

RESTATEMENT OF THE LAW (3D), THE LAW GOVERNING LAWYERS (2000)

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Chapter 1. Regulation Of The Legal Profession

Topic 1. Regulation Of Lawyers'In General

§ 1. Regulation of Lawyers'In General

Topic 2. Process Of Professional Regulation

§ 2. Admission to Practice Law

§ 3. Jurisdictional Scope of the Practice of Law by a Lawyer

§ 4. Unauthorized Practice by a Nonlawyer

§ 5. Professional Discipline

Topic 3. Civil Judicial Remedies In General

§ 6. Judicial Remedies Available to a Client or Nonclient for Lawyer Wrongs

§ 7. Judicial Remedies Available to a Lawyer for Client Wrongs

Topic 4. Lawyer Criminal Offenses

§ 8. Lawyer Criminal Offenses

Topic 5. Law-Firm Structure And Operation

§ 9. Law-Practice Organizations'In General

§ 10. Limitations on Nonlawyer Involvement in a Law Firm

§ 11. A Lawyer's Duty of Supervision

§ 12. Duty of a Lawyer Subject to Supervision

§ 13. Restrictions on the Right to Practice Law

Chapter 2. The Client-lawyer Relationship

Topic 1. Creating A Client-Lawyer Relationship

§ 14. Formation of a Client-Lawyer Relationship

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

Topic 2. Summary Of The Duties Under A Client-Lawyer Relationship

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

§ 17. A Client's Duties to a Lawyer

§ 18. Client-Lawyer Contracts

§ 19. Agreements Limiting Client or Lawyer Duties

Topic 3. Authority To Make Decisions

§ 20. A Lawyer's Duty to Inform and Consult with a Client

§ 21. Allocating the Authority to Decide Between a Client and a Lawyer

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

Topic 4. A Lawyer's Authority To Act For A Client

- § 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

- § 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

Chapter 3. Client And Lawyer: The Financial And Property Relationship

Topic 1. Legal Controls On Attorney Fees

- § 34. Reasonable and Lawful Fees
- § 35. Contingent-Fee Arrangements
- § 36. Forbidden Client-Lawyer Financial Arrangements
- § 37. Partial or Complete Forfeiture of a Lawyer's Compensation

Topic 2. A Lawyer's Claim To Compensation

- § 38. Client-Lawyer Fee Contracts
- § 39. A Lawyer's Fee in the Absence of a Contract
- § 40. Fees on Termination

Topic 3. Fee-Collection Procedures

- § 41. Fee-Collection Methods
- § 42. Remedies and the Burden of Persuasion
- § 43. Lawyer Liens

Topic 4. Property And Documents Of Clients And Others

- § 44. Safeguarding and Segregating Property
- § 45. Surrendering Possession of Property
- § 46. Documents Relating to a Representation

Topic 5. Fee-Splitting With A Lawyer Not In The Same Firm

- § 47. Fee-Splitting Between Lawyers Not in the Same Firm

Chapter 4. Lawyer Civil Liability

Topic 1. Liability For Professional Negligence And Breach Of Fiduciary Duty

- § 48. Professional Negligence·Elements and Defenses Generally
- § 49. Breach of Fiduciary Duty·Generally
- § 50. Duty of Care to a Client
- § 51. Duty of Care to Certain Nonclients
- § 52. The Standard of Care
- § 53. Causation and Damages
- § 54. Defenses; Prospective Liability Waiver; Settlement with a Client

Topic 2. Other Civil Liability

- § 55. Civil Remedies of a Client. Other Than for Malpractice
- § 56. Liability to a Client or Nonclient Under General Law
- § 57. Nonclient Claims·Certain Defenses and Exceptions to Liability

Topic 3. Vicarious Liability

- § 58. Vicarious Liability

Chapter 5. Confidential Client Information

Topic 1. Confidentiality Responsibilities Of Lawyers

- § 59. Definition of “Confidential Client Information”
- § 60. A Lawyer’s Duty to Safeguard Confidential Client Information
- § 61. Using or Disclosing Information to Advance Client Interests
- § 62. Using or Disclosing Information with Client Consent
- § 63. Using or Disclosing Information When Required by Law
- § 64. Using or Disclosing Information in a Lawyer’s Self-Defense
- § 65. Using or Disclosing Information in a Compensation Dispute
- § 66. Using or Disclosing Information to Prevent Death or Serious Bodily Harm
- § 67. Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss

Topic 2. The Attorney-Client Privilege

- § 68. Attorney-Client Privilege
- § 69. Attorney-Client Privilege “Communication”
- § 70. Attorney-Client Privilege “Privileged Persons”
- § 71. Attorney-Client Privilege “In Confidence”
- § 72. Attorney-Client Privilege·Legal Assistance as the Object of a Privileged Communication
- § 73. The Privilege for an Organizational Client
- § 74. The Privilege for a Governmental Client
- § 75. The Privilege of Co-Clients
- § 76. The Privilege in Common-Interest Arrangements
- § 77. Duration of the Privilege
- § 78. Agreement, Disclaimer, or Failure to Object
- § 79. Subsequent Disclosure

- § 80. Putting Assistance or a Communication in Issue
- § 81. A Dispute Concerning a Decedent's Disposition of Property
- § 82. Client Crime or Fraud
- § 83. Lawyer Self-Protection
- § 84. Fiduciary-Lawyer Communications
- § 85. Communications Involving a Fiduciary Within an Organization
- § 86. Invoking the Privilege and Its Exceptions

Topic 3. Lawyer's Work-Product Immunity

- § 87. Lawyer Work-Product Immunity
- § 88. Ordinary Work Product
- § 89. Opinion Work Product
- § 90. Invoking the Lawyer Work-Product Immunity and Its Exceptions
- § 91. Voluntary Acts
- § 92. Use of Lawyer Work Product in Litigation
- § 93. Client Crime or Fraud

Chapter 6. Representing Clients In General

Topic 1. Lawyer Functions In Representing Clients In General

- § 94. Advising and Assisting a Client In General
- § 95. An Evaluation Undertaken for a Third Person

Topic 2. Representing Organizational Clients

- § 96. Representing an Organization as Client
- § 97. Representing a Governmental Client

Topic 3. Lawyer Dealings With A Nonclient

- § 98. Statements to a Nonclient
- § 99. A Represented Nonclient The General Anti-Contact Rule
- § 100. Definition of a Represented Nonclient
- § 101. A Represented Governmental Agency or Officer
- § 102. Information of a Nonclient Known to Be Legally Protected
- § 103. Dealings with an Unrepresented Nonclient

Topic 4. Legislative And Administrative Matters

- § 104. Representing a Client in Legislative and Administrative Matters

Chapter 7. Representing Clients In Litigation

Topic 1. Advocacy In General

- § 105. Complying with Law and Tribunal Rulings
- § 106. Dealing with Other Participants in Proceedings
- § 107. Prohibited Forensic Tactics
- § 108. An Advocate as a Witness

§ 109. An Advocate's Public Comment on Pending Litigation

Topic 2. Limits On Advocacy

§ 110. Frivolous Advocacy

§ 111. Disclosure of Legal Authority

§ 112. Advocacy in Ex Parte and Other Proceedings

Topic 3. Advocates And Tribunals

§ 113. Improperly Influencing a Judicial Officer

§ 114. A Lawyer's Statements Concerning a Judicial Officer

§ 115. Lawyer Contact with a Juror

Topic 4. Advocates And Evidence

§ 116. Interviewing and Preparing a Prospective Witness

§ 117. Compensating a Witness

§ 118. Falsifying or Destroying Evidence

§ 119. Physical Evidence of a Client Crime

§ 120. False Testimony or Evidence

Chapter 8. Conflicts Of Interest

Topic 1. Conflicts Of Interest In General

§ 121. The Basic Prohibition of Conflicts of Interest

§ 122. Client Consent to a Conflict of Interest

§ 123. Imputation of a Conflict of Interest to an Affiliated Lawyer

§ 124. Removing Imputation

Topic 2. Conflicts Of Interest Between A Lawyer And A Client

§ 125. A Lawyer's Personal Interest Affecting the Representation of a Client

§ 126. Business Transactions Between a Lawyer and a Client

§ 127. A Client Gift to a Lawyer

Topic 3. Conflicts Of Interest Among Current Clients

§ 128. Representing Clients with Conflicting Interests in Civil Litigation

§ 129. Conflicts of Interest in Criminal Litigation

§ 130. Multiple Representation in a Nonlitigated Matter

§ 131. Conflicts of Interest in Representing an Organization

Topic 4. Conflicts Of Interest With A Former Client

§ 132. A Representation Adverse to the Interests of a Former Client

§ 133. A Former Government Lawyer or Officer

Topic 5. Conflicts Of Interest Due To A Lawyer's Obligation To A Third Person

§ 134. Compensation or Direction of a Lawyer by a Third Person

§ 135. A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient

Chapter 1. Regulation Of The Legal Profession

Topic 1. Regulation of Lawyers—In General

§ 1. Regulation of Lawyers—In General

Upon admission to the bar of any jurisdiction, a person becomes a lawyer and is subject to applicable law governing such matters as professional discipline, procedure and evidence, civil remedies, and criminal sanctions.

Comment:

b. Lawyer codes and background law. Today, as for the last quarter-century, professional discipline of a lawyer in the United States is conducted pursuant to regulations contained in regulatory codes that have been approved in most states by the highest court in the jurisdiction in which the lawyer has been admitted. Such codes are referred to in this Restatement as lawyer codes. Those codes are more or less patterned on model codes published by the American Bar Association, but only the version of the code officially adopted and in force in a jurisdiction regulates the activities of lawyers subject to it. While in most jurisdictions the lawyer code is adopted and subject to revision only through action of the highest court in the state (see Comment c hereto), in all jurisdictions at least some legislation is applicable to lawyers and law practice. See, e.g., § 56, Comments i and j (federal legislation and state consumer-protection laws applicable to lawyers); § 58(3) and Comment b thereto (statutes authorizing lawyers to practice in the form of limited-liability partnerships and similar types of law firms); § 68 and following (attorney-client privilege). Federal district courts generally have adopted the lawyer code of the jurisdiction in which the court sits, and all federal courts exercise the power to regulate lawyers appearing before them. Some administrative agencies, primarily within the federal government, have also regulated lawyers practicing before the agency, sometimes through lawyer codes adopted by the agency and specifically applicable to those practitioners. Although uniformity is desirable for many purposes, lawyer codes in fact differ markedly in certain respects from one jurisdiction to another, and no state follows any nationally promulgated bar-association model in all respects.

The lawyer codes and much general law remain complementary. The lawyer codes draw much of their moral force and, in many particulars, the detailed description of their rules from preexisting legal requirements and concepts found in the law of torts, contracts, agency, trusts, property, remedies, procedure, evidence, and crimes. Thus, lawyer codes particularize some general legal rules in the particular occupational situation of lawyers but are not exhaustive of those rules. By the same token, lawyer codes often establish the same rules as would apply in a comparable situation involving a nonlawyer professional providing a related service or a rule very like it. The lawyer codes presuppose the general legal background thus referred to and its applicability to lawyers and the rules that make up that background, and they do not preclude application of remedies prescribed by other law. Particular lawyer conduct may violate a lawyer code, tort law, and a criminal statute, or it may have less than all those legal effects. Lawyer codes sometimes differ from other legal provisions with respect to such factors as the following: the specified mental state of the lawyer-actor defined in the standard of conduct; the required presence and kind or degree of harm on the part of the claimant or injured victim of the lawyer's action or nonaction; the possible relevance of reliance by others; and the extent of imputed knowledge, duty, and liability (see Topic 3, Introductory Note).

c. The inherent powers of courts. The highest courts in most states have ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function. Thus, the grant of judicial power in a state constitution devolves upon the courts the concomitant regulatory power. The power is said to derive both from the historical role of courts in the United States in regulating lawyers through admission and disbarment and from the traditional practice of courts in England. Admitting lawyers to practice (see § 2), formulating and amending lawyer codes (see Comment b), and regulating the system of lawyer discipline (see § 5, Comment b) are functions reserved in most states to the highest court of the state.

Beyond affirmative empowerment, some state courts have further held that their constitutional power to regulate lawyers is exclusive of other branches of state government with respect to some matters. On that basis, those courts have held that an attempt by another branch of state government to regulate lawyers is an interference with that judicial power and a violation of the state's constitutionally mandated separation of powers. Some decisions have given effect to an otherwise-invalid statute or regulation on a notion of comity, when the court is persuaded of the wisdom of the enactment and convinced that it does not pose a threat to the court's overall regulation of lawyers.

d. The role of bar associations. Beginning in the early decades of the 20th century, bar associations have played an

increasingly active role in regulating the conduct of lawyers. Together with lawyers who work on disciplinary and similar committees within state- and federal-court systems, bar associations have become the chief embodiment of the concept that lawyers are a self-regulated profession. Self-regulation provides protection of lawyers against political control by the state. However, self-regulation also carries its own risk of under-regulation of lawyers as a whole, regulation (however strict) that is in the interest of lawyers as a group and not the public, or regulation that focuses disproportionately on groups of lawyers disfavored within the controlling bar association or committee.

In a number of states, membership in the state's bar association is compulsory, in the sense that a lawyer otherwise appropriately admitted to practice must maintain active membership in the bar association as a condition of retention of a valid license to practice law within the jurisdiction. (Such mandatory bars are sometimes called "integrated" bars.) Decisions of the United States Supreme Court have limited the extent to which a member of such a mandatory bar association can be required to pay any portion of dues that supports activities not germane to the organization's functions in providing self-regulation. Those generally include activities of a political or ideological nature not directly connected to the regulation of lawyers and maintenance of the system of justice. Under those decisions, the bar must maintain a system for allocating dues payments for permissible and noncovered purposes and a process to permit lawyers to regain the portion of dues collected for noncovered purposes.

Topic 2. Process of Professional Regulation

§ 2. Admission to Practice Law

In order to become a lawyer and qualify to practice law in a jurisdiction of admission, a prospective lawyer must comply with requirements of the jurisdiction relating to such matters as education, other demonstration of competence such as success in a bar examination, and character.

§ 3. Jurisdictional Scope of the Practice of Law by a Lawyer

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

- (1) at any place within the admitting jurisdiction;
- (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
- (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Comment:

e. Extra-jurisdictional law practice by a lawyer. Admission in a state permits a lawyer to maintain an office and otherwise practice law anywhere within its borders. No state today continues the restrictions of former centuries that limited practice to a particular judicial district or county in which a lawyer was admitted.

The rules governing interstate practice by nonlocal lawyers were formed at a time when lawyers conducted very little practice of that nature. Thus, the limitation on legal services threatened by such rules imposed little actual inconvenience. However, as interstate and international commerce, transportation, and communications have expanded, clients have increasingly required a truly interstate and international range of practice by their lawyers. (To a limited extent, many states recognize such needs in the international realm by providing for limited practice in the state by foreign legal consultants. See § 2, Comment g.) Applied literally, the old restrictions on practice of law in a state by a lawyer admitted elsewhere could seriously inconvenience clients who have need of such services within the state. Retaining locally admitted counsel would often cause serious delay and expense and could require the client to deal with unfamiliar counsel. Modern communications, including ready electronic connection to much of the law of every state, makes concern about a competent analysis of a distant state's law unfounded. Accordingly, there is much to be said for a rule permitting a lawyer to practice in any state, except for litigation matters or for the purpose of establishing a permanent in-state branch office. Results approaching that rule may arguably be required under the federal interstate commerce clause and the privileges and immunities clause. The approach of the Section is more

guarded. However, its primary focus is appropriately on the needs of clients.

The extent to which a lawyer may practice beyond the borders of the lawyer's home state depends on the circumstances in which the lawyer acts in both the lawyer's home state and the other state. At one extreme, it is clear that a lawyer's admission to practice in one jurisdiction does not authorize the lawyer to practice generally in another jurisdiction as if the lawyer were also fully admitted there. Thus, a lawyer admitted in State A may not open an office in State B for the general practice of law there or otherwise engage in the continuous, regular, or repeated representation of clients within the other state.

Certainty is provided in litigated matters by procedures for securing the right to practice elsewhere, although the arrangement is limited to appearances as counsel in individual litigated matters. Apparently all states provide such a procedure for temporary admission of an unadmitted lawyer, usually termed admission *pro hac vice*. (Compare admission on-motion to the right to practice generally within a jurisdiction as described in § 2, Comment b.) Although the decision is sometimes described as discretionary, a court will grant admission *pro hac vice* if the lawyer applying for admission is in good standing in the bar of another jurisdiction and has complied with applicable requirements (sometimes requiring the association of local counsel), and if no reason is shown why the lawyer cannot be relied upon to provide competent representation to the lawyer's client in conformance with the local lawyer code. Such temporary admission is recognized in Subsection (2). Courts are particularly apt to grant such applications in criminal-defense representations. Some jurisdictions impose limitations, such as a maximum number of such admissions in a specified period. Admission *pro hac vice* normally permits the lawyer to engage within the jurisdiction in all customary and appropriate activities in conducting the litigation, including appropriate office practice. Activities in contemplation of such admission are also authorized, such as investigating facts or consulting with the client within the jurisdiction prior to drafting a complaint and filing the action.

A lawyer who is properly admitted to practice in a state with respect to litigation pending there, either generally or *pro hac vice*, may need to conduct proceedings and activities ancillary to the litigation in other states, such as counseling clients, dealing with co-counsel or opposing counsel, conducting depositions, examining documents, interviewing witnesses, negotiating settlements, and the like. Such activities incidental to permissible practice are appropriate and permissible.

Transactional and similar out-of-court representation of clients may raise similar issues, yet there is no equivalent of temporary admission *pro hac vice* for such representation, as there is in litigation. Even activities that bear close resemblance to in-court litigation, such as representation of clients in arbitration or in administrative hearings, may not include measures for *pro hac vice* appearance. Some activities are clearly permissible. Thus, a lawyer conducting activities in the lawyer's home state may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no *per se* bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law. It is also clearly permissible for a lawyer from a home-state office to direct communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telecopier, or other forms of electronic communication. On the other hand, as with litigation, it would be impermissible for a lawyer to set up an office for the general practice of nonlitigation law in a jurisdiction in which the lawyer is not admitted as described in § 2.

When other activities of a lawyer in a non-home state are challenged as impermissible for lack of admission to the state's bar, the context in which and purposes for which the lawyer acts should be carefully assessed. Beyond home-state activities, proper representation of clients often requires a lawyer to conduct activities while physically present in one or more other states. Such practice is customary in many areas of legal representation. As stated in Subsection (3), such activities should be recognized as permissible so long as they arise out of or otherwise reasonably relate to the lawyer's practice in a state of admission. In determining that issue, several factors are relevant, including the following: whether the lawyer's client is a regular client of the lawyer or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature. Because lawyers in a firm often practice collectively, the activities of all lawyers in the representation of a client are relevant. The customary practices of lawyers who engage in interstate law practice is one appropriate measure of the reasonableness of a lawyer's activities out of state. Association with local counsel may permit a lawyer to conduct in-state activities not otherwise permissible, but such association is not required in most instances of in-state practice. Among other things, the additional expense for the lawyer's client of retaining additional counsel and educating that lawyer about the client's affairs would make such required retention unduly burdensome.

Particularly in the situation of a lawyer representing a multistate or multinational organization, the question of geographical connection may be difficult to assess or establish. Thus, a multinational corporation wishing to select a location in the United States to build a new facility may engage a lawyer to accompany officers of the corporation to survey possible sites in several states, perhaps holding discussions with local governmental officers about such topics as zoning, taxation, environmental requirements, and the like. Such occasional, temporary in-state services, when reasonable and appropriate in performing the lawyer's functions for the client, are a proper aspect of practice and do not constitute impermissible practice in the other state.

Illustrations:

1. Lawyer has an office and is duly licensed to practice law in State A. Lawyer's office is in a community near State B, where Lawyer is not admitted to practice. In the past, several of Lawyer's clients have been residents of State B, and their legal issues sometimes involve research into issues of State B law. In order to provide better service to those clients and to attract business of other clients there, Lawyer rents space, hires nonlawyer assistants, and otherwise prepares premises for the general practice of law at a branch-office location in State B. While representation of residents of State B in Lawyer's office in State A is permissible, Lawyer may not open an office for the general practice of law in State B without obtaining general admission to practice there (see § 2).

2. Same facts as in Illustration 1, except that Lawyer represents a regulated Utility, which operates a power plant in State A near the border with State B. Lawyer's work for Utility principally relates to environmental issues, such as providing advice, obtaining permits, and otherwise complying with federal law and the law of State A. Utility also has occasional issues relating to compliance with the environmental laws of State B because of those same activities. It is permissible for Lawyer to travel to State B to deal with governmental officials with respect to environmental issues arising out of Utility's activities.

3. Same facts as in Illustration 2, except that Lawyer's original work for Utility in State A related to rate-setting proceedings before a utility commission in that state and before the Federal Energy Regulatory Commission. Under recent legislation, Utility may now be able to make retail sales of electricity to consumers in many states. Because of Lawyer's extensive knowledge of Utility's rate-related financial information, Utility has asked Lawyer to take charge of new rate applications in 15 other states, all being states in which Lawyer is not admitted to practice. Lawyer's work in those matters would involve extensive presence and activities in each of the other states until the necessary rates have been established. Although local counsel would often be retained in such matters, Lawyer and other lawyers in Lawyer's firm may permissibly conduct those activities in the other states on behalf of Utility.

4. Lawyer, who practices with a law firm in California, is a nationally known expert in corporate mergers and acquisitions. Utility is a major electricity generator and distributor in the southeastern United States. Under the new legislation referred to in Illustration 3, Utility is considering a hostile takeover of Old Company, an established regional electricity generator and distributor in the northeastern United States. Legal work on the acquisition would require the physical presence of Utility's mergers-and-acquisitions counsel in a number of states in addition to the West Coast state in which Lawyer is admitted, in addition to representation before at least one federal agency in Washington, D.C. Given the multistate and federal nature of the legal work, Lawyer and other members of Lawyer's firm may represent Utility as requested.

5. Lawyer is admitted to practice and has an office in Illinois, where Lawyer practices in the area of trusts and estates, an area involving, among other things, both the law of wills, property, taxation, and trusts of a particular state and federal income, estate, and gift tax law. Client A, whom Lawyer has represented in estate-planning matters, has recently moved to Florida and calls Lawyer from there with a request that leads to Lawyer's preparation of a codicil to A's will, which Lawyer takes to Florida to obtain the necessary signatures. While there, A introduces Lawyer to B, a friend of A, who, after learning of A's estate-planning arrangements from A, wishes Lawyer to prepare a similar estate arrangement for B. Lawyer prepares the necessary documents and conducts legal research in Lawyer's office in Illinois, frequently conferring by telephone and letter with B in Florida. Lawyer then takes the documents to Florida for execution by B and necessary witnesses. Lawyer's activities in Florida on behalf of both A and B were permissible.

§ 4. Unauthorized Practice by a Nonlawyer

A person not admitted to practice as a lawyer (see § 2) may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so.

Comment:

- a. Scope and cross-references.

A nonlawyer who impermissibly engages in the practice of law may be subject to several sanctions, including injunction, contempt, and conviction for crime.

b. Unauthorized practice by a nonlawyer—in general. Courts, typically as the result of lawsuits brought by bar associations, began in the early part of the 20th century to adapt common-law rules to permit bar associations and lawyer-competitors to seek injunctions against some forms of unauthorized practice by nonlawyers. The courts also played a large role in attempting to define and delineate such practice. The primary justification given for unauthorized practice limitations was that of consumer protection—to protect consumers of unauthorized practitioner services against the significant risk of harm believed to be threatened by the nonlawyer practitioner’s incompetence or lack of ethical constraints. Delineating the respective areas of permissible and impermissible activities has often been controversial. Some consumer groups and governmental agencies have criticized some restrictions as over-protective, anti-competitive, and costly to consumers.

In the latter part of the 20th century, unauthorized practice restrictions have lessened, to a greater or lesser extent, in most jurisdictions. In some few jurisdictions traditional restraints are apparently still enforced through active programs. In other jurisdictions, enforcement has effectively ceased, and large numbers of lay practitioners perform many traditional legal services. Debate continues about the broad public-policy elements of unauthorized-practice restrictions, including the delineation of lawyer-only practice areas. On areas of nonlawyer practice officially permitted, see Comment c hereof.

c. Delineation of unauthorized practice. The definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.

Certain activities, such as the representation of another person in litigation, are generally proscribed. Even in that area, many jurisdictions recognize exceptions for such matters as small-claims and landlord-tenant tribunals and certain proceedings in administrative agencies. Moreover, many jurisdictions have authorized law students and others not admitted in the state to represent indigent persons or others as part of clinical legal-education programs.

Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, nonlawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution. The position of bar associations has traditionally been that nonlawyer provision of such services denies the person served the benefit of such legal measures as the attorney-client privilege, the benefits of such extraordinary duties as that of confidentiality of client information and the protection against conflicts of interest, and the protection of such measures as those regulating lawyer trust accounts and requiring lawyers to supervise nonlawyer personnel. Several jurisdictions recognize that many such services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.

d. Pro se appearance. Every jurisdiction recognizes the right of an individual to proceed “pro se” by providing his or her own representation in any matter, whether or not the person is a lawyer. Because the appearance is personal only, it does not involve an issue of unauthorized practice. The right extends to self-preparation of legal documents and other kinds of out-of-court legal work as well as to in-court representation. In some jurisdictions, tribunals have inaugurated programs to assist persons without counsel in filing necessary papers, with appropriate cautions that court personnel assisting the person do not thereby undertake to provide legal assistance. The United States Supreme Court has held that a person accused of crime in a federal or state prosecution has, as an aspect of the right to the assistance of counsel, the constitutional right to waive counsel and to proceed pro se. In general, however, a person appearing pro se cannot represent any other person or entity, no matter how close the degree of kinship, ownership, or other relationship.

e. Unauthorized practice for and by entities. A limitation on pro se representation (see Comment d) found in many jurisdictions is that a corporation cannot represent itself in litigation and must accordingly always be represented by counsel. The rule applies, apparently, only to appearances in litigated matters. Thus a nonlawyer officer of a corporation may permissibly draft legal documents, negotiate complex transactions, and perform other tasks for the employing organization, even if the task is typically performed by lawyers for organizations. With respect to litigation, several jurisdictions except representation in certain tribunals, such as landlord-tenant and small-claims courts and in certain administrative proceedings (see Comment c hereto), where incorporation (typically of a small owner-operated business)

has little bearing on the prerogative of the person to provide self-representation. Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters. Included within the powers of a lawyer retained by an organization (see § 3, Comment f) should be the capacity to perform legal services for all entities within the same organizational family. It has proved controversial whether a lawyer employed full time by an insurance company (see § 134) may represent policyholders of the company in covered matters.

§ 5. Professional Discipline

(1) A lawyer is subject to professional discipline for violating any provision of an applicable lawyer code.

(2) A lawyer is also subject to professional discipline under Subsection (1) for attempting to commit a violation, knowingly assisting or inducing another to do so, or knowingly doing so through the acts of another.

(3) A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Topic 3. Civil Judicial Remedies in General

§ 6. Judicial Remedies Available to a Client or Nonclient for Lawyer Wrongs

For a lawyer's breach of a duty owed to the lawyer's client or to a nonclient, judicial remedies may be available through judgment or order entered in accordance with the standards applicable to the remedy awarded, including standards concerning limitation of remedies. Judicial remedies include the following:

- (1) awarding a sum of money as damages;
- (2) providing injunctive relief, including requiring specific performance of a contract or enjoining its nonperformance;
- (3) requiring restoration of a specific thing or awarding a sum of money to prevent unjust enrichment;
- (4) ordering cancellation or reformation of a contract, deed, or similar instrument;
- (5) declaring the rights of the parties, such as determining that an obligation claimed by the lawyer to be owed to the lawyer is not enforceable;
- (6) punishing the lawyer for contempt;
- (7) enforcing an arbitration award;
- (8) disqualifying a lawyer from a representation;
- (9) forfeiting a lawyer's fee (see § 37);
- (10) denying the admission of evidence wrongfully obtained;
- (11) dismissing the claim or defense of a litigant represented by the lawyer;
- (12) granting a new trial; and
- (13) entering a procedural or other sanction.

Comment:

d. Preventing unjust enrichment. A court in a civil action may order a lawyer to return specific property, such as client property wrongfully retained by a lawyer (see § 45). See also § 60(2) (accounting for profits from improper use of confidential information). Disciplinary authorities are also sometimes empowered to order restitution as a disciplinary sanction (see § 5, Comment j). On forfeiture of a lawyer's fees, see § 37.

e. Rescission or reformation of a transaction. Cancellation of an instrument with otherwise legal effect would be appropriate when, for example, a lawyer obtains a deed to a client's property through undue influence in violation of limitations on business dealings with a client (see § 126) or on client gifts to lawyers (see § 127) or when the instrument was prepared by a lawyer representing clients with substantial conflicts of interests (see § 130). The remedy implements substantive standards applicable to lawyers as an expression of the strong public policy of the jurisdiction.

f. Declaratory relief. Under standards otherwise governing the availability of declaratory relief, it may be appropriate for a court to enter an order declaring the respective rights of lawyer and client with respect to a disputed issue or the responsibilities of a lawyer with respect to a nonclient.

g. Contempt. An order providing a sanction for civil or criminal contempt may be appropriate for a lawyer's violation of a court injunction or similar order. See Comment c; see also § 105. In addition, a lawyer functioning as advocate in a proceeding may be subject to remedies through contempt orders without issuance of a prior judicial order where necessary and appropriate to maintain order in the courtroom or otherwise to prevent significant impairment of the proceedings (see § 105, Comment e). Included in such relief may be an appropriate sanction directed toward repairing or punishing harm that the lawyer's contemptuous conduct caused to the lawyer's own client.

h. Enforcing an arbitration award. As indicated in § 42, Comment b, a lawyer and client may agree to submit a dispute to binding arbitration, and a jurisdiction may require a lawyer to submit to fee arbitration when a client so elects. See also § 54, Comment b (malpractice arbitration). As with arbitration awards generally, a court may in an appropriate case enter an order enforcing such an award or denying it enforcement on appropriate grounds. On arbitration awards in a lawyer's favor and against a client or former client, see § 7, Comment c.

i. Disqualification from a representation. Disqualification of a lawyer and those affiliated with the lawyer from further participation in a pending matter has become the most common remedy for conflicts of interest in litigation (see Chapter 8). Disqualification draws on the inherent power of courts to regulate the conduct of lawyers (see § 1, Comment c) as well as the related inherent power of judges to regulate the course of proceedings before them and to issue injunctive and similar directive orders (see Comment c hereto). Disqualification, where appropriate, ensures that the case is well presented in court, that confidential information of present or former clients is not misused, and that a client's substantial interest in a lawyer's loyalty is protected. In most instances, determining whether a lawyer should be disqualified involves a balancing of several interests and is appropriate only when less-intrusive remedies are not reasonably available.

Concern that motions to disqualify might be used to delay proceedings and harass opposing parties also requires that the motion to disqualify be timely. If a present or former client with knowledge of the

conflict fails to take reasonably prompt steps to object or to seek a remedy, disqualification may be precluded. Whether an objection is timely depends on such circumstances as the length of delay from the time when the conflict was reasonably apparent, whether the movant was represented by counsel at relevant times, why the delay occurred, and whether acting now would result in prejudice to the responding party.

A file of the work done on a matter before disqualification by a disqualified lawyer may be provided to a successor lawyer in circumstances in which doing so does not threaten confidential information (see generally § 59) of the successful moving client. The party seeking to justify such a transfer may be required to show both that no impermissible confidential client information is contained in the material transferred, and that the former and new lawyers exchange none in the process of transferring responsibilities for the matter.

When a lawyer undertakes a representation that is later determined to involve a conflict of interest that could not reasonably have been and in fact was not identified at an earlier point (see § 121, Comment g), the lawyer is not liable for damages or subject to professional discipline. In such a situation, disqualification may or may not be appropriate (see § 49, Illustration 2).

j. Denying the admissibility of evidence. If the admission of evidence on behalf of a party would violate the obligation owed by a lawyer to a client or former client (see generally § 60) or was obtained by a lawyer in violation of the lawyer's obligation not to mislead a nonclient (see § 98), the tribunal may exercise discretion to exclude the evidence, even if the evidence is not otherwise subject to exclusion because of the attorney-client privilege (see § 68 and following) or the work-product immunity (see § 87 and following). Exclusion is proper where it would place the parties in the position they would have occupied if the lawyer had not obtained the confidential information in the first place.

k. Dismissing a claim or defense. When a litigant bases an essential element of a claim or defense entirely on

confidential client information improperly disclosed by a lawyer (see generally § 60), the tribunal may exercise discretion to dismiss the claim or defense. Such extreme relief is appropriate when no less drastic relief would adequately remedy the disclosure. If, on the other hand, the tribunal finds that the claim or defense would have been made notwithstanding the disclosure, a more appropriate remedy may be disqualification of the revealing lawyer if the lawyer presently represents the responding party and suppression of only such evidence (see Comment j) as would not be properly discoverable.

l. New trial. Where the determination in a case was affected prejudicially and substantially by a conflict of interest, by a lawyer misuse of confidential information of an objecting client, by a breach of rules governing admissibility of evidence or conduct of the proceeding, or by similarly wrongful conduct of a lawyer, the determination may be reversed and the matter retried. Tribunals are properly reluctant to grant such a remedy. On the other hand, it may be the only effective remedy in a particular case, for example in a criminal case in which a lawyer representing the defendant labored under an impermissible conflict of interest (see § 129). When the complaining party is the client of the offending lawyer in a civil case, tribunals generally relegate the client to such remedies as the client may have directly against the lawyer, concluding that reversal of a determination in favor of an otherwise uninvolved opposing party would be inappropriate (see § 26, Comment d).

m. Procedural or other sanctions. Most tribunals possess the power to provide sanctions against participants in litigation, including lawyers, who engage in seriously harassing or other sanctionable activities. See generally § 1; see also § 110. Such sanctions include an award of attorney fees to a party injured by the lawyer's conduct, a fine, or a reprimand. In appropriate circumstances, the court may determine that the client was blameless and the lawyer fully blameworthy and accordingly direct that the full weight of a sanction entered against a party be borne only by the lawyer and not by the lawyer's client (see § 110, Comment g). Rarely will such relief entail an award from the offending lawyer to that lawyer's own client. However, such an order may be appropriate, for example, when, due to the lawyer's offensive activities, the lawyer's client has retained another lawyer and the court retains jurisdiction to award such a sanction against the predecessor lawyer.

§ 7. Judicial Remedies Available to a Lawyer for Client Wrongs

A lawyer may obtain a remedy based on a present or former client's breach of a duty to the lawyer if the remedy:

- (1) is appropriate under applicable law governing the remedy; and
- (2) does not put the lawyer in a position prohibited by an applicable lawyer code.

Topic 4. Lawyer Criminal Offenses

§ 8. Lawyer Criminal Offenses

The traditional and appropriate activities of a lawyer in representing a client in accordance with the requirements of the applicable lawyer code are relevant factors for the tribunal in assessing the propriety of the lawyer's conduct under the criminal law. In other respects, a lawyer is guilty of an offense for an act committed in the course of representing a client to the same extent and on the same basis as would a nonlawyer acting similarly.

Topic 5. Law-Firm Structure and Operation

§ 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.

§ 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 by 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.

§ 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.

§ 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.

§ 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.

Chapter 2. The Client-Lawyer Relationship

Introductory Note

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.

Topic I. Creating a Client-Lawyer Relationship

§ 14. Formation of a Client-Lawyer Relationship

A relationship of client and lawyer arises when:

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

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

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

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

Comment:

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

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

Illustrations:

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

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

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

Illustrations:

3. Claimant writes to Lawyer, describing a medical-malpractice suit that Claimant wishes to bring and asking Lawyer to represent Claimant. Lawyer does not answer the letter. A year later, the statute of limitations applicable to

the suit expires. Claimant then sues Lawyer for legal malpractice for not having filed the suit on time. Under this Section no client-lawyer relationship was created (see § 50, Comment c). Lawyer did not communicate willingness to represent Claimant, and Claimant could not reasonably have relied on Lawyer to do so. On a lawyer's duty to a prospective client, see § 15.

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

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

Under Subsection (1)(b), a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity (see Subsection (1)(b); see also § 103, Comment b (extent of a lawyer's duty to warn an unrepresented person that the lawyer represents a client with conflicting interests)). Such clarification may be required, for example, with respect to an officer of an entity client such as a corporation, with respect to one or more partners in a client partnership or in the case of affiliated organizations such as a parent, subsidiary, or similar organization related to a client person or client entity. An implication that such a relationship exists is more likely to be found when the lawyer performs personal legal services for an individual as well or where the organization is small and characterized by extensive common ownership and management. But the lawyer does not enter into a client-lawyer relationship with a person associated with an organizational client solely because the person communicates with the lawyer on matters relevant to the organization that are also relevant to the personal situation of the person. In all events, the question is one of fact based on the reasonable and apparent expectations of the person or entity whose status as client is in question.

