g., FDIC v. Nathan, 804 F.Supp. 888, 897–98 (S.D.Tex.1992) (partner could be held directly liable to client for negligent failure to supervise other lawyers in firm); Anderson v. Hall, 755 F.Supp. 2, 5 (D.D.C.1991) (plaintiff sufficiently pleaded claim that law firm improperly supervised associate, who missed filing within statute of limitations); Gautam v. DeLuca, 521 A.2d 1343, 1347 (N.J.Super.Ct.App. Div.1987) (same; failure properly to supervise work of associate, particularly if associate shown to be hindered or disabled by illness); cf., e.g., Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 943 P.2d 104 (N.M.1997) (individual members of incorporated law firm who voted to end firm's representation of client of one member and who signed letter of withdrawal could be personally liable in client's suit for damages caused by negligence in withdrawing).

Comment d. Delegating supervisory duties. Mere delegation does not exonerate a lawyer who does not carry through adequately to determine that delegated tasks are in fact per-

formed. E.g., Attorney Grievance Comm'n v. Boyd, 635 A.2d 382 (Md. 1994) (although lawyer could properly ask employees to complete withholding-tax forms, lawyer remained responsible to see that forms were in fact completed and filed as required by law). Clearly, a lawyer may not delegate supervision of an important compliance task to the very employee whose compliance is in issue. E.g., Smart Indus. Corp. v. Superior Court, 876 P.2d 1176 (Ariz.Ct.App. 1994) (while screening of nonlawyer employee with confidential information about same case gained in former law firm could have avoided firm-wide imputation of conflict, it was insufficient merely to instruct employee not to disclose confidences while having employee work on same case). In general, courts have been reluctant to release lawyers from responsibilities on a defense of delegation. E.g., Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 558 (9th Cir. 1986) (Rule 11 violation), cert. denied, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987); Harris v. Marsh, 123 F.R.D. 204, 216 (E.D.N.C.1988) (same).

Comment e. Responsibility for directly supervised lawyers; for other lawyers. See generally Miller, Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties, 70 Notre Dame L. Rev. 259 (1994); e.g., Piotrowski v. City of Houston, 1998 WL 268827, No. Civ. A 94–4046 (S.D. Tex. May 5, 1998) (city-law-office superiors assigned inexperienced junior lawyers to complex and highly charged federal civil-rights litigation); Florida Bar v. Hollander, 607 So.2d 412, 415 (Fla.1992) (lawyer who instructed associate to send out improper fee letter to client responsible for violation for failure to take reasonable remedial action); In re Helman, 640 N.E.2d 1063, 1065 (Ind.1994) (in discipline case involving law-firm associate, critically noting absence of "consistent careful supervision on the part of the more senior attorneys" in firm); Cincinnati Bar Ass'n v. Schultz, 643 N.E.2d 1139 (Ohio 1994) (majority shareholder of professional association responsible in disciplinary proceeding for known violations of employed lawyers); compare, e.g., Dziubek v. Schumann, 646 A.2d 492, 498 (N.J.Super.Ct.App.Div. 1994) (under rule requiring bad faith as predicate for fee sanction, principals in firm employing associate who acted wrongfully regarding settlement not liable for mere negligence in supervision, in absence of showing they authorized, acquiesced in, or ratified associate's conduct). See also authority cited, supra, Reporter's Note c, on civil liability for failure to supervise. On other possible consequences of ratification by a supervisory lawyer, see, e.g., Kramer v. Nowak, 908 F.Supp. 1281 (E.D.Pa.1995) (supervisory lawyer must establish, among other things, lack of ratification, in order to recover on claim for negligence or contribution against former associate whose alleged negligence resulted in supervisory lawyer's liability to client).