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

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

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

A class-action lawyer may therefore be privileged or obliged to oppose the views of the class representatives after having consulted with them. The lawyer may also propose that opposing positions within the class be separately

represented, that sub-classes be created, or that other measures be taken to ensure broader class participation. Withdrawal may be an option (see § 32), but one that is often undesirable because it may leave the class without effective representation. The lawyer should act for the benefit of the class as its members would reasonably define that benefit.

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

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

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

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

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

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

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

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

Topic 2. Summary of the Duties Under a Client-Lawyer Relationship

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

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

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

(2) act with reasonable competence and diligence;

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

(4) fulfill valid contractual obligations to the client.

§ 17. A Client's Duties to a Lawyer

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

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

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

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

§ 18. Client-Lawyer Contracts

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

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

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

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

§ 19. Agreements Limiting Client or Lawyer Duties

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

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

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

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

Comment:

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

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

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

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

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

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

Fifth, the terms of the limitation must in all events be reasonable in the circumstances (§ 19(1)(b)). When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For

other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver—typically, a reduced legal fee or the ability to retain a particularly able lawyer—could reasonably be considered to outweigh the potential risk posed by the limitation. It is also relevant whether there were special circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.

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

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

Illustrations:

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

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

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

Topic 3. Authority to Make Decisions

Introductory Note

Traditionally, some lawyers considered that a client put affairs in the lawyer's hands, who then managed them as the lawyer thought would best advance the client's interests. So conducting the relationship can subordinate the client to the lawyer. The lawyer might not fully understand the client's best interests or might consciously or unconsciously pursue the lawyer's own interests. An opposite view of the client-lawyer relationship treats the lawyer as a servant of the client, who must do whatever the client wants limited only by the requirements of law. That view ignores the interest of the lawyer and of society that a lawyer practice responsibly and independently.

A middle view is that the client defines the goals of the representation and the lawyer implements them, but that each consults with the other. Except for certain matters reserved for client or lawyer to decide, the scope of the lawyer's authority is itself one of the subjects for consultation, with room for the client's wishes and the parties' contracts to modify the traditionally broad delegation of authority to the lawyer. This approach, accepted in this Restatement, permits a variety of allocations of authority.

§ 20. A Lawyer's Duty to Inform and Consult with a Client

(1) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer under §§ 21-23.

(2) A lawyer must promptly comply with a client's reasonable requests for information.

(3) A lawyer must notify a client of decisions to be made by the client under §§ 21-23 and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

§ 21. Allocating the Authority to Decide Between a Client and a Lawyer

As between client and lawyer:

(1) A client and lawyer may agree which of them will make specified decisions, subject to the requirements stated in §§ 18, 19, 22, 23, and other provisions of this Restatement. The agreement may be superseded by another valid agreement.

(2) A client may instruct a lawyer during the representation, subject to the requirements stated in §§ 22, 23, and other provisions of this Restatement.

(3) Subject to Subsections (1) and (2) a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client, consulting with the client as required by § 20.

(4) A client may ratify an act of a lawyer that was not previously authorized.

Comment:

e. A lawyer's authority in the absence of an agreement or instruction. A lawyer has authority to take any lawful measure within the scope of representation (see § 19) that is reasonably calculated to advance a client's objectives as defined by the client (see § 16), unless there is a contrary agreement or instruction and unless a decision is reserved to the client (see § 22). A lawyer, for example, may decide whether to move to dismiss a complaint and what discovery to pursue or resist. Absent a contrary agreement, instruction, or legal obligation (see § 23(2)), a lawyer thus remains free to exercise restraint, to accommodate reasonable requests of opposing counsel, and generally to conduct the representation in the same manner that the lawyer would recommend to other professional colleagues.

Signing a client's name to endorse a settlement check, however, is normally unauthorized and indeed may be a crime. A lawyer's presumptive authority does not extend to retaining another lawyer outside the first lawyer's firm to represent the client (see Restatement Second, Agency § 18), although a lawyer may consult confidentially about a client's case with another lawyer.

Because a lawyer is required to consult with a client and report on the progress of the representation (see § 20(1)), a client ordinarily should be kept sufficiently aware of what is occurring to intervene in the representation with instructions as to important decisions.

A lawyer often must make a decision without sufficient time to consult with the client. During a hearing, for example, decision must be made whether to object to another party's question, probe further answers of a witness, or seek a curative instruction. Such matters often involve technical legal and strategic considerations difficult for a client to assess. Sometimes a lawyer cannot reach a client within the time during which a decision must be made. In the absence of a contrary agreement or instruction, lawyers have authority to make such decisions. Generally, in making such decisions, the lawyer properly takes into account moral considerations and appropriate courtroom and professional decorum.

f. Ratification by a client. A client may ratify a lawyer's unauthorized act by explicit consent, by knowingly accepting its benefits, or by other conduct manifesting knowing approval after the act. Ratification does not bar disciplinary proceedings against a lawyer, although the fact that the client ratified the unauthorized decision may be relevant in appraising the lawyer's conduct. As between lawyer and client, ratification does not absolve the lawyer if the client was obliged to affirm the lawyer's act in order to protect the client's interests or was induced to ratify by the lawyer's misrepresentation or other misconduct. The law governing ratification of acts by lawyers is the same as that

applicable to other agents (see Restatement Second, Agency, Chapter 4).

Illustration:

2. Acting against Client's instructions, Lawyer negotiates a plea bargain with Prosecutor under which Client will plead guilty to pending criminal charges and receive a 10-year sentence. Client, learning of the bargain, discharges Lawyer and communicates with Prosecutor who states that, although Prosecutor would have agreed to a more lenient bargain, Prosecutor, believing that Lawyer deceived Prosecutor by claiming to have Client's authorization, declines to renegotiate the plea bargain. Client's only choice is therefore to affirm the bargain or to go to trial, in which event it is probable that, should Client be convicted, the court will impose a substantially longer sentence. Client elects to accept the bargain and pleads guilty, receiving the 10-year sentence. Client's election does not prevent professional discipline or bar whatever malpractice claim Client may have against Lawyer for the unauthorized plea bargain.

§ 22. Authority Reserved to a Client

(1) As between client and lawyer, subject to Subsection (2) and § 23, the following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution.

(2) A client may not validly authorize a lawyer to make the decisions described in Subsection (1) when other law (such as criminal-procedure rules governing pleas, jury-trial waiver, and defendant testimony) requires the client's personal participation or approval.

(3) Regardless of any contrary contract with a lawyer, a client may revoke a lawyer's authority to make the decisions described in Subsection (1).

§ 23. Authority Reserved to a Lawyer

As between client and lawyer, a lawyer retains authority that may not be overridden by a contract with or an instruction from the client:

(1) to refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer reasonably believes to be unlawful;

(2) to make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal.

§ 24. A Client with Diminished Capacity

(1) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, physical illness, mental disability, or other cause, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as stated in Subsection (2).

(2) A lawyer representing a client with diminished capacity as described in Subsection (1) and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.

(3) If a client with diminished capacity as described in Subsection (1) has a guardian or other person legally entitled to act for the client, the client's lawyer must treat that person as entitled to act with respect to the client's interests in the matter, unless:

(a) the lawyer represents the client in a matter against the interests of that person; or

(b) that person instructs the lawyer to act in a manner that the lawyer knows will violate the person's legal duties toward the client.

(4) A lawyer representing a client with diminished capacity as described in Subsection (1) may seek the appointment of a guardian or take other protective action within the scope of the representation when doing so is practical and will advance the client's objectives or interests, determined as stated in Subsection (2).

Comment:

c. Maintaining a normal client-lawyer relationship so far as possible. Disabilities in making decisions vary from mild to totally incapacitating; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times; and they may be caused by childhood, old age, physical illness, retardation, chemical dependency, mental illness, or other factors. Clients should not be unnecessarily deprived of their right to control their own affairs on account of such disabilities. Lawyers, moreover, should be careful not to construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views.

When a client with diminished capacity is capable of understanding and communicating, the lawyer should maintain the flow of information and consultation as much as circumstances allow (see § 20). The lawyer should take reasonable steps to elicit the client's own views on decisions necessary to the representation. Sometimes the use of a relative, therapist, or other intermediary may facilitate communication (see §§ 70 & 71). Even when the lawyer is empowered to make decisions for the client (see Comment d), the lawyer should, if practical, communicate the proposed decision to the client so that the client will have a chance to comment, remonstrate, or seek help elsewhere. A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully (see § 20, Comment b, & § 46, Comment c).

A lawyer for a client with diminished capacity may be retained by a parent, spouse, or other relative of the client. Even when that person is not also a co-client, the lawyer may provide confidential client information to the person to the extent appropriate in providing representation to the client (see § 61). If the disclosure is to be made to a nonclient and there is a significant risk that the information may be used adversely to the client, the lawyer should consult with the client concerning such disclosure.

A client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so. The lawyer should adhere, to the extent reasonably possible, to the lawyer's usual function as advocate and agent of the client, not judge or guardian, unless the lawyer's role in the situation is modified by other law. The lawyer should, for example, help the client oppose confinement as a juvenile delinquent even though the lawyer believes that confinement would be in the long-term interests of the client and has unsuccessfully urged the client to accept confinement. Advancing the latter position should be left to opposing counsel.

If a client with diminished capacity owes fiduciary duties to others, the lawyer should be careful to avoid assisting in a violation of those duties (cf. § 51(4)).

d. Deciding for a client with diminished capacity. When a client's disability prevents maintaining a normal client-lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused or misguided. Because a disability might vary from time to time, the lawyer must reasonably believe that the client is unable to make an adequately considered decision without prejudicial delay.

A lawyer's reasonable belief depends on the circumstances known to the lawyer and discoverable by reasonable investigation. Where practicable and reasonably available, independent professional evaluation of the client's capacity may be sought. If a conflict of interest between client and lawyer is involved (see § 125), disinterested evaluation by another lawyer may be appropriate. Careful consideration is required of the client's circumstances, problems, needs,

character, and values, including interests of the client beyond the matter in which the lawyer represents the client. If the client, when able to decide, had expressed views relevant to the decision, the lawyer should follow them unless there is reason to believe that changed circumstances would change those views. The lawyer should also give appropriate weight to the client's presently expressed views.

A lawyer may bring the client's diminished capacity before a tribunal when doing so is reasonably calculated to advance the client's objectives or interests as the client would define them if able to do so rationally. A proceeding seeking appointment of a guardian for the client is one example (see Comment e). A lawyer may also raise the issue of the client's incompetence to stand trial in a criminal prosecution or, when a client is incompetent to stand trial, interpose the insanity defense. In such situations, the court and the adversary process provide some check on the lawyer's decision.

In some jurisdictions, if a criminal defendant's competence to stand trial is reasonably arguable, the defendant's lawyer must bring the issue to the court's attention, whether or not the lawyer reasonably believes this to be for the client's benefit. That should not be considered a duty to the client flowing from the representation and is not provided for by this Section.

A lawyer must also make necessary decisions for an incompetent client when it is impractical or undesirable to have a guardian appointed or to take other similar protective measures. For example, when a court appoints a lawyer to represent a young child, it may consider the lawyer to be in effect the child's guardian ad litem. When a client already has a guardian but retains counsel to proceed against that guardian, a court often will not appoint a second guardian to make litigation decisions for the client. Other situations exist in which appointment of a guardian would be too expensive, traumatic, or otherwise undesirable or impractical in the circumstances.

It is often difficult to decide whether the conditions of this Section have been met. A lawyer who acts reasonably and in good faith in perplexing circumstances is not subject to professional discipline or malpractice or similar liability (see Chapter 4). In some situations (for example, when a lawyer discloses a client's diminished capacity to a tribunal against a client's wishes), the lawyer might be required to attempt to withdraw as counsel if the disclosure causes the client effectively to discharge the lawyer (see § 32(2)(c)).

e. Seeking appointment of a guardian. When a client's diminished capacity is severe and no other practical method of protecting the client's best interests is available, a lawyer may petition an appointment of a guardian or other representative to make decisions for the client. A general or limited power of attorney may sometimes be used to avoid the expense and possible embarrassment of a guardianship.

The client might instruct the lawyer to seek appointment of a guardian or take other protective measures. On the use of confidential client information in a guardianship proceeding, see § 61 and § 69, Comment f.

A lawyer is not required to seek a guardian for a client whenever the conditions of Subsection (4) are satisfied. For example, it may be clear that the courts will not appoint a guardian or that doing so is not in the client's best interests (see § 16 & Comment d hereto).

f. Representing a client for whom a guardian or similar person may act. When a guardian has been appointed, the guardian normally speaks for the client as to matters covered by the guardianship. (When under the law of the jurisdiction a client's power of attorney remains in effect during a disability, the appointee has such authority.) The lawyer therefore should normally follow the decisions of the guardian as if they were those of the client. That principle does not apply when the lawyer is representing the client in proceedings against the guardian, for example, in an attempt to have the guardianship terminated or its terms altered. The law sometimes authorizes the client to bypass a guardian—for example, when a mature minor seeks a court order authorizing her to have an abortion without having to disclose her pregnancy to her parents or guardians. The lawyer may also believe that the guardian is violating fiduciary duties owed to the client and may then seek relief setting aside the guardian's decision or replacing the guardian (see also § 51(4)). If the lawyer believes the guardian to be acting lawfully but inconsistently with the best interests of the client, the lawyer may remonstrate with the guardian or withdraw under § 32(3)(d) (see § 23, Comment c).

When a guardian retains a lawyer to represent the guardian, the guardian is the client.

Topic 4. A Lawyer's Authority to Act for a Client

§ 25. Appearance Before a Tribunal

A lawyer who enters an appearance before a tribunal on behalf of a person is presumed to represent that person as a client. The presumption may be rebutted.

§ 26. A Lawyer's Actual Authority

A lawyer's act is considered to be that of a client in proceedings before a tribunal or in dealings with third persons when:

- (1) the client has expressly or impliedly authorized the act;
- (2) authority concerning the act is reserved to the lawyer as stated in § 23; or
- (3) the client ratifies the act.

Comment:

b. Rationale. Legal representation saves the client's time and effort and enables legal work to be delegated to an expert. Lawyers therefore are recognized as agents for their clients in litigation and other legal matters. Indeed, courts commonly will not allow a corporation to participate in litigation through an agent other than a lawyer.

Allowing clients to act through lawyers also subjects clients to obligations and disabilities. With respect to the rights of a third person, the client is bound when a case is lost or a negotiation handled disadvantageously by a lawyer. Attributing the acts of lawyers to their clients is warranted by the fact that, in an important sense, they really are acts authorized by the principal. Much serious activity in business and personal affairs is done through lawyers. The same considerations apply, with qualifications, in holding the client liable for certain wrongs committed by the lawyer (see Comment d hereto).

Binding clients to the acts of their lawyers can be unfair in some circumstances. A client might have authorized a lawyer's conduct only in general terms, without contemplating the particular acts that lead to liability. However, it has been regarded as more appropriate for costs flowing from a lawyer's misconduct generally to be borne by the client rather than by an innocent third person. Where the lawyer rather than the client is directly to blame, the client may be able to recover any losses by suing the lawyer, a right not generally accorded to nonclients (see Chapter 4). In practice, however, clients are sometimes unable to control their lawyer's conduct and accordingly may sometimes be excused from the consequences of their lawyer's behavior when that can be done without seriously harming others (see § 29).

d. Effects of attributing authorized acts to a client. When a lawyer's act is attributed to a client various legal consequences might follow for the client. If the act consisted of assenting to a contract, the client is bound by the contract (see Restatement Second, Agency, Chapter 6). If the lawyer was authorized to bring or defend a lawsuit, the client is bound by the result. Likewise, the client is bound by authorized lawyer action or inaction during litigation, for example when the lawyer asks a question that elicits an answer harmful to the client or files a frivolous motion.

When a lawyer's act is wrongful and causes injury to a third person, the client as principal is liable as provided by agency law (see Restatement Second, Agency, Chapter 7; see also § 27, Comment e).

§ 27. A Lawyer's Apparent Authority

A lawyer's act is considered to be that of the client in proceedings before a tribunal or in dealings with a third person if the tribunal or third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's) manifestations of such authorization.

Comment:

b. Rationale. Under the law of agency, a client is bound by the lawyer's act or failure to act when the client has vested the lawyer with apparent authority—an appearance of authority arising from and in accordance with the client's manifestations to third persons (see Restatement Second, Agency § 8). Apparent authority can be identical to, greater, or less than a lawyer's actual authority (see *id.* Comment a). The concepts of actual and apparent authority often lead to similar results. The same acts or statements of a client that confer actual authority can serve to manifest authority to a third person and vice versa. Apparent authority extends beyond actual authority in a lawyer's transactions with third persons when the client has limited the lawyer's actual authority but the limitation has not been disclosed to that person and, instead, the client has manifested to the third person that the lawyer has authority to act in the matter.

Apparent authority exists when and to the extent a client causes a third person to form a reasonable belief that a lawyer is authorized to act for the client. Permitting disavowal would allow clients at their convenience to ratify or disavow their lawyer's acts despite the client's inconsistent manifestation of the lawyer's authority. It would also impose

on the third person the burden of proving a fact better known to the client. A client usually can make clear to third persons the limited scope of a lawyer's authority or take care to act in ways that do not manifest authority that the client does not intend.

Recognizing a lawyer as agent creates a risk that a client will be bound by an act the client never intended to authorize. Several safeguards are therefore included in the apparent-authority principle. First, the client must in fact have retained the lawyer or given the third party reason to believe that the client has done so. Second, the client's own acts (including the act of retaining the lawyer) must have warranted a reasonable observer in believing that the client authorized the lawyer to act. Third, the third person must in fact have such a belief. The test thus includes both an objective and a subjective element (see Restatement Second, Agency § 27). In some circumstances courts will take into account the lawyer's lack of actual authority in deciding whether to vacate a default (see § 29). If the client suffers detriment from a lawyer's act performed with apparent but not actual authority, the client can recover from the lawyer for acting beyond the scope of the lawyer's authority (see Comment f hereto & § 30; Restatement Second, Agency § 383).

c. Apparent authority created by retention of a lawyer. By retaining a lawyer, a client implies that the lawyer is authorized to act for the client in matters relating to the representation and reasonably appropriate in the circumstances to carry it out. Circumstances known to the third person can narrow the scope of apparent authority thus conferred, for example statements by the client or lawyer that the lawyer is to handle only specified matters (see § 21(2) & Comment d thereto). The client can also enlarge the lawyer's apparent authority, for example by acquiescing, to the outsider's knowledge, in the lawyer's taking certain action. In the absence of such variations, a lawyer has apparent authority to do acts that reasonably appear to be calculated to advance the client's objectives in the representation, except for matters reserved to the client under § 22. (For apparent authority with respect to matters reserved to the client, see Comment d hereto.)

When a lawyer's apparent authority is in question, what reasonably appears calculated to advance the client's objectives must be determined from the third person's viewpoint.

The third person's belief in the lawyer's authority must be reasonable. The same standard applies in a proceeding before a tribunal. However, because of the lawyer's broad actual authority in litigation (see §§ 21 & 23), it will often be unnecessary to conduct a factual inquiry into whether a lawyer had apparent authority in the eyes of either the opposing party or the tribunal.

Illustrations:

1. At Judge's suggestion, Lawyer agrees that both parties to a civil action will waive further discovery and that the trial will begin the next week. Judge does not know, but opposing counsel does, that Lawyer's Client (which has many similar cases) instructs its lawyers in writing not to bring cases to trial without specified discovery, some of which Lawyer has not yet accomplished. Although Lawyer lacked actual authority to waive discovery, Lawyer had apparent authority from Judge's reasonable point of view, and Judge may hold Client to the trial date. Client's remedies are to seek discretionary release from the waiver (see § 29) and to seek to recover any damages from Lawyer for acting beyond authority (see Comment f hereto & § 30).

2. At a pretrial conference in a medical-malpractice case, Lawyer agrees with opposing counsel that neither party will call more than one expert witness at the trial. Opposing counsel is not aware that Lawyer's client (which has many similar cases) instructs its lawyers to present expert testimony from at least two witnesses in every medical-malpractice case involving more than a certain amount in claimed damages. Judge knows of the client's practice but does not inform opposing counsel. The opposing party can hold Lawyer's client to the contract, which Lawyer had apparent authority to make, unless the court releases the parties from the contract (see § 29).

d. Lawyer's apparent authority to settle and perform other acts reserved to a client. Generally a client is not bound by a settlement that the client has not authorized a lawyer to make by express, implied, or apparent authority (and that is not validated by later ratification under § 26(3)). Merely retaining a lawyer does not create apparent authority in the lawyer to perform acts governed by § 22. When a lawyer purports to enter a settlement binding on the client but lacks authority to do so, the burden of inconvenience resulting if the client repudiates the settlement is properly left with the opposing party, who should know that settlements are normally subject to approval by the client and who has no manifested contrary indication from the client. The opposing party can protect itself by obtaining clarification of the lawyer's authority. Refusing to uphold a settlement reached without the client's authority means that the case remains open, while upholding such a settlement deprives the client of the right to have the claim resolved on other terms.

f. Recovery against a lawyer. When a client is bound by an act of a lawyer with apparent but not actual authority, a lawyer is subject to liability to the client for any resulting damages to the client, unless the lawyer reasonably believed that the act was authorized by the client (see Restatement Second, Agency § 383; §§ 16, 21, & 22 hereto). The lawyer can also be subject to professional discipline (see § 5) or procedural sanctions (see § 110) for harming the interests of a client through action taken without the client's consent.

If a lawyer's act does not bind the client, the lawyer can be subject to liability to a third person who dealt with the lawyer in good faith. Liability can be based on implied warranty of actual authority or on misrepresentation of the lawyer's authority (see § 30; Restatement Second, Agency §§ 329 & 330). The lawyer is also subject to liability for damages to the client, for example the client's expenses of having the act declared not to be binding (see § 53, Comment f (client's recovery of legal fees in such an instance)).

§ 28. A Lawyer's Knowledge; Notification to a Lawyer; and Statements of a Lawyer

(1) Information imparted to a lawyer during and relating to the representation of a client is attributed to the client for the purpose of determining the client's rights and liabilities in matters in which the lawyer represents the client, unless those rights or liabilities require proof of the client's personal knowledge or intentions or the lawyer's legal duties preclude disclosure of the information to the client.

(2) Unless applicable law otherwise provides, a third person may give notification to a client, in a matter in which the client is represented by a lawyer, by giving notification to the client's lawyer, unless the third person knows of circumstances reasonably indicating that the lawyer's authority to receive notification has been abrogated.

(3) A lawyer's unprivileged statement is admissible in evidence against a client as if it were the client's statement if either:

- (a) the client authorized the lawyer to make a statement concerning the subject; or
- (b) the statement concerns a matter within the scope of the representation and was made by the lawyer during it.

§ 29. A Lawyer's Act or Advice as Mitigating or Avoiding a Client's Responsibility

(1) When a client's intent or mental state is in issue, a tribunal may consider otherwise admissible evidence of a lawyer's advice to the client.

(2) In deciding whether to impose a sanction on a person or to relieve a person from a criminal or civil ruling, default, or judgment, a tribunal may consider otherwise admissible evidence to prove or disprove that the lawyer who represented the person did so inadequately or contrary to the client's instructions.

§ 30. A Lawyer's Liability to a Third Person for Conduct on Behalf of a Client

(1) For improper conduct while representing a client, a lawyer is subject to professional discipline as stated in § 5, to civil liability as stated in Chapter 4, and to prosecution as provided in the criminal law (see § 7).

(2) Unless at the time of contracting the lawyer or third person disclaimed such liability, a lawyer is subject to liability to third persons on contracts the lawyer entered into on behalf of a client if:

- (a) the client's existence or identity was not disclosed to the third person; or
 - (b) the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer's credit.
- (3) A lawyer is subject to liability to a third person for damages for loss proximately caused by the lawyer's acting without authority from a client under § 26 if:

- (a) the lawyer tortiously misrepresents to the third person that the lawyer has authority to make a contract, conveyance, or affirmation on behalf of the client and the third person reasonably relies on the misrepresentation; or
- (b) the lawyer purports to make a contract, conveyance, or affirmation on behalf of the client, unless the lawyer manifests that the lawyer does not warrant that the lawyer is authorized to act or the other party knows that the lawyer is not authorized to act.

Topic 5. Ending a Client-Lawyer Relationship

§ 31. Termination of a Lawyer's Authority

- (1) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue.
- (2) Subject to Subsection (1) and § 33, a lawyer's actual authority to represent a client ends when:
 - (a) the client discharges the lawyer;
 - (b) the client dies or, in the case of a corporation or similar organization, loses its capacity to function as such;
 - (c) the lawyer withdraws;
 - (d) the lawyer dies or becomes physically or mentally incapable of providing representation, is disbarred or suspended from practicing law, or is ordered by a tribunal to cease representing a client; or
 - (e) the representation ends as provided by contract or because the lawyer has completed the contemplated services.
- (3) A lawyer's apparent authority to act for a client with respect to another person ends when the other person knows or should know of facts from which it can be reasonably inferred that the lawyer lacks actual authority, including knowledge of any event described in Subsection (2).

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

- (1) Subject to Subsection (5), a client may discharge a lawyer at any time.
- (2) Subject to Subsection (5), a lawyer may not represent a client or, where representation has commenced, must withdraw from the representation of a client if:
 - (a) the representation will result in the lawyer's violating rules of professional conduct or other law;
 - (b) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (c) the client discharges the lawyer.
- (3) Subject to Subsections (4) and (5), a lawyer may withdraw from representing a client if:
 - (a) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (b) the lawyer reasonably believes withdrawal is required in circumstances stated in Subsection (2);

- (c) the client gives informed consent;
 - (d) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal, fraudulent, or in breach of the client's fiduciary duty;
 - (e) the lawyer reasonably believes the client has used or threatens to use the lawyer's services to perpetrate a crime or fraud;
 - (f) the client insists on taking action that the lawyer considers repugnant or imprudent;
 - (g) the client fails to fulfill a substantial financial or other obligation to the lawyer regarding the lawyer's services and the lawyer has given the client reasonable warning that the lawyer will withdraw unless the client fulfills the obligation;
 - (h) the representation has been rendered unreasonably difficult by the client or by the irreparable breakdown of the client-lawyer relationship; or
 - (i) other good cause for withdrawal exists.
- (4) In the case of permissive withdrawal under Subsections (3)(f)-(i), a lawyer may not withdraw if the harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing.
- (5) Notwithstanding Subsections (1)-(4), a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with a valid order of a tribunal requiring the representation to continue.

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

- (1) In terminating a representation, a lawyer must take steps to the extent reasonably practicable to protect the client's interests, such as giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee the lawyer has not earned.
- (2) Following termination of a representation, a lawyer must:
- (a) observe obligations to a former client such as those dealing with client confidences (see Chapter 5), conflicts of interest (see Chapter 8), client property and documents (see §§ 44-46), and fee collection (see § 41);
 - (b) take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client;
 - (c) take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation; and
 - (d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.

Chapter 3. Client And Lawyer: The Financial And Property Relationship

Topic I. Legal Controls on Attorney Fees

§ 34. Reasonable and Lawful Fees

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

§ 35. Contingent-Fee Arrangements

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

- (a) contingent on success in prosecuting or defending a criminal proceeding; or
- (b) contingent on a specified result in a divorce proceeding or a proceeding concerning custody of a child.

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

§ 36. Forbidden Client-Lawyer Financial Arrangements

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

- (a) acquire a lien as provided by § 43 to secure the lawyer's fee or expenses; and
- (b) contract with a client for a contingent fee in a civil case except when prohibited as stated in § 35.

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

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

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

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

Comment:

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

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

Illustration:

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

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

some cases, although the contract is unenforceable on its own terms, the lawyer will still be able to recover the fair value of services rendered (see § 39, Comment e).

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

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

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

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

The Section refers only to duties that a lawyer owes to a client, not to those owed to other persons. That a lawyer, for example, harassed an opponent in litigation without harming the client does not warrant relieving the client of any duty to pay the lawyer. On other remedies in such situations, see § 110. But sometimes harassing a nonclient will also violate the lawyer's duty to the client, perhaps exposing the client to demands for sanctions or making the client's cause

less likely to prevail. Forfeiture will then be appropriate unless the client is primarily responsible for the breach of duty to a nonclient.

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

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

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

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

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

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

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

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

Topic 2. A Lawyer's Claim to Compensation

§ 38. Client-Lawyer Fee Contracts

(1) Before or within a reasonable time after beginning to represent a client in a matter, a lawyer must communicate to the client, in writing when applicable rules so provide, the basis or rate of the fee, unless the communication is unnecessary for the client because the lawyer has previously represented that client on the same basis or at the same rate.

(2) The validity and construction of a contract between a client and a lawyer concerning the lawyer's fees are governed by § 18.

(3) Unless a contract construed in the circumstances indicates otherwise:

(a) a lawyer may not charge separately for the lawyer's general office and overhead expenses;

(b) payments that the law requires an opposing party or that party's lawyer to pay as attorney-fee awards or sanctions are credited to the client, not the client's lawyer, absent a contrary statute or court order; and

(c) when a lawyer requests and receives a fee payment that is not for services already rendered, that payment is to be credited against whatever fee the lawyer is entitled to collect.

§ 39. A Lawyer's Fee in the Absence of a Contract

If a client and lawyer have not made a valid contract providing for another measure of compensation, a client owes a lawyer who has performed legal services for the client the fair value of the lawyer's services.

§ 40. Fees on Termination

If a client-lawyer relationship ends before the lawyer has completed the services due for a matter and the lawyer's fee has not been forfeited under § 37:

(1) a lawyer who has been discharged or withdraws may recover the lesser of the fair value of the lawyer's services as determined under § 39 and the ratable proportion of the compensation provided by any otherwise enforceable contract between lawyer and client for the services performed; except that

(2) the tribunal may allow such a lawyer to recover the ratable proportion of the compensation provided by such a contract if:

(a) the discharge or withdrawal is not attributable to misconduct of the lawyer;

(b) the lawyer has performed severable services; and

(c) allowing contractual compensation would not burden the client's choice of counsel or the client's ability to replace counsel.

Comment:

b. Measure of compensation when a client discharges a lawyer. A client might discharge a lawyer before substantial completion of the services. . Some older decisions reason that such a lawyer, not having violated the contract, is entitled to receive the contractual fee less the value of any services the lawyer avoided by being discharged. Alternatively, it could be argued that the lawyer should be able to treat the contract as revoked and recover in quantum meruit under § 39 the fair value of whatever services the lawyer rendered, even if that recovery exceeds the contractual price.

Those approaches are incorrect except in the circumstances in which contractual recovery is appropriate (see Subsection (2)). The discharged lawyer has not completed the work for which the contractual fee was due. Noncompletion results not from any improper act of the client, but from the client's exercise of the right to discharge counsel (see § 32). That right should not be encumbered by permitting the lawyer the option of either recovery at the contractual rate or in quantum meruit without appropriate adjustment for work yet to be performed.

It is an assumption of each of the following Illustrations that the circumstances warrant neither fee forfeiture (see § 37 & Comment e hereto) nor contractual recovery.

Illustrations:

1. Client retained Lawyer to handle Client's divorce. Lawyer requested and Client paid \$2,000 in advance, as full payment. After Lawyer had worked eight hours out of the approximately 16 likely to be needed, Client discharged Lawyer in order to hire Client's brother. (a) If the fair value of Lawyer's work is \$100 per hour, Lawyer is entitled to \$800 for the eight hours actually worked. Lawyer must refund the rest of the \$2,000. (b) If the fair value of Lawyer's work is \$300 per hour, Lawyer is entitled to that part of the \$2,000 applicable to the work performed, that is to \$1,000 and not the fair value of \$2,400, because \$1,000 was the contractual price for the work Lawyer performed, which was

approximately half of the work actually contemplated. Lawyer is not entitled to the full \$2,000 lump-sum fee because that fee contemplated performance of all work involved in Client's divorce. Accordingly, the \$2,000 must be prorated to reflect the extent of Lawyer's actual services.

3. The same facts as in Illustration 1, except that the \$2,000 payment is designated in the fee contract as a nonrefundable engagement-retainer fee (see § 34, Comment e), and the contract between Client and Lawyer further provides that Lawyer is to be compensated at Lawyer's typical hourly rate of \$100 per hour. If \$100 is the fair value of Lawyer's services, Lawyer is entitled to \$800 for the eight hours worked. In addition, if \$2,000 is a reasonable amount to charge in the circumstances as an engagement retainer (id.), Lawyer is entitled to retain that \$2,000.

4. Client retained Lawyer to bring a tort suit for a contingent fee of one-third of any recovery. Client discharged Lawyer after Lawyer had worked 100 hours, because Client found Lawyer's manner overbearing. The fair value of Lawyer's time is \$100 per hour. Until Client prevails in the suit, Lawyer has no right to a fee, because under the contract no fee was due unless and until Client recovered (see § 38(3)(d)). If Client recovers \$60,000, Lawyer is entitled to \$10,000, which is the lesser of the contractual fee (\$20,000) and the fair value of Lawyer's services (100 hours at \$100 per hour, or \$10,000).

Topic 3. Fee-Collection Procedures

§ 41. Fee-Collection Methods

In seeking compensation claimed from a client or former client, a lawyer may not employ collection methods forbidden by law, use confidential information (as defined in Chapter 5) when not permitted under § 65, or harass the client.

§ 42. Remedies and the Burden of Persuasion

(1) A fee dispute between a lawyer and a client may be adjudicated in any appropriate proceeding, including a suit by the lawyer to recover an unpaid fee, a suit for a refund by a client, an arbitration to which both parties consent unless applicable law renders the lawyer's consent unnecessary, or in the court's discretion a proceeding ancillary to a pending suit in which the lawyer performed the services in question.

(2) In any such proceeding the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.

§ 43. Lawyer Liens

(1) Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order

to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of any document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.

(2) Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows:

(a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter;

- (b) the lien becomes binding on a third party when the party has notice of the lien;
- (c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and
- (d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.

(3) A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the property to the client or lawyer, and grant such other relief as justice may require.

(4) With respect to property neither in the lawyer's possession nor recovered by the client through the lawyer's efforts, the lawyer may obtain a security interest on property of a client only as provided by other law and consistent with §§ 18 and 126. Acquisition of such a security interest is a business or financial transaction with a client within the meaning of § 126.

Topic 4. Property and Documents of Clients and Others

§ 44. Safeguarding and Segregating Property

(1) A lawyer holding funds or other property of a client in connection with a representation, or such funds or other property in which a client claims an interest, must take reasonable steps to safeguard the funds or property. A similar obligation may be imposed by law on funds or other property so held and owned or claimed by a third person. In particular, the lawyer must hold such property separate from the lawyer's property, keep records of it, deposit funds in an account separate from the lawyer's own funds, identify tangible objects, and comply with related requirements imposed by regulatory authorities.

(2) Upon receiving funds or other property in a professional capacity and in which a client or third person owns or claims an interest, a lawyer must promptly notify the client or third person. The lawyer must promptly render a full accounting regarding such property upon request by the client or third person.

§ 45. Surrendering Possession of Property

(1) Except as provided in Subsection (2), a lawyer must promptly deliver, to the client or nonclient so entitled, funds or other property in the lawyer's possession belonging to a client or nonclient.

(2) A lawyer may retain possession of funds or other property of a client or nonclient if:

- (a) the client or nonclient consents;
- (b) the lawyer's client is entitled to the property, the lawyer appropriately possesses the property for purposes of the representation, and the client has not asked for delivery of the property;
- (c) the lawyer has a valid lien on the property (see § 43);
- (d) there are substantial grounds for dispute as to the person entitled to the property; or
- (e) delivering the property to the client or nonclient would violate a court order or other legal obligation of the lawyer.

§ 46. Documents Relating to a Representation

(1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.

(2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.

(3) Unless a client or former client consents to nondelivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

(4) Notwithstanding Subsections (2) and (3), a lawyer may decline to deliver to a client or former client an original or copy of any document under circumstances permitted by § 43(1).

Topic 5. Fee-Splitting with a Lawyer Not in the Same Firm

§ 47. Fee-Splitting Between Lawyers Not in the Same Firm

A division of fees between lawyers who are not in the same firm may be made only if:

(1) (a) the division is in proportion to the services performed by each lawyer or (b) by agreement with the client, the lawyers assume joint responsibility for the representation;

(2) the client is informed of and does not object to the fact of division, the terms of the division, and the participation of the lawyers involved; and

(3) the total fee is reasonable (see § 34).

Chapter 4. Lawyer Civil Liability

Topic 1. Liability for Professional Negligence and Breach of Fiduciary Duty

§ 48. Professional Negligence—Elements and Defenses Generally

In addition to the other possible bases of civil liability described in §§ 49, 55, and 56, a lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care within the meaning of § 50 or § 51, if the lawyer fails to exercise care within the meaning of § 52 and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.

§ 49. Breach of Fiduciary Duty—Generally

In addition to the other possible bases of civil liability described in §§ 48, 55, and 56, a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client set forth in § 16(3) and if that failure is a legal cause of injury within the meaning of § 53, unless the lawyer has a defense within the meaning of § 54.

§ 50. Duty of Care to a Client

For purposes of liability under § 48, a lawyer owes a client the duty to exercise care within the meaning of § 52 in pursuing the client's lawful objectives in matters covered by the representation.

§ 51. Duty of Care to Certain Nonclients

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

- (1) to a prospective client, as stated in § 15;
- (2) to a nonclient when and to the extent that:
 - (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
 - (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
- (3) to a nonclient when and to the extent that:
 - (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
 - (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
 - (c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and
- (4) to a nonclient when and to the extent that:
 - (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
 - (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
 - (c) the nonclient is not reasonably able to protect its rights; and
 - (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

Comment:

a. Scope and cross-references. This Section sets forth the limited circumstances in which a lawyer owes a duty of care to a nonclient.

As stated in § 54(1), a lawyer is not liable under this Section for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule. As stated in § 66(3) and 67(4), a lawyer who takes action or decides not to take action permitted under those Sections is not, solely by reason of such action or inaction, liable for damages.

In appropriate circumstances, a lawyer is also subject to liability to a nonclient on grounds other than negligence (see §§ 48 & 56), for litigation sanctions (see § 110), and for acting without authority (see § 30). On indemnity and contribution, see § 53, Comment i. This Section does not consider those liabilities, such as liabilities arising under securities or similar legislation. Nor does the Section consider when a lawyer found liable to a nonclient may recover from a client under such theories as indemnity, contribution, or subrogation. On a client's liability to a nonclient arising out of a lawyer's conduct, see § 26, Comment d.

b. Rationale. Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section. Such a duty must be applied in light of those conflicting concerns.

c. Opposing parties. A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment e hereto). Imposing such a duty could discourage vigorous representation of the lawyer's own client through fear of liability to the opponent. Moreover, the opposing party is protected by the rules and procedures of the adversary system and, usually, by counsel. In some circumstances, a lawyer's negligence will entitle an opposing party to relief other than damages, such as vacating a settlement induced by negligent misrepresentation. For a lawyer's liability to sanctions, which may include payments to an opposing party, based on certain litigation misconduct, see § 110. See also § 56, on liability for intentional torts.

Similarly, a lawyer representing a client in an arm's-length business transaction does not owe a duty of care to opposing nonclients, except in the exceptional circumstances described in this Section. On liability for aiding a client's unlawful conduct, see § 56.

Illustration:

1. Lawyer represents Plaintiff in a personal-injury action against Defendant. Because Lawyer fails to conduct an appropriate factual investigation, Lawyer includes a groundless claim in the complaint. Defendant incurs legal expenses in obtaining dismissal of this claim. Lawyer is not liable for negligence to Defendant. Lawyer may, however, be subject to litigation sanctions for having asserted a claim without proper investigation (see § 110). On claims against lawyers for wrongful use of civil proceedings and the like, see § 57(2) and Comment d thereto.

d. Prospective clients (Subsection (1)). When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship, and even if no such relationship arises, the lawyer may be liable for failure to use reasonable care to the extent the lawyer advises or provides other legal services for the person (see § 15(2) and the Comments thereto). On duties to a former client, see § 50, Comment c.

e. Inviting reliance of a nonclient (Subsection (2)). When a lawyer or that lawyer's client (with the lawyer's acquiescence) invites a nonclient to rely on the lawyer's opinion or other legal services, and the nonclient reasonably does so, the lawyer owes a duty to the nonclient to use care (see § 52), unless the jurisdiction's general tort law excludes liability on the ground of remoteness. Accordingly, the nonclient has a claim against the lawyer if the lawyer's negligence with respect to the opinion or other legal services causes injury to the nonclient (see § 95). The lawyer's client typically benefits from the nonclient's reliance, for example, when providing the opinion was called for as a condition to closing under a loan agreement, and recognition of such a claim does not conflict with duties the lawyer properly owed to the client. Allowing the claim tends to benefit future clients in similar situations by giving nonclients reason to rely on similar invitations. See Restatement Second, Torts § 552. If a client is injured by a lawyer's negligence in providing opinions or services to a nonclient, for example because that renders the client liable to the nonclient as the lawyer's principal, the lawyer may have corresponding liability to the client (see § 50).

Clients or lawyers may invite nonclients to rely on a lawyer's legal opinion or services in various circumstances (see § 95). For example, a sales contract for personal property may provide that as a condition to closing the seller's lawyer will provide the buyer with an opinion letter regarding the absence of liens on the property being sold (see *id.*, Illustrations 1 & 2; § 52, Illustration 2). A nonclient may require such an opinion letter as a condition for engaging in a transaction with a lawyer's client. A lawyer's opinion may state the results of a lawyer's investigation and analysis of facts as well as the lawyer's legal conclusions (see § 95). On when a lawyer may properly decline to provide an opinion and on a lawyer's duty when a client insists on nondisclosure, see § 95, Comment d. A lawyer's acquiescence in use of the lawyer's opinion may be manifested either before or after the lawyer renders it.

In some circumstances, reliance by unspecified persons may be expected, as when a lawyer for a borrower writes an opinion letter to the original lender in a bank credit transaction knowing that the letter will be used to solicit other lenders to become participants in syndication of the loan. Whether a subsequent syndication participant can recover for the lawyer's negligence in providing such an opinion letter depends on what, if anything, the letter says about reliance and whether the jurisdiction in question, as a matter of general tort law, adheres to the limitations on duty of Restatement Second, Torts § 552(2) or those of *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.1931), or has rejected such limitations. To account for such differences in general tort law, Subsection (2) refers to applicable law excluding

liability to persons too remote from the lawyer.

When a lawyer owes a duty to a nonclient under this Section, whether the nonclient's cause of action may be asserted in contract or in tort should be determined by reference to the applicable law of professional liability generally. The cause of action ordinarily is in substance identical to a claim for negligent misrepresentation and is subject to rules such as those concerning proof of materiality and reliance (see Restatement Second, Torts §§ 552-554). For liability under securities legislation, see § 56, Comment i. Whether the representations are actionable may be affected by the duties of disclosure, if any, that the client owes the nonclient (see § 98, Comment e). In the absence of such duties of disclosure, the duty of a lawyer providing an opinion is ordinarily limited to using care to avoid making or adopting misrepresentations. On a lawyer's obligations in furnishing an opinion, see § 95, Comment c. On intentionally making or assisting misrepresentations, see § 56, Comment f, and § 98.

A lawyer may avoid liability to nonclients under Subsection (2) by making clear that an opinion or representation is directed only to a client and should not be relied on by others. Likewise, a lawyer may limit or avoid liability under Subsection (2) by qualifying a representation, for example by making clear through limiting or disclaiming language in an opinion letter that the lawyer is relying on facts provided by the client without independent investigation by the lawyer (assuming that the lawyer does not know the facts provided by the client to be false, in which case the lawyer would be liable for misrepresentation). The effectiveness of a limitation or disclaimer depends on whether it was reasonable in the circumstances to conclude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions and whether the recipient is represented by counsel or a similarly experienced agent.

When a nonclient is invited to rely on a lawyer's legal services, other than the lawyer's opinion, the analysis is similar. For example, if the seller's lawyer at a real-estate closing offers to record the deed for the buyer, the lawyer is subject to liability to the buyer for negligence in doing so, even if the buyer did not thereby become a client of the lawyer. When a nonclient is invited to rely on a lawyer's nonlegal services, the lawyer's duty of care is determined by the law applicable to providers of the services in question.

f. A nonclient enforcing a lawyer's duties to a client (Subsection (3)). When a lawyer knows (see Comment h hereto) that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has died.

A nonclient's claim under Subsection (3) is recognized only when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the representation. A duty to a third person hence exists only when the client intends to benefit the third person as one of the primary objectives of the representation, as in the Illustrations below and in Comment g hereto. Without adequate evidence of such an intent, upholding a third person's claim could expose lawyers to liability for following a client's instructions in circumstances where it would be difficult to prove what those instructions had been. Threat of such liability would tend to discourage lawyers from following client instructions adversely affecting third persons. When the claim is that the lawyer failed to exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third person must prove the client's intent by evidence that would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document. See Restatement Third, Property (Donative Transfers) §§ 11.2 and 12.1 (Tentative Draft No. 1, 1995) (preponderance of evidence to resolve ambiguity in donative instruments; clear and convincing evidence to reform such instruments).

Subsections (3) and (4), although related in their justifications, differ in application. In situations falling under Subsection (3), the client need not owe any preexisting duty to the intended beneficiary. The scope of the intended benefit depends on the client's intent and the lawyer's undertaking. On the other hand, the duty under Subsection (4) typically arises when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law.

Illustrations:

2. Client retains Lawyer to prepare and help in the drafting and execution of a will leaving Client's estate to Nonclient. Lawyer prepares the will naming Nonclient as the sole beneficiary, but negligently arranges for Client to sign it before an inadequate number of witnesses. Client's intent to benefit Nonclient thus appears on the face of the will executed by Client. After Client dies, the will is held ineffective due to the lack of witnesses, and Nonclient is thereby harmed. Lawyer is subject to liability to Nonclient for negligence in drafting and supervising execution of the will.

3. Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses, but Nonclient later alleges that Lawyer negligently wrote the will to name someone other than Nonclient

as the legatee. Client's intent to benefit Nonclient thus does not appear on the face of the will. Nonclient can establish the existence of a duty from Lawyer to Nonclient only by producing clear and convincing evidence that Client communicated to Lawyer Client's intent that Nonclient be the legatee. If Lawyer is held liable to Nonclient in situations such as this and the preceding Illustration, applicable principles of law may provide that Lawyer may recover from their unintended recipients the estate assets that should have gone to Nonclient.

4. Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses. After Client's death, Heir has the will set aside on the ground that Client was incompetent and then sues Lawyer for expenses imposed on Heir by the will, alleging that Lawyer negligently assisted Client to execute a will despite Client's incompetence. Lawyer is not subject to liability to Heir for negligence. Recognizing a duty by lawyers to heirs to use care in not assisting incompetent clients to execute wills would impair performance of lawyers' duty to assist clients even when the clients' competence might later be challenged. Whether Lawyer is liable to Client's estate or personal representative (due to privity with the lawyer) is beyond the scope of this Restatement. On a lawyer's obligations to a client with diminished capacity, see § 24.

g. A liability insurer's claim for professional negligence. Under Subsection (3), a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer (see § 134, Comment f). For example, if the lawyer negligently fails to oppose a motion for summary judgment against the insured and the insurer must pay the resulting adverse judgment, the insurer has a claim against the lawyer for any proximately caused loss. In such circumstances, the insured and insurer, under the insurance contract, both have a reasonable expectation that the lawyer's services will benefit both insured and insurer. Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligations to the insured. However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured. For example, if the lawyer recommends acceptance of a settlement offer just below the policy limits and the insurer accepts the offer, the insurer may not later seek to recover from the lawyer on a claim that a competent lawyer in the circumstances would have advised that the offer be rejected. Allowing recovery in such circumstances would give the lawyer an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer.

h. Duty based on knowledge of a breach of fiduciary duty owed by a client (Subsection (4)). A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules (see § 54(i)). The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations. Because fiduciaries are generally obliged to pursue the interests of their beneficiaries, the duty does not subject the lawyer to conflicting or inconsistent duties. A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable, as would be a nonlawyer (see Restatement Second, Trusts § 326). Moreover, to the extent that the lawyer has assisted in creating a risk of injury, it is appropriate to impose a preventive and corrective duty on the lawyer (cf. Restatement Second, Torts § 321).

The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries—trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility, imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, Subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

The scope of a client's fiduciary duties is delimited by the law governing the relationship in question (see, e.g., Restatement Second, Trusts §§ 169–185). Whether and when such law allows a beneficiary to assert derivatively the claim of a trust or other entity against a lawyer is beyond the scope of this Restatement (see Restatement Second, Trusts § 282). Even when a relationship is fiduciary, not all the attendant duties are fiduciary. Thus, violations of duties of loyalty by a fiduciary are ordinarily considered breaches of fiduciary duty, while violations of duties of care are not.

Sometimes a lawyer represents both a fiduciary and the fiduciary's beneficiary and thus may be liable to the beneficiary as a client under § 50 and may incur obligations concerning conflict of interests (see §§ 130–131). A lawyer who represents only the fiduciary may avoid such liability by making clear to the beneficiary that the lawyer represents the fiduciary rather than the beneficiary (compare § 103, Comment e).

The duty recognized by Subsection (4) arises only when the lawyer knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's fiduciary duty. As used in this Subsection and Subsection (3)

(see Comment f), “know” is the equivalent of the same term defined in ABA Model Rules of Professional Conduct, Terminology ¶ [5] (1983) (“‘Knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”). The concept is functionally the same as the terminology “has reason to know” as defined in Restatement Second, Torts § 12(1) (actor has reason to know when actor “has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such facts exists.”). The “know” terminology should not be confused with “should know” (see *id.* § 12(2)). As used in Subsection (3) and (4) “knows” neither assumes nor requires a duty of inquiry.

Generally, a lawyer must follow instruction of the client-fiduciary (see § 21(2) hereto) and may assume in the absence of contrary information that the fiduciary is complying with the law. The duty stated in Subsection (4) applies only to breaches constituting crime or fraud, as determined by applicable law and subject to the limitations set out in § 67, Comment d, and § 82, Comment d, or those in which the lawyer has assisted or is assisting the fiduciary. A lawyer assists fiduciary breaches, for example, by preparing documents needed to accomplish the fiduciary’s wrongful conduct or assisting the fiduciary to conceal such conduct. On the other hand, a lawyer subsequently consulted by a fiduciary to deal with the consequences of a breach of fiduciary duty committed before the consultation began is under no duty to inform the beneficiary of the breach or otherwise to act to rectify it. Such a duty would prevent a person serving as fiduciary from obtaining the effective assistance of counsel with respect to such a past breach.

Liability under Subsection (4) exists only when the beneficiary of the client’s fiduciary duty is not reasonably able to protect its rights. That would be so, for example, when the fiduciary client is a guardian for a beneficiary unable (for reasons of youth or incapacity) to manage his or her own affairs. By contrast, for example, a beneficiary of a family voting trust who is in business and has access to the relevant information has no similar need of protection by the trustee’s lawyer. In any event, whether or not there is liability under this Section, a lawyer may be liable to a nonclient as stated in § 56.

A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer’s performance of obligations to the lawyer’s client in the circumstances of the representation. Such impairment might occur, for example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with a beneficiary or for assisting the fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Subsection (4) for representing the fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciary’s interests.

Under Subsection (4) a lawyer is not liable for failing to take action that the lawyer reasonably believes to be forbidden by professional rules (see § 54(1)). Thus, a lawyer is not liable for failing to disclose confidences when the lawyer reasonably believes that disclosure is forbidden. For example, a lawyer is under no duty to disclose a prospective breach in a jurisdiction that allows disclosure only regarding a crime or fraud threatening imminent death or substantial bodily harm. However, liability could result from failing to attempt to prevent the breach of fiduciary duty through means that do not entail disclosure. In any event, a lawyer’s duty under this Section requires only the care set forth in § 52.

Illustrations:

5. Lawyer represents Client in Client’s capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client’s own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would

be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction’s professional rules do not forbid such disclosures (see § 67). Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

6. Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust’s account. Even though lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer’s services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

§ 52. The Standard of Care

(1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:

(a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;

(b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and

(c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) or § 49 to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

§ 53. Causation and Damages

A lawyer is liable under § 48 or § 49 only if the lawyer's breach of a duty of care or breach of fiduciary duty was a legal cause of injury, as determined under generally applicable principles of causation and damages.

Comment:

b. Action by a civil litigant: loss of a judgment. In a lawyer-negligence or fiduciary-breach action brought by one who was the plaintiff in a former and unsuccessful civil action, the plaintiff usually seeks to recover as damages the damages that would have been recovered in the previous action or the additional amount that would have been recovered but for the defendant's misconduct. To do so, the plaintiff must prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action. The plaintiff must thus prevail in a "trial within a trial." All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial; in considering whether the plaintiff has carried that burden, however, the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial. (On a lawyer's right to disclose client confidences when reasonably necessary in defending against a claim, see §§ 64 and 80.) Similar principles apply when a former civil defendant contends that, but for the misconduct of the defendant's former lawyer, the defendant would have secured a better result at trial.

What would have been the result of a previous trial presenting issues of fact normally is an issue for the factfinder in the negligence or fiduciary-breach action. What would have been the result of an appeal in the previous action is, however, an issue of law to be decided by the judge in the negligence or fiduciary breach action. The judges or jurors who heard or would have heard the original trial or appeal may not be called as witnesses to testify as to how they would have ruled. That would constitute an inappropriate burden on the judiciary and jurors and an unwise personalization of the issue of how a reasonable judge or jury would have ruled.

A plaintiff may show that the defendant's negligence or fiduciary breach caused injury other than the loss of a judgment. For example, a plaintiff may contend that, in a previous action, the plaintiff would have obtained a settlement but for the malpractice of the lawyer who then represented the plaintiff. A plaintiff might contend that the defendant in the previous action made a settlement offer, that the plaintiff's then lawyer negligently failed to inform plaintiff of the offer (see § 20(3)), and that, if informed, plaintiff would have accepted the offer. If the plaintiff can prove this, the plaintiff can recover the difference between what the claimant would have received under the settlement offer and the amount, if any, the claimant in fact received through later settlement or judgment. Similarly, in appropriate circumstances, a plaintiff who can establish that the negligence or fiduciary breach of the plaintiff's former lawyer deprived the plaintiff of a substantial chance of prevailing and that, due to that misconduct, the results of a previous trial cannot be reconstructed, may recover for the loss of that chance in jurisdictions recognizing such a theory of

recovery in professional-malpractice cases generally.

The plaintiff in a previous civil action may recover without proving the results of a trial if the party claims damages other than loss of a judgment. For example, a lawyer who negligently discloses a client's trade secret during litigation might be liable for harm to the client's business caused by the disclosure.

Even when a plaintiff would have recovered through trial or settlement in a previous civil action, recovery in the negligence or fiduciary-breach action of what would have been the judgment or settlement in the previous action is precluded in some circumstances. Thus, the lawyer's misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectible, for example because the previous defendant was insolvent and uninsured. The defendant lawyer bears the burden of coming forward with evidence that this was so. Placement of this burden on the defending lawyer is appropriate because most civil judgments are collectible and because the defendant lawyer was the one who undertook to seek the judgment that the lawyer now calls worthless. The burden of persuading the jury as to collectibility remains upon the plaintiff.

c. Action by a civil litigant: attorney fees that would have been due. When it is shown that a plaintiff would have prevailed in the former civil action but for the lawyer's legal fault, it might be thought that—applying strict causation principles—the damages to be recovered in the legal-malpractice action should be reduced by the fee due the lawyer in the former matter. That is, the plaintiff has lost the net amount recovered after paying that attorney fee. Yet if the net amount were all the plaintiff could recover in the malpractice action, the defendant lawyer would in effect be credited with a fee that the lawyer never earned, and the plaintiff would have to pay two lawyers (the defendant lawyer and the plaintiff's lawyer in the malpractice action) to recover one judgment.

Denial of a fee deduction hence may be an appropriate sanction for the defendant lawyer's misconduct: to the extent that the lawyer defendant did not earn a fee due to the lawyer's misconduct, no such fee may be deducted in calculating the recovery in the malpractice action. The same principles apply to a legal-malpractice plaintiff who was a defendant in a previous civil action. The appropriateness and extent of disallowing deduction of the fee are determined under the standards of § 37 governing fee forfeiture. In some circumstances, those standards allow the lawyer to be credited with fees for services that benefited the client. See § 37, Comment e.

d. Action by a criminal defendant. A convicted criminal defendant suing for malpractice must prove both that the lawyer failed to act properly and that, but for that failure, the result would have been different, for example because a double-jeopardy defense would have prevented conviction. Although most jurisdictions addressing the issue have stricter rules, under this Section it is not necessary to prove that the convicted defendant was in fact innocent. As required by most jurisdictions addressing the issue, a convicted defendant seeking damages for malpractice causing a conviction must have had that conviction set aside when process for that relief on the grounds asserted in the malpractice action is available.

A judgment in a postconviction proceeding is binding in the malpractice action to the extent provided by the law of judgments. That law prevents a convicted defendant from relitigating an issue decided in a

postconviction proceeding after a full and fair opportunity to litigate, even though the lawyer sued was not a party to that proceeding and is hence not bound by any decision favorable to the defendant. Some jurisdictions hold public defenders immune from malpractice suits.

g. Damages for emotional distress. General principles applicable to the recovery of damages for emotional distress apply to legal-malpractice actions. In general, such damages are inappropriate in types of cases in which emotional distress is unforeseeable. Thus, emotional-distress damages are ordinarily not recoverable when a lawyer's misconduct causes the client to lose profits from a commercial transaction, but are ordinarily recoverable when misconduct causes a client's imprisonment. The law in some jurisdictions permits recovery for emotional-distress damages only when the defendant lawyer's conduct was clearly culpable (see also § 56, Comment g).

h. Punitive damages. Whether punitive damages are recoverable in a legal-malpractice action depends on the jurisdiction's generally applicable law. Punitive damages are generally permitted only on a showing of intentional or reckless misconduct by a defendant.

A few decisions allow a plaintiff to recover from a lawyer punitive damages that would have been recovered from the defendant in an underlying action but for the lawyer's misconduct. However, such recovery is not required by the punitive and deterrent purposes of punitive damages. Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury's reaction.

§ 54. Defenses; Prospective Liability Waiver; Settlement with a Client

(i) Except as otherwise provided in this Section, liability under §§ 48 and 49 is subject to the defenses available under generally applicable principles of law governing respectively actions for

professional negligence and breach of fiduciary duty. A lawyer is not liable under § 48 or § 49 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule.

(2) An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

(3) The client or former client may rescind an agreement settling a claim by the client or former client against the person's lawyer if:

(a) the client or former client was subjected to improper pressure by the lawyer in reaching the settlement; or

(b) (i) the client or former client was not independently represented in negotiating the settlement, and (ii) the settlement was not fair and reasonable to the client or former client.

(4) For purposes of professional discipline, a lawyer may not:

(a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(b) settle a claim for such liability with an unrepresented client or former client

without first advising that person in writing that independent representation is appropriate in connection therewith.

Topic 2. Other Civil Liability

§ 55. Civil Remedies of a Client Other Than for Malpractice

(1) A lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law.

(2) A client is entitled to restitutionary, injunctive, or declaratory remedies against a lawyer in the circumstances and to the extent provided by generally applicable law governing such remedies.

§ 56. Liability to a Client or Nonclient Under General Law

Except as provided in § 57 and in addition to liability under §§ 48-55, a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances.

§ 57. Nonclient Claims—Certain Defenses and Exceptions to Liability

(1) In addition to other absolute or conditional privileges, a lawyer is absolutely privileged to publish matter concerning a nonclient if:

(a) the publication occurs in communications preliminary to a reasonably anticipated proceeding before a tribunal or in the institution or during the course and as a part of such a proceeding;

(b) the lawyer participates as counsel in that proceeding; and

(c) the matter is published to a person who may be involved in the proceeding, and the publication has some relation to the proceeding.

(2) A lawyer representing a client in a civil proceeding or procuring the institution of criminal proceedings by a client is not liable to a nonclient for wrongful use of civil proceedings or for

malicious prosecution if the lawyer has probable cause for acting, or if the lawyer acts primarily to help the client obtain a proper adjudication of the client's claim in that proceeding.

(3) A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.

Topic 3. Vicarious Liability

§ 58. Vicarious Liability

(1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.

(2) Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm.

(3) A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

Chapter 5. Confidential Client Information

Topic 1. Confidentiality Responsibilities of Lawyers

§ 59. Definition of "Confidential Client Information"

Confidential client information consists of information relating to representation of a client, other than information that is generally known.

Comment:

d. Generally known information. Confidential client information does not include information that is generally known. Such information may be employed by lawyer who possesses it in permissibly representing other clients (see § 60, Comments g & h) and in other contexts where there is a specific justification for doing so (compare Comment e hereto). Information might be generally known at the time it is conveyed to the lawyer or might become generally known thereafter. At the same time, the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.

Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Moreover, if a current client specifically requests that information of any kind not be used or disclosed in ways otherwise permissible, the lawyer must either honor that request or withdraw from the representation (see § 32; see also §§ 16(2) & 21(2)).

§ 60. A Lawyer's Duty to Safeguard Confidential Client Information

(1) Except as provided in §§ 61-67, during and after representation of a client:

(a) the lawyer may not use or disclose confidential client information as defined in § 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information;

(b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.

(2) Except as stated in § 62, a lawyer who uses confidential information of a client for

the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.

Comment:

j. A lawyer's self-dealing in confidential client information. Subsection (2) prohibits a lawyer from using or disclosing confidential client information for the lawyer's personal enrichment, regardless of lack of risk of prejudice to the affected client. The duty is removed by client consent (see § 62). The sole remedy of the client for breach of the duty is restitutionary relief in the form of disgorgement of profit (see Restatement Second, Agency § 388, Comment c). The lawyer codes differ over whether such self-enriching use or disclosure constitutes a disciplinary violation in the absence of prejudice to the client.

The strict confidentiality duty of the Subsection is warranted for prophylactic purposes. A lawyer who acquires confidential client information as the result of a representation should not be tempted by expectation of profit to risk a possibly incorrect assessment of future harm to a client. There is no important social interest in permitting lawyers to make unconsented use or revelation of confidential client information for self-enrichment in personal transactions.

It is not inconsistent with Subsection (2) for a lawyer to use one client's confidential information for the benefit of another client in the course of representing the other client, even if doing so might also redound to the lawyer's gain, such as by enhancing a contingent-fee recovery. In all such instances, of course, the lawyer may not do so when it would create a material risk of harm to the original client.

l. Use or disclosure of confidential information of co-clients. A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them (see § 121) or when a conflict exists but the co-clients have adequately consented (see § 122). When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information (see § 122, Comment c(i)), including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them (see § 75).

Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected. As between the co-clients, in many such relationships each co-client is under a fiduciary duty to share all information material to the co-clients' joint enterprise. Such is the law, for example, with respect to members of a partnership. Limitation of the attorney-client privilege as applied to communications of co-clients is based on an assumption that each intends that his or her communications with the lawyer will be shared with the other co-clients but otherwise kept in confidence (see § 75, Comment d). Moreover, the common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter (see § 20). The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-

client, whether learned from the lawyer's own investigation or learned in confidence from that co-client.

Co-clients may understand from the circumstances those obligations on the part of the lawyer and their own obligations, or they may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients (see § 75, Comment d). A lawyer must honor such agreements. If one co-client threatens physical harm or other types of crimes or fraud against the other, an exception to the lawyer's duty of confidentiality may apply (see §§ 66-67).

There is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing of information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client. The communicating co-client's expectation that the information be withheld from the other co-client may be manifest from the circumstances, particularly when the communication is clearly antagonistic to the interests of the affected co-client. The lawyer thus confronts a dilemma. If the information is material to the other co-client, failure to communicate it would compromise the lawyer's duties of loyalty, diligence (see § 16(1) & (2)), and communication (see § 20) to that client. On the other hand, sharing the communication with the affected co-client would compromise the communicating client's hope of confidentiality and risks impairing that client's trust in the lawyer.

Such circumstances create a conflict of interest among the co-clients (see § 121 & § 122, Comment h). The lawyer cannot continue in the representation without compromising either the duty of communication to the affected co-client or the expectation of confidentiality on the part of the communicating co-client. Moreover, continuing the joint representation without making disclosure may mislead the affected client or otherwise involve the lawyer in assisting the communicating client in a breach of fiduciary duty or other misconduct. Accordingly, the lawyer is required to withdraw unless the communicating client can be persuaded to permit sharing of the communication (see § 32(2)(a)). Following withdrawal, the lawyer may not, without consent of both, represent either co-client adversely to the other with respect to the same or a substantially related matter (see § 121, Comment e(i)).

In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such

determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person. See also § 66.

Illustration:

2. Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other (compare § 130, Comment c, Illustrations 1-3). Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about whom Husband had not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of the information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband proposes

to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife.

3. Same facts as Illustration 2, except that Husband's proposed inter vivos trust would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the Spouses' intended testamentary arrangements. If Husband refuses to inform Wife or to permit Lawyer to do so, Lawyer must withdraw from representing both Husband and Wife. In the light of all relevant circumstances, Lawyer may exercise discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent will or to inform Wife of some or all the details of the information that Husband has recently provided so that Wife may protect her interests. Alternatively, Lawyer may inform Wife only that Lawyer is withdrawing because Husband will not permit disclosure of relevant information.

4. Lawyer represents both A and B in forming a business. Before the business is completely formed, A discloses to Lawyer that he has been convicted of defrauding business associates on two recent occasions. The circumstances of the communication from A are such that Lawyer reasonably infers that A believes that B is unaware of that information

and does not want it provided to B. Lawyer reasonably believes that B would call off the arrangement with A if B were made aware of the information. Lawyer must first attempt to persuade A either to inform B directly or to permit Lawyer to inform B of the information. Failing that, Lawyer must withdraw from representing both A and B. In doing so, Lawyer has discretion to warn B that Lawyer has learned in confidence information indicating that B is at significant risk in carrying through with the business arrangement, but that A will not permit Lawyer to disclose that information to B. On the other hand, even if the circumstances

do not warrant invoking § 67, Lawyer has the further discretion to inform B of the specific nature of A's communication to B if Lawyer reasonably believes this necessary to protect B's interests in view of the immediacy and magnitude of the threat that Lawyer perceives posed to B.

Even if the co-clients have agreed that the lawyer will keep certain categories of information confidential from one or more other co-clients, in some circumstances it might be evident to the lawyer that the uninformed co-client would not have agreed to nondisclosure had that co-client been aware of the nature of the adverse information. For example, a lawyer's examination of confidential financial information, agreed not to be shown to another co-client to reduce antitrust concerns, could show in fact, contrary to all exterior indications, that the disclosing co-client is insolvent. In view of the co-client's agreement, the lawyer must honor the commitment of confidentiality and not inform the other client, subject to the exceptions described in § 67. The lawyer must, however, withdraw if failure to reveal would mislead the affected client, involve the lawyer in assisting the communicating client in a course of fraud, breach of fiduciary duty, or other unlawful activity, or, as would be true in most such instances, involve the lawyer in representing conflicting interests.

§ 61. Using or Disclosing Information to Advance Client Interests

A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation.

§ 62. Using or Disclosing Information with Client Consent

A lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure.

§ 63. Using or Disclosing Information When Required by Law

A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.

§ 64. Using or Disclosing Information in a Lawyer's Self-Defense

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.

§ 65. Using or Disclosing Information in a Compensation Dispute

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to permit the lawyer to resolve a dispute with the client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer.

§ 66. Using or Disclosing Information to Prevent Death or Serious Bodily Harm

(1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person.

(2) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent the harm and advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.

(3) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

Comment:

b. Rationale. The exception recognized by this Section is based on the overriding value of life and physical integrity. Threats to life or body encompassed within this Section may be the product of an act of the client or a nonclient and may be created by wrongful acts, by accident, or by circumstances. See Comment c..

c. Use or disclosure to prevent death or serious bodily harm. On what constitutes reasonable belief, see § 67, Comment h. A threat within Subsection (1) need not be the product of a client act; an act of a nonclient threatening life or personal safety is also included, as is a threat created through accident or natural causes. It follows that if such a threat is created by a person, whether a client or a nonclient, there is no requirement that the act be criminal or otherwise unlawful.

Illustration:

1. Lawyer is representing Defendant, a responding party in a suit by Plaintiff seeking damages for personal injuries arising out of a vehicle accident. Lawyer asks Doctor, as a consulting expert, to conduct an evaluation of medical evidence submitted by Plaintiff in support of a claim of personal injury. Following the examination, Doctor reports to Lawyer that Plaintiff has an undiagnosed aortal

aneurism, which is serious and life-threatening but which can readily be repaired through surgery. Lawyer knows from work on the case that Plaintiff, as well as Plaintiff's treating physician, lawyer, and medical experts, are unaware of the condition. Lawyer is also aware that, if notified of the condition, Plaintiff will likely claim significant additional damages following corrective surgery. Despite Lawyer's urging, Defendant refuses to permit revelation of the condition to Plaintiff. Under this Section, Lawyer has discretion under Subsection (1) to reveal the condition to Plaintiff.

So long as the predicate threat to life or body exists, discretion under Subsection (1) exists notwithstanding that the threat is created by the completed act of a person (including a client) or that the lawyer's information comes from otherwise privileged conversations.

Illustrations:

3. As the result of confidential disclosures at a meeting with engineers employed by Client Corporation, Lawyer reasonably believes that one of the engineers released a toxic substance into a city's water-supply system. Lawyer reasonably believes that the discharge will cause reasonably certain death or serious bodily harm to elderly or ill persons within a short period and that Lawyer's disclosure of the discharge is necessary to permit authorities to remove that threat or lessen the number of its victims. Lawyer's efforts to persuade responsible Client Corporation personnel to take corrective action have been unavailing. Although the act creating the threat has already occurred, Lawyer has discretion to disclose under Subsection (1) for the purpose of preventing the consequences of the act.

In circumstances such as those in Illustration 3, the Section applies even if the act creating the threat of death or serious bodily harm was not a crime or fraud. In other situations, the likelihood that other actors know about and will eliminate the risk may be relevant. Most situations will be intensely fact-sensitive. For example, the character of a threatened act as a crime or fraud suggests a state of mind on the part of the perpetrator that is more threatening to the intended victim than an act that is merely negligent or not wrongful, and thus may more readily warrant the lawyer's conclusion that the risk of harm is great.

Serious bodily harm within the meaning of the Section includes life-threatening illness and injuries and the consequences of events such as imprisonment for a substantial period and child sexual abuse. It also includes a client's threat of suicide.

Illustration:

4. Lawyer advises Manufacturer on product-liability matters. Lawyer had previously advised Manufacturer that use of Component A in a consumer product did not create an unreasonable risk of harm and was in compliance with consumer-protection and other law. Lawyer has now learned that Supplier, unknown to Manufacturer, provided Component A in a form not in compliance with Manufacturer's specifications. Manufacturer promptly altered its production methods so as to avoid any significant risk of harm in products manufactured in the future. There is a slight statistical chance that a consumer using the prior version of the product containing the noncomplying version of Component A might suffer serious bodily harm, but only in a highly unlikely combination of circumstances. Manufacturer's responsible officers have decided not to issue a public notice of the slightly increased risk of harm. Lawyer does not have discretion under this Section to use or disclose Manufacturer's confidential information to make a public warning of the slightly increased risk of harm.

f. Appropriate action. A lawyer's use or disclosure under this Section is a last resort when no other available action is reasonably likely to prevent the threatened death or serious bodily harm. Use or disclosure, when made, should be no more extensive than the lawyer reasonably believes necessary to accomplish the relevant purpose.

Preventive steps that a lawyer may appropriately take include consulting with relatives or friends of the person likely to cause the death or serious bodily harm and with other advisers to that person. (The lawyer may also seek the assistance of such persons in efforts to persuade the person not to act or to warn the threatened victim (see Comment e hereto).) A lawyer may also consult with law-enforcement authorities or agencies with jurisdiction over the type of conduct involved in order to prevent it and warn a threatened victim.

When a lawyer has taken action under the Section, in all but extraordinary cases the relationship between lawyer and client would have so far deteriorated as to make the lawyer's effective representation of the client impossible. Generally, therefore, the lawyer is required to withdraw from the representation (see § 32(2)(a) & Comment f thereto), unless the client gives informed consent to the lawyer's continued representation notwithstanding the lawyer's adverse use or disclosure of information. In any event, the lawyer generally must inform the client of the fact of the lawyer's use or disclosure (see § 20(1)), unless the lawyer has a superior interest in not informing the client, such as to protect the lawyer from wrongful retaliation by the client, to effectuate permissible measures that are not yet complete, or to prevent the client from inflicting further harms on third persons.

g. Effects of a lawyer taking or not taking discretionary remedial action. A lawyer's decision to take action to

disclose or not to disclose under this Section is discretionary with the lawyer (compare § 63 (disclosure required by law)). Such action would inevitably conflict to a significant degree with the lawyer's customary role of protecting client interests. Critical facts may be unclear, emotions may be high, and little time may be available in which the lawyer must decide on an appropriate course of action. Subsequent re-examination of the reasonableness of a lawyer's action in the light of later developments would be unwarranted; reasonableness of the lawyer's belief at the time and in the circumstances in which the lawyer acts is alone controlling.