Comment f. Responsibility for nonlawyers in a law firm. With respect to discipline, see, e.g., In re Miller, 872 P.2d 661 (Ariz.1994) (failure to supervise adequately nonlawyer assistant); Mays v. Neal, 938 S.W.2d 830 (Ark.1997) (discipline of lawyer whose unsupervised nonlawyer employees impermissibly solicited clients and communicated with them without supervision by lawyer); In re Kaplan, 2 Cal.St.Bar Ct.Rptr. 504

(Cal. St. B. Ct., Review Dep't, 1993) (failure of solo practitioner to supervise office manager); Florida Bar v. Lawless, 640 So.2d 1098 (Fla.1994) (failure to supervise out-of-office paralegal who was given plenary responsibility for visa problems of clients); In re Schreiber, 632 N.E.2d 362 (Ind.1994) (general mismanagement and failure to supervise employees in multi-office firm); Office of Disciplinary Counsel v. Ball, 618 N.E.2d 159 (Ohio 1993) (failure of solo practitioner to supervise secretary who misappropriated substantial client funds over 10–year period); compare, e.g, In re Harrington, 608 So.2d 631, 634 (La.1992) (insufficient evidence of either ratification or failure to supervise where employee drafted offending letter without consulting lawyer, which was first and only time employee took such action); In re Jenkins, 816 P.2d 335, 341–42 (Idaho 1991) (conduct of nonlawyer employees constituted blatant solicitation, but insufficient evidence that lawyer ordered or ratified such). With respect to liability to a client for acts of a nonemployee agent, see, e.g., Kleeman v. Rheingold, 614 N.E.2d 712 (N.Y.1993) (lawyer can be liable to client for negligence in service of process even though task was farmed out to nonemployee independent contractor); see generally § 58, Comments *c* and *e*, and Reporter's Note thereto.

Comment g. Responsibility for law-firm policies and practices. See ABA Model Rules of Professional Conduct, Rule 5.1, Comment ¶ [1] (1983); e.g., Dresser Indus., Inc. v. Digges, 1989 WL 139234 (D.Md.1989) (partners of lawyer who fraudulently billed client could be found vicariously liable to client by jury because firm had no monitoring system in place to ensure accuracy of bills or to prevent fraud); Davis v. Alabama St. Bar, 676 So.2d 306 (Ala.1996) (discipline of supervisory lawyer for imposing policies on associate lawyers concerning case volume and budget that prevented competent legal services); In re Lenaburg, 864 P.2d 1052, 1055 (Ariz.1993) (censure of lawyer plus probation, terms of which require cooperation of law firm in instituting procedures to deal with supervision responsibilities over nonlawyer employees); In re Dahowski, 479 N.Y.S.2d 755 (N.Y.App.Div.1984) (discipline for failure to oversee or review record keeping of firm, contributing to conversion of entrusted funds by partner); compare, e.g., Lane v. Williams, 521 A.2d 706 (Me. 1987) (lawyer has duty to establish office procedures to ensure that notice of appeal was timely filed, but failure to do so not "excusable neglect" permitting late filing).

§ 12. Duty of a Lawyer Subject to Supervision

(1) For purposes of professional discipline, a lawyer must conform to the requirements of an applicable lawyer code even if the lawyer acted at the direction of another lawyer or other person.

(2) For purposes of professional discipline, a lawyer under the direct supervisory authority of another lawyer does not violate an applicable lawyer code by acting in accordance with the supervisory lawyer's direction based

on a reasonable resolution of an arguable question of professional duty.

Comment:

a. Scope and cross-references. This Section states the extent to which a lawyer under the supervisory authority of another lawyer must exercise independent judgment to conform to rules of an applicable lawyer code. The Subsections are a close paraphrase of ABA Model Rules of Professional Conduct, Rule 5.2 (1983). The stated sanction for violating the rules of the Section is professional discipline. For the consequences, if any, for civil litigation of proof of violation of a duty stated in the Section, see § 11, Comment *a*.

b. Responsibility of a supervised lawyer. As indicated in Subsection (1), a lawyer under the direct supervisory authority of another lawyer does not by the fact of supervision become absolved from violations of an applicable lawyer code. Thus, a junior law-firm associate working under the supervision of a senior partner is nonetheless personally responsible to know and apply relevant lawyer-code and other legal requirements in the course of the associate's work. Even a direct instruction from the senior lawyer does not protect the supervised lawyer except to the limited extent provided in Subsection (2) (see Comment *c*). Similarly, attempted instructions or announcements of binding firm policy by a nonlawyer manager, such as the firm's business manager, for example on the manner in which clients are to be charged fees, do not bind even the most junior lawyer in the firm if following such an instruction would violate the lawyer's duty under an applicable lawyer code.

c. Acting pursuant to a supervisory lawyer's direction. In some matters involving the joint work of a supervised and supervisory lawyer, differences of view may exist between them on whether a course of action is consistent with requirements of an applicable lawyer code. When there is no reasonable basis for concluding that those obligations permit a course of action, the supervised lawyer has independent responsibility as stated in Subsection (1) (see Comment *b*).