Because the interests protected by the rule are those of the public and third persons, the discretion of a lawyer to take action consistent with the Section may not be contracted away by agreement between the lawyer and the client or the lawyer and a third person (compare § 23(1)).

§ 67. Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss

(1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:

(a) the crime or fraud threatens substantial financial loss;

(b) the loss has not yet occurred;

(c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and

(d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.

(2) If a crime or fraud described in Subsection (1) has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.

(3) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent, rectify, or mitigate the loss. The lawyer must, if feasible, also advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.

(4) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.

Comment:

b. Rationale. The exceptions recognized in this Section reflect a balance between the competing considerations of protecting interests in client confidentiality and lawyer loyalty to clients, on the one hand, and protecting the interests of society and third persons in avoiding substantial financial consequences of crimes or frauds, on the other. The integrity, professional reputation, and financial interests of the lawyer can also be implicated under Subsections (1) and (2) in view of the requirement that the lawyer's services have been employed in commission of the crime or fraud. The exceptions are also justified on the ground that the client is not entitled to the protection of confidentiality when the client knowingly causes substantial financial harm through a crime or fraud and when, as required under Subsections (1) and (2), the client has in effect misused the client-lawyer relationship for that purpose. In most instances of unlawful client acts that threaten such consequences to others, it may be hoped that the client's own sober reflection and the

lawyer's counseling (see Comment i hereto) will lead the client to refrain from the act or to prevent or mitigate its consequences.

The exceptions stated in this Section permit a lawyer to exercise discretion to prevent the described

loss to third persons, even though adverse effects might befall the client as a result. The exceptions are extraordinary. The only acts covered under the Section are the described crimes or frauds that threaten substantial financial loss to others. Clients remain protected in consulting a lawyer concerning the legal consequences of any such act in which the lawyer's services were not employed, including acts constituting crimes or frauds.

The discretion recognized in this Section may to an unknowable extent lessen some clients' willingness to consult freely with their lawyers. In this respect, the Section has an effect similar to that of the crime-fraud exception to the attorney-client privilege (see § 82; see also Comment d hereto). The social benefits of allowing a lawyer to prevent, mitigate, or rectify substantial financial loss to intended victims of criminal or fraudulent client acts under the described circumstances warrant incurring that additional risk.

Not all crimes and frauds are covered by this Section, but only those that involve a risk of substantial financial loss. The Section applies when a client intends to commit a crime or fraud either personally or through a third person (see Subsection (1)(c)). What constitutes a crime or a fraud is determined under otherwise applicable law. The distinction between acts entailing risks of such loss and other acts that may also be criminal or fraudulent reflects a balance between client confidentiality (see § 60, Comment b) and protection of third persons. It could be argued that a lawyer's discretion should be constrained in another manner, for example through case-by-case balancing of those competing interests, perhaps including as a factor the extent to which exercise of the lawyer's discretion would harm the client. Lawyers can be expected to take into account that and other relevant considerations in determining whether to exercise the professional discretion that the Section recognizes. However, the Section does not require that the lawyer exercise discretion only after explicitly making such an evaluation or in any other particular manner.

c. Comparison with the crime-fraud exception to the attorney-client privilege. This Section generally corresponds to the crime-fraud exception to the attorney-client privilege (see § 82, Comment d). Somewhat different considerations underlie the two rules and they operate in different settings, testimonial and nontestimonial. This Section and § 82 both apply to client crimes or frauds. Both apply to acts that a client intends to commit and to acts by a third person whom the client intends to aid.

This Section applies only when the likelihood of financial loss is great and the lawyer reasonably believes that use or revelation is necessary to prevent the crime or fraud or to prevent, rectify, or mitigate the loss it causes (see Comment f hereto). In contrast, the crime-fraud exception to the attorney-client privilege stated in § 82 applies without regard to the consequences of the intended act so long as the act itself is a crime or fraud. That exception to the attorney-client privilege applies only when a client consults a lawyer with intention to obtain assistance to commit a crime or fraud or so uses the lawyer's services, whereas the Section applies regardless of the client's intention at the time of consultation (see Comment g hereto). The crime-fraud exception to the attorney-client privilege is administered by a tribunal and applies only when a lawyer or another person is called upon to give evidence, whereas the Section concerns action that a lawyer may take on the basis of a reasonable belief and outside of any proceeding and thus without direction from a judicial officer. Finally, this Section is limited to client acts in which a lawyer's services are employed; the crime-fraud exception applies whether or not the lawyer's services are so employed. Due to the several differences in the requirements for this Section and § 82, a finding that a lawyer permissibly used or disclosed confidential client information under this Section and a determination whether § 82 applies must be made independently.

Lawyer disclosure under this Section is taken in the lawyer's personal capacity and not as agent. Accordingly, such disclosure would not constitute disclosure by an agent of the client for purposes of subject-matter waiver of other confidential communications under § 79 (see § 79, Comment c).

e. Employment of the lawyer's services in the client's act. Use or disclosure under either Subsection (1) or (2) requires that the lawyer's services are being or were employed in commission of a criminal or fraudulent act. The lawyer's involvement need not be known to or discoverable by the victim or other person. Subsections (1) and (2) apply without regard either to the lawyer's prior knowledge of the client's intended use of the lawyer's services or to when the lawyer forms a reasonable basis for a belief concerning the nature of the client's act. Such employment may occur, for example, when a client has a document prepared by the lawyer for use in a criminal or fraudulent scheme, receives the lawyer's advice concerning the act to assist in carrying it out, asks the lawyer to appear before a court or administrative agency as part of a transaction, or obtains advice that will assist the client in avoiding detection or apprehension for the crime or fraud. It is not necessary that the lawyer's services have been critical to success of the client's act or that the services were specifically requested by the client. It suffices if the services were or are being employed in the commission of the act.

Illustrations:

1. As part of a business transaction, Lawyer on behalf of Client prepares and sends to Victim an opinion letter helpful to Client in completing an aspect of the transaction. At the time of preparing and sending the opinion letter, Lawyer had no reason to believe that the transaction was other than proper, but Lawyer thereafter receives information giving reason to believe the transaction constitutes a crime or fraud by Client within this Section. If the other conditions of the Section are present, Lawyer's opinion letter will have been employed in commission of Client's act, and Lawyer accordingly has discretion to use or disclose confidential information of Client as provided in the Section.

2. Client has put in place a scheme to defraud Victim of substantial funds. After doing so, but before Victim has actually lost any funds, Client seeks Lawyer's assistance in meeting regulatory action and a suit by Victim seeking restitution that might ensue. Despite Lawyer's counseling, Client refuses to warn Victim, return the funds, or take other corrective action. Because Lawyer's services have not been employed in the commission of Client's fraud, Lawyer may not use or disclose Client's confidential information under this Section.

Legal assistance provided only after the client's crime or fraud has already been committed is not within this Section, whether or not loss to the victim has already occurred, if the lawyer's services are not employed for the purposes of a further crime or fraud, such as the crime of obstruction of justice or other unlawful attempt to cover up the prior wrongful act. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, the limitation of Subsection (1)(d) applies with attention to the time at which the client's acts actually occurred.

Illustrations:

3. Client has been charged by a regulatory agency with participation in a scheme to defraud Victim. Client seeks the assistance of Lawyer in defending against the charges. The loss to Victim has already occurred. During the initial interview and thereafter, Lawyer is provided with ample reason to believe that Client's acts were fraudulent and caused substantial financial loss to Victim. Because Lawyer's services were not employed by Client in committing the fraud, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.

4. The same facts as in Illustration 3, except that the law of the applicable jurisdiction provides that each day during which a wrongdoer in the position of Client fails to make restitution to Victim constitutes a separate offense of the same type as the original wrong. Notwithstanding the continuing-offense law, commission of the fraudulent act of Client has already occurred without use of Lawyer's services. As in Illustration 3, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.

f. Use or disclosure to prevent (Subsection (1)) or to rectify or mitigate (Subsection (2)) a client wrongful act. Action by the lawyer to prevent, rectify, or mitigate loss under Subsection (2) is in addition to and goes beyond that permitted for preventive purposes under Subsection (1). Actions to prevent, rectify, or mitigate the loss caused by the client's act include correcting or preventing the effects of the client's criminal or fraudulent act, even if the client's crime or fraud has already occurred and regardless of whether its impact has been visited upon the victim. Thus, a lawyer who acquires information from which the lawyer reasonably believes that a client has already defrauded a victim in a scheme in which the lawyer's services were employed may disclose the fraud to the victim when necessary to permit the victim to take possible corrective action, such as to initiate proceedings promptly in order to seize or recover assets fraudulently obtained by the client.

Once use or disclosure of information has been made to prevent, rectify, or mitigate loss under Subsection (2), the lawyer is not further warranted in actively assisting the victim on an ongoing basis in pursuing a remedy against the lawyer's client or in any similar manner aiding the victim or harming the client. Thus, a lawyer is not warranted under this Section in serving as legal counsel for a victim (see also § 132), volunteering to serve as witness in a proceeding by the victim, or cooperating with an administrative agency in obtaining compensation for victims. The lawyer also may not use or disclose information for the purpose of voluntarily assisting a law-enforcement agency to apprehend and prosecute the client, unless the lawyer reasonably believes that such disclosure would be necessary to prevent, rectify, or mitigate the victim's loss. On the rule that disclosure of confidential client information does not constitute waiver of the client's privilege due to subsequent disclosure by an agent, see Comment c hereto.

Illustrations:

5. Lawyer has assisted Client in preparing documents by means of which Client will obtain a \$5,000,000 loan from Bank. The loan closing occurred on Monday and Bank will make the funds available for Client's use on Wednesday. On Tuesday Client reveals to Lawyer for the first time that Client knowingly obtained the loan by means of a materially false statement of Client's assets. Assuming that the other conditions for application of Subsection (2) are present, while Client's fraudulent act of obtaining the loan has, in large part, already occurred, Lawyer has discretion under the

Subsection to use or disclose Client's confidential information to prevent the consequences of the fraud (final release of the funds from Bank) from occurring.

6. The same facts as in Illustration 5, except that Lawyer learned of the fraud on Wednesday after Bank had already released the funds to Client. Under Subsection (2), Lawyer's use or disclosure would be permissible if necessary for the purpose, for example, of enabling Bank to seize assets of Client in its possession or control as an offset against the fraudulently obtained loan or to prevent Client from sending the funds overseas and thereby making it difficult or impossible to trace them.

Topic 2. The Attorney-Client Privilege

§ 68. Attorney-Client Privilege

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.

Comment:

c. Rationale supporting the privilege. The modern attorney-client privilege evolved from an earlier reluctance of English courts to require lawyers to breach the code of a gentleman by being compelled to reveal in court what they had been told by clients. The privilege, such as it was then, belonged to the lawyer. It was a rule congenial with the law, which prevailed in England until the mid-19th century, that made parties to litigation themselves incompetent to testify, whether called as witnesses in their own behalf

or by their adversaries. The modern conception of the privilege, reflected in this Restatement, protects clients, not lawyers, and clients have primary authority to determine whether to assert the privilege (see § 86) or waive it (see §§ 78- 80).

The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services. The rationale is founded on three related assumptions. First, vindicating rights and complying with obligations under the law and under modern legal processes are matters often too complex and uncertain for a person untrained in the law, so that clients need to consult lawyers. The second assumption is that a client who consults a lawyer needs to disclose all of the facts to the lawyer and must be able to receive in return communications from the lawyer reflecting those facts. It is assumed that, in the absence of such frank and full discussion between client and lawyer, adequate legal assistance cannot be realized. Many legal rules are complex and most are fact-specific in their application. Lawyers are much better situated than nonlawyers to appreciate the effect of legal rules and to identify facts that determine whether a legal rule is applicable. Full disclosure by clients facilitates efficient presentation at trials and other proceedings and in a lawyer's advising functions.

The third assumption supporting the privilege is controversial—that clients would be unwilling to disclose personal, embarrassing, or unpleasant facts unless they could be assured that neither they nor their lawyers could be called later to testify to the communication. Relatedly, it is assumed that lawyers would not feel free in probing client's stories and giving advice unless assured that they would not thereby expose the client to adverse evidentiary risk. Those assumptions cannot be tested but are widely believed by lawyers to be sound. The privilege implies an impairment of the search for truth in some instances. Recognition of the privilege reflects a judgment that this impairment is outweighed by the social and moral values of confidential consultations. The privilege provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow.

The evidentiary consequences of the privilege are indeterminate. If the behavioral assumptions supporting the privilege are well-founded, perhaps the evidence excluded by the privilege would not have

come into existence save for the privilege. In any event, testimony concerning out-of-court communications often would be excluded as hearsay, although some of it could come in under exceptions such as that for statements against interest. The privilege also precludes an abusive litigation practice of calling an opposing lawyer as a witness.

Some judicial fact findings undoubtedly have been erroneous because the privilege excluded relevant evidence. The privilege creates tension with the right to confront and cross-examine opposing witnesses. It excuses lawyers from

giving relevant testimony and precludes full examination of clients. The privilege no doubt protects wrongdoing in some instances. To that extent the privilege may facilitate serious social harms. The crime-fraud exception to the privilege (see § 82) results in forced disclosure of some such confidential conversations, but certainly not all.

Suggestions have been made that the privilege be conditional, not absolute, and thus inapplicable in cases where extreme need can be shown for admitting evidence of attorney-client communications. The privilege, however, is not subject to ad hoc exceptions. The predictability of a definite rule encourages forthright discussions between client and lawyer. The law accepts the risks of factual error and injustice in individual cases in deference to the values that the privilege vindicates.

d. Source of the law concerning the privilege. In most of the states, the privilege is defined by statute or rule, typically in an evidence code; in a few states, the privilege is common law. In the federal system, the definition of the privilege is left to the common-law process with respect to issues on which federal law applies. Federal Rule of Evidence 501 provides generally that questions of privilege “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” On elements of a claim or defense as to which state law supplies the rule of decision, however, Rule 501 provides that the federal courts are to apply the attorney-client privilege of the relevant state.

§ 69. Attorney-Client Privilege—“Communication”

A communication within the meaning of § 68 is any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression.

Comment:

b. Communications qualifying for the privilege. A communication can be in any form. Most confidential client communications to a lawyer are written or spoken words, but the privilege applies to communication through technologically enhanced methods such as telephone and telegraph, audio or video tape recording, film, telecopier, and other electronic means. However, communications through a public mode may suggest the absence of a reasonable expectation of confidentiality (see § 71, Comment e).

c. Intercepted communications. The communication need not in fact succeed; for example, an intercepted communication is within this Section (see § 71, Comment c (eavesdroppers)).

Illustration:

1. Lawyer represents Client in a pending criminal investigation. Lawyer directs Client to make a tape recording detailing everything that Client knows about an unlawful enterprise for Lawyer's review. Client makes the tape recording in secret. A cell mate, after learning of the tape recording, informs the prosecutor who causes the tape to be seized under a subpoena. The attorney-client privilege covers the tape recording.

For the rule where a communication is disclosed to nonprivileged persons, see § 79.

d. Distinction between the content of a communication and knowledge of facts. The attorney-client privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about the facts themselves. Although a client cannot be required to testify about communications with a lawyer about a subject, the client may be required to testify about what the client knows concerning the same subject. The client thus may invoke the privilege with respect to the question “Did you tell your lawyer the light was red?” but not with respect to the question “Did you see that the light was red?” Similarly, the privilege does not apply to preexisting documents or other tangible evidence (see Comment j), even if they concern the same subject as a privileged communication.

Illustration:

2. Client, a defendant in a breach-of-contract suit, confidentially informs Lawyer about Client's recollection of a course of dealings between Client and a subcontractor, Plaintiff in the pending contract suit. The attorney-client

privilege does not prevent Plaintiff from requiring Client to testify at a deposition or trial concerning Client's present recollection of the course of dealings between Client and Plaintiff. Plaintiff may not, however, require Lawyer or Client to testify concerning what Client told Lawyer about those same facts.

e. Communicative client acts. The privilege extends to nonverbal communicative acts intended to convey information. For example, a client may communicate with a lawyer through facial expressions or other communicative bodily motions or gestures (nodding or shaking the head or holding up a certain number of fingers to indicate number) or acting out a recalled incident. On the other hand, the privilege does not extend to a client act simply because the client performed the act in the lawyer's presence. The privilege applies when the purpose in performing the act is to convey information to the lawyer.

Illustrations:

3. Client, charged with a crime, retains Lawyer as defense counsel. Lawyer obtains a police report stating that the perpetrator of the crime had a tattooed right forearm. Lawyer asks Client whether Client's right arm is tattooed. In answer, Client rolls up his right sleeve revealing his forearm. The information that the lawyer thereby acquires derives from a protected communication.

4. The same facts as in Illustration 3, except that, shortly after the crime, Client appears at Lawyer's office wearing a short-sleeved shirt. The observation by Lawyer that Client had a tattoo on his arm is not a communication protected by the privilege.

5. Lawyer represents Client in a divorce and child-custody proceeding. While accompanying Client in a visit to the residence of Client's child, Lawyer observes Client physically break into the premises. Lawyer's knowledge is not protected as a communication from Client.

f. A lawyer's testimony on a client's mental state. A lawyer may have knowledge about a client's mental state based on the client's communications with the lawyer. That knowledge may be relevant, for example, in the context of determining whether an accused is competent to stand trial. The lawyer in such cases is uniquely competent to testify concerning the client's ability to assist in presenting a defense. Testimony may be elicited that concerns the client's mode of thought but not if it would disclose particulars that would tend to incriminate the client. On representing a client with diminished capacity, see § 24.

g. Client identity, the fact of consultation, fee payment, and similar matters. Courts have sometimes asserted that the attorney-client privilege categorically does not apply to such matters as the following: the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation; the identity of a nonclient who retained or paid the lawyer to represent the client; the details of any retainer agreement; the amount of the agreed-upon fee; and the client's whereabouts. Testimony about such matters normally does not reveal the content of communications from the client. However, admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communication. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication. But the privilege does not protect clients or lawyers against revealing a lawyer's knowledge about a client solely on the ground that doing so would incriminate the client or otherwise prejudice the client's interests.

Illustration:

6. Client consults Lawyer about Client's taxes. In the consultation, Client communicates to Lawyer Client's name and information indicating that Client owes substantial amounts in back taxes. The fact that Client owes back taxes is not known to the taxing authorities. Lawyer sends a letter to the taxing authorities and encloses a bank draft to cover the back taxes of Client. Lawyer does so to gain an advantage for Client under the tax laws by providing a basis for arguing against the accrual of penalties for continued nonpayment of taxes. Neither Lawyer's letter nor the bank draft reveals the identity of Client. (For the purpose of the Illustration, it is assumed that the client-lawyer communication occurred for the purpose of obtaining legal assistance (see § 72)). In a grand-jury proceeding investigating Client's past failure to pay taxes, Lawyer cannot be required to testify concerning the identity of Client because, on the facts of the Illustration, that testimony would by reasonable inference reveal a confidential communication from Client, Client's communication concerning Client's nonpayment of taxes.

A client also enjoys the constitutional protection against self-incrimination. But this right does not provide a basis on which the client's lawyer can refuse to reveal incriminating information about the client that is not protected by the attorney-client privilege. The precise interaction of the attorney-client and self-incrimination privileges is beyond the scope of this Restatement. Protection may also be provided by the

constitutional guarantee of the right to counsel. On the application of the attorney-client privilege to a lawyer's testimony about how the lawyer came into the possession of instrumentalities of crime or the fruits of crime, see § 119.

h. A record of a privileged communication. The privilege applies both to communications when made and to confidential records of such communications, such as a lawyer's note of the conversation. The privilege applies to a record when a communication embodied in the record can be traced to a privileged person as its expressive source (see § 70) and the record was created (see § 71) and preserved (see § 79) in a confidential state.

i. Lawyer communications to a client. Confidential communications by a lawyer to a client are also protected, including a record of a privileged communication such as a memorandum to a confidential file or to another lawyer or other person privileged to receive such a communication under § 71. Some decisions have protected a lawyer communication only if it contains or expressly refers to a client communication. That limitation is rejected here in favor of a broader rule more likely to assure full and frank communication (see § 68, Comment c). Moreover, the broader rule avoids difficult questions in determining whether a lawyer's communication itself discloses a client communication. A lawyer communication may also be protected by the work-product immunity (see Topic 3).

Illustration:

7. Lawyer writes a confidential letter to Client offering legal advice on a tax matter on which Client had sought Lawyer's professional assistance. Lawyer's letter is based in part on information that Client supplied to Lawyer, in part on information gathered by Lawyer from third persons, and in part on Lawyer's legal research. Even if each such portion of the letter could be separated from the others, the letter is a communication under this Section, and neither Lawyer nor Client can be made to disclose or testify about any of its contents.

A lawyer may serve as the conduit for information to be conveyed from third persons to the lawyer's client. For most purposes, notice to a lawyer constitutes notice to the lawyer's client (see § 28(1)). In any event, both lawyer and client can be required to testify to the message for which the lawyer served as conduit. Lawyers in such situations serve, not as confidants, but as a communicative link between their clients and opposing parties, courts, and other legal institutions. Were such communications privileged, an opposing party would be required to communicate directly with the client, in derogation of the rule that communications with represented parties must be conducted through their lawyers (see § 99).

j. Preexisting documents and records. A client may communicate information to a lawyer by sending writings or other kinds of documentary or electronic recordings that came into existence prior to the time that the client communicates with the lawyer. The privilege protects the information that the client so communicated but not the preexisting document or record itself. A client-authored document that is not a privileged document when originally composed does not become privileged simply because the client has placed it in the lawyer's hands. However, if a document was a privileged preexisting document and was delivered to the lawyer under circumstances that otherwise would make its communication privileged, it remains privileged in the hands of the lawyer.

Illustrations:

8. Client confidentially delivers Client's business records to Lawyer, who specializes in tax matters, in order to obtain Lawyer's legal advice about taxes. As business records, the documents were not themselves prepared for the purpose of obtaining legal advice and are not protected by another testimonial privilege. They gain no privileged status by the fact that Client delivers them to Lawyer in seeking legal advice.

9. Client possesses a memorandum prepared by Client to communicate with Lawyer A during an earlier representation by Lawyer A. Client takes the memorandum to Lawyer B in confidence to obtain legal services on a different matter. The memorandum qualified as a privileged communication in the earlier matter. While in the hands of Lawyer B, the memorandum remains protected by the attorney-client privilege due to its originally privileged nature.

§ 70. Attorney-Client Privilege—"Privileged Persons"

Privileged persons within the meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

Comment:

e. Privileged agents for a client or lawyer: in general. The privilege normally applies to communications involving persons who on their own behalf seek legal assistance from a lawyer (see § 72). However, a client need not personally seek legal assistance, but may appoint a third person to do so as the client's agent (e.g., § 134, Comment f). Whether a third person is an agent of the client or lawyer or a nonprivileged "stranger" is critical in determining application of the attorney-client privilege. If the third person is an agent for the purpose of the privilege, communications through or in the presence of that person are privileged; if the third person is not an agent, then the communications are not in confidence (see § 71) and are not privileged. Accordingly, a lawyer should allow a nonclient to participate only upon clarifying that person's role and when it reasonably appears that the benefit of that person's presence offsets the risk of a later claim that the presence of a third person forfeited the privilege.

f. A client's agent for communication. A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence. Factors that may be relevant in determining whether a third person is an agent for communication include the customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice.

Illustrations:

1. The police arrest Client and do not permit Client to communicate directly with Client's regular legal counsel, Lawyer. Client asks Friend, a person whom Client trusts to keep information confidential, to convey to Lawyer the message that Lawyer should not permit the police to search Client's home. Friend is an agent for communication.

2. Client and Lawyer do not speak a language known by the other. Client uses Translator to communicate an otherwise privileged message to Lawyer. Translator is an acquaintance of Client. Translator is an agent for communication.

3. Client regularly employs Secretary to record and transcribe Client's important business letters, including confidential correspondence. Client uses the services of Secretary to prepare a letter to Lawyer. Secretary is an agent for communication.

An agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client's psychological or other need. A business person may be accompanied by a business associate or expert consultant who can assist the client in interpreting the legal situation.

Illustrations:

4. Client, 16 years old, is represented by Lawyer. Client's parents accompany Client at a meeting with Lawyer concerning a property interest of Client. Client's parents are appropriate agents for communication.

5. Client is advised by Accountant to consult a lawyer about a legal problem involving complex questions of tax accounting. Client, who does not fully understand the nature of the accounting questions, asks Accountant to accompany Client to a consultation with Lawyer so that Accountant can explain the nature of Client's legal matter to Lawyer. Accountant is Client's agent for communication. That would also be true if Accountant were to explain Lawyer's legal advice in business or accounting terms more understandable to Client.

The privilege applies to communications to and from the client disclosed to persons who hire the lawyer as an incident of the lawyer's engagement. Thus, the privilege covers communications by a client-insured to an insurance-company investigator who is to convey the facts to the client's lawyer designated by the insurer, as well as communications from the lawyer for the insured to the insurer in providing a progress report or discussing litigation strategy or settlement (see § 134, Comment f). Such situations must be distinguished from communications by an insured to an insurance investigator who will report to the company, to which the privilege does not apply.

g. A lawyer's agent. A lawyer may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff—secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants. On the duty of a lawyer to protect client information being handled by nonlawyer personnel, see § 60(1)(b). The privilege also extends to communications to and from the client that are disclosed to independent

contractors retained by a lawyer, such as an accountant or physician retained by the lawyer to assist in providing legal services to the client and not for the purpose of testifying.

h. An incompetent person as a client. When a client is mentally or physically incapacitated from effectively consulting with a lawyer, a representative may communicate with the incompetent person's lawyer under the protection of the privilege. The privilege also extends to any communications between the incompetent person and the

representative relating to the communication with the lawyer.

Illustration:

6. Client is mentally incapacitated, and a court has appointed Guardian as the guardian of the person and property of Client. A question has arisen concerning a right of Client in certain property, and Lawyer is retained to represent the interests of Client in the property. Guardian serves as the agent for communication of Client in discussing the matter with Lawyer.

§ 71. Attorney-Client Privilege—“In Confidence”

A communication is in confidence within the meaning of § 68 if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person as defined in § 70 or another person with whom communications are protected under a similar privilege.

§ 72. Attorney-Client Privilege—Legal Assistance as the Object of a Privileged Communication

A communication is made for the purpose of obtaining or providing legal assistance within the meaning of § 68 if it is made to or to assist a person:

- (1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and
- (2) whom the client or prospective client consults for the purpose of obtaining legal assistance.

§ 73. The Privilege for an Organizational Client

When a client is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, or other for-profit or not-for-profit organization, the attorney-client privilege extends to a communication that:

- (1) otherwise qualifies as privileged under §§ 68-72;
- (2) is between an agent of the organization and a privileged person as defined in § 70;
- (3) concerns a legal matter of interest to the organization; and
- (4) is disclosed only to:
 - (a) privileged persons as defined in § 70; and
 - (b) other agents of the organization who reasonably need to know of the communication in order to act for the organization.

Comment:

a. Scope and cross-references. This Section states the conditions under which an organization can claim the attorney-client privilege. The requirements of §§ 68-72 must be satisfied, except that this Section recognizes a special class of agents who communicate in behalf of the organizational client (see Comment d). The Section also requires that the communication relate to a matter of interest to the organization as such (see Subsection (3) & Comment f hereto) and that it be disclosed within the organization only to persons having a reasonable need to know of it (see Subsection (4)(b) & Comment g hereto).

Conflicts of interest between an organizational client and its officers and other agents are considered in § 131, Comment e. On the application of the privilege to governmental organizations and officers, see § 74.

b. Rationale. The attorney-client privilege encourages organizational clients to have their agents confide in lawyers in order to realize the organization's legal rights and to achieve compliance with law (Comment d hereto). Extending the privilege to corporations and other organizations was formerly a matter of doubt but is no longer questioned. However, two pivotal questions must be resolved.

The first is defining the group of persons who can make privileged communications on behalf of an organization. Balance is required. The privilege should cover a sufficiently broad number of organizational communications to realize the organization's policy objectives, but not insulate ordinary intraorganizational communications that may later have importance as evidence. Concern has been expressed, for example, that the privilege would afford organizations "zones of silence" that would be free of evidentiary scrutiny. A subsidiary problem is whether persons who would be nonprivileged occurrence witnesses with respect to communications to a lawyer representing a natural person can be conduits of privileged communications when the client is an organization. That problem has been addressed in terms of the "subject-matter" and "control-group" tests for the privilege (see Comment d).

Second is the problem of defining the types of organizations treated as clients for purposes of the privilege. It is now accepted that the privilege applies to corporations, but some decisions have questioned whether the privilege should apply to unincorporated associations, partnerships, or sole proprietorships. Neither logic nor principle supports limiting the organizational privilege to the corporate form (see Comment c hereto).

c. Application of the privilege to an organization. As stated in the Section, the privilege applies to all forms of organizations. A corporation with hundreds of employees could as well be a sole proprietorship if its assets were owned by a single person rather than its shares being owned by the same person. It would be anomalous to accord the privilege to a business in corporate form but not if it were organized as a sole proprietorship. In general, an organization under this Section is a group having a recognizable identity as such and some permanency. Thus, an organization under this Section ordinarily would include a law firm, however it may be structured (as a professional corporation, a partnership, a sole proprietorship, or otherwise). The organization need not necessarily be treated as a legal entity for any other legal purpose. The privilege extends as well to charitable, social, fraternal, and other nonprofit organizations such as labor unions and chambers of commerce.

d. An agent of an organizational client. As stated in Subsection (2), the communication must involve an agent of the organization, on one hand, and, on the other, a privileged person within the meaning of § 70, such as the lawyer for the organization. Persons described in Subsection (4)(b) may disclose the communication under a need-to-know limitation (see Comment g hereto). The existence of a relationship of principal and agent between the organizational client and the privileged agent is determined according to agency law (see generally Restatement Second, Agency §§ 1-139).

Some decisions apply a "control group" test for determining the scope of the privilege for an organization. That test limits the privilege to communications from persons in the organization who have authority to mold organizational policy or to take action in accordance with the lawyer's advice. The control-group circle excludes many persons within an organization who normally would cooperate with an organization's lawyer. Such a limitation overlooks that the division of functions within an organization often separates decisionmakers from those knowing relevant facts. Such a limitation is unnecessary to prevent abuse of the privilege (see Comment g) and significantly frustrates its purpose.

Other decisions apply a "subject matter" test. That test extends the privilege to communications with any lower-echelon employee or agent so long as the communication relates to the subject matter of the representation. In substance, those decisions comport with the need-to-know formulation in this Section (see Comment g).

It is not necessary that the agent receive specific direction from the organization to make or receive the communication (see Comment h).

Agents of the organization who may make privileged communications under this Section include the organization's officers and employees. For example, a communication by any employee of a corporation to the corporation's lawyer concerning the matter as to which the lawyer was retained to represent the corporation would be privileged, if other conditions of the privilege are satisfied. The concept of agent also includes independent contractors with whom the corporation has a principal-agent relationship and extends to agents of such persons when acting as subagents of the organizational client. For example, a foreign-based corporation may retain a general agency (perhaps a separate corporation) in an American city for the purpose of retaining counsel to represent the interests of the foreign-based corporation. Communications by the general agency would be by an agent for the purpose of this Section.

For purpose of the privilege, when a parent corporation owns controlling interest in a corporate subsidiary, the parent corporation's agents who are responsible for legal matters of the subsidiary are considered agents of the subsidiary. The subsidiary corporation's agents who are responsible for affairs of the parent are also considered agents of the parent for the purpose of the privilege. Directors of a corporation are not its agents for many legal purposes, because they are not subject to the control of the

corporation (see Restatement Second, Agency § 14C). However, in communications with the organization's

counsel, a director who communicates in the interests and for the benefit of the corporation is its agent for the purposes of this Section. Depending on the circumstances, a director acts in that capacity both when participating in a meeting of directors and when communicating individually with a lawyer for the corporation about the corporation's affairs. Communications to and from nonagent constituents of a corporation, such as shareholders and creditors, are not privileged.

In the case of a partnership, general partners and employees and other agents and subagents of the partnership may serve as agents of the organization for the purpose of making privileged communications (see generally Restatement Second, Agency § 14A). Limited partners who have no other relationship (such as employee) with the limited partnership are analogous to shareholders of a corporation and are not such agents.

In the case of an unincorporated association, agents whose communications may be privileged under this Section include officers and employees and other contractual agents and subagents. Members of an unincorporated association, for example members of a labor union, are not, solely by reason of their status as members, agents of the association for the purposes of this Section. In some situations, for example, involving a small unincorporated association with very active members, the members might be considered agents for the purpose of this Section on the ground that the association functionally is a partnership whose members are like partners.

In the case of an enterprise operated as a sole proprietorship, agents who may make communications privileged under this Section with respect to the proprietorship include employees or contractual agents and subagents of the proprietor.

Communications of a nonagent constituent of the organization may be independently privileged under § 75 where the person is a co-client along with the organization. If the agent of the organization has a conflict of interest with the organization, the lawyer for the organization must not purport to represent both the organization and the agent without consent (see § 131, Comment c). The lawyer may not mislead the agent about the nature of the lawyer's loyalty to the organization (see § 103). If a lawyer fails to clarify the lawyer's role as representative solely of the organization and the organization's agent reasonably believes that the lawyer represents the agent, the agent may assert the privilege personally with respect to the agent's own communications (compare § 72(2), Comment f; see also § 131, Comment e).

The lawyer must also observe limitations on the extent to which a lawyer may communicate with a person of conflicting interests who is not represented by counsel (see § 103) and limitations on communications with persons who are so represented (see § 99 and following).

e. The temporal relationship of principal-agent. Under Subsection (2), a person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization.

The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer (see Comment d hereto). Generally, that premise implies that persons be agents of the organization at the time of communicating. The privilege may also extend, however, to communications with a person with whom the organization has terminated, for most other purposes, an agency relationship. A former agent is a privileged person under Subsection (2) if, at the time of communicating, the former agent has a continuing legal obligation to the principal-organization to furnish the information to the organization's lawyer. The scope of such a continuing obligation is determined by the law of agency and the terms of the employment contract (see Restatement Second, Agency § 275, Comment e, & § 381, Comment f). The privilege covers communications with a lawyer for an organization by a retired officer of the organization concerning a matter within the officer's prior responsibilities that is of legal importance to the organization.

Subsection (2) does not include a person with whom the organization established a principal-agent relationship predominantly for the purpose of providing the protection of the privilege to the person's communications, if the person was not an agent at the time of learning the information. For example, communications between the lawyer for an organization and an eyewitness to an event whose communications would not otherwise be privileged cannot be made privileged simply through the organization hiring the person to consult with the organization's lawyer. (As to experts and similar persons employed by a lawyer, see § 70, Comment g).

Ordinarily, an agent communicating with an organization's lawyer within this Section will have acquired the information in the course of the agent's work for the organization. However, it is not necessary that the communicated information be so acquired. Thus, a person may communicate under this Section with respect to information learned prior to the relationship or learned outside the person's functions as an agent, so long as the person bears an agency relationship to the principal-organization at the time of the communication and the communication concerns a matter of interest to the organization (see Comment f). For example, a chemist for an organization who communicates to the organization's lawyer information about a process that the chemist learned prior to being employed by the organization makes a privileged communication if the other conditions of this Section are satisfied.

f. Limitation to communications relating to the interests of the organization. Subsection (3) requires that the communication relate to a legal matter of interest to the organization. The lawyer must be representing the

organization as opposed to the agent who communicates with the lawyer, such as its individual officer or employee. A lawyer representing such an officer or employee, of course, can have privileged communications with that client. But the privilege will not be that of the organization. When a lawyer represents as co-clients both the organization and one of its officers or employees, the privileged nature of communications is determined under § 75. On the conflicts of interest involved in such representations, see § 131, Comment e.

g. The need-to-know limitation on disclosing privileged communications. Communications are privileged only if made for the purpose of obtaining legal services (see § 72), and they remain privileged only if neither the client nor an agent of the client subsequently discloses the communication to a nonprivileged person (see § 79; see also § 71, Comment d). Those limitations apply to organizational clients as provided in Subsection (4). Communications become, and remain, so protected by the privilege only if the organization does not permit their dissemination to persons other than to privileged persons. Agents of a client to whom confidential communications may be disclosed are generally defined in § 70, Comment f, and agents of a lawyer are defined in § 70, Comment g. Included among an organizational client's agents for communication are, for example, a secretary who prepares a letter to the organization's lawyer on behalf of a communicating employee.

The need-to-know limitation of Subsection (4)(b) permits disclosing privileged communications to other agents of the organization who reasonably need to know of the privileged communication in order to act for the organization in the matter. Those agents include persons who are responsible for accepting or rejecting a lawyer's advice on behalf of the organization or for acting on legal assistance, such as general legal advice, provided by the lawyer. Access of such persons to privileged communications is not limited to direct exchange with the lawyer. A lawyer may be required to take steps assuring that attorney-client communications will be disseminated only among privileged persons who have a need to know. Persons defined in Subsection (4)(b) may be apprised of privileged communications after they have been made, as by examining records of privileged communications previously made, in order to conduct the affairs of the organization in light of the legal services provided.

Illustration:

1. Lawyer for Organization makes a confidential report to President of Organization, describing Organization's contractual relationship with Supplier, and advising that Organization's contract with Supplier could be terminated without liability. President sends a confidential memorandum to Manager, Organization's purchasing manager, asking whether termination of the contract would nonetheless be inappropriate for business reasons. Because Manager's response would reasonably depend on several aspects of Lawyer's advice, Manager would have need to know the justifying reason for Lawyer's advice that the contract could be terminated. Lawyer's report to President remains privileged notwithstanding that President shared it with Manager.

The need-to-know concept properly extends to all agents of the organization who would be personally held financially or criminally liable for conduct in the matter in question or who would personally benefit from it, such as general partners of a partnership with respect to a claim for or against the partnership. It extends to persons, such as members of a board of directors and senior officers of an organization, whose general management and supervisory responsibilities include wide areas of organizational activities and to lower-echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered.

Dissemination of a communication to persons outside those described in Subsection (4)(b) implies that the protection of confidentiality was not significant (see § 71, Comment b). An organization may not immunize documents and other communications generated or circulated for a business or other nonlegal purpose (see § 72).

h. Directed and volunteered agent communications. It is not necessary that a superior organizational authority specifically direct an agent to communicate with the organization's lawyer. Unless instructed to the contrary, an agent has authority to volunteer information to a lawyer when reasonably related to the interests of the organization. An agent has similar authority to respond to a request for information from a lawyer for the organization. And the lawyer for the organization ordinarily may seek relevant information directly from employees and other agents without prior direction from superior authorities in the organization.

i. Inside legal counsel and outside legal counsel. The privilege under this Section applies without distinction to lawyers who are inside legal counsel or outside legal counsel for an organization (see § 72, Comment c). Communications predominantly for a purpose other than obtaining or providing legal services for the organization are not within the privilege (see § 72, Comment c). On the credentials of a lawyer for the purposes of the privilege, see § 72(1), Comment e.

j. Invoking and waiving the privilege of an organizational client. The privilege for organizational clients can be asserted and waived only by a responsible person acting for the organization for this purpose. On waiver, see §§ 78-80. Communications involving an organization's director, officer, or employee may qualify as privileged, but it is a separate question whether such a person has authority to invoke or waive the privilege on behalf of the organization. If the

lawyer was representing both the organization and the individual as co-clients, the question of invoking and waiving the privilege is determined under the rule for co-clients (see § 75, Comment e). Whether a lawyer has formed a client-lawyer relationship with a person affiliated with the organization, as well as with the organization, is determined under § 14. Communications of such a person who approaches a lawyer for the organization as a prospective client are privileged as provided in § 72. Unless the person's contrary intent is reasonably manifest to a lawyer for the organization, the lawyer acts properly in assuming that a communication from any such person is on behalf and in the interest of the organization and, as such, is privileged in the interest of the organization and not of the individual making the communication. When the person manifests an intention to make a communication privileged against the organization, the lawyer must resist entering into such a client-lawyer relationship and receiving such a communication if doing so would constitute an impermissible conflict of interest (see § 131, Comment e).

An agent or former agent may have need for a communication as to which the organization has authority to waive the privilege, for example, when the agent is sued personally. A tribunal may exercise discretion to order production of such a communication for benefit of the agent if the agent establishes three conditions. First, the agent must show that the agent properly came to know the contents of the communication. Second, the agent must show substantial need of the communication. Third, the agent must show that production would create no material risk of prejudice or embarrassment to the organization

beyond such evidentiary use as the agent may make of the communication. Such a risk may be controlled by protective orders, redaction, or other measures.

Illustration:

2. Lawyer, representing only Corporation, interviews Employee by electronic mail in connection with reported unlawful activities in Corporation's purchasing department in circumstances providing Corporation with a privilege with respect to their communications. Corporation later dismisses Employee, who sues Corporation, alleging wrongful discharge. Employee files a discovery request seeking all copies of communications between Employee and Lawyer. The tribunal has discretion to order discovery under the conditions stated in the preceding paragraph. In view of the apparent relationship of Employee's statements to possible illegal activities, it is doubtful that Employee could persuade the tribunal that access by Employee would create no material risk that third persons, such as a government agency, would thereby learn of the communication and thus gain a litigation or other advantage with respect to Corporation.

k. Succession in legal control of an organization. When ownership of a corporation or other organization as an entity passes to successors, the transaction carries with it authority concerning asserting or waiving the privilege. After legal control passes in such a transaction, communications from directors, officers, or employees of the acquired organization to lawyers who represent only the predecessor organization, if it maintains a separate existence from the acquiring organization, may no longer be covered by the privilege. When a corporation or other organization has ceased to have a legal existence such that no person can act in its behalf, ordinarily the attorney-client privilege terminates (see generally § 77, Comment c).

Illustration:

3. X, an officer of Ajax Corporation, communicates in confidence with Lawyer, who represents Ajax, concerning dealings between Ajax and one of its creditors, Vendor Corporation. Ajax later is declared bankrupt and a bankruptcy court appoints Trustee as the trustee in bankruptcy for Ajax.

Thereafter, Lawyer is called to the witness stand in litigation between Vendor Corporation and Trustee. Trustee has authority to determine whether the attorney-client privilege should be asserted or waived on behalf of the bankrupt Ajax Corporation with respect to testimony by Lawyer about statements by X. X cannot assert a privilege because X was not a client of Lawyer in the representation. Former officers and directors of Ajax cannot assert the privilege because control of the corporation has passed to Trustee.

A lawyer for an organization is ordinarily authorized to waive the privilege in advancing the interests of the client (see § 61 & § 79, Comment c). Otherwise, when called to testify, a lawyer is required to invoke the privilege on behalf of the client (see § 86(1)(b)). On waiver, see §§ 78-80.

§ 74. The Privilege for a Governmental Client

Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72.

Comment:

c. Application of the general attorney-client-privilege rules to a governmental client. The general requirements of the attorney-client privilege apply with respect to assertedly privileged communications of a governmental client. For example, the privilege extends only to communication for the purpose of obtaining or giving legal assistance (see § 72).

The privilege does not apply to a document that has an independent legal effect as an operative statement of governmental policy. For example, a memorandum by a government lawyer that directs, rather than advises, a governmental officer to act in a certain way is not protected by the privilege. Such a document is a necessarily public statement of public policy and as such is meant to be publicly disseminated (see § 71, Comment e).

Communications between a lawyer representing one governmental agency and an employee of another governmental agency are privileged only if the lawyer represents both agencies (see § 75) or if the communication is pursuant to a common-interest arrangement (see § 76).

d. Individual government employees and agents. Employees and agents of a governmental agency may have both official and personal interests in a matter. A police officer sued for damages for the alleged use of excessive force, for example, may be both officially and personally interested in the lawsuit. The officer has the right to consult counsel of the officer's choice with respect to the officer's personal interests. If the officer consults a lawyer retained by the officer's agency or department, the principles of § 73, Comment j, determine whether the officer is a co-client with the agency or department (see § 75) or is not a client of the lawyer. Government lawyers may be prohibited from the private practice of law or accepting a matter adverse to the government. Thus, the fact that the common employer of both lawyer and officer is a government agency may affect the reasonableness of the officer's claim of expectation that the lawyer could function as personal counsel for the officer. On the conflict-of-interest limitations on such joint representations, see § 131, Comment e. If a lawyer is retained by the agency as separate counsel to represent the personal interests of the employee, for purposes of the privilege the employee is the sole client. As with agents of nongovernmental organizations, the status of a governmental employee or agent as co-client (see § 75), individual client, or nonrepresented communicating agent of the agency sometimes may be difficult to determine. Inquiry in such cases should focus upon the employment relationship of the lawyer and the reasonable belief of the agent at the time of communicating.

e. Invoking and waiving the privilege of a governmental client. The privilege for governmental entities may be asserted or waived by the responsible public official or body. The identity of that responsible person or body is a question of local governmental law. In some states, for example, the state's attorney general decides matters of litigation policy for state agencies, including decisions about the privilege. In other states, such decisions are made by another executive officer or agency in suits in which the attorney general otherwise conducts the litigation. As a general proposition, the official or body that is empowered to assert or forego a claim or defense is entitled to assert or forego the privilege for communications relating to the claim or defense. Waiver of the privilege is determined according to the standards set forth in § 73, Comment j. See also Comment d hereto.

§ 75. The Privilege of Co-Clients

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Comment:

b. The co-client privilege. Under Subsection (1), communications by co-clients with their common lawyer retain confidential characteristics as against third persons. The rule recognizes that it may be desirable to have multiple clients represented by the same lawyer.

c. Delimiting co-client situations. Whether a client-lawyer relationship exists between each client and the common lawyer is determined under § 14, specifically whether they have expressly or impliedly agreed to common representation in which confidential information will be shared. A co-client representation can begin with a joint approach to a lawyer or by agreement after separate representations had begun. However, clients of the same lawyer who share a common interest are not necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties and the lawyer in light of the circumstances (see § 14).

Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person with allied interests cooperates with the client and the client's lawyer (see § 76).

The scope of the co-client relationship is determined by the extent of the legal matter of common interest. For example, a lawyer might also represent one co-client on other matters separate from the common one. On whether, following the end of a co-client relationship, the lawyer may continue to represent one former co-client adversely to the interests of another, see § 121, Comment e. On the confidentiality of communications during a co-client representation, see Comment d hereto.

d. The subsequent-proceeding exception to the co-client privilege. As stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, one of them may not invoke the attorney-client privilege against the other with respect to communications involving either of them during the co-client relationship. That rule applies whether or not the co-client's communication had been disclosed to the other during the co-client representation, unless they had otherwise agreed.

Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness and candor between the co-clients and with the lawyer generally precludes the lawyer from keeping information secret from any one of them, unless they have agreed otherwise (see § 60, Comment l).

Illustration:

1. Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Whether communications between the lawyer and a client that occurred before formation of a joint representation are subject to examination depends on the understanding at the time that the new person was joined as a co-client.

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such

an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients (see § 60, Comment l). A co-client may also retain additional, separate counsel on the matter of the common representation; communications with such counsel are not subject to this Section.

e. Standing to assert the co-client privilege; waiver. If a third person attempts to gain access to or to introduce a co-client communication, each co-client has standing to assert the privilege. The objecting client need not have been the source of the communication or previously have known about it.

The normal rules of waiver (see §§ 78-80) apply to a co-client's own communications to the common lawyer. Thus, in the absence of an agreement with co-clients to the contrary, each co-client may waive the privilege with respect to that co-client's own communications with the lawyer, so long as the communication relates only to the communicating and waiving client.

One co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer. If a document or other recording embodies communications from two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.

Disclosure of a co-client communication in the course of subsequent adverse proceeding between co-clients operates as waiver by subsequent disclosure under § 79 with respect to third persons.

§ 76. The Privilege in Common-Interest Arrangements

(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.

Comment:

b. Rationale. The rule in this Section permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers. For example, where conflict of interest disqualifies a lawyer from representing two co-defendants in a criminal case (see § 129), the separate lawyers representing them may exchange confidential communications to prepare their defense without loss of the privilege. Clients thus can elect separate representation while maintaining the privilege in cooperating on common elements of interest.

c. Confidentiality and common-interest rules. The common-interest privilege somewhat relaxes the requirement of confidentiality (see § 71) by defining a widened circle of persons to whom clients may disclose privileged communications. As a corollary, the rule also limits what would otherwise be instances of waiver by disclosing a communication (compare § 79). Communications of several commonly interested clients remain confidential against the rest of the world, no matter how many clients are involved. However, the known presence of a stranger negates the privilege for communications made in the stranger's presence.

Exchanging communications may be predicated on an express agreement, but formality is not required. It may pertain to litigation or to other matters. Separately represented clients do not, by the mere fact of cooperation under this Section, impliedly undertake to exchange all information concerning the matter of common interest.

d. The permissible extent of common-interest disclosures. Under the privilege, any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent (see § 70)—can exchange communications with members of a similar client set. However, a communication directly among the clients is not privileged unless made for the purpose of communicating with a privileged person as defined in § 70. A person who is not represented by a lawyer and who is not himself or herself a lawyer cannot participate in a common-interest arrangement within this Section.

e. Extent of common interests. The communication must relate to the common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent.

Illustration:

1. Lawyer One separately represents Corporation A and Lawyer Two represents Corporation B in defending a products-liability action brought by a common adversary, Plaintiff X. The two lawyers agree to exchange otherwise privileged communications of their respective clients concerning settlement strategies. Plaintiff Y later sues Corporation A and Corporation B for damages for alleged defects involving the same products and attempts to obtain discovery of the communications between Lawyer One and Lawyer Two. The communications exchanged between the lawyers for Corporation A and Corporation B are privileged and cannot be discovered.

Unlike the relationship between co-clients, the common-interest relationship does not imply an undertaking to disclose all relevant information (compare § 75, Comment d). Confidential communications disclosed to only some members of the arrangement remain privileged against other members as well as against the rest of the world.

§ 77. Duration of the Privilege

Unless waived (see §§ 78-80) or subject to exception (see §§ 81-85), the attorney-client privilege may be invoked as provided in § 86 at any time during or after termination of the relationship between client or prospective client and lawyer.

Comment:

d. Situations of need and hardship. The law recognizes no exception to the rule of this Section. Set out below are considerations that may support such an exception, although no court or legislature has adopted it.

It would be desirable that a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure. Permitting such disclosure would do little to inhibit clients from confiding in their lawyers. The fortuity of death prevents waiver of the privilege by the client. Appointing a personal representative to consider waiving the privilege simply transforms the issue into one before a probate court. It would be more direct to permit the judge in the proceeding in which the evidence is offered to make a determination based on the relevant factors.

§ 78. Agreement, Disclaimer, or Failure to Object

The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client:

- (1) agrees to waive the privilege;
- (2) disclaims protection of the privilege and
 - (a) another person reasonably relies on the disclaimer to that person's detriment; or
 - (b) reasons of judicial administration require that the client not be permitted to revoke the disclaimer; or
- (3) in a proceeding before a tribunal, fails to object properly to an attempt by another person to give or exact testimony or other evidence of a privileged communication.

§ 79. Subsequent Disclosure

The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a nonprivileged communication.

Comment:

b. Subsequent disclosure. Voluntary disclosure of a privileged communication is inconsistent with a later claim that the communication is to be protected. When the disclosure has been made voluntarily, it is unnecessary that there have been detrimental reliance (compare § 78(2)).

c. Authorized disclosure by a lawyer or other agent. The privilege is waived if the client's lawyer or another authorized agent of the client discloses the communication acting under actual or apparent authority. A lawyer generally has implied authority to disclose confidential client communications in the course of representing a client (see § 27, Comment c; see also § 61). Ratification of the agent's authority has the same effect (see § 26, Comment e). Whether a subagent of the client or lawyer has authority to waive is governed by agency law. A file clerk in a law firm, for example, does not have implied authority.

Unauthorized disclosure by a lawyer not in pursuit of the client's interests does not constitute waiver under this Section. For example, disclosure of a client's confidential information to prevent a threat to the life or safety of another (§ 66) or to prevent a client crime or fraud (§ 67) does not constitute waiver within the meaning of this Section, although another basis for finding the privilege inapplicable may apply.

Because of the lawyer's apparent authority to act for the client, a lawyer's failure to consult the client about disclosing privileged information generally will not affect the rights of third persons. A third person may not, however, reasonably rely on acts of an opposing lawyer or other agent constituting manifest disregard of responsibility for the client's interests (see also § 60, Comment 1, & § 71, Comment c (eavesdroppers)). Upon discovery of an agent's wrongful disclosure, the client must promptly take reasonable steps to suppress or recover the wrongfully disclosed communication in order to preserve the privilege.

Illustration:

1. Lawyer sends a confidential memorandum containing privileged communications to Client for Client's review. Lawyer sends it by a reputable document-courier service. An employee of the document-courier service opens the sealed envelope, makes copies, and gives the copies to a government agency. As soon as the existence of the copies is discovered, Lawyer takes reasonable steps to recover them and demands that the document-courier service and the government agency return all communications taken or information gained from them. Even if the document-courier service is considered an agent of Lawyer for some purposes, its employee's actions do not waive Client's privilege in the communications.

d. A privileged subsequent disclosure. A subsequent disclosure that is itself privileged does not result in waiver. Thus, a client who discloses a communication protected by the attorney-client privilege to a second lawyer does not waive the privilege if the attorney-client privilege or work-product immunity protects the second communication. So also, showing a confidential letter from the client's lawyer to the client's spouse under circumstances covered by the marital privilege preserves the attorney-client privilege.

e. Extent of disclosure. Waiver results only when a nonprivileged person learns the substance of a privileged communication. Knowledge by the nonprivileged person that the client consulted a lawyer does not result in waiver, nor does disclosure of nonprivileged portions of a communication or its general subject matter. Public disclosure of facts that were discussed in confidence with a lawyer does not waive the privilege if the disclosure does not also reveal that they were communicated to the lawyer. See § 69, Comment d (distinction between communications and facts).

Illustrations:

2. Client, a defendant in a personal-injury action, makes a privileged communication to Lawyer concerning the circumstances of the accident. In a later judicial proceeding, Client, under questioning by Lawyer, testifies about the occurrence but not about what Client told Lawyer about the same matter. On cross-examination, the lawyer for Plaintiff inquires whether the Client's testimony is consistent with the account Client gave to Lawyer in confidence. Client's testimony did not waive the privilege.

3. The same facts as in Illustration 2, except that Client states that "I've testified exactly as I told Lawyer just a week after the accident happened. I told Lawyer that the skid marks made by Plaintiff's car were 200 feet long. And I've said the same things here." Such testimony waives the privilege by subsequent disclosure. On the extent of waiver, see Comment f hereto.

In the circumstances of Illustration 3, if the client merely testifies that the subject of skid marks was discussed with the client's lawyer, the privilege is not waived.

f. Partial subsequent disclosure and "subject matter" waiver. An initial disclosure resulting in waiver under this Section may consist of disclosure of fewer than all communications between lawyer and client on the subject. The question then arises whether an inquiring party is entitled to access to other relevant communications beyond those actually disclosed. (Similar questions can arise with respect to waiver under § 78 (waiver by agreement, disclaimer, or failure to object) and § 80 (waiver by putting assistance or communication in issue).)

General waiver of all related communications is warranted when a party has selectively offered in evidence before a factfinder only part of a more extensive communication or one of several related communications, and the opposing party seeks to test whether the partial disclosure distorted the context or meaning of the part offered. All authorities agree that in such a situation waiver extends to all otherwise-privileged communications on the same subject matter that are reasonably necessary to make a complete and balanced presentation (compare Federal Rules of Evidence, Rule 106). That breadth of waiver is required by considerations of forensic fairness, to prevent a partial disclosure that would otherwise mislead the factfinder because selectively incomplete. Similar considerations generally apply when the privilege holder makes a partial disclosure in pretrial proceedings, as in support of a motion for summary judgment or during a pretrial hearing on a request for provisional relief.

If partial disclosure occurs in a nontestimonial setting or in the context of pretrial discovery, a clear majority of decisions indicates that a similar broad waiver will be found, even though the disclosure is not intended to obtain advantage as a possibly misleading half-truth in testimony. Although arguably different considerations might apply (because of the absence of opportunity to mislead a factfinder by partial disclosure), courts insist in effect that a party who wishes to assert the privilege take effective steps to protect against even partial disclosure, regardless of the nontestimonial setting. In an appropriate factual setting, waiver may also be supportable on the ground that the partial disclosure was designed to mislead an opposing party in negotiations or was inconsistent with a candid exchange of information in pretrial discovery.

Parties may agree that disclosure of one privileged communication will not be regarded as waiver as to others, and

a tribunal may so order, for example in a discovery protective order. Such an agreement or order governs questions of waiver both in the proceeding involved and, with respect to the parties to the agreement, in other proceedings.

g. Voluntary subsequent disclosure. To constitute waiver, a disclosure must be voluntary. The disclosing person need not be aware that the communication was privileged, nor specifically intend to waive the privilege. A disclosure in obedience to legal compulsion or as the product of deception does not constitute waiver.

Illustrations:

4. A burglar ransacks Client's confidential files and carries away copies of communications from Client to Lawyer protected by the attorney-client privilege. The police apprehend the burglar, recover the copies, and examine them in order to identify their owner. Client's right to invoke the privilege is not lost.

5. At a hearing before a tribunal, the presiding officer erroneously overrules Lawyer's objection to a question put to Client that calls for a communication protected by the attorney-client privilege. Client then testifies. By testifying, Client has not waived objection to efforts to elicit additional privileged communications in the litigation nor to claim on appeal that the hearing officer incorrectly overruled Lawyer's objection. Client also can seek protection of the attorney-client privilege in subsequent litigation.

On resisting disclosure by legal compulsion, see § 86.

h. Inadvertent disclosure. A subsequent disclosure through a voluntary act constitutes a waiver even though not intended to have that effect. It is important to distinguish between inadvertent waiver and a change of heart after voluntary waiver. Waiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure. What is reasonable depends on circumstances, including: the relative importance of the communication (the more sensitive the communication, the greater the necessary protective measures); the efficacy of precautions taken and of additional precautions that might have been taken; whether there were externally imposed pressures of time or in the volume of required disclosure; whether disclosure was by act of the client or lawyer or by a third person; and the degree of disclosure to nonprivileged persons.

Once the client knows or reasonably should know that the communication has been disclosed, the client must take prompt and reasonable steps to recover the communication, to reestablish its confidential nature, and to reassert the privilege. Otherwise, apparent acceptance of the disclosure may reflect indifference to confidentiality. Even if fully successful retrieval is impracticable, the client must nonetheless take feasible steps to prevent further distribution.

Illustration:

6. Plaintiff has threatened Client with suit unless Client is able to persuade Plaintiff's lawyers that

Client is free from fault. Plaintiff imposes a stringent deadline for Client's showing. Client authorizes Lawyer to produce a large mass of documents. Although reviewed by Lawyer, the documents include a confidential memorandum by Client to Lawyer. The standard procedure of lawyers in the circumstances would not have included reexamining the copies prior to submission. Lawyer's inadvertent disclosure did not waive the privilege. After discovering the mistake, Client must promptly reassert the privilege and demand return of the document.

i. Consequences of client waiver of the privilege. Waiver ordinarily extends to the litigation in or in anticipation of which a disclosure was made and future proceedings as well, whether or not related to the original proceeding. However, if no actual disclosure resulted from the waiver, a client might be in a position to reassert the privilege. For example, inadvertent disclosure of a privileged document in discovery should not preclude subsequent assertion of the privilege against a different opponent in different litigation if the disclosure does not result in the document becoming known to anyone other than the party who received it.

§ 80. Putting Assistance or a Communication in Issue

(1) The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that:

- (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct; or
 - (b) a lawyer's assistance was ineffective, negligent, or otherwise wrongful.
- (2) The attorney-client privilege is waived for a recorded communication if a witness:
- (a) employs the communication to aid the witness while testifying; or
 - (b) employed the communication in preparing to testify, and the tribunal finds that disclosure is required in the interests of justice.

§ 81. A Dispute Concerning a Decedent's Disposition of Property

The attorney-client privilege does not apply to a communication from or to a decedent relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction.

§ 82. Client Crime or Fraud

The attorney-client privilege does not apply to a communication occurring when a client:

- (a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
- (b) regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

Comment:

a. Scope and cross-references. On a lawyer's responsibilities with respect to counseling a client concerning illegal acts, see § 94. On a lawyer's responsibilities with respect to perjurious or other false evidence, see § 120. A lawyer's duty to safeguard confidential client information (see § 60(1)(b)) is subject to §§ 66-67, permitting a lawyer to use or disclose information as reasonably necessary to prevent (or in some instances to mitigate) certain illegal acts of a client.

b. Rationale. When a client consults a lawyer intending to violate elemental legal obligations, there is less social interest in protecting the communication. Correlatively, there is a public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends. Denying protection of the privilege can be founded on the additional moral ground that the client's wrongful intent forfeits the protection. The client can choose whether or not to commit or aid the act after consulting the lawyer and thus is able to avoid exposing secret communications. The exception does not apply to communications about client crimes or frauds that occurred prior to the consultation. Whether a communication relates to past or ongoing or future acts can be a close question. See Comment e hereto.

c. Intent of the client and lawyer. The client need not specifically understand that the contemplated act is a crime or fraud. The client's purpose in consulting the lawyer or using the lawyer's services may be inferred from the circumstances. It is irrelevant that the legal service sought by the client (such as drafting an instrument) was itself lawful.

Illustrations:

1. Client is a member of a group engaged in the ongoing enterprise of importing and distributing illegal drugs. Client has agreed with confederates, as part of the consideration for participating in the enterprise, that Client will provide legal representation for the confederates when necessary. Client and Lawyer agree that, for a substantial monthly retainer, Lawyer will stand ready to provide legal services in the event that Client or Client's associates encounter legal difficulties during the operation of the enterprise. In a communication that otherwise qualifies as privileged under § 68, Client informs Lawyer of the identities of confederates in the enterprise. Client continues to engage in the criminal enterprise following the communication. The crime-fraud exception renders nonprivileged the communications between Client and Lawyer, including identification of Client's confederates.

2. Client, who is in financial difficulty, consults Lawyer A concerning the sale of a parcel of real estate owned by Client. Lawyer A provides legal services in connection with the sale. Client then asks Lawyer A to represent Client in

petitioning for bankruptcy. Lawyer A advises Client that the bankruptcy petition must list the sale of the real estate because it occurred within the year previous to the date of filing the petition. Client ends the representation. Client shortly thereafter hires Lawyer B. Omitting to tell Lawyer B about the land sale, Client directs Lawyer B to file a bankruptcy petition that does not disclose the proceeds of the sale. In a subsequent proceeding in which Client's fraud in filing the petition is in issue, a tribunal would be warranted in inferring that Client consulted Lawyer A with the purpose of obtaining assistance to defraud creditors in bankruptcy and thus that the communications between Client and Lawyer A concerning report of the land sale in the bankruptcy petition are not privileged. It would also suffice should the tribunal find that Client attempted to use Lawyer A's advice about the required contents of a bankruptcy petition to defraud creditors by withholding information about the land sale from Lawyer B.

A client could intend criminal or fraudulent conduct but not carry through the intended act. The exception should not apply in such circumstances, for it would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance. By the same token, lawyers might be discouraged from giving full and candid advice to clients about legally questionable courses of action. On the other hand, a client may consult a lawyer about a matter that constitutes a criminal conspiracy but that is later frustrated—and, in that sense, not later accomplished (cf. Subsection (a))—or, similarly, about a criminal attempt. Such a crime is within the exception stated in the Section if its elements are established.

The crime-fraud exception applies regardless of the fact that the client's lawyer is unaware of the client's intent. The exception also applies if the lawyer actively participates in the crime or fraud. However, if a client does not intend to commit a criminal or fraudulent act, the privilege protects the client's communication even if the client's lawyer acts with a criminal or fraudulent intent in giving advice.

Illustration:

3. Lawyer, in complicity with confederates who are not clients, is furthering a scheme to defraud purchasers in a public offering of shares of stock. Client, believing that the stock offering is legitimate and ignorant of facts indicating its wrongful nature, seeks to participate in the offering as an underwriter. In the course of obtaining legal advice from Lawyer, Client conveys communications to Lawyer that are privileged under § 68. The crime-fraud exception does not prevent Client from asserting the attorney-client privilege, despite Lawyer's complicity in the fraud.

d. Kinds of illegal acts included within the exception. The authorities agree that the exception stated in this Section applies to client conduct defined as a crime or fraud. Fraud, for the purpose of the exception, requires a knowing or reckless misrepresentation (or nondisclosure when applicable law requires disclosure) likely to injure another (see Restatement Second, Torts §§ 525-530 (defining elements of fraudulent misrepresentation)).

The evidence codes and judicial decisions are divided on the question of extending the exception to other wrongs such as intentional torts, which, although not criminal or fraudulent, have hallmarks of clear illegality and the threat of serious harm. Legislatures and courts classify illegal acts as crimes and frauds for purposes and policies different from those defining the scope of the privilege. Thus, limiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise indicate. Nonetheless, the prevailing view limits the exception to crimes and frauds. The actual instances in

which a broader exception might apply are probably few and isolated, and it would be difficult to formulate a broader exception that is not objectionably vague.

Consultation about some acts of civil disobedience is privileged under the Section, for example violations of a law based on a nonfrivolous claim that the law is unconstitutional. The same is true of a communication concerning a contempt sanction necessary to obtain immediate appellate review of an order whose validity is challenged in good faith. (See § 94, Comment e, & § 105, Comment e.) If, however, the client's position is that the law is valid but there is a superior moral justification for violating it, this Section applies if its conditions are otherwise satisfied.

e. Continuing crimes and frauds. The crime-fraud exception depends on a distinction between past client wrongs and acts that are continuing or will occur in the future. The exception does not apply to communications about client criminal or fraudulent acts that occurred in the past. Communications about past acts are necessary in defending against charges concerning such conduct and, for example, providing background for legal advice concerning a present transaction that is neither criminal nor fraudulent. The possible social costs of denying access to relevant evidence of past acts is accepted in order to realize the enhanced legality and fairness that confidentiality fosters (see § 68, Comment c).

The exception does apply to client crimes or frauds that are ongoing or continuing. With respect to past acts that have present consequences, such as the possession of stolen goods, consultation of lawyer and client is privileged if it addresses how the client can rectify the effects of the illegal act—such as by returning the goods to their rightful owner—or defending the client against criminal charges arising out of the offense.

Illustration:

4. Client consults Lawyer about Client's indictment for the crimes of theft and of unlawfully possessing stolen goods. Applicable law treats possession of stolen goods as a continuing offense. Client is hiding the goods in a secret place, knowing that they are stolen. Confidential communications between Client and Lawyer concerning the indictment for theft and possession and the facts underlying those offenses are privileged. Confidential communications concerning ways in which Client can continue to possess the stolen goods, including information supplied by Client about their present location, are not protected by the privilege because of the crime-fraud exception. Confidential communications about ways in which Client might lawfully return the stolen goods to their owner are privileged.

Strict limitation of the exception to ongoing or future crimes and frauds would prohibit a lawyer from testifying that a client confessed to a crime for which an innocent person is on trial. The law of the United Kingdom recognizes an exception in such cases. At least in capital cases, the argument for so extending the exception seems compelling. Compare also § 66 (disclosure to prevent loss of life or serious bodily injury, whether or not risk is created by wrongful client act).

f. Invoking the crime-fraud exception. The crime-fraud exception is relevant only after the attorney-client privilege is successfully invoked. The person seeking access to the communication then must present a prima facie case for the exception. A prima facie case need show only a reasonable basis for concluding that the elements of the exception (see Comment d) exist. The showing must be made by evidence other than the contested communication itself. Once a prima facie showing is made, the tribunal has discretion to examine the communication or hear testimony about it in camera, that is, without requiring that the communications be revealed to the party seeking to invoke the exception (see § 86, Comment f).

Unless the crime-fraud exception plainly applies to a client-lawyer communication, a lawyer has an obligation to assert the privilege (see § 63, Comment b).

g. Effects of the crime-fraud exception. A communication to which the crime-fraud exception applies is not privileged under § 68 for any purpose. Evidence of the communication is admissible in the proceeding in which that determination is made or in another proceeding. The privilege still applies, however, to communications that were not for a purpose included within this Section. For example, a client who consulted a lawyer about several different matters on several different occasions could invoke the privilege with respect to consultations concerning matters unrelated to the illegal acts (compare § 79, Comment e). With respect to a lawyer's duty not to use or disclose client information even if not privileged, see § 60; compare §§ 66-67.

§ 83. Lawyer Self-Protection

The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding:

- (1) to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or
- (2) to defend the lawyer or the lawyer's associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client.

§ 84. Fiduciary-Lawyer Communications

In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise within § 68 is nonetheless not privileged if the communication:

- (a) is relevant to the claimed breach; and
- (b) was between the trustee and a lawyer (or other privileged person within the meaning of § 70) who was retained to advise the trustee concerning the administration of the trust.

§ 85. Communications Involving a Fiduciary Within an Organization

In a proceeding involving a dispute between an organizational client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, the attorney-client privilege of the organization may be withheld from a communication otherwise within § 68 if the tribunal finds that:

- (a) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;
- (b) the communication occurred prior to the assertion of the charges and relates directly to those charges; and
- (c) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

§ 86. Invoking the Privilege and Its Exceptions

(1) When an attempt is made to introduce in evidence or obtain discovery of a communication privileged under § 68:

(a) A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke or waive the privilege, either personally or through counsel or another authorized agent.

(b) A lawyer, an agent of the lawyer, or an agent of a client from whom a privileged communication is sought must invoke the privilege when doing so appears reasonably appropriate, unless the client:

- (i) has waived the privilege; or
- (ii) has authorized the lawyer or agent to waive it.

(c) Notwithstanding failure to invoke the privilege as specified in Subsections (1)(a) and (1)(b), the tribunal has discretion to invoke the privilege.

(2) A person invoking the privilege must ordinarily object contemporaneously to an attempt to disclose the communication and, if the objection is contested, demonstrate each element of the privilege under § 68.

(3) A person invoking a waiver of or exception to the privilege (§§ 78-85) must assert it and, if the assertion is contested, demonstrate each element of the waiver or exception.

Topic 3. The Lawyer Work-Product Immunity

§ 87. Lawyer Work-Product Immunity

(1) Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.

(2) Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.

(3) Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated in §§ 88 (ordinary work product) and 89 (opinion work product) when the immunity is invoked as described in § 90.

Comment:

b. Rationale. The Federal Rules of Civil Procedure in 1938 provided for notice pleading supplemented by expanded discovery. The Rules sought to eliminate the “sporting” concept of litigation in favor of more accurate factfinding and open truth-seeking. However, the discovery rules presupposed that counsel should be able to work within an area of professional confidentiality, described by the work-product rule. A companion assumption has been that the truth emerges from the adversary presentation of information by opposing sides, in which opposing lawyers competitively develop their own sources of factual and legal information. The work-product doctrine also protects client interests in obtaining diligent assistance from lawyers. A lawyer whose work product would be open to the other side might forgo useful preparatory procedures, for example, note-taking. The immunity also reduces the possibility that a lawyer would have to testify concerning witness statements (compare § 108).

Nonetheless, the work-product immunity is in tension with the purposes of modern discovery by impeding the pretrial exchange of information. The immunity also entails duplication of investigative efforts, perhaps increasing litigation costs. Enforcement of the immunity causes satellite litigation and additional expense.

Protection of lawyer thought processes (see § 89) is at the core of work-product rationale; accordingly, those are accorded the broadest protection. A lawyer’s analysis can readily be replicated by an opposing

lawyer and, in any event, would usually be inadmissible in evidence. Factual information gathered by a lawyer usually relates directly to controverted issues and generally is discoverable in forms that do not reveal the lawyer’s thought processes.

Beyond that, the work-product rules are a set of compromises between openness and secrecy. Thus, under Federal Rule 26(b), the identity of witnesses must be disclosed even if ascertaining their identity has been burdensome or involved confidential consultations with a client. Similarly, under Rule 26(b) statements given by a party to an opposing lawyer are subject to discovery, even though such a statement necessarily reflects the lawyer’s thought process in some degree. So also are the opinions of an expert who is expected to testify at trial. A nonparty witness’s statement must be produced upon demand by that witness. A party’s documents and other records are generally discoverable even if they have been reviewed by counsel. On the other hand, the identity of an expert consulted but who will not testify is protected against discovery, even if that expert’s opinion is highly material. So also, the classification systems employed by a lawyer in reviewing a client’s documents are not subject to discovery.

c. Applications of the work-product immunity. The work-product immunity operates primarily as a limitation on pretrial discovery, but it can apply to evidence at a trial or hearing. Work-product immunity is also recognized in criminal and administrative proceedings and is incorporated as a limitation on other types of disclosure, for example in the federal Freedom of Information Act. The scope of those applications of the work-product rule is generally beyond the scope of this Restatement.

d. The relationship of the work-product immunity to the attorney-client privilege. The attorney-client privilege is limited to communications between a client and lawyer and certain of their agents (see § 70); in contrast, work product includes many other kinds of materials (see Comment f), even when obtained from sources other than the client. Application of the attorney-client privilege absolutely bars discovery or

testimonial use; in contrast, the work-product immunity is a qualified protection that, in various circumstances, can be overcome on a proper showing (see § 88 & 89). The attorney-client privilege protects communications between client and lawyer regarding all kinds of legal services (see § 72); in contrast, the work-product immunity is limited to

materials prepared for or in anticipation of litigation (see Comments h-j).