In some instances, however, professional requirements may be unclear because a reasonable view of the facts or the lawyer code is subject to conflicting interpretations, or the matter may involve an exercise of professional discretion. When supervisory and supervised lawyers disagree over such a matter, the supervisory lawyer may make either of two decisions. First, consistently with § 12(2), the supervisory lawyer may reasonably decide that, given the strength of support for the supervised lawyer's position in light of the probable

risk and magnitude of harm to a client or third person, the view of the supervised lawyer may be followed. Alternatively, the supervising lawyer may decide to direct, and is empowered to direct (see § 11, Comment *e*), that the course of action preferred by the supervisory lawyer be followed.

As provided in Subsection (2), in either event the supervised lawyer does not violate an applicable lawyer-code provision even if it is later determined that the course of action approved or directed by the supervisory lawyer, although reasonably supportable, in fact was impermissible under the lawyer code. In a situation within Subsection (2), although the supervised lawyer commits no violation (because acting pursuant to reasonable direction of the supervisory lawyer), the supervisory lawyer may be in violation of the rule stated in § 11(3). For example, the supervised lawyer may commit no violation because that lawyer is unaware of facts, known only to the supervising lawyer, that indicate the impermissible nature of the lawyer's proposed action.

REPORTER'S NOTE

Comment a. Scope and cross-references. As stated in the Comment, the Section follows and is a close paraphrase of ABA Model Rules of Professional Conduct, Rule 5.2 (1983). See generally 2 G. Hazard & W. Hodes, Law of Lawyering § 5.2:101 et seq. (2d ed.1990); C. Wolfram, Modern Legal Ethics §§ 8.8.4 & 16.6.2 (1986); Twitchell, The Ethical Dilemmas of Lawyers on Teams, 72 Minn. L. Rev. 697 (1988); Gross, Ethical Problems of Law Firm Associates, 26 Wm. & Mary L. Rev. 259 (1985); Wessel, Institutional Responsibility: Professionalism and Ethics, 60 Neb. L. Rev. 504 (1981).

Comment b. Responsibility of a supervised lawyer. E.g., ABA Model Rules of Professional Conduct, Rule 5.2(a) (1983). See generally supra, Comment *c*, Reporter's Note. See, e.g., Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin, 717 A.2d 724 (Conn.1998) (failure of junior associate to seek appropriate supervision could be basis for finding of lack of due care).

Comment c. Acting pursuant to a supervisory lawyer's direction. E.g., ABA Model Rules of Professional Conduct, Rule 5.2(b) (1983); In re Ockrassa, 799 P.2d 1350 (Ariz.1990) (fact that superiors to prosecutor saw no problem in his prosecution of same person whom he had earlier defended in substantially related matter no defense when even minimal research would have disclosed clear authority to contrary); cf., e.g., Harris v. Marsh, 123 F.R.D. 204, 216 (E.D.N.C. 1988) (for purposes of liability for Rule 11 violation in filing groundless suit, associate in law firm may not blindly follow commands of partners known to be wrong); People v. Casey, 948 P.2d 1014 (Colo.1997) (direction of supervising lawyer no defense when ethical dilemma not even arguable); In re Howes, 940 P.2d 159, 164–65 (N.M.1997) (assistant United States attorney disciplined for unconsented conversations with represent-

ed criminal defendants; argument that lawyer followed reasonable interpretation of arguable question of professional duty rejected on view that superior had no reasonable basis for position that anti-contact rule (cf. § 99, Comment *h*) was inapplicable to Justice Department lawyers). In resolving a dispute between supervisory and supervised lawyers, the supervisory lawyer may be required to act so as to minimize intrusion into the supervised lawyer's privacy. E.g., McCurdy v. Department of Transp., 898 P.2d 650 (Kan.Ct.App.1995) (subordinate lawyer who claimed inability to accept case of public-agency employer against person represented by law firm on ground that lawyer had existing client-lawyer relationship with same law firm not required to reveal exact nature of conflict; employer could verify relationship by inquiry to law firm). For criticism of the lawyer-code rule restated in Subsection (2), see Rice, The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers, 32 Wake Forest L. Rev. 887 (1997).