Work-product immunity is also similar to the rule recognized in some jurisdictions that a self-evaluation study and report is immune from discovery. The self-evaluation immunity is not limited to work performed in anticipation of litigation. The scope of self-evaluation and similar immunities is beyond the scope of this Restatement.

e. The source of the law concerning work-product immunity. In the federal system, work-product immunity is recognized both under Rule 26(b)(3) of the Federal Rules of Civil Procedure and as a common-law rule following the decision in *Hickman v. Taylor*. In a few states work-product immunity is established by common law, but in most states it is defined by statute or court rule. Some state statutes mirror Federal Rule of Civil Procedure 26(b)(3); others codify the principles of *Hickman v. Taylor* more broadly; and others codify pre-*Hickman* rules that were not adopted for the federal courts. State courts, in construing their statutes, often look to federal case law in applying work-product immunity.

f. Types of work-product materials. Work product includes tangible materials and intangible equivalents prepared, collected, or assembled by a lawyer. Tangible materials include documents, photographs, diagrams, sketches, questionnaires and surveys, financial and economic analyses, hand-written notes, and material in electronic and other technologically advanced forms, such as stenographic, mechanical, or electronic recordings or transmissions, computer data bases, tapes, and printouts. Intangible work product is equivalent work product in unwritten, oral or remembered form. For example, intangible work product can come into question by a discovery request for a lawyer's recollections derived from oral communications.

A compilation or distillation of non-work-product materials can itself be work product. For example, a lawyer's memorandum analyzing publicly available information constitutes work product. The selection or arrangement of documents that are not themselves protected might reflect mental impressions and legal opinions inherent in making a selection or arrangement. Thus, a lawyer's index of a client's preexisting and discoverable business files will itself be work product if prepared in anticipation of litigation. So also, the manner in which a lawyer has selected certain client files, organized them in pretrial work, and plans to present them at trial is work product.

g. The distinction between protected materials and nonprotected underlying facts. Work-product immunity does not apply to underlying facts of the incident or transaction involved in the litigation, even if the same information is contained in work product. For a comparison to the nonprivileged status accorded to facts under the attorney-client privilege, see § 69, Comment d.

The distinction between discoverable underlying facts and nondiscoverable work product can be difficult to draw. Relevant are the form of the question or request, the identity of the person who is to respond, and the form of a responsive answer. Immunity does not attach merely because the underlying fact was discovered through a lawyer's effort or is recorded only in otherwise protected work product, for example, in a lawyer's file memorandum. Immunity does not apply to an interrogatory seeking names of witnesses to the occurrence in question or whether a witness recounts a particular version of events, for example that a traffic light was red or green. On the other hand, an interrogatory seeking the substantially verbatim contents of the witness's unrecorded statement would be objectionable.

h. Anticipation of litigation: kinds of proceedings. The limitation of the work-product immunity to litigation activities is best explained by the origin of the rule in the context of litigation. "Litigation" includes civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. It also includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing. In general, a proceeding is adversarial when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues. Thus, an adversarial rulemaking proceeding is litigation for purposes of the immunity.

i. Anticipation of litigation: the reasonableness standard. Work-product immunity attaches when litigation is then in progress or there is reasonable anticipation of litigation by the lawyer at the time the material was prepared. On what constitutes litigation, see Comment h hereto. The fact that litigation did not actually ensue does not affect the immunity.

In one sense, almost all of a lawyer's work anticipates litigation to some degree, because preparing documents or arranging transactions is aimed at avoiding future litigation or enhancing a client's position

should litigation occur. However, the immunity covers only material produced when apprehension of litigation was reasonable in the circumstances. The reasonableness of anticipation is determined objectively by considering the factual context in which materials are prepared, the nature of the materials, and the expected role of the lawyer in ensuing litigation.

Illustrations:

1. Employer's Lawyer writes to Physician, setting out circumstances of an employee's death and asking for Physician's opinion as to the cause, stating that Lawyer is preparing for a "possible claim" by the employee's executor for

worker-compensation benefits. Lawyer's letter is protected work product.

2. Informed that agents of the Justice Department are questioning Publisher's customers, Lawyer for Publisher prepared a memorandum analyzing the antitrust implications of Publisher's standard contract form with commercial purchasers. Publisher's employees testify before a grand jury investigating antitrust issues in the publishing industry. Lawyer, reasonably believing there is a risk that the grand jury will indict Publisher, interviews the employees and prepares a debriefing memorandum. Both Lawyer's memorandum analyzing the contract form and Lawyer's debriefing memorandum were prepared in anticipation of litigation. The grand-jury proceeding is itself litigation for this purpose (see Comment h).

j. Future litigation. If litigation was reasonably anticipated, the immunity is afforded even if litigation occurs in an unanticipated way. For example, work product prepared during or in anticipation of a lawsuit remains immune in a subsequent suit for indemnification, whether or not the indemnification claim could have been anticipated. Work product prepared in anticipation of litigation remains protected in all future litigation.

§ 88. Ordinary Work Product

When work product protection is invoked as described in § 90, ordinary work product (§ 87(2)) is immune from discovery or other compelled disclosure unless either an exception recognized in §§ 91-93 applies or the inquiring party:

- (1) has a substantial need for the material in order to prepare for trial; and
- (2) is unable without undue hardship to obtain the substantial equivalent of the material by other means.

Comment:

b. The need-and-hardship exception—in general.

Demonstrating the requisite need and hardship requires the inquiring party to show that the material is relevant to the party's claim or defense, and that the inquiring party will likely be prejudiced in the absence of discovery. As a corollary, it must be shown that substantially equivalent material is not available or, if available, only through cost and effort substantially disproportionate to the amount at stake in the litigation and the value of the information to the inquiring party. The necessary showing is more easily made after other discovery has been completed.

The most common situation involves a prior statement by a witness who is absent, seriously ill, or deceased and thus now unavailable. See Federal Rule of Evidence 804(a). Another common situation concerns statements made contemporaneously with an event. Such statements are often the most reliable recording of recollections of that event and in that sense unique. A third situation is where the passage of time has dulled the memory of the witness.

Illustration:

1. Several witnesses testify before a grand jury investigating the publishing industry. Shortly afterward, Lawyer for Publisher debriefs the witnesses and writes memoranda of those interviews in anticipation of the possible indictment of Publisher and later civil suits. Six years later, Plaintiffs, representing a class of consumers, file an antitrust class action against Publisher and seek discovery of the non-opinion work-product portions of Lawyer's debriefing memoranda. Plaintiffs have been diligent in preparing their case and gathering evidence through other means and demonstrate that the witnesses now are unable to recall the events to which they testified. The court may order the memorandum produced. If the memorandum contains both ordinary and opinion work product, see § 89, Comment c.

Substantial need also exists when the material consists of tests performed nearly contemporaneously with a litigated event and substantially equivalent testing is no longer possible.

c. Material for impeachment. Need is shown when a requesting party demonstrates that there is likely to be a material discrepancy between a prior statement of a witness reflected in a lawyer's notes and a statement of the same person made later during discovery, such as during a deposition. The discrepancy must be of an impeaching quality. A clear case exists when the witness admits to such a discrepancy. However, the inquiring party may demonstrate a

reasonable basis by inference from circumstances. In camera inspection of the statement may be appropriate to determine whether the material should be produced.

d. Witness statements. A statement given to a lawyer by a witness is work product. Being ordinary work product, a witness statement may be obtained by an opposing party only upon an appropriate showing of need and hardship. Under the Federal Rules and the law of many states, the person who gives a substantially verbatim statement has the right to obtain a copy of it.

§ 89. Opinion Work Product

When work product protection is invoked as described in § 90, opinion work product (§ 87(2)) is immune from discovery or other compelled disclosure unless either the immunity is waived or an exception applies (§§ 91-93) or extraordinary circumstances justify disclosure.

§ 90. Invoking the Lawyer Work-Product Immunity and Its Exceptions

(1) Work-product immunity may be invoked by or for a person on whose behalf the work product was prepared.

(2) The person invoking work-product immunity must object and, if the objection is contested, demonstrate each element of the immunity.

(3) Once a claim of work product has been adequately supported, a person entitled to invoke a waiver or exception must assert it and, if the assertion is contested, demonstrate each element of the waiver or exception.

§ 91. Voluntary Acts

Work-product immunity is waived if the client, the client's lawyer, or another authorized agent of the client:

(1) agrees to waive the immunity;

(2) disclaims protection of the immunity and:

(a) another person reasonably relies on the disclaimer to that person's detriment; or

(b) reasons of judicial administration require that the client not be permitted to revoke the disclaimer; or

(3) in a proceeding before a tribunal, fails to object properly to an attempt by another person to give or exact testimony or other evidence of work product; or

(4) discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.

§ 92. Use of Lawyer Work Product in Litigation

(1) Work-product immunity is waived for any relevant material if the client asserts as to a material issue in a proceeding that:

(a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct; or

- (b) a lawyer's assistance was ineffective, negligent, or otherwise wrongful.
- (2) The work-product immunity is waived for recorded material if a witness:
 - (a) employs the material to aid the witness while testifying, or
 - (b) employed the material in preparing to testify, and the tribunal finds that disclosure is required in the interests of justice.

§ 93. Client Crime or Fraud

Work-product immunity does not apply to materials prepared when a client consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or to aid a third person to do so or uses the materials for such a purpose.

Chapter 6. Representing Clients—In General

Topic I. Lawyer Functions in Representing Clients—In General

§ 94. Advising and Assisting a Client—In General

(1) A lawyer who counsels or assists a client to engage in conduct that violates the rights of a third person is subject to liability:

- (a) to the third person to the extent stated in §§ 51 and 56-57; and
- (b) to the client to the extent stated in §§ 50, 55, and 56.

(2) For purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct, but the lawyer may counsel or assist a client in conduct when the lawyer reasonably believes:

- (a) that the client's conduct constitutes a good-faith effort to determine the validity, scope, meaning, or application of a law or court order; or
- (b) that the client can assert a nonfrivolous argument that the client's conduct will not constitute a crime or fraud or violate a court order.
- (3) In counseling a client, a lawyer may address nonlegal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects.

Comment:

f. Advice about enforcement policy. A lawyer's advice to a client about the degree of risk that a law violation will be detected or prosecuted violates the rule of Subsection (2) when the circumstances indicate that the lawyer thereby intended to counsel or assist the client's crime, fraud, or violation of a court order.

No bright-line rule immunizes the lawyer from adverse legal consequences. In many borderline situations, the lawyer's intent will be a disputable question of fact (see Comments a & c), as will be questions of the lawyer's knowledge (see Comment g). Such questions will be determined from all the circumstances. In general, a lawyer may advise a client about enforcement policy in areas of doubtful legality so long as the lawyer does not knowingly counsel or assist the client to engage in criminal or fraudulent activity or activity that violates a court order. Clearly, such advice is permissible when the lawyer knows that nonenforcement amounts to effective abandonment of the prohibition and not simply temporary dereliction on the part of enforcing authorities or ignorance on their part of sufficient facts to bring an enforcement proceeding.

Illustrations:

1. Client plays cards with friends in Client's home and asks Lawyer whether it would be illegal for the players to place small bets on the games. Lawyer knows that a criminal statute prohibiting gambling literally applies to such betting. Lawyer also knows that as a matter of long-standing policy and practice, persons who gamble on social games played in private homes for small stakes are not prosecuted. Lawyer may advise Client about the nonenforcement policy and practice.

2. Lawyer reasonably believes that Client has a nonfrivolous basis for asserting on state income-tax returns that Client's use of a personal automobile is for a business purpose and thus that related expenses are a proper deduction. Among other things, Lawyer has advised Client concerning the likelihood of an audit by tax authorities if Client takes the intended deduction. Lawyer bases the assessment of audit likelihood on published figures showing the incidence of audits for automobile use for taxpayers at Client's income level. In the course of that discussion, Client also asks Lawyer what the average taxpayer at Client's income level deducts for charitable contributions in a year without incurring an audit. From prior dealings with Client, Lawyer knows that Client seldom makes charitable contributions and in past years has not made contributions of more than a few dollars. In the circumstances, Lawyer's advice about enforcement policy concerning the automobile use was appropriate within Subsection (2). While the facts stated above suggest that advice concerning enforcement policy for charitable deductions would not be permissible, whether under all the facts Lawyer may so advise Client depends on whether Lawyer reasonably believes that Client will likely use Lawyer's advice to claim false deductions.

§ 95. An Evaluation Undertaken for a Third Person

(1) In furtherance of the objectives of a client in a representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter.

(2) When providing the information, evaluation, or opinion under Subsection (1) is reasonably likely to affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interests.

(3) In providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient to the extent stated in § 51(2) and not make false statements prohibited under § 98.

Topic 2. Representing Organizational Clients

§ 96. Representing an Organization as Client

(1) When a lawyer is employed or retained to represent an organization:

(a) the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures; and

(b) subject to Subsection (2), the lawyer must follow instructions in the representation, as stated in § 21(2), given by persons authorized so to act on behalf of the organization.

(2) If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it,

the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

(3) In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization.

Comment:

e. A constituent's breach of a legal obligation to the client organization. A lawyer representing an organization is required to act with reasonable competence and diligence in the representation (see § 16(2)) and to use care in representing the organizational client (see § 50). The lawyer thus must not knowingly or negligently assist any constituent to breach a legal duty to the organization. However, a lawyer's duty of care to the organization is not limited to avoidance of assisting acts that threaten injury to a client. A lawyer is also required to act diligently and to exercise care by taking steps to prevent reasonably foreseeable harm

to a client. Thus, Subsection (2) requires a lawyer to take action to protect the interests of the client organization with respect to certain breaches of legal duty to the organization by a constituent.

The lawyer is not prevented by rules of confidentiality from acting to protect the interests of the organization by disclosing within the organization communications gained from constituents who are not themselves clients. That follows even if disclosure is against the interests of the communicating person, of another constituent whose breach of duty is in issue, or of other constituents (see § 131, Comment e). Such disclosure within the organization is subject to direction of a constituent who is authorized to act for the organization in the matter and who is not complicit in the breach (see Comment d). The lawyer may withdraw any support that the lawyer may earlier have provided the intended act, such as by withdrawing an opinion letter or draft transaction documents prepared by the lawyer.

Illustration:

1. Lawyer represents Charity, a not-for-profit corporation. Charity promotes medical research through tax-deductible contributions made to it. President as chief executive officer of Charity retained Lawyer to represent Charity as outside general counsel and has extensively communicated in confidence with Lawyer on a variety of matters concerning Charity. President asks Lawyer to draft documents by which Charity would make a gift of a new luxury automobile to a social friend of President. In that and all other work, Lawyer represents only Charity and not President as a client. Lawyer concludes that such a gift would cause financial harm to Charity in violation of President's legal duties to it. Lawyer may not draft the documents. If unable to dissuade President from effecting the gift, Lawyer must take action to protect the interests of Charity (see Subsection (2) & Comment f). Lawyer may, for example, communicate with members of Charity's board of directors in endeavoring to prevent the gift from being effectuated.

f. Proceeding in the best interests of the client organization. Within the meaning of Subsection (2), a wrongful act of a constituent threatening substantial injury to a client organization may be of two types. One is an act or failure to act that violates a legal obligation to the organization and that would directly harm the organization, such as by unlawfully converting its assets. The other is an act or failure to act by the constituent that, although perhaps intended to serve an interest of the organization, will foreseeably cause injury to the client, such as by exposing the organization to criminal or civil liability.

In either circumstance, as stated in Subsection (2), if the threatened injury is substantial the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization. Those interests are normally defined by appropriate managers of the organization in the exercise of the business and managerial judgment that would be exercised by a person of ordinary prudence in a similar position. The lawyer's duty of care is that of an ordinarily prudent lawyer in such a position (see ALI Principles of Corporate Governance: Analysis and Recommendations § 4.01, at 148-149 (1994)). In the face of threats of substantial injury to the organization of the kind described in Subsection (2), the lawyer must assess the following: the degree and imminence of threatened financial, reputational, and other harms to the organization; the probable results of litigation that might ensue against the organization or for which it would be financially responsible; the costs of taking measures within the organization to prevent or correct the harm; the likely efficaciousness of measures that might be taken; and similar considerations.

The measures that a lawyer may take are those described in Subsection (3), among others. Whether a lawyer has proceeded in the best interests of the organization is determined objectively, on the basis of the circumstances reasonably apparent to the lawyer at the time. Not all lawyers would attempt to resolve a problem defined in Subsection

(2) in the same manner. Not all threats to an organization are of the same degree of imminence or substantiality. In some instances the constituent may be acting solely for reasons of self-interest. In others, the constituent may act on the basis of a business judgment whose utility or prudence may be doubtful but that is within the authority of the constituent. The lawyer's assessment of those factors may depend on the constituent's credibility and intentions, based on prior dealings between them and other information available to the lawyer.

The appropriate measures to take are ordinarily a matter for the reasonable judgment of the lawyer, with due regard for the circumstances in which the lawyer must function. Those circumstances include such matters as time and budgetary limitations and limitations of access to additional information and to persons who may otherwise be able to act. If one measure fails, the lawyer must, if the nature of the threat warrants and circumstances permit, take other reasonably available measures. With respect to the lawyer's possible liability to the organizational client, failure to take a particular remedial step is tested under the general standard of § 50. When the lawyer reasonably concludes that any particular step would not likely advance the best interests of the client, the step need not be taken.

Several options are described in Subsection (3). The lawyer may be able to prevent the wrongful act or its harmful consequences by urging reconsideration by the constituent who intends to commit the act. The lawyer may also suggest that the organization obtain a second legal or other expert opinion concerning the questioned activity. It may be appropriate to refer the matter to someone within the organization having authority to prevent the prospective harm, such as an official in the organization senior in authority to the constituent threatening to act. In appropriate circumstances, the lawyer may request intervention by the highest executive authority in the organization or by its governing body, such as a board of directors or the independent directors on the board, or by an owner of a majority of the stock in the organization. In determining how to proceed, the lawyer may be guided by the organization's internal policies and lines of authority or channels of communication.

In a situation arising under Subsection (2), a lawyer does not fulfill the lawyer's duties to the organizational client by withdrawing from the representation without attempting to prevent the constituent's wrongful act. However, the lawyer's threat to withdraw unless corrective action is taken may constitute an effective step in such an attempt.

If a lawyer has attempted appropriately but unsuccessfully to protect the best interests of the organizational client, the lawyer may withdraw if permissible under § 32. Particularly when the lawyer has unsuccessfully sought to enlist assistance from the highest authority within the organization, the lawyer will be warranted in withdrawing either because the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent (see § 32(3)(d)) or because the client insists on taking action that the lawyer considers repugnant or imprudent (see § 32(3)(f)). On proportionality between certain grounds for withdrawal and possible harm to the organizational client that would be caused by withdrawal, see § 32, Comment h(i). On the circumstances in which a lawyer is required to withdraw, see § 32(2). Following withdrawal, if the lawyer had fulfilled applicable duties prior to withdrawal, the lawyer has no further duty to initiate action to protect the interests of the client organization with respect to the matter. The lawyer continues to be subject to the duties owed to any former client, such as the duty not to become involved in subsequent adverse representations (see § 132) or otherwise to use or disclose the former client's confidential information adversely to the former client (see § 60).

Whether the lawyer may disclose a constituent's breach of legal duty to persons outside the organization is determined primarily under §§ 66-67 (see also §§ 61-64). In limited circumstances, it may clearly appear that limited disclosure to prevent or limit harm would be in the interests of the organizational client and that constituents who purport to forbid disclosure are not authorized to act for the organization. Whether disclosure in such circumstances is warranted is a difficult and rarely encountered issue, on which this Restatement does not take a position.

g. A constituent's breach of fiduciary duty to another constituent. One constituent of an organization may owe fiduciary duties to another such constituent, for example in some instances a majority stockholder to a minority holder. A lawyer representing only the organization has no duty to protect one constituent from another, including from a breach by one constituent of such fiduciary duties, unless the interests of the lawyer's client organization are at risk. On communicating with a nonclient constituent, see § 103, Comment e. However, if the lawyer represents as a client either the entity or the constituent owing fiduciary duties, the lawyer may not counsel or assist a breach of any fiduciary obligation owed by the constituent to the organization.

Illustrations:

2. Lawyer represents Client, a closely held corporation, and not any constituent of Client. Under law applicable to the corporation, a majority shareholder owes a fiduciary duty of fair dealing to a minority shareholder in a transaction caused by action of a board of directors whose members have been designated by the majority stockholder. The law provides that the duty is breached if the action detrimentally and substantially affects the value of the minority shareholder's stock. Majority Shareholder has asked the board of directors of Client, consisting of Majority Shareholder's designees, to adopt a plan for buying back stock of the majority's shareholders in Client. A minority

shareholder has protested the plan as unfair to the minority shareholder. Lawyer may advise the board about the position taken by the minority shareholder, but is not obliged to advise against or otherwise seek to prevent action that is consistent with the board's duty to Client.

3. The same facts as in Illustration 2, except that Lawyer has reason to know that the plan violates applicable corporate law and will likely be successfully challenged by minority shareholders in a suit against Client and that Client will likely incur substantial expense as a result. Lawyer owes a duty to Client to take action to protect Client, such as by advising Client's board about the risks of adopting the plan.

On conflicts of interest in cases of intra-organization disagreement, see § 131, Comment h.

The foregoing discussion assumes an entity of substantial size and significant degree of organization. On the other hand, in the case of a closely held organization, some decisions have held that a lawyer may owe duties to a nonclient constituent, such as one who owns a minority interest.

h. Relationships with constituent and affiliated organization. Subject to conflict-of-interest considerations addressed in § 131, a lawyer representing a client organization may also represent one or more constituents of the organization, such as an officer or director of the organization (§ 131, Comment e) or an organization affiliated with the client (see § 131, Comment d). On whether a lawyer has entered into a client-lawyer relationship with a constituent person or an organization affiliated with a client organization, see § 14, Comment f. On avoiding misleading a corporate constituent about the role of a lawyer for the organization, see § 103, Comment e.

§ 97. Representing a Governmental Client

A lawyer representing a governmental client must proceed in the representation as stated in § 96, except that the lawyer:

(1) possesses such rights and responsibilities as may be defined by law to make decisions on behalf of the governmental client that are within the authority of a client under §§ 22 and 21(2);

(2) except as otherwise provided by law, must proceed as stated in §§ 96(2) and 96(3) with respect to an act of a constituent of the governmental client that violates a legal obligation that will likely cause substantial public or private injury or that reasonably can be foreseen to be imputable to and thus likely result in substantial injury to the client;

(3) if a prosecutor or similar lawyer determining whether to file criminal proceedings or take other steps in such proceedings, must do so only when based on probable cause and the lawyer's belief, formed after due investigation, that there are good factual and legal grounds to support the step taken; and

(4) must observe other applicable restrictions imposed by law on those similarly functioning for the governmental client.

Comment:

c. Identity of a governmental client. No universal definition of the client of a governmental lawyer is possible. For example, it has been asserted that government lawyers represent the public, or the public

interest. However, determining what individual or individuals personify the government requires reference to the need to sustain political and organizational responsibility of governmental officials, as well as the organizational arrangements structured by law within which governmental lawyers work. Those who speak for the governmental client may differ from one representation to another. The identity of the client may also vary depending on the purpose for which the question of identity is posed. For example, when government lawyers negotiate a disputed question of departmental jurisdiction between two federal agencies, it is not helpful to refer to the client of each of the lawyers as "the federal government" or "the public" when considering who is empowered to direct the lawyers' activities. For many purposes, the preferable approach on the question presented is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation (see Subsection (3)).

Government agencies exist in various forms, ranging from departments or governmental corporations that may sue and be sued in their own names, to divisions of government without such separate legal status, to legislatures or committees of legislatures. If a question arises concerning which of several possible governmental entities a government

lawyer represents, the identity of the lawyer's governmental client depends on the circumstances. Relevant are such factors as the terms of retention or other manifestations of the reasonable understanding of the lawyer and the hiring authority involved, the anticipated scope and nature of the lawyer's services, particular regulatory arrangements relevant to the lawyer's work, and the history and traditions of the office (see also § 96, Comment h).

A lawyer employed by a governmental agency to represent persons accused of offenses in military court-martial proceedings, in a state-operated public-defender office, or in similar arrangements is properly regarded as representing the individual and not any governmental entity. That would be true despite the fact

that for other legal purposes the lawyer is an officer or employee of the government. On the requirement that a lawyer not permit his or her exercise of independent professional judgment to be directed by a nonclient source of the lawyer's fee, see § 134(2) and Comment d.

Some litigation involving governmental policy is brought by or against individual governmental officials in their capacity as such, such as is commonly done in mandamus proceedings, habeas corpus proceedings, and agency proceedings brought in the name of the head of the agency or other officer. Proceeding in that form remains the required method of much federal-court litigation against state governmental officials because of the Eleventh Amendment prohibition against suits against a state as such. A lawyer representing a governmental official in such a proceeding is subject to this Section.

When a lawyer is retained to represent a specific individual, either in that person's public (see Comment b) or private (nongovernmental) capacity, the person (in the appropriate capacity) is the client, unless the use of the individual's name is merely nominal and the government is the interested party. As described above with respect to multiple agencies, the identity and the specification of the capacity of the person represented by the lawyer is determined by the undertaking and reasonable expectations of both the lawyer and individual (see § 14). A lawyer who represents a governmental official in the person's public capacity must conduct the representation to advance public interests as determined by appropriate governmental officers and not, if different, the personal interests of the occupant of the office (see generally Comment f).

j. Wrongdoing by a constituent of a governmental client. When a constituent of a governmental client has acted, failed to act, or proposes to act as stated in Subsection (2), the lawyer must proceed as stated in § 96(2) and (3). In addition, legislation or regulations may prescribe different conditions for the lawyer's actions, conferring broader authority on a governmental lawyer to prevent or rectify constituent wrongdoing.

Wrongful acts of a constituent of a governmental client that require or permit a governmental lawyer to take remedial action under Subsection (2) include any act that would violate law applicable to the client and that would cause substantial private or public injury. Injury to the property interests of the client, for example by reason of the constituent's unlawful conversion of public funds, results in a violation of the government's legal rights. In addition, the public interest in the integrity of government may reasonably lead a lawyer to conclude, for example, that misappropriation of a small sum warrants remedial action for the government that might not be warranted for a nongovernmental client. Unlawful acts of a governmental official may also violate the nonproprietary rights of third persons—such as depriving them of the right to vote or of the right to be free of racial or gender discrimination. When a lawyer is required to act to protect the best interests of a governmental client (compare § 96, Comment f), those interests are defined with reference to applicable constitutional, statutory, and regulatory definitions of the objectives and responsibilities of the governmental client.

If a constituent's acts fall within Subsection (2), a lawyer representing a governmental client must proceed as stated in § 96(3) and (4) with respect to those acts. With respect to referral of a matter to a higher authority, such a referral can often be made to allied governmental agencies, such as the government's general legal office, such as a state's office of attorney general.

Topic 3. Lawyer Dealings with a Nonclient

§ 98. Statements to a Nonclient

A lawyer communicating on behalf of a client with a nonclient may not:

- (1) knowingly make a false statement of material fact or law to the nonclient;
- (2) make other statements prohibited by law; or
- (3) fail to make a disclosure of information required by law.

Comment:

d. Subsequently discovered falsity. A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises, unless the lawyer takes other corrective action. See Restatement Second, Agency § 348, Comment c; Restatement Second, Contracts § 161(a)

(nondisclosure as equivalent to assertion when person “knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material”). Disclosure, being required by law (see § 63), is not prohibited by the general rule of confidentiality (see § 60). Disclosure should not exceed what is required to comply with the disclosure obligation, for example by indicating to recipients that they should not rely on the lawyer’s statement. On permissive disclosure to prevent or rectify a client’s wrongful act, see §§ 66-67.

§ 99. A Represented Nonclient—The General Anti-Contact Rule

(1) A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless:

- (a) the communication is with a public officer or agency to the extent stated in § 101;
- (b) the lawyer is a party and represents no other client in the matter;
- (c) the communication is authorized by law;
- (d) the communication reasonably responds to an emergency; or
- (e) the other lawyer consents.

(2) Subsection (1) does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer’s client with a represented nonclient.

Comment:

f. Prohibited forms of communication. Under the anti-contact rule of this Section, a lawyer ordinarily is not authorized to communicate with a represented nonclient even by letter with a copy to the opposite lawyer or even if the opposite lawyer wrongfully fails to convey important information to that lawyer’s client (see § 20), such as a settlement offer. The rule prohibits all forms of communication, such as sending a represented nonclient a copy of a letter to the nonclient’s lawyer or causing communication through

someone acting as the agent of the lawyer (see § 5(2) & Comment f thereto) (prohibition against violation of duties through agents). The anti-contact rule applies to any communication relating to the lawyer’s representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication.

h. A represented nonclient accused or suspected of a crime. Controversy has surrounded the question whether prosecutors are fully subject to the rule of this Section with respect to contact, prior to indictment,

with represented nonclients accused or suspected of crime. Certain considerations favor a relaxed anti-contact rule. Law-enforcement officials traditionally have resorted to undercover means of gathering important evidence. If retention of a lawyer alone precluded direct prosecutorial contact, a knowledgeable criminal suspect could obtain immunity from otherwise lawful forms of investigation by retaining a lawyer,

while unsophisticated suspects would have no similar protection. Moreover, nonlawyer law-enforcement personnel such as the police are not subject to the rule of this Section. Rigidly extending the anti-contact rule to prosecutors would create unfortunate incentives to eliminate them from involvement in investigations.

On the other hand, certain considerations argue in favor of an anti-contact rule for prosecutors. They are in a position to overreach suspects or interfere in client-lawyer relationships in the same manner as lawyers in private practice and may be tempted to do so to solve a crime. Accordingly, at a minimum, a suspect or accused has constitutional protection of the following kind: against governmental intrusion, including prosecutorial intrusion, into essentials of the client-lawyer relationship, such as attempts to dissuade a nonclient from retaining counsel or from trusting or consulting counsel already retained or assigned; against taking statements from a suspect who is in custody and has not effectively waived the right to counsel; and against such measures as unlawful searches of a lawyer’s office or

similar threats to client-lawyer confidentiality. Elaboration of such limitations is beyond the scope of this Restatement.

It has been extensively debated whether, beyond such constitutional protections, the anti-contact rule independently imposes all constraints of this Section on prosecutors or, to the contrary, whether the authorized-by-law exception (see Comment g) entirely removes such limitations. Both polar positions seem unacceptable. Organizations of prosecutors and lawyers are elaborating rules governing specific situations. The scope of such rules and the law in default of such rules are subjects beyond the scope of this Restatement. Prosecutor contact in compliance with law is within the authorized-by-law exception stated in

Subsection (1)(c).

k. A communication by a client with a represented nonclient. No general rule prevents a lawyer's client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer's investigator or other agent (see Comment b hereto) may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client's investigator or other agent.

As stated in Subsection (2), the anti-contact rule does not prohibit a lawyer from advising the lawyer's own client concerning the client's communication with a represented nonclient, including communications that may occur without the prior consent (compare Comment j) or knowledge of the lawyer for the nonclient.

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer. The lawyer may suggest that the client make such a communication but must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.

Illustration:

6. Lawyer represents Owner, who has a worsening business relationship with Contractor. From earlier meetings, Lawyer knows that Contractor is represented by a lawyer in the matter. Owner drafts a letter to send to Contractor stating Owner's position in the dispute, showing a copy of the draft to Lawyer. Viewing the draft as inappropriate, Lawyer redrafts the letter, recommending that Client send out the letter as redrafted. Client does so, as Lawyer knew would occur. Lawyer has not violated the rule of this Section.

m. Clarifying, protective, and remedial orders of a tribunal. In situations of doubt involving communication with a represented nonclient, a clarifying ruling may be sought from a tribunal. A party seeking to protect against impermissible contact by an opposing lawyer may seek a protective or remedial ruling. A ruling may impose conditions on access and may expand or contract the general rule of this Section as appropriate in light of circumstances. For example, a ruling permitting access may require the lawyer to inform each contacted nonclient of the identity and interests of the lawyer's client, the right of the nonclient to refuse to be interviewed, and the right of the nonclient to request the presence of a lawyer during an interview. The court may grant access on condition that no statement taken will be admissible in evidence. Contact pursuant to the terms of such a ruling is authorized by law within the meaning of this Section (see Comment h).

n. Disqualification, evidence suppression, and related remedies. When contact has been made in violation of this Section, a court may disqualify the offending lawyer when necessary to protect against a significant risk of future misuse of confidential information obtained through the contact, when the contact has substantially interfered with the client's relationship with the client's lawyer, or when disqualification is appropriate to deter flagrant or reckless violations. A lawyer violating or threatening to violate the rule may be enjoined from doing so. A lawyer who violates the rule of this Section is also subject to professional discipline. Fines and fee-shifting sanctions may be warranted under applicable procedural law.

A court may also suppress or otherwise exclude from evidence statements, documents, or other material obtained in violation of the rule. When a release or other document affecting the interests of a represented nonclient is obtained in violation of the rule, the law against fraud or overreaching may permit the nonclient to obtain a ruling voiding the document. A tribunal may compel production of any statement taken in violation of the rule despite its status otherwise as protected work product (see § 87(3)).

§ 100. Definition of a Represented Nonclient

Within the meaning of § 99, a represented nonclient includes:

- (1) a natural person represented by a lawyer; and
- (2) a current employee or other agent of an organization represented by a lawyer:

(a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;

(b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or

(c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Comment:

e. An employee or agent whose statement binds an organization under applicable evidence law (Subsection (2)(c)). Under evidence law generally applied a century ago and still in force in some jurisdictions for certain purposes, some employees and agents have the power to make statements that bind the principal, in the sense that the principal may not introduce evidence contradicting the binding statement. When such a binding-admission rule applies, under Subsection (2)(c) an employee or agent with power to make such a statement is a represented nonclient within the anti-contact rule of § 99. Such a person is analogous to a person who possesses power to settle a dispute on behalf of the organization (see Comment c).

However, under modern evidence law, employees and agents who lack authority to enter into binding contractual settlements on behalf of the organization have no power to make such binding statements. Modern evidence rules make certain statements of an employee or agent admissible notwithstanding the hearsay rule, but allow the organization to impeach or contradict such statements. Employees or agents are not included within Subsection (2)(c) solely on the basis that their statements are admissible evidence. A contrary rule would essentially mean that most employees and agents with relevant information would be within the anti-contact rule, contrary to the policies described in Comment b.

f. Instructing an employee or agent not to communicate with an opposing lawyer. A principal or the principal's lawyer may inform employees or agents of their right not to speak with opposing counsel and may request them not to do so (see § 116(4) & Comment e thereto). In certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law. However, even when lawful, such an instruction is a matter of intra-organizational policy and not a limitation against a lawyer for another party who is seeking evidence. Thus, even if an employer, by general policy or specific directive, lawfully instructs all employees not to cooperate with another party's lawyer, that does not enlarge the scope of the anti-contact rule applicable to that lawyer.

§ 101. A Represented Governmental Agency or Officer

(1) Unless otherwise provided by law (see § 99(1)(c)) and except as provided in Subsection (2), the prohibition stated in § 99 against contact with a represented nonclient does not apply to communications with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity.

(2) In negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity, the prohibition stated in § 99 applies, except that the lawyer may contact any officer of the government if permitted by the agency or with respect to an issue of general policy.

§ 102. Information of a Nonclient Known to Be Legally Protected

A lawyer communicating with a nonclient in a situation permitted under § 99 may not seek to obtain information that the lawyer reasonably should know the nonclient may not reveal without violating a duty of confidentiality to another imposed by law.

§ 103. Dealings with an Unrepresented Nonclient

In the course of representing a client and dealing with a nonclient who is not represented by a lawyer:

(1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and

(2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make

reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.