TITLE D. RESTRICTIONS ON THE RIGHT TO PRACTICE LAW

Introductory Note

Section

13. Restrictions on the Right to Practice Law

Introductory Note: Lawyer codes have traditionally stated two related restrictions on contractual undertakings by a lawyer that have the direct effect of restricting the lawyer's practice in ways that the law would not otherwise provide. The restrictions seek to further the general goal of facilitating a prospective client's choice of competent counsel by removing certain contractual barriers to accepting or competently representing clients.

§ 13. Restrictions on the Right to Practice Law

(1) A lawyer may not offer or enter into a law-firm agreement that restricts the right of the lawyer to practice law after terminating the relationship, except for a restriction incident to the lawyer's retirement from the practice of law.

(2) In settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients.

Comment:

a. Scope and cross-references. This Section states two related restrictions on the ability of a lawyer and others to impose contractual limitations on the lawyer's future law practice. While the restriction is found in lawyer codes, courts have generally accepted the restrictions for purposes of assessing the availability of civil remedies, such as a request by the law firm or third party to enforce the agreement. In that way, the restrictions are also found as a part of jurisdictions' common law governing lawyers. See Comment *b*.

This Section applies only to contractual restrictions on a lawyer's right to practice law. A statute or regulation may impose restrictions beyond those in an applicable lawyer code, particularly with respect to former government lawyers (see § 133). A disqualification (§ 6(8) & Comment *i* thereto) or injunctive order (§ 6(2) & Comment *c* thereto) of a tribunal also has that effect.

b. Law-firm restrictive covenants and a client's choice of counsel. As stated in Subsection (1), a lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to prevent undue restrictions on the ability of present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers in a firm and prohibits both making and accepting such a restriction.

Beyond professional discipline, such rules preclude enforcement of a provision of a firm agreement under which a departing lawyer is denied otherwise-accrued financial benefits on entering into competitive law practice, unless the denial applies to all departing firm lawyers, whether entering into competitive practice or not (including, for example, lawyers who become judges, government counsel, or inside legal counsel for a firm client or who change careers, such as by entering teaching). See § 9, Comment *i*.

An exception recognized in all the lawyer codes is for restriction of a lawyer's right to practice law that is to be enforced upon a lawyer's retirement. The restriction is supportable because it only minimally interferes with the ability of clients to choose counsel freely, given the lawyer's intent to retire from practice.

Also distinguishable are law-firm requirements restricting a lawyer's right to practice law prior to termination, such as the common restriction that the lawyer must devote his or her entire practice to clients of the firm. Similarly, an organization employing a lawyer does not violate the rule of this Section in requiring that the lawyer's

practice be limited to the affairs of the organization. For example, governmental practice is often so limited.

c. Restrictive agreements in settling claims. Subsection (2) states the prohibition against restrictive agreements made in settling a client's claim. For example, a defendant as a condition of settlement may insist that the lawyer representing the plaintiff agree not to take action on behalf of other clients, such as filing similar claims, against the defendant. Proposing such an agreement would tend to create conflicts of interest between the lawyer, who would normally be expected to oppose such a limitation, and the lawyer's present client, who may wish to achieve a favorable settlement at the terms offered. The agreement would also obviously restrict the freedom of future clients to choose counsel skilled in a particular area of practice. To prevent such effects, such agreements are void and unenforceable.