Topic 4. Legislative and Administrative Matters

§ 104. Representing a Client in Legislative and Administrative Matters

A lawyer representing a client before a legislature or administrative agency:

(1) must disclose that the appearance is in a representative capacity and not misrepresent the capacity in which the lawyer appears;

(2) must comply with applicable law and regulations governing such representations; and

(3) except as applicable law otherwise provides:

(a) in an adjudicative proceeding before a government agency or involving such an agency as a participant, has the legal rights and responsibilities of an advocate in a proceeding before a judicial tribunal; and

(b) in other types of proceedings and matters, has the legal rights and responsibilities applicable in the lawyer's dealings with a private person.

Chapter 7. Representing Clients In Litigation

Topic 1. Advocacy in General

§ 105. Complying with Law and Tribunal Rulings

In representing a client in a matter before a tribunal, a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings.

§ 106. Dealing with Other Participants in Proceedings

In representing a client in a matter before a tribunal, a lawyer may not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that are prohibited by law.

Comment:

b. Investigating and tape recording witnesses. A lawyer may conduct an investigation of a witness to gather information from or about the witness. Such an investigation may legitimately address potentially relevant aspects of the finances, associations, and personal life of the witness. In conducting such investigations personally or through

others, however, a lawyer must observe legal constraints on intrusion on privacy. The law of some jurisdictions, for example, prohibits recording conversations with another person without the latter's consent. When secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form. Such a need may exist more readily in a criminal-defense representation. In conducting such an investigation, a lawyer must comply with the limitations of § 99 prohibiting contact with represented person, of § 102 restricting communication with persons who owe certain duties of confidentiality to others, and of § 103 prohibiting misleading an unrepresented person.

§ 107. Prohibited Forensic Tactics

In representing a client in a matter before a tribunal, a lawyer may not, in the presence of the trier of fact:

- (1) state a personal opinion about the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, but the lawyer may argue any position or conclusion adequately supported by the lawyer's analysis of the evidence; or
- (2) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.

§ 108. An Advocate as a Witness

(1) Except as provided in Subsection (2), a lawyer may not represent a client in a contested hearing or trial of a matter in which:

- (a) the lawyer is expected to testify for the lawyer's client; or
- (b) the lawyer does not intend to testify but (i) the lawyer's testimony would be material to establishing a claim or defense of the client, and (ii) the client has not consented as stated in § 122 to the lawyer's intention not to testify.

(2) A lawyer may represent a client when the lawyer will testify as stated in Subsection (1)(a) if:

- (a) the lawyer's testimony relates to an issue that the lawyer reasonably believes will not be contested or to the nature and value of legal services rendered in the proceeding;
- (b) deprivation of the lawyer's services as advocate would work a substantial hardship on the client; or

(c) consent has been given by (i) opposing parties who would be adversely affected by the lawyer's testimony and, (ii) if relevant, the lawyer's client, as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the lawyer's testimony would create.

(3) A lawyer may not represent a client in a litigated matter pending before a tribunal when the lawyer or a lawyer in the lawyer's firm will give testimony materially adverse to the position of the lawyer's client or materially adverse to a former client of any such lawyer with respect to a matter substantially related to the earlier representation, unless the affected client has consented as stated in § 122 with respect to any conflict of interest

between lawyer and client (see § 125) that the testimony would create.

(4) A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony.

Comment:

d. An advocate appearing pro se. A lawyer (or any other party) appearing pro se is entitled to testify as a witness, but the lawyer is subject to the Section with respect to representing other co-parties as clients. The tribunal may order separate trials where joinder of the pro se lawyer-litigant with other parties would substantially prejudice a co-party or adverse party. When a lawyer appears as the advocate for a class and claims to be the party representative of the class as well, a tribunal may refuse to permit the litigation to proceed in that form.

§ 109. An Advocate's Public Comment on Pending Litigation

(1) In representing a client in a matter before a tribunal, a lawyer may not make a statement outside the proceeding that a reasonable person would expect to be disseminated by means of public communication when the lawyer knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing a juror or influencing or intimidating a prospective witness in the proceeding. However, a lawyer may in any event make a statement that is reasonably necessary to mitigate the impact on the lawyer's client of substantial, undue, and prejudicial publicity recently initiated by one other than the lawyer or the lawyer's client.

(2) A prosecutor must, except for statements necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law-enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

Topic 2. Limits on Advocacy

§ 110. Frivolous Advocacy

(1) A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

(2) Notwithstanding Subsection (1), a lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration may so defend the proceeding as to require that the prosecutor establish every necessary element.

(3) A lawyer may not make a frivolous discovery request, fail to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail otherwise to comply with applicable procedural requirements concerning discovery.

§ 111. Disclosure of Legal Authority

In representing a client in a matter before a tribunal, a lawyer may not knowingly:

(1) make a false statement of a material proposition of law to the tribunal; or

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

§ 112. Advocacy in Ex Parte and Other Proceedings

In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must comply with the requirements of § 110 and §§ 118-120 and further:

- (1) must not present evidence the lawyer reasonably believes is false;
- (2) must disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision; and
- (3) must comply with any other applicable special requirements of candor imposed by law.

Topic 3. Advocates and Tribunals

§ 113. Improperly Influencing a Judicial Officer

(1) A lawyer may not knowingly communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law.

(2) A lawyer may not make a gift or loan prohibited by law to a judicial officer, attempt to influence the officer otherwise than by legally proper procedures, or state or imply an ability so to influence a judicial officer.

§ 114. A Lawyer's Statements Concerning a Judicial Officer

A lawyer may not knowingly or recklessly make publicly a false statement of fact concerning the qualifications or integrity of an incumbent of a judicial office or a candidate for election to such an office.

§ 115. Lawyer Contact with a Juror

A lawyer may not:

- (1) except as allowed by law, communicate with or seek to influence a person known by the lawyer to be a member of a jury pool from which the jury will be drawn;
- (2) except as allowed by law, communicate with or seek to influence a member of a jury; or
- (3) communicate with a juror who has been excused from further service:
 - (a) when that would harass the juror or constitute an attempt to influence the juror's actions as a juror in future cases; or
 - (b) when otherwise prohibited by law.

Topic 4. Advocates and Evidence

§ 116. Interviewing and Preparing a Prospective Witness

- (1) A lawyer may interview a witness for the purpose of preparing the witness to testify.
- (2) A lawyer may not unlawfully obstruct another party's access to a witness.
- (3) A lawyer may not unlawfully induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify.

(4) A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless:

- (a) the person is the lawyer's client in the matter; or
- (b) (i) the person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and (ii) the lawyer reasonably believes compliance will not materially and adversely affect the person's interests.

Comment:

b. Preparing a witness to testify. Under litigation practice uniformly followed in the United States, a lawyer may interview prospective witnesses prior to their testifying. A prospective witness is generally under no obligation to submit to such an interview. As a practical matter, rules requiring inquiry to support factual allegations in a complaint or other document (see § 110, Comment c) may require a lawyer to interview witnesses to gain the necessary factual foundation. Competent preparation for trial (see generally § 52(1)) (general negligence standard might also require pre-testimonial interviews with witnesses).

The work-product immunity (see Chapter 5, Topic 3) and the obligation of confidentiality regarding trial-preparation material (see § 60(1)), result in the process of witness preparation normally being confidential. Compare § 80(2)(b) (loss of confidentiality of material otherwise protected by attorney-client privilege); § 92(1) (same for work-product immunity).

Attempting to induce a witness to testify falsely as to a material fact is a crime, either subornation of perjury or obstruction of justice, and is ground for professional discipline and other remedies (see § 120, Comment l). It may also constitute fraud, warranting denial of the attorney-client privilege to client-lawyer communications relating to preparation of the witness (see § 82).

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact (see § 120(1)(a)).

§ 117. Compensating a Witness

A lawyer may not offer or pay to a witness any consideration:

- (1) in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time spent in providing evidence, except that an expert witness may be offered and paid a noncontingent fee;
- (2) contingent on the content of the witness's testimony or the outcome of the litigation; or
- (3) otherwise prohibited by law.

§ 118. Falsifying or Destroying Evidence

- (1) A lawyer may not falsify documentary or other evidence.
- (2) A lawyer may not destroy or obstruct another party's access to documentary or other evidence when doing so would violate a court order or other legal requirements, or counsel or assist a client to do so.

Comment:

b. Falsifying documentary and other evidence. Advocates in the adversary system are primarily responsible for assembling documentary and other evidence to be presented. A lawyer thereby may serve as custodian of evidentiary material, which ordinarily should reach the proceeding in its original condition. A lawyer may not alter such material in any way that impairs its evidentiary value for other parties. Rules of procedure may permit alteration of evidence in the course of reasonable scientific tests by experts.

A lawyer may not forge a document or alter a document with the purpose of misleading another, such as by back-dating the document, removing the document to another file to create a false impression of its provenance, deleting or adding language or other characters to the document so as to alter its effect, or materially changing its physical appearance.

A document, such as an affidavit or declaration, prepared by a lawyer for verification by another person must include only factual statements that the lawyer reasonably believes the person would make if testifying in person before the factfinder. On a submission to a tribunal based on the lawyer's personal knowledge, such as the lawyer's own affidavit or declaration, see § 120.

c. Destroying documentary or other physical evidence. Unlawful destruction or concealment of documents or other evidence during or in anticipation of litigation may subvert fair and full exposition of the facts. On the other hand, it would be intolerable to require retention of all documents and other evidence against the possibility that an adversary in future litigation would wish to examine them. Accordingly, it is presumptively lawful to act pursuant to an established document retention-destruction program that conforms to existing law and is consistently followed, absent a supervening obligation such as a subpoena or other lawful demand for or order relating to the material. On a lawyer's advice to a client on such matters as document retention or suppression, see generally § 94. If the client informs the lawyer that the client intends to destroy a document unlawfully or in violation of a court order, the lawyer must not advise or assist the client to do so (*id.*).

It may be difficult under applicable criminal law to define the point at which legitimate destruction becomes unlawful obstruction of justice. Under criminal law, a lawyer generally is subject to constraints no different from those imposed on others. Obstruction of justice and similar statutes generally apply only when an official proceeding is ongoing or imminent. For example, The American Law Institute Model Penal Code § 241.7 (1985) provides that the offense of tampering with or fabricating physical evidence occurs only if "an official proceeding or investigation is pending or about to be instituted."

A lawyer may not destroy evidence or conceal or alter it when a discovery demand, subpoena, or court order has directed the lawyer or the lawyer's client to turn over the evidence. Difficult questions of interpretation can arise with respect to destruction of documents in anticipation of a subpoena or similar process that has not yet issued at the time of destruction. For example, a company manufacturing a product that may cause injuries in the future is not, in the absence of specific prohibition, prohibited from destroying all manufacturing records after a period of time; but difficult questions of interpretation of obstruction-of-justice statutes may arise concerning such practices as culling incriminating documents while leaving others in place. No general statement can accurately describe the legality of record destruction; statutes and decisions in the particular jurisdiction must be consulted. In many jurisdictions, there is no applicable precedent. Legality may turn on such factual questions as the state of mind of the client or a lawyer.

Particular statutes and regulations may impose special obligations to retain records and files and to make them accessible to governmental officials. Procedural law or a tribunal ruling may impose other or additional obligations. For example, a lawyer may not knowingly withhold a document that has been properly requested in discovery unless the lawyer does so in procedurally proper form (see § 110,

Comment e). Conversely, a lawyer responding to a request for discovery of documents may not mix responsive and nonresponsive documents together in a way designed to obstruct detection of responsive documents (see *id.*).

Some jurisdictions have recognized an action for damages by a litigant who suffers loss from "spoliation"—an opposing party's or lawyer's unwarranted and injurious suppression of evidence. In some jurisdictions, an unfavorable evidentiary inference may be drawn from failure to produce material that was at one time in the possession and under the control of a party to litigation. The inference may be invoked even in circumstances in which destruction is otherwise lawful. Section 51 does not provide for a lawyer's liability to a nonclient for negligence in such a situation. Falsification or unlawful destruction of evidence may also constitute contempt or may be subject to the tribunal's inherent power to impose a suitable sanction (see § 1, Comment c).

§ 119. Physical Evidence of a Client Crime

With respect to physical evidence of a client crime, a lawyer:

(1) may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but

(2) following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer's possession of the evidence or turn the evidence over to them.

Comment:

a. This Section applies to evidence of a client crime, contraband, weapons, and similar implements used in an offense. It also includes such material as documents and material in electronically retrievable form used by the client to plan the offense, documents used in the course of a mail-fraud violation, or transaction documents evidencing a crime.

Witness statements, photographs of the scene of a crime, trial exhibits, and the like prepared by a lawyer or the lawyer's assistants constitute work product and thus are not subject to the Section, even if such material could constitute evidence of a client crime for some purposes, such as if waived. See § 87, Comment f, and § 92, Comment e; see also § 87, Comment b, on the distinction between work-product materials and preexisting documents, such as client files or financial records.

b. Physical evidence of a client crime; retention for reasonably necessary examination. As stated in Subsection (1), a lawyer may legitimately need to possess evidence relating to a crime for the purpose of examining it to prepare a defense. A lawyer has the same privilege as prosecutors to possess and examine such material for the lawful purpose of assisting in the trial of criminal cases. Such an examination may include scientific tests, so long as they do not alter or destroy the value of the evidence for possible use by the prosecution. So long as the lawyer's possession is for that purpose, criminal laws that generally prohibit possession of contraband or other evidence of crimes are inapplicable to the lawyer. Nonetheless, possession of such material otherwise than in strict compliance with the requirements stated in this Section may subject the lawyer to risk of prosecution as an accessory after the fact for accepting evidence that might otherwise be found. A lawyer's office may also thereby be subject to search. In dealing with such evidence, a lawyer may not unlawfully alter, destroy, or conceal it (see § 118). On the prohibition against advising or assisting another person, including the client, to do so, see § 94.

c. Disposition of evidence of a client crime. Once a lawyer's reasonable need for examination of evidence of a client crime has been satisfied, a lawyer's responsibilities with respect to further possession of the evidence are determined under the criminal law and the law affecting confidentiality of client information (see generally Chapter 5). Under the general criminal law, physical evidence of a client crime in possession of the lawyer may not be retained to a point at which its utility as evidence for the prosecution is significantly impaired, such as by waiting until after the trial.

Some decisions have alluded to an additional option—returning the evidence to the site from which it was taken, when that can be accomplished without destroying or altering material characteristics of the evidence. That will often be impossible. The option would also be unavailable when the lawyer reasonably should know that the client or another person will intentionally alter or destroy the evidence.

Evidence subject to this Section will come to the attention of the authorities either through being turned over by the lawyer to them or through notification by the lawyer or another. In the latter case, the authorities may obtain the evidence from the lawyer by proper process. The prosecution and defense should make appropriate arrangements for introduction and authentication of the evidence at trial. Because of the risk of prejudice to the client, that should be done without improperly revealing the source of the evidence to the finder of fact. The parties may also agree that the tribunal may instruct the jury, without revealing the lawyer's involvement, that an appropriate chain of possession links the evidence to the place where it was located before coming into the lawyer's possession. In the absence of agreement to such an instruction by the defense, the prosecutor may offer evidence of the lawyer's possession if necessary to establish the chain of possession.

§ 120. False Testimony or Evidence

(1) A lawyer may not:

(a) knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence;

(b) knowingly make a false statement of fact to the tribunal;

(c) offer testimony or other evidence as to an issue of fact known by the lawyer to be false.

(2) If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.

(3) A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.

Comment:

b. Rationale. An advocate seeks to achieve the client's objectives (see § 16(1)) but in doing so may not distort factfinding by the tribunal by knowingly offering false testimony or other evidence.

A lawyer's discovery that testimony or other evidence is false may occur in circumstances suggesting complicity by the client in preparing or offering it, thus presenting the risk that remedial action by the lawyer can lead to criminal investigation or other adverse consequences for the client. At the very least, remedial action will deprive the client of whatever evidentiary advantage the false evidence would otherwise provide. It has therefore been asserted that remedial action by the lawyer is inconsistent with the requirements of loyalty and confidentiality (see § 60 and following). However, preservation of the integrity of the forum is a superior interest, which would be disserved by a lawyer's knowing offer of false evidence. Moreover, a client has no right to the assistance of counsel in offering such evidence. As indicated in Subsection (2), taking remedial measures required to correct false evidence may necessitate the disclosure of confidential client information otherwise protected under Chapter 5 (see Comment h hereto).

The procedural rules concerning burden of proof allocate responsibility for bringing forward evidence. A lawyer might know of testimony or other evidence vital to the other party, but unknown to that party or their advocate. The advocate who knows of the evidence, and who has complied with applicable rules concerning pretrial discovery and other applicable disclosure requirements (see, e.g., § 118), has no legal obligation to reveal the evidence, even though the proceeding thereby may fail to ascertain the facts as the lawyer knows them.

c. A lawyer's knowledge. A lawyer's obligations under Subsection (2) depend on what the lawyer knows and, in the case of Subsection (3), on what the lawyer reasonably believes (see Comment j). A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document (see § 94, Comment g). A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

d. Offer of false testimony or other false evidence. False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness has been instructed to say. This Section employs the terms "false testimony" and "false evidence" rather than "perjury" because the latter term defines a crime, which may require elements not relevant for application of the requirements of the Section in other contexts. For example, although a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. When a lawyer is charged with the criminal offense of suborning perjury, the more limited definition appropriate to the

criminal offense applies.

A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify (see § 116(1)). A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness. Thus, a plaintiff's lawyer, aware that an adverse witness being examined by the defendant's lawyer is giving false evidence favorable to the plaintiff, is not required to correct it (compare Comment e). However, the lawyer may not attempt to reinforce the false evidence, such as by arguing to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence (see also Comment e).

Illustrations:

1. Lawyer, representing Defendant, knows that a contract between Plaintiff's decedent and Defendant had been superseded by a materially revised version that was executed and retained by Defendant. Plaintiff's Counsel is unaware of the revised contract and has failed to seek information about it in discovery. At trial, Lawyer elicits testimony from Defendant by inquiring about "the contract that you and Plaintiff's decedent signed" and presents Defendant with the

original contract, asking, “Is this the contract that you and Plaintiff’s decedent signed?” Defendant responds affirmatively. Lawyer has violated Subsection (1)(c).

2. Same facts as in Illustration 1, except that Lawyer does not elicit the testimony there described and Plaintiff’s Counsel, mistakenly believing that the revised contract was not in writing, offers an accurate account of its contents through the testimony of a third-party witness. Lawyer successfully objects to the proposed testimony under the jurisdiction’s statute of frauds, thereby removing the only evidence known to Plaintiff’s Counsel on which the factfinder could find that the original contract was superseded. Defendant offers no additional evidence, and Lawyer does not produce the revised contract. As a result the tribunal enters a directed verdict for Defendant. Lawyer did not violate this Section in making the successful objection, which kept out evidence, or in failing to inform the lawyer for Defendant of the evidence in fact available.

e. Counseling or assisting a witness to offer false testimony or other false evidence. A lawyer may not knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence as to a material issue of fact (Subsection (1)(a)). With respect to the right of a criminal defendant to testify and application of the rule to criminal-defense counsel, see Comment i hereto. If a lawyer knows that a witness will provide truthful evidence as to some matters but false evidence as to others, the lawyer must not elicit the false evidence. On affirmative remedial steps that a lawyer must take when a lawyer knows that a witness has offered false evidence, see Comment h.

Illustration:

3. Lawyer, representing as Plaintiff’s the officers of a closed financial institution, seeks a preliminary injunction requiring governmental regulators to reopen the institution. Plaintiff’s have the burden of establishing that certain documents were executed prior to closure of the institution. Lawyer drafts an affidavit for the signature of the president of the institution, stating that attached as exhibits are such documents. As Lawyer knows, the exhibits are in fact drafts that were not executed when dated but which have been backdated. Lawyer’s offer of the affidavit would violate the rule of Subsection (1)(c).

The prohibitions against false evidence address matters offered in aid of the lawyer’s client (see Comment d). It is not a violation to elicit from an adversary witness evidence known by the lawyer to be false and apparently adverse to the lawyer’s client. The lawyer may have sound tactical reasons for doing so, such as eliciting false testimony for the purpose of later demonstrating its falsity to discredit the witness. Requiring premature disclosure could, under some circumstances, aid the witness in explaining away false testimony or recasting it into a more plausible form.

Illustration:

4. Lawyer, representing Plaintiff, takes the deposition of Witness, who describes the occurrence in question in a way unfavorable to Plaintiff. From other evidence, Lawyer knows that Witness is testifying falsely. Subsequently, the case is settled, and Lawyer never discloses the false nature of Witness’s deposition testimony. Lawyer’s conduct does not violate this Section.

f. A lawyer’s statement of fact to a tribunal. A lawyer may make a submission to a tribunal based on the lawyer’s personal knowledge, such as the lawyer’s own affidavit or declaration or a representation made on the lawyer’s own knowledge. For example, the lawyer may state during a scheduling conference that a conflict exists in the lawyer’s trial schedule or state on appeal that certain evidence appears of record. In such statements the lawyer purports to convey information based on personal knowledge. A tribunal or another party should be able to rely on such a statement. Such a statement must have a reasonable basis for belief.

Illustration:

5. Lawyer, representing Accused in defending against criminal charges, files a motion to suppress a purported confession. Lawyer attaches to the motion a copy of a document that appears to be the written confession of Accused. Lawyer states in the motion that Lawyer obtained the document from a police file, but Lawyer takes the position in the motion that other evidence accompanying the motion indicates that the document is a forgery. Because Lawyer purports to be asserting as a personally known fact that the document was obtained from the police file, Lawyer must know from Lawyer’s own knowledge that the document is what Lawyer asserts it to be. On the other hand, Lawyer may characterize the document as a forgery based on other evidence so long as Lawyer has a nonfrivolous basis for that position (see § 110(1), Subsection (2) & Comment d hereto), even if Lawyer does not personally believe that the document is a forgery.

For the purpose of Subsection (1)(b) a knowing false statement of fact includes a statement on which the lawyer then has insufficient information from which reasonably to conclude that the statement is accurate. A lawyer may make conditional or suppositional statements so long as they are so identified and are neither known to be false nor made

without a reasonable basis in fact for their conditional or suppositional character.

Illustration:

6. Lawyer represents A Corporation as defendant in an action seeking damages. Lawyer has filed A Corporation's motion to dismiss for lack of personal jurisdiction. In support of the motion, Lawyer's affidavit states that an attached certificate of a governmental agency of State X is genuine. The certificate states the jurisdiction in which A Corporation is incorporated, a material issue on the motion. Lawyer sought such a certificate from the relevant agency, but the certificate had not arrived by the time for filing the affidavit. Lawyer accordingly prepares what Lawyer reasonably believes is an accurate copy of the certificate and signs it in the name of a governmental official, having seen a telecopied facsimile of the certificate transmitted from the state agency. The certificate arrives the day following the filing of the motion and corresponds to the document attached to Lawyer's affidavit. Lawyer has violated this Section, as well as § 118. Lawyer would not have violated this Section if Lawyer had stated in the affidavit that the attached document was a copy of a document the original of which would be supplied by supplemental submission.

For purposes of professional discipline, the lawyer codes prohibit a lawyer from making only a false statement of "material" fact. A similar condition attaches to the crime of perjury (although often not to the related crime of false swearing or false statements.) However, other procedural or substantive rules may contain no such qualification.

g. Remonstrating with a client or witness. Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstrance is a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action (see Comment h).

h. Reasonable remedial measures. A lawyer who has taken appropriate steps to avoid offering false evidence (see Comment g) may be required to take additional measures. A lawyer may be surprised by unexpected false evidence given by a witness or may come to know of its falsity only after it has been offered.

If the lawyer's client or the witness refuses to correct the false testimony (see Comment g), the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the finder of fact (Subsection (2)). Alternatively, a lawyer could seek a recess and attempt to persuade the witness to correct the false evidence (see Comment g). If such steps are unsuccessful, the lawyer must take other steps, such as by moving or stipulating to have the evidence stricken or otherwise withdrawn, or recalling the witness if the witness had already left the stand when the lawyer comes to know of the falsity. Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal (see Comment k hereto). If no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps.

To the extent necessary in taking reasonable remedial measures under Subsection (2), a lawyer may use or reveal otherwise confidential client information (see § 63). However, the lawyer must proceed so that, consistent with carrying out the measures (including, if necessary, disclosure to the opposing party or tribunal), the lawyer causes the client minimal adverse effects. The lawyer has discretion as to which measures to adopt, so long as they are reasonably calculated to correct the false evidence. If the lawyer makes disclosure to the opposing party or tribunal, thereafter the lawyer must leave further steps to the opposing party or tribunal. Whether testimony concerning client-lawyer communications with respect to the false evidence can be elicited is determined under § 82 (crime-fraud exception to attorney-client privilege). The lawyer's disclosure may give rise to a conflict between the lawyer and client requiring the lawyer to withdraw from the representation (see Comment k hereto).

Responsibilities of a lawyer under this Section extend to the end of the proceeding in which the question of false evidence arises. Thus, a lawyer representing a client on appeal from a verdict in a trial continues to carry responsibilities with respect to false evidence offered at trial, particularly evidence discovered to be false after trial (see Comment i). If a lawyer is discharged by a client or withdraws, whether or not for reasons associated with the false evidence, the lawyer's obligations under this Section are not thereby terminated. In such an instance, a reasonable remedial measure may consist of disclosing the matter to successor counsel.

Even after the proceeding concludes, the rule stated in other Sections of this Restatement may permit corrective or self-protective action, such as through notification of others of the fact of withdrawal (see §§ 66-67 & 64).

i. False evidence in a criminal-defense representation. The rules stated in the Section generally govern defense counsel in criminal cases. The requirement stated in Comment g with respect to remonstrating with a client may often be relevant. However, because of the right to the effective assistance of counsel, withdrawal (see Comment k) may be inappropriate in response to threatened client perjury in a criminal case. If defense counsel withdraws, normally it will be necessary for the accused to retain another lawyer or for the court to appoint one, unless the accused proceeds

without counsel. Replacement counsel also may have to deal with the same client demand to take the stand to testify falsely. A tribunal may also be concerned that controversy over false evidence may be contrived to delay the proceeding. In criminal cases many courts thus are strongly inclined not to permit withdrawal of defense counsel, particularly if trial is underway or imminent. Withdrawal may be required, however, if the accused denies defense counsel's assertion that presentation of false evidence is threatened.

Some courts permit an accused in such circumstances to give "open narrative" testimony, without requiring defense counsel to take affirmative remedial action as required under Subsection (2). Defense counsel asks only a general question about the events, provides no guidance through additional questions, and does not refer to the false evidence in subsequent argument to the factfinder. Counsel does not otherwise indicate to the presiding officer or opposing counsel that the testimony or other evidence is false, although such indication may be necessary to deal with a prosecutor's objection to use of the open-narrative form of testimony. From the unusual format of examination, prosecutor and presiding officer are likely to understand that the accused is offering false testimony, but an unguided jury may be unaware of or confused about its significance. That solution is not consistent with the rule stated in Subsection (2) or with the requirements of the lawyer codes in most jurisdictions.

However, the defendant may still insist on giving false testimony despite defense counsel's efforts to persuade the defendant not to testify or to testify accurately (see Comment g). The accused has the constitutional rights to take the witness stand and to offer evidence in self-defense (see § 22). Unlike counsel in a civil case, who can refuse to call a witness (including a client) who will offer false evidence (see Comment e), defense counsel in a criminal case has no authority (beyond persuasion) to prevent a client-accused from taking the witness stand. (Defense counsel does possess that authority with respect to nonclient witnesses and must exercise it consistent with this Section (see § 23).) If the client nonetheless insists on the right to take the stand, defense counsel must accede to the demand of the accused to testify. Thereafter defense counsel may not ask the accused any question if counsel knows that the response would be false. Counsel must also be prepared to take remedial measures, including disclosure, in the event that

the accused indeed testifies falsely (see Comment h).

In one situation, disclosure of client perjury to the tribunal may not be feasible. When a criminal case is being tried without a jury, informing the judge of perjury by an accused might be tantamount to informing the factfinder of the guilt of the accused. In such an instance, disclosure to the prosecutor might suffice as a remedial measure. The prosecutor may not refer in the judge's presence to the information provided by defense counsel under this Section.

j. An advocate's discretion to refuse to offer testimony or other evidence reasonably believed to be false. The rule of Subsection (3) protects a lawyer from forced complicity in violations of the law and protects the tribunal and third persons from erroneous decisions. It also protects the lawyer's reputation as an honest person and as an advocate capable of discriminating between reliable and unreliable evidence. A lawyer may not by agreement with a client surrender the discretion stated in Subsection (3) (see § 23(1)).

The rule of Subsection (3) consists of two elements. First, the lawyer's knowledge is assessed objectively according to a standard of reasonable belief. (In contrast, a firm factual basis is necessary before the mandatory rules stated in Subsections (1) and (2) are applicable (see Comment c).) Second, a lawyer who reasonably believes (but does not know) that evidence is false, has discretion to offer or to refuse to offer it.

k. False evidence and the client-lawyer relationship. A lawyer's actions in accordance with this Section may impair the trust and respect that otherwise would exist between lawyer and client. A lawyer may be discharged by the client or withdraw from the representation (see § 32).

If a difference between lawyer and client over falsity occurs just before or during trial, a tribunal may refuse to permit a lawyer to withdraw when withdrawal would require the client to proceed without counsel (see § 32(4)).

l. Remedies. Violation of Subsections (1) and (2) may be sanctioned through professional discipline. Certain violations may also be remedied through appropriate sanctions in the proceeding (see § 110, Comment g). Criminal liability exists for perjury or subornation of perjury. A court may have discretion to disqualify a lawyer who violates a rule of the Section from further representation in the proceeding. Knowing use of perjured testimony may be a basis for granting a new trial or for vacating a judgment or setting aside a settlement based on the false evidence. A litigant has no damage remedy against an opposing lawyer for an alleged perjurious client based solely on violation of this Section. Compare § 57, Comments d and e (lawyer liability for abuse of process and similar intentional torts).

Chapter 8. Conflicts Of Interest

Topic 1. Conflicts of Interest—In General

§ 121. The Basic Prohibition of Conflicts of Interest

Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

Comment:

b. Rationale. The prohibition against lawyer conflicts of interest reflects several competing concerns. First, the law seeks to assure clients that their lawyers will represent them with undivided loyalty. A client is entitled to be represented by a lawyer whom the client can trust. Instilling such confidence is an objective important in itself. For example, the principle underlying the prohibition against a lawyer's filing suit against a present client in an unrelated matter (see § 128, Comment e) may also extend to situations, not involving litigation, in which significant impairment of a client's expectation of the lawyer's loyalty would be similarly likely. Contentious dealings, for example involving charges of bad faith against the client whom the lawyer represents in another matter would raise such a concern. So also would negotiating on behalf of one client when a large proportion of the lawyer's other client's net worth is at risk.

Second, the prohibition against conflicts of interest seeks to enhance the effectiveness of legal representation. To the extent that a conflict of interest undermines the independence of the lawyer's professional judgment or inhibits a lawyer from working with appropriate vigor in the client's behalf, the client's expectation of effective representation (see § 16) could be compromised.

Third, a client has a legal right to have the lawyer safeguard the client's confidential information (see § 60). Preventing use of confidential client information against the interests of the client, either to benefit the lawyer's personal interest, in aid of some other client, or to foster an assumed public purpose is facilitated through conflicts rules that reduce the opportunity for such abuse.

Fourth, conflicts rules help ensure that lawyers will not exploit clients, such as by inducing a client to make a gift to the lawyer (see § 127).

Finally, some conflict-of-interest rules protect interests of the legal system in obtaining adequate presentations to tribunals. In the absence of such rules, for example, a lawyer might appear on both sides of the litigation, complicating the process of taking proof and compromising adversary argumentation (see § 128).

On the other hand, avoiding conflicts of interest can impose significant costs on lawyers and clients. Prohibition of conflicts of interest should therefore be no broader than necessary. First, conflict avoidance can make representation more expensive. To the extent that conflict-of-interest rules prevent multiple clients from being represented by a single lawyer, one or both clients will be required to find other lawyers. That might entail uncertainty concerning the successor lawyers' qualifications, usually additional cost, and the inconvenience of separate representation. In matters in which individual claims are small, representation of multiple claimants might be required if the claims are effectively to be considered at all. Second, limitations imposed by conflicts rules can interfere with client expectations. At the very least, one of the clients might be deprived of the services of a lawyer whom the client had a particular reason to retain, perhaps on the basis of a long-time association with the lawyer. In some communities or fields of practice there might be no lawyer who is perfectly conflict-free. Third, obtaining informed consent to conflicted representation itself might compromise important interests. As discussed in § 122, consent to a conflict of interest requires that each affected client give consent based on adequate information. The process of obtaining informed consent is not only potentially time-consuming; it might also be impractical because it would require the disclosure of information that the clients would prefer not to have disclosed, for example, the subject matter about which they have consulted the lawyer. Fourth, conflicts prohibitions interfere with lawyers' own freedom to practice according to their own best judgment of appropriate professional behavior. It is appropriate to give significant weight to the freedom and professionalism of lawyers in the formulation of legal rules governing conflicts.

c. The general conflict-of-interest standard. The standard adopted in this Chapter answers the four questions to which any conflicts-of-interest standard must respond. Those are (i) What kind of effect is prohibited? (ii) How significant must the effect be? (iii) What probability must there be that the effect will occur? (iv) From whose

perspective are conflicts of interest to be determined? The standard adopted here incorporates elements common to all three of the major lawyer codes developed in this century. It casts the answer to each question in terms of factual predicates and practical consequences that are reasonably susceptible of objective assessment by lawyers subject to the rules, by clients whom the rules affect, and by tribunals.

“Adverse” effect relates to the quality of the representation, not necessarily the quality of the result obtained in a given case. The standard refers to the incentives faced by the lawyer before or during the representation because it often cannot be foretold what the actual result would have been if the representation had been conflict-free.

Illustration:

1. Lawyer has been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license from Agency. Such work often requires advocacy by the lawyer for an applicant before Agency. Lawyer’s representation will have an adverse effect on both A and B as that term is used in this Section. Even though either A or B might obtain the license and thus arguably not have been adversely affected by the joint representation, Lawyer will have duties to A that restrict Lawyer’s ability to urge B’s application and vice versa. In most instances, informed consent of both A and B would not suffice to allow the dual representation (see § 122).

Illustration:

3. Clients A and B have come to Lawyer for help in organizing a new business. Lawyer is satisfied that both clients are committed to forming the enterprise and that an agreement can be prepared that will embody their common undertaking. Nonetheless, because a substantial risk of future conflict exists in any such arrangement, Lawyer must explain to the clients that because of future economic uncertainties inherent in any such undertaking, the clients’ interests could differ in material ways in the future. Lawyer must obtain informed consent pursuant to § 122 before undertaking the common representation.

Whether there is adverseness, materiality, and substantiality in a given circumstance is often dependent on specific circumstances that are ambiguous and the subject of conflicting evidence. Accordingly, there are necessarily circumstances in which the lawyer’s avoidance of a representation is permissible but not obligatory. A lawyer also would be justified in withdrawing from some representations in circumstances in which it would be improper to disqualify the lawyer or the lawyer’s firm.

d. Representation of a client. The prohibition of conflicts of interest ordinarily restricts a lawyer’s activities only where those activities materially and adversely affect the lawyer’s ability to represent a client including such an effect on a client’s reasonable expectation of the lawyer’s loyalty.

For purposes of identifying conflicts of interest, a lawyer’s client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship, see § 14. For example, when a lawyer is retained by Corporation A, Corporation A is ordinarily the lawyer’s client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer’s client.

In some situations, however, the financial or personal relationship between the lawyer’s client and other persons or entities might be such that the lawyer’s obligations to the client will extend to those other persons or entities as well. That will be true, for example, where financial loss or benefit to the nonclient person or entity will have a direct, adverse impact on the client.

Illustrations:

6. Lawyer represents Corporation A in local real-estate transactions. Lawyer has been asked to represent Plaintiff in a products-liability action against Corporation B claiming substantial damages. Corporation B is a wholly owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material adverse impact on the value of Corporation B’s assets and on the value of the assets of Corporation A. Just as Lawyer could not file suit against Corporation A on behalf of another client, even in a matter unrelated to the subject of Lawyer’s representation of Corporation A (see § 128, Comment e), Lawyer may not represent Plaintiff in the suit against Corporation B without the consent of both Plaintiff and Corporation A under the limitations and conditions provided in § 122.

7. The same facts as in Illustration 6, except that Corporation B is not a subsidiary of Corporation A. Instead, 51 percent of the stock of Corporation A and 60 percent of the stock of Corporation B are owned by X Corporation. The remainder of the stock in both Corporation A and Corporation B is held by the public. Lawyer does not represent X Corporation. The circumstances are such that an adverse judgment against Corporation B will have no material adverse impact on the financial position of Corporation A. No conflict of interest is presented; Lawyer may represent Plaintiff in the suit against Corporation B.