REPORTER'S NOTE

Comment b. Law-firm restrictive covenants and a client's choice of counsel. See generally R. Hillman, Lawyer Mobility § 2.3.3 (1994). On the prohibition against partnership, employment, and similar agreements restricting the postemployment practice rights of a lawyer, see, e.g., ABA Model Rules of Professional Conduct, Rule 5.6 (1983) ("A lawyer shall not participate in offering or making: (1) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement ..."); ABA Model Code of Professional Responsibility, DR 2–108 (1969) (similar); cf. Cal. Rule Prof. Conduct, Rule 1–500(A)(1) (such agreement permissible if "the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship"). For an argument that the prohibition of restrictive covenants in the lawyer codes is unreasonable, see Kalish, Covenants Not to Compete and the Legal Profession, 29 St. Louis U. L. Rev. 433 (1985). Only in California, however, are restrictive covenants in law-firm agreements enforced, despite the contrary lawyer-code prohibition, in effect treating lawyers in the same way as members of any other profession (and disregarding the contrary implication of the state's lawyer code). See Howard v. Babcock, 25 Cal.Rptr.2d 80, 863 P.2d 150 (Cal.1993). For a critical analysis, compare, e.g., Anderson & Steele, Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney–Client Relationship, 4 Geo. J. Legal Ethics 791, 841–46 (1991) (law-firm restrictions should be governed by same legal analysis as those of physicians and other occupations), with, e.g., Hamilton, Are We a Profession or Merely a Business? The Erosion of Rule 5.6 and the Bar Against Restrictions on the Right to Practice, 22 Wm. Mitchell L. Rev. 1409 (1996) (defending rule of majority of jurisdictions).

In the clear majority of jurisdictions a covenant in a partnership agreement that restricts the right of

a former law-firm lawyer to practice by reason of a substantial financial penalty for competing with the former firm will be denied effect, on the ground that the covenant is unreasonable in that it violates the lawyer-code prohibition. In the majority of those decisions, the prohibition is applied only to income or other benefits accrued prior to departure from the firm. See Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y. 1989); see also, e.g., Peroff v. Liddy, Sullivan, Galway, Begler & Peroff, P.C., 852 F.Supp. 239 (S.D.N.Y.1994); Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598 (Iowa 1990); Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358 (Ill.1998); White v. Medical Review Consultants, Inc., 831 S.W.2d 662 (Mo.Ct.App. 1992); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991); Whiteside v. Griffis & Griffis, P.C., 902 S.W.2d 739 (Tex.Ct.App. 1995); cf., e.g., Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142 (N.J.1992) (same rule, but no distinction between earned income and future profits); Denburg v. Parker, Chapin, Flattau & Klimpl, 624 N.E.2d 995 (N.Y.1993) (*Cohen*, supra, applied to formula that penalized departing lawyer for amount of billings to former clients of firm, despite argument that purpose of provision was to compensate firm for refurbishing offices during lawyer's tenure there); ABA Formal Opin. 94–381 (1994) (prohibition in employment agreement of lawyer for corporation that lawyer would not, following employment, represent any client against corporation is impermissible under ABA Model Rule 5.6(a)). *Jacob v. Norris, McLaughlin & Marcus*, supra, also held that penalties for otherwise-permissible recruitment of other firm lawyers or nonlawyer personnel were also unenforceable as unfairly restricting the career mobility of such persons. Cf., e.g., Pettingell v. Morrison, Mahoney & Miller, 687 N.E.2d 1237 (Mass.1997) (provision of law-firm agreement reducing size of departure compensation enforceable to extent firm can prove that departure threatened firm's financial integrity); Barna, Guzy & Steffen, Ltd. v. Beens, 541 N.W.2d 354 (Minn.Ct.App. 1995) (2–partner agreement providing for 50–50 share of postdeparture fees earned in work in progress at time of departure not anti-competitive or unduly restrictive of client choice); McCroskey, Feldman, Cochrane & Brock, P.C. v. Waters, 494 N.W.2d 826 (Mich.Ct.App.1992), appeal denied, 503 N.W.2d 446 (Mich.1993) (similar); Hackett v. Milbank, Tweed, Hadley & McCloy, 654 N.E.2d 95 (N.Y.1995) (upholding determination of arbitrator that provision under which departed lawyers are paid less in retained earnings for annual post-departure income exceeding $100,000 is competition-neutral and thus enforceable).

The "retirement" exception has been held to apply only to bona fide retirements at the end of a career of practice. See Miller v. Foulston, Siefkin, Powers & Eberhardt, 790 P.2d 404 (Kan.1990) (retirement exception properly applies in view of minimum requirements of age (60) or period of service (30 years)). The exception cannot properly be interpreted to apply to any departure from a firm to compete with it. See Gray v. Martin, 663 P.2d 1285 (Or.Ct.App.1983).

Comment c. Restrictive agreements in settling claims. On the prohibition against law-practice restrictions in settlement or similar agreements, see, e.g., ABA Model Rules of Professional Conduct, Rule 5.6(b) (1983);

Jarvis v. Jarvis, 758 P.2d 244 (Kan. Ct.App.1988) (agreement settling marriage-dissolution litigation containing clause restricting wife's right to employ particular lawyer in any future action against husband to enforce decree void and unenforceable); see also, e.g., ABA Formal Opin. 95–394 (1995) (despite limitation in ABA Model Rule 5.6(b) to prohibiting restrictive agreements in settlements "between private parties," same rationale should extend to settlement of client's claim against governmental agency); cf., e.g., Shebay v. Davis, 717 S.W.2d 678 (Tex.Ct.App.1986) (restrictive clause in settlement agreement, even if invalid, does not affect remainder of agreement). Contra, e.g., Lee v. Florida Dept. Of Ins. & Treasurer, 586 So.2d 1185 (Fla.Dist. Ct.App.1991) (restrictive covenant in private settlement agreement cannot be avoided by disciplinary rule).

CHAPTER 2

THE CLIENT–LAWYER RELATIONSHIP

Introductory Note

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Introductory Note

Section

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23. Authority Reserved to a Lawyer
24. A Client with Diminished Capacity

TOPIC 4. A LAWYER'S AUTHORITY TO ACT FOR A CLIENT

Introductory Note

25. Appearance Before a Tribunal
26. A Lawyer's Actual Authority
27. A Lawyer's Apparent Authority
28. A Lawyer's Knowledge; Notification to a Lawyer; and Statements of a Lawyer
29. A Lawyer's Act or Advice as Mitigating or Avoiding a Client's Responsibility
30. A Lawyer's Liability to a Third Person for Conduct on Behalf of a Client

TOPIC 5. ENDING A CLIENT–LAWYER RELATIONSHIP

Introductory Note

31. Termination of a Lawyer's Authority
32. Discharge by a Client and Withdrawal by a Lawyer
33. A Lawyer's Duties When a Representation Terminates

Introductory Note: This Chapter considers regulation of the client-lawyer relationship. Other features of that relationship are treated in the Chapters on the financial relationship (see Chapter 3), liability of lawyers (see Chapter 4), client confidences (see Chapter 5), and conflicts of interest (see Chapter 8).

The subject of this Chapter is, from one point of view, derived from the law of agency. It concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client. A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity. Because those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law stated in this Chapter provides a number of safeguards for clients beyond those generally provided to principals. The client-lawyer relationship normally comes into existence only if the client consents, and the client may end it at any time. The lawyer is subject to duties of care, loyalty, confidentiality, and communication, duties enforceable by the client and through disciplinary sanctions. The client also retains considerable authority to control the lawyer, although practical considerations often inhibit the use of that authority. The law also limits client authority for the protection of third persons dealing with the lawyer and for the convenience of the judicial system.

A lawyer, although required to work for the client's benefit, has considerable independence in doing so. Except when appointed counsel by a tribunal, a lawyer need not accept representation of a client. A lawyer also may condition acceptance on agreement by the client concerning the ends and the scope of the representation (see § 19). The lawyer must advise the client about decisions to be made by the client and must refuse to carry out decisions when the lawyer reasonably concludes that doing so would be unlawful. The lawyer, in addition, normally may withdraw from the representation rather than pursue a repugnant course of action, as well as for other reasons (see § 32).

The rights and duties of clients and lawyers are set forth here under five Topics. The first deals with the creation of the client-lawyer relationship. The second summarizes its obligations. The third concerns the allocation of authority to make decisions within the relationship, while the fourth describes the authority of the lawyer to bind the client in dealings with outsiders. The fifth and final Topic concerns the termination of the relationship.