In yet other situations, the conflict of interest arises because the circumstances indicate that the confidence that a client reasonably reposes in the loyalty of a lawyer would be compromised due to the lawyer's relationship with another client or person whose interests would be adversely affected by the representation.

Illustration:

8. The same facts as in Illustration 7, except that one-half of Lawyer's practice consists of work for Corporation A. Plaintiff could reasonably believe that Lawyer's concern about a possible adverse reaction by Corporation A to the suit against Corporation B will inhibit Lawyer's pursuit of Plaintiff's case against Corporation B (see §§ 125 & 128). Lawyer may not represent Plaintiff in the suit against Corporation B unless Plaintiff consents to the representation under the limitations and conditions provided in § 122. Because Lawyer's representation of Corporation A is assumed in Illustration 7 not to be adversely affected by the representation of Plaintiff, the consent of Corporation A to the representation is not required.

Significant control of the nonclient by the client also might suffice to require a lawyer to treat the nonclient as if it were a client in determining whether a conflict of interest exists in a lawyer's representation of another client with interests adverse to the nonclient.

Illustration:

9. The same facts as in Illustration 7, except that X Corporation has elected a majority of the Directors of Corporation B and has approved its key officers. Officers of X Corporation regularly supervise decisions made by Corporation B, and Lawyer has regularly advised X Corporation on products-liability issues affecting all of the corporations in which X Corporation owns an interest. X Corporation has used that advice to give direction about minimizing claims exposure to Corporation B. Although Lawyer does not represent Corporation B, Lawyer's earlier assistance to X Corporation on products-liability matters was substantially related to the suit that Plaintiff has asked Lawyer to file against Corporation B (see § 132). Lawyer may not represent Plaintiff in the suit against Corporation B unless Plaintiff, X Corporation, and Corporation B consent to the representation under the limitations and conditions provided in § 122. In the circumstances, informed consent on behalf of Corporation B may be provided by officers of X Corporation who direct the legal affairs of Corporation B pursuant to applicable corporate law.

A conflict of interest can also arise because of specific obligations, such as the obligation to hold information confidential, that the lawyer has assumed to a nonclient.

Illustration:

10. Lawyer represents Association, a trade association in which Corporation C is a member, in supporting legislation to protect Association's industry against foreign imports. Lawyer does not represent any individual members of Association, including Corporation C, but at the request of Association and Lawyer, Corporation C has given Lawyer confidential information about Corporation C's cost of production. Plaintiff has asked Lawyer to sue Corporation C for unfair competition based on Corporation C's alleged pricing below the cost of production. Although Corporation C is not Lawyer's client, unless both Plaintiff and Corporation C consent to the representation under the limitations and conditions provided in § 122, Lawyer may not represent Plaintiff against Corporation C in the matter because of the serious risk of material adverse use of Corporation C's confidential information against Corporation C.

e(i). Withdrawal or consent in typical cases of postrepresentation conflict. If a lawyer withdraws from representation of multiple clients because of a conflict of interest (or for any other reason), the rule stated in § 132 prohibits representation in the same or a substantially related matter of a remaining client whose interests in the matter are materially adverse to the interests of a now-former client. For example, two clients previously represented by lawyers in a firm in the same transaction pursuant to effective consent might thereafter have a falling out such that litigation is in prospect (see §§ 130 & 128). The firm may not withdraw from representing one client and take an adversary position against that client in behalf of the other in the subsequent litigation (see § 132, Comment c). The firm must obtain informed consent from both clients (see § 122) or withdraw entirely. Consent in advance to such continued representation may also be provided as stated in § 122, Comment d. The fact that neither joint client could assert the attorney-client privilege in subsequent litigation between them (see § 75) does not by itself negate the lawyer's more extensive obligations of confidentiality under § 60 and loyalty under § 16(i).

f. Sanctions and remedies for conflicts of interest. In addition to the sanction of professional discipline, disqualifying a lawyer from further participation in a pending matter is a common remedy for conflicts of interest in litigation (§ 6, Comment i). For matters not before a tribunal where disqualification can be sought, an injunction against a lawyer's further participation in the matter is a comparable remedy (§ 6, Comment c).

When a conflict of interest has caused injury to a client, the remedy of legal malpractice is available (§§ 48 and

following). Availability of the sanction of fee forfeiture is considered in § 37. If the result in a matter was affected prejudicially by conflicting loyalties or misuse of confidential information by the lawyer, the result will sometimes be reversed or set aside. Some conflicts of interest subject a lawyer to criminal sanctions.

§ 122. Client Consent to a Conflict of Interest

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation.

Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

(2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

(a) the representation is prohibited by law;

(b) one client will assert a claim against the other in the same litigation; or

(c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Comment:

b. Rationale. The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be characterized by loyalty, vigor, and confidentiality (see § 121, Comment b). The conflict rules are subject to waiver through informed consent by a client who elects less than the full measure of protection that the law otherwise provides. For example, a client in a multiple representation might wish to avoid the added costs that separate representation often entails. Similarly, a client might consent to a conflict where that is necessary in order to obtain the services of a particular law firm.

Other considerations, however, limit the scope of a client's power to consent to a conflicted representation. A client's consent will not be effective if it is based on an inadequate understanding of the nature and severity of the lawyer's conflict (Comment c hereto), violates law (Comment g(i)), or if the client lacks capacity to consent (Comment c). Client consent must also, of course, be free of coercion. Consent will also be insufficient to permit conflicted representation if it is not reasonably likely that the lawyer will be able to provide adequate representation to the affected clients, or when a lawyer undertakes to represent clients who oppose each other in the same litigation (Comment g(iii)).

In effect, the consent requirement means that each affected client or former client has the power to preclude the representation by withholding consent. When a client withholds consent, a lawyer's power to withdraw from representation of that client and proceed with the representation of the other client is determined under § 121, Comment e.

While a lawyer may elect to proceed with a conflicted representation after effective client consent as stated in this Section, a lawyer is not required to do so (compare § 14, Comment g (required representation by order of court)). A lawyer might be unwilling to accept the risk that a consenting client will later become disappointed with the representation and contend that the consent was defective, or the lawyer might conclude for other reasons that the lawyer's own interests do not warrant proceeding. In such an

instance, the lawyer also may elect to withdraw if grounds permitting withdrawal are present under § 32. After withdrawal, a lawyer's ability to represent other clients is as described in § 121, Comment e.

c(i). The requirement of informed consent—adequate information. Informed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.

Information relevant to particular kinds of conflicts is considered in several of the Sections hereafter. In a multiple-client situation, the information normally should address the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict; the effect of the representation or the process of obtaining other clients'

informed consent upon confidential information of the client; any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and the consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients (see § 121, Comment e). Where the conflict arises solely because a proposed representation will be adverse to an existing client in an unrelated matter, knowledge of the general nature and scope of the work being performed for each client normally suffices to enable the clients to decide whether or not to consent.

When the consent relates to a former-client conflict (see § 132), it is necessary that the former client be aware that the consent will allow the former lawyer to proceed adversely to the former client. Beyond that, the former client must have adequate information about the implications (if not readily apparent) of the adverse representation, the fact that the lawyer possesses the former client's confidential information, the measures that the former lawyer might undertake to protect against unwarranted disclosures, and the right of the former client to refuse consent. The former client will often be independently represented by counsel. If so, communication with the former client ordinarily must be through successor counsel (see § 99 and following).

The lawyer is responsible for assuring that each client has the necessary information. A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the consent is invalid. A lawyer's failure to inform the clients might also bear on the motives and good faith of the lawyer. On the other hand, clients differ as to their sophistication and experience, and situations differ in terms of their complexity and the subtlety of the conflicts presented. The requirements of this Section are satisfied if the client already knows the necessary information or learns it from other sources. A client independently represented—for example by inside legal counsel or by other outside counsel—will need less information about the consequences of a conflict but nevertheless may have need of information adequate to reveal its scope and severity. When several lawyers represent the same client, responsibility to make disclosure and obtain informed consent may be delegated to one or more of the lawyers who appears reasonably capable of providing adequate information.

Disclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential (see § 60). The affected clients may consent to disclosure (see § 62), but it also might be possible for the lawyer to explain the nature of undisclosed information in a manner that nonetheless provides an adequate basis for informed consent. If means of adequate disclosure are unavailable, consent to the conflict may not be obtained.

The requirement of consent generally requires an affirmative response by each client. Ambiguities in a client's purported expression of consent should be construed against the lawyer seeking the protection of the consent (cf. § 18). In general, a lawyer may not assume consent from a client's silent acquiescence. However, consent may be inferred from active participation in a representation by a client who has reasonably adequate information about the material risks of the representation after a lawyer's request for consent. Even in the absence of consent, a tribunal applying remedies such as disqualification (see § 121, Comment f) will apply concepts of estoppel and waiver when an objecting party has either induced reasonable reliance on the absence of objection or delayed an unreasonable period of time in making objection.

Effective client consent to one conflict is not necessarily effective with respect to other conflicts or other matters. A client's informed consent to simultaneous representation of another client in the same matter despite a conflict of interest (see Topic 3) does not constitute consent to the lawyer's later representation of the other client in a manner that would violate the former-client conflict rule (see § 132; see also § 121, Comment e(i)).

Illustration:

1. Client A and Client B give informed consent to a joint representation by Lawyer to prepare a commercial contract. Lawyer's bill for legal services is paid by both clients and the matter is terminated. Client B then retains Lawyer to file a lawsuit against former Client A on the asserted ground that A breached the contract. Lawyer may not represent Client B against Client A in the lawsuit without A's informed consent (see § 132). Client A's earlier consent to Lawyer's joint representation to draft the contract does not itself permit Lawyer's later adversarial representation.

c(ii). The requirement of informed consent—the capacity of the consenting person. Each client whose consent is required must have the legal capacity to give informed consent. Consent purportedly given by a client who lacks legal

capacity to do so is ineffective. Consent of a person under a legal disability normally must be obtained from a guardian or conservator appointed for the person. Consent of a minor normally is effective when given by a parent or guardian of the minor. In class actions certification of the class, determination that the interests of its members are congruent, and assessment of the adequacy of representation are typically made by a tribunal.

In some jurisdictions, a governmental unit might lack legal authority under applicable law to give consent to some conflicts of interest (see Comment g(ii) below).

When the person who normally would make the decision whether or not to give consent—members of a corporate board of directors, for example—is another interested client of the lawyer, or is otherwise self-interested in the decision whether to consent, special requirements apply to consent (see §§ 131 & 135, Comment d). Similarly, an officer of a government agency capable of consenting might be disabled from giving consent when that officer is a lawyer personally interested in consenting to the conflict.

d. Consent to future conflicts. Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. A client's informed consent to a gift to a lawyer (see § 127) ordinarily should be given contemporaneously with the gift.

On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Illustrations:

2. Law Firm has represented Client in collecting commercial claims through Law Firm's New York office for many years. Client is a long-established and sizable business corporation that is sophisticated in commercial matters generally and specifically in dealing with lawyers. Law Firm also has a Chicago office that gives tax advice to many companies with which Client has commercial dealings. Law Firm asks for advance consent from Client with respect to conflicts that otherwise would prevent Law Firm from filing commercial claims on behalf of Client against the tax clients of Law Firm's Chicago office (see § 128). If Client gives informed consent the consent should be held to be proper as to Client. Law Firm would also be required to obtain informed consent from any tax client of its Chicago office against whom Client wishes to file a commercial claim, should Law Firm decide to undertake such a representation.

3. The facts being otherwise as stated in Illustration 2, Law Firm seeks advance consent from each of its Chicago-office corporate-tax clients to its representation of any of its other clients in matters involving collection of commercial claims adverse to such tax clients if the matters do not involve information that Law Firm might have learned in the tax representation. To provide further assurance concerning the protection of confidential information, the consent provides that, should Law Firm represent any client in a collection matter adverse to a tax client, a procedure to protect confidential information of the tax client will be established (compare § 124, Comment d). Unless such a tax client is shown to be unsophisticated about legal matters and relationships with lawyers, informed consent to the arrangement should be held to be proper.

If a material change occurs in the reasonable expectations that formed the basis of a client's informed consent, the new conditions must be brought to the attention of the client and new informed consent obtained (see also Comment f hereto (client revocation of consent)). If the new conflict is not consentable (see Comment g hereto), the lawyer may not proceed.

e. Partial or conditional consent. A client's informed consent to a conflict can be qualified or conditional. A client might consent, for example, to joint representation with one co-party but not another. Similarly, the client might condition consent on particular action being taken by the lawyer or law firm. For example, a former client might consent that the conflict of one individually prohibited lawyer should not be imputed (see § 123) to the rest of the firm, but only if the firm takes steps to assure that the prohibited lawyer is not involved in the representation (see § 124; see also Illustration 3 hereto). Such a partial or conditional consent can be valid even if an unconditional consent in the same situation would be invalid. For example, a client might give informed consent to a lawyer serving only in the role of mediator between clients (see § 130, Comment d), but not to the lawyer representing those clients opposing each other in litigation if mediation is unavailing (see Comment g(iii) hereto).

f. Revocation of consent through client action or a material change of circumstances. A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent (see § 21(2)). Revoking consent to the client's own representation, however, does not necessarily prevent the lawyer from continuing to represent other clients who had been jointly represented along with the revoking client. Whether the lawyer may

continue the other representation depends on whether the client was justified in revoking the consent (such as because of a material change in the factual basis on which the client originally gave informed consent) and whether material detriment to the other client or lawyer would result. In addition, if the client had reserved the prerogative of revoking consent, that agreement controls the lawyer's subsequent ability to continue representation of other clients.

A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. For example, in the absence of an agreement to the contrary, the consent of a client to be represented concurrently with another (see Topic 3) normally presupposes that the co-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. If the conflict is subject to informed consent (see Comment (g)(iii) hereto), the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If the conflict is not consentable, or the lawyer cannot obtain informed consent from the other client or decides not to proceed with the representation, the lawyer must withdraw from representing all affected clients adverse to any former client in the matter (see § 121, Comment e).

A client who has given informed consent to be represented as a joint client with another would be justified in revoking the consent if the common lawyer failed to represent that client with reasonable loyalty (see Comment h hereto). The client would also be justified in revoking consent if a co-client materially violated the express or implied terms of the consent, such as by abusing the first client's confidential information through disclosing important information to third persons without justification. Improper behavior of the other client or the lawyer might indicate that one or both of them cannot be trusted to respect the legitimate interests of the consenting client.

Illustration:

4. Client A and Client B validly consent to be represented by Lawyer in operating a restaurant in a city. After a period of amicable and profitable collaboration, Client A reasonably concludes that Lawyer has begun to take positions against Client A and consistently favoring the interests of Client B in the business. Reasonably concerned that Lawyer is no longer properly serving the interests of both clients, Client A withdraws consent. Withdrawal of consent is effective and justified (see Comment h hereto). Lawyer may not thereafter continue representing either Client A or Client B in a matter adverse to the other and substantially related to Lawyer's former representation of the clients (see § 121, Comment e(i)).

In the absence of valid reasons for a client's revocation of consent, the ability of the lawyer to continue representing other clients depends on whether material detriment to the other client or lawyer would result and, accordingly, whether the reasonable expectations of those persons would be defeated. Once the client or former client has given informed consent to a lawyer's representing another client, that other client as well as the lawyer might have acted in reliance on the consent. For example, the other client and the lawyer might already have invested time, money, and effort in the representation. The other client might already have disclosed confidential information and developed a relationship of trust and confidence with the lawyer. Or, a client relying on the consent might reasonably have elected to forgo opportunities to take other action.

Illustrations:

5. On Monday, Client A and Client B validly consent to being represented by Lawyer in the same matter despite a conflict of interest. On Wednesday, before either Client B or Lawyer has taken or forgone any significant action in reliance, Client A withdraws consent. Lawyer is no longer justified in continuing with the joint representation. Lawyer also may not continue to represent Client B alone without A's renewed informed consent to Lawyer's representation of B if doing so would violate other Sections of this Chapter, for example because A's and B's interests in the matter would be antagonistic or because Lawyer had learned confidential information from A relevant in the matter (see § 132; see also § 15, Comment c, & § 121, Comment e(i)). Similarly, if Client A on Wednesday did not unequivocally withdraw consent but stated to Lawyer that on further reflection Client A now had serious doubts about the wisdom of the joint representation, Lawyer could not reasonably take material steps in reliance on the consent. Before proceeding, Lawyer must clarify with Client A whether A indeed gives informed consent and whether the joint representation may thereby continue.

6. Clients A and B validly consent to Lawyer representing them jointly as co-defendants in a breach-of-contract action. On the eve of trial and after months of pretrial discovery on the part of all parties, Client A withdraws consent to the joint representation for reasons not justified by the conduct of Lawyer or Client B and insists that Lawyer cease representing Client B. At this point it would be difficult and expensive for Client B to find separate representation for the impending trial. Client A's withdrawal of consent is ineffective to prevent the continuing representation of B in the absence of compelling considerations such as harmful disloyalty by Lawyer.

7. Client A, who consulted Lawyer about a tax question, gave informed advance consent to Lawyer's representing

any of Lawyer's other clients against Client A in matters unrelated to Client A's tax question. Client B, who had not theretofore been a client of Lawyer, wishes to retain Lawyer to file suit against Client A for personal injuries suffered in an automobile accident. After Lawyer informs Client B of the nature of Lawyer's work for Client A, and the nature and risks presented by any conflict that might be produced, Client B consents to the conflict of interest. After Lawyer has undertaken substantial work in preparation of Client B's case, Client A seeks to withdraw the advance consent for reasons not justified by the conduct of Lawyer or Client B. Even though Client A was Lawyer's client before Client B was a client, the material detriment to both Lawyer and Client B would render Client A's attempt to withdraw consent ineffective.

The terms of the consent itself can control the effects of revocation of consent. A client's consent could state that it is conditioned on the client's right to revoke consent at any time for any reason. If so conditioned, the consent would cease to be effective if the client exercised that right.

g. Nonconsentable conflicts. Some conflicts of interest preclude adverse representation even if informed consent is obtained.

g(i). Representations prohibited by law. As stated in Subsection (2)(a), informed consent is unavailing when prohibited by applicable law. In some states, for example, the law provides that the same lawyer may not represent more than one defendant in a capital case and that informed consent does not cure the conflict (see § 129, Comment c). Under federal criminal statutes, certain representations by a former government lawyer (cf. § 133) are prohibited, and informed consent by the former client is not recognized as a defense.

g(ii). Consent by governmental clients. Decisional law in a minority of states has limited the extent to which a governmental client may consent to a conflict of interest. Subject to local law on the powers of governmental bodies and the requirement that any consenting governmental officer must be disinterested in the issues giving rise to the question of conflict (see Comment c(ii) hereto), such questions should otherwise be decided under the customary rules governing conflicts of interest.

g(iii). Conflicts between adversaries in litigation. When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable (see § 128, Comment c, & § 129). The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences (see § 130, Comment d), the joint representation may not continue if the parties become opposed to each other in litigation.

Illustration:

8. A and B wish to obtain an amicable dissolution of their marriage. State law treats marriage dissolution as a contested judicial proceeding. Lawyer is asked to represent both A and B in negotiation of the property settlement to be submitted to the court in the proceeding. Informed consent can authorize Lawyer to represent both parties in the property-settlement negotiations (subject to exceptions in some jurisdictions, where interests of children are involved, for example), but consent does not authorize Lawyer to represent both A and B if litigation is necessary to obtain the final decree. The parties may agree that Lawyer will represent only one of them in the judicial proceeding. The other party would either be represented by another lawyer or appear pro se (see § § 128 & 130).

Whether clients are aligned directly against each other within the meaning of this Comment requires examination of the context of the litigation. In multi-party litigation, a single lawyer might, for example, represent members of a class in a class action, multiple creditors or debtors in a bankruptcy proceeding, or multiple interested parties in environmental clean-up litigation (see § 128). Joint representation is appropriate following effective client consent, together with compliance with applicable statutory or rule requirements, which may require court approval of the representation after disclosure of the conflict. Such joint representation is appropriate, notwithstanding that the co-clients may have conflicting claims against each other in other matters as to which the lawyer is not providing representation. The clients may also give informed consent to joint representation while they negotiate any differences they may have in the matter in litigation, perhaps employing the lawyer as appropriate in such negotiations (see § 130, Comments c & d), or prior agreement on such negotiated matters may be a condition of the clients' consent (see Comment e hereto). Where the alignment of parties, clients, and claims is such that the lawyer will not oppose another client with respect to the matters of dispute between them, as indicated in § 122(2)(b), there is no conflict. Thus, in complex litigation, the same lawyer may represent two defendants with largely congruent positions with respect to their defense, if other counsel are representing the two clients with respect to a dispute between them.

g(iv). Other circumstances rendering a lawyer incapable of providing adequate representation. Concern for client autonomy generally warrants respecting a client's informed consent. In some situations, however, joint representation would be objectively inadequate despite a client's voluntary and informed consent. In criminal cases, for example, joint representation of co-defendants with irreconcilable or unreconciled interests might render their representation

constitutionally inadequate and thus require a court to prohibit the joint representation (see § 129, Comment c). Similarly, a conflict of interest among class members might render a lawyer's representation in a class action inadequate despite informed consent by the class representatives (see § 128, Comment d; see also, e.g., § 131, Comment f, Illustration 5).

The general standard stated in Subsection (2)(c) assesses the likelihood that the lawyer will, following consent, be able to provide adequate representation to the clients. The standard includes the requirements both that the consented-to conflict not adversely affect the lawyer's relationship with either client and that it not adversely affect the representation of either client. In general, if a reasonable and disinterested lawyer would conclude that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is nonconsentable.

Decisions holding that a conflict is nonconsentable often involve facts suggesting that the client, who is often unsophisticated in retaining lawyers, was not adequately informed or was incapable of adequately appreciating the risks of the conflict (compare Comments c(i) & c(ii) hereto). Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is nonconsentable.

The nature of the conflict is also important. The professional rules and court decisions indicate that informed consent will always suffice with respect to a former-client conflict of interest (§ 132). With respect to simultaneous-representation conflicts (Topic 3), when the matters are unrelated it would only be in unusual circumstances that a lawyer could not provide adequate representation with consent of all affected clients. On the other hand, when the representation involves the same matter or the matters are significantly related, it may be more difficult for the lawyer to provide adequate legal assistance to multiple clients (see, e.g., § 131, Comment e, Illustration 4).

Illustrations:

9. Lawyer occasionally represents Bank in collection matters and is doing so currently in one lawsuit. Employee requests Lawyer to file an employment-discrimination charge against Bank. Bank, acting through its inside legal counsel, gives informed consent to Lawyer's representation of Employee against Bank with respect to the matter. Employee, following discussion with Lawyer concerning the nature of Lawyer's collection representations of Bank, freely gives informed consent as well. The circumstances indicate no basis for concluding that Lawyer would be unable to provide adequate representation to Bank in the collection matters and to Employee in the discrimination claim against Bank.

10. Lawyer has been asked by Buyer and Seller to represent both of them in negotiating and documenting a complex real-estate transaction. The parties are in sharp disagreement on several important terms of the transaction. Given such differences, Lawyer would be unable to provide adequate representation to both clients.

11. The facts being otherwise as stated in Illustration 10, the parties are both in agreement on terms and possess comparable knowledge and experience in such transactions, but, viewed objectively, the transaction is such that both parties should receive extensive counseling concerning their rights in the transaction and possible optional arrangements, including security interests, guarantees, and other rights against each other and in resisting the claims of the other party for such rights. Given the scope of legal representation that each prospective client should receive, Lawyer would be unable to provide adequate representation to both clients.

A conflict can be rendered nonconsentable because of personal circumstances affecting the lawyer's ability in fact to provide adequate representation. For example, if the lawyer has such strong feelings of friendship toward one of two prospective joint clients that the lawyer could not provide adequate representation to the other client (compare Comment h hereto), the lawyer may not proceed with the joint representation.

h. Duties of a lawyer representing a client subject to a conflict consent. When a lawyer undertakes representation despite a conflict and after required disclosure and informed consent, the lawyer must represent all affected clients diligently and competently (see § 16) and must not regard informed consent as a basis for limiting the scope of the representation or favoring the interests of one client over the interests of another, except as expressly agreed under the informed consent. The lawyer must protect the confidential information of all affected clients (see § 60), subject to whatever modifications are warranted pursuant to the informed consent. On communicating information with each client in the absence of a different agreement among co-clients, see § 60, Comment l, and § 75, Comment d.

§ 123. Imputation of a Conflict of Interest to an Affiliated Lawyer

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122 or unless imputation hereunder is removed as provided in § 124, the restrictions upon a lawyer imposed by §§ 125-135 also restrict other affiliated lawyers who:

- (1) are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association;
- (2) are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization; or
- (3) share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

§ 124. Removing Imputation

(1) Imputation specified in § 123 does not restrict an affiliated lawyer when the affiliation between the affiliated lawyer and the personally prohibited lawyer that required the imputation has been terminated, and no material confidential information of the client, relevant to the matter, has been communicated by the personally prohibited lawyer to the affiliated lawyer or that lawyer's firm.

(2) Imputation specified in § 123 does not restrict an affiliated lawyer with respect to a former-client conflict under § 132, when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:

(a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;

(b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and

(c) timely and adequate notice of the screening has been provided to all affected clients.

(3) Imputation specified in § 123 does not restrict a lawyer affiliated with a former government lawyer with respect to a conflict under § 133 if:

(a) the personally prohibited lawyer is subject to screening measures adequate to eliminate involvement by that lawyer in the representation; and

(b) timely and adequate notice of the screening has been provided to the appropriate government agency and to affected clients.

Comment:

c. Imputation after the termination of an affiliation.

c(i). Personally prohibited lawyer terminates the affiliation. During the time that a personally prohibited lawyer is associated with another lawyer, law firm, or other organization to which prohibition is imputed under § 123, the lawyer could reveal confidential information to any other lawyer within the organization. Accordingly, imputed prohibition of all lawyers in the firm is appropriately required by § 123. However, after the personally prohibited lawyer has left the firm, an irrebuttable presumption of continued sharing of client confidences or continued disloyalty induced by the affiliation is no longer justified.

The lawyers remaining in the affiliation may rebut the presumption that confidential information was shared during the period of actual affiliation. They have the burden of persuasion concerning three facts: (1) that no material

confidential client information relevant to the matter was revealed to any lawyer remaining in the firm; (2) that the firm does not now possess or have access to sources of client confidential information, particularly client documents or files; and (3) that the personally prohibited lawyer will not share fees in the matter so as to have an interest in the representation.

A personally prohibited lawyer who enters a new law firm or other affiliation causes imputed prohibition of all affiliated lawyers as stated in § 123. Such imputation is subject to removal under

Subsection (2) or (3).

c(ii). A non-personally-prohibited lawyer terminates the affiliation. When a lawyer leaves a firm or other organization whose lawyers were subject to imputed prohibition owing to presence in the firm of another lawyer, the departed lawyer becomes free of imputation so long as that lawyer obtained no material confidential client information relevant to the matter. Similarly, lawyers in the new affiliation are free of imputed prohibition if they can carry the burden of persuading the finder of fact that the arriving lawyer did not obtain confidential client information about a questioned representation by another lawyer in the former affiliation.

d(i). Screening—in general.

Lawyer codes generally recognize the screening remedy in cases involving former government lawyers who have returned to private practice (see Comment e hereto). Screening to prevent imputation from former private-client representations has similar justification, giving clients wider choice of counsel and making it easier for lawyers to change employers. The rule in Subsection (2) thus permits screening as a remedy in situations in which the information possessed by a personally prohibited lawyer is not likely to be significant. The lawyer or firm seeking to remove imputation has the burden of persuasion that there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client.

Significance of the information is determined by its probable utility in the later representation, including such factors as the following: (1) whether the value of the information as proof or for tactical purposes is peripheral or tenuous; (2) whether the information in most material respects is now publicly known; (3) whether the information was of only temporary significance; (4) the scope of the second representation; and (5) the duration and degree of responsibility of the personally prohibited lawyer in the earlier representation.

The lawyer codes in most states impose disciplinary responsibility in a wider range of circumstances of former private-client representations. Specifically, most codes do not recognize that screening can preclude disqualification of a law firm by imputation from a personally prohibited lawyer, even if the screening is timely and effective and the client information involved is innocuous. The issue typically arises under motions to disqualify, not in disciplinary proceedings. A tribunal has discretion whether or not to require disqualification. Subsection (2) states a rule to guide exercise of that discretion.

Illustrations:

3. As can readily be shown from contemporaneous time records, when Lawyer was an associate in Law Firm ABC, Lawyer spent one-half hour in conversation with another associate about research strategies involving a narrow issue of venue in federal court in the case of Developer v. Bank, in which the firm represented Bank. The conversation was based entirely on facts pleaded in the complaint and answer, and Lawyer learned no confidential information about the matter. Lawyer then left Firm ABC and became an associate in Firm DEF. Two years later, Lawyer was asked to represent Developer against Bank in a matter substantially related to the matter in which Firm ABC represented Bank. In the circumstances, due to the proven lack of exposure of Lawyer to confidential information of Bank, Bank should not be regarded as the former client of Lawyer for the purpose of applying § 132 (see § 132, Comment h). Alternatively, a tribunal may require that Lawyer be screened from participation in the matter as provided in this Section and, on that basis, permit other lawyers affiliated with Lawyer in Firm DEF to represent the client against Bank.

4. The same facts as Illustration 3, except that Lawyer while representing Bank in Firm ABC was principally in charge of developing factual information about the underlying dispute. The dispute involved a loan Bank made to Developer on Tract A in the city in which both conduct business. The dispute was resolved after extensive discovery and a full trial before Lawyer left Firm ABC. An affiliated lawyer in Lawyer's new firm, Firm DEF, has been asked to represent Developer in a dispute with Bank over a loan on Tract B. Because of the similarity of facts in the two disputes--involving both tracts, both loans, and both parties to them--a tribunal finds the matters are substantially related and accordingly that Lawyer is personally prohibited from representing Developer against Bank with respect to Tract B (see § 132). However, the tribunal also finds that, despite that factual overlap, the information Lawyer might have acquired about Bank would have little significance in the later dispute because it concerned only an earlier period of time so that any importance it might have had was significantly diminished by the time of the second dispute, because it mainly involves information already a matter of public record in the earlier trial, and because all factual information will be largely irrelevant in view of the fact that the pleadings indicate that the only contested issue in the

second dispute involves a matter of contract interpretation. In the circumstances, the tribunal should further find that Firm DEF may represent Developer against Bank if Lawyer has been screened as provided in Subsection (2).

5. The same facts as Illustration 4, except that the earlier dispute was settled after Lawyer had conducted extensive examination of Bank's files but without any discovery by Developer's then counsel or trial. Little time has passed since Lawyer acquired the information from Bank, and the information remains highly relevant in the later dispute. The pleadings in the second dispute indicate that a large number of important factual issues similar to those in the earlier dispute remain open. In the circumstances, the likelihood that the information possessed by Lawyer will be significant in the second matter renders screening under this Section inappropriate.

d(ii). Screening—adequacy of measures. Screening must assure that confidential client information will not pass from the personally prohibited lawyer to any other lawyer in the firm. The screened lawyer should be prohibited from talking to other persons in the firm about the matter as to which the lawyer is prohibited, and from sharing documents about the matter and the like. Further, the screened lawyer should receive no direct financial benefit from the firm's representation, based upon the outcome of the matter, such as a financial bonus or a larger share of firm income directly attributable to the matter. However, it is not impermissible that the lawyer receives compensation and benefits under standing arrangements established prior to the representation. An adequate showing of screening ordinarily requires affidavits by the personally prohibited lawyer and by a lawyer responsible for the screening measures. A tribunal can require that other appropriate steps be taken.

If a lawyer in a law firm assertedly observing screening measures in fact breaches the screen and shares confidential information with lawyers proceeding adversely to the former client, the tribunal should take appropriate corrective measures. The screen should no longer be considered adequate to prevent disqualification of affiliated lawyers. Contempt might be an appropriate remedy to the extent that breach of the screen was knowing and deliberate and in violation of direct undertakings to the tribunal. In circumstances involving lesser culpability, lesser sanctions within the court's inherent power may be appropriate.

d(iii). Screening—timely and adequate notice of screening to all affected clients. An affected client will usually have difficulty demonstrating whether screening measures have been honored. Timely and adequate notice of the screening must therefore be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest and to allow arrangements to be made for monitoring compliance.

Notice should ordinarily be given as soon as practical after the lawyer or firm realizes or should realize the need for screening. Obligations of confidentiality to a current client, however, might justify reasonable delay. A firm advising about a possible takeover of a former client of a lawyer now in the firm, for example, need not provide notice until the attempt becomes known to the target client.

Topic 2. Conflicts of Interest Between a Lawyer and a Client

§ 125. A Lawyer's Personal Interest Affecting the Representation of a Client

Unless the affected client consents to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.

Comment:

f. Initiation and settlement of class actions and other multiple-client representations. Class actions and similar proceedings can raise a number of personal-interest conflict-of-interest questions. A class action can transform a modest claim into a set of claims of large consequence and often has potential for magnifying attorney's fees. An individual plaintiff usually begins with a concern about an individual wrong, and prompt and complete redress of that wrong is often the client's goal. A class action might be the only practical means of vindicating the client interest. However, a class action can substitute a longer, more complex proceeding for one more beneficial for the client's individual interests. Where bringing a claim as a class action might materially and adversely affect the interests of the individual client, that possibility must be disclosed to that client. On the determination of client-lawyer relationships in class actions, see § 14, Comment f.

Settlement of a class action or similar suit can also create a conflict concerning the lawyer's fee. The defendant, for

example, might offer to settle the matter for an amount or kind of relief that is relatively generous to the lawyer's client if the lawyer will agree to accept a low fee award. Conversely, the defendant might acquiesce in a generous award of attorney's fees in exchange for relatively modest relief for the client's substantive claim. The latter arrangement must be rejected by the class lawyer as subordinating the interests of the lawyer's client to the lawyer's own interest.

The lawyer should make reasonable effort to separate settlement of the substantive claim from determination of the amount of attorney's fees. Some decisions have attempted to effectuate that requirement by forbidding settlement discussions to address the fee that the lawyer is to receive. Some commentators have urged that a court refuse to approve a settlement unless award of reasonable attorney's fees is to be judicially determined rather than negotiated. Neither of those suggestions gives adequate effect to the interests of the client in all cases.

A more appropriate arrangement, where possible, is for the lawyer's fee to be negotiated initially by the client and lawyer at the outset of the relationship, it being understood and disclosed to the client that the ultimate award may be scrutinized by the opposing party and approved by the court (compare § 22, Comment c). On interpretation of agreements between client and lawyer concerning fee awards, see § 38, Comment f. On aggregate settlement of claims involving multiple clients who are not class members, see § 128, Comment d(i).

§ 126. Business Transactions Between a Lawyer and a Client

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

- (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
- (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
- (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

§ 127. A Client Gift to a Lawyer

(1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.

(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:

- (a) the lawyer is a relative or other natural object of the client's generosity;
- (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount;

or

(c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

Comment:

a. Scope and cross-references. The law of undue influence treats client gifts as presumptively fraudulent, so that the lawyer-donee bears a heavy burden of persuasion that the gift is fair and not the product of overreaching or otherwise an imposition upon the client. See Restatement Second, Trusts § 343, Comments l and m (voidability of gifts from beneficiary to trustee); cf. Restatement Second, Contracts § 177 (contracts voidable on ground of undue influence). This Section assumes, but does not restate fully, the law of undue influence. The Section is stricter than the general law of undue influence in some jurisdictions. For example, the Section prohibits a lawyer from accepting a gift from a client (apart from the three stated exceptions) even if the lawyer has not engaged in undue influence.

Topic 3. Conflicts of Interest Among Current Clients

§ 128. Representing Clients with Conflicting Interests in Civil Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in civil litigation may not:

(1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter; or

(2) represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related.

Comment:

d. Clients nominally aligned on the same side in the litigation. Multiple representation is precluded when the clients, although nominally on the same side of a lawsuit, in fact have such different interests that representation of one will have a material and adverse effect on the lawyer's representation of the other. Such conflicts can occur whether the clients are aligned as co-plaintiffs or co-defendants, as well as in complex and multiparty litigation.

d(i). Clients aligned as co-plaintiffs. No conflict of interest is ordinarily presented when two or more of a lawyer's clients assert claims against a defendant. However, sometimes two parties aligned on the same side of a case as co-claimants might wish to characterize the facts differently. The client-claimants might also have a potential lawsuit against each other. For example, a passenger in an automobile damage action might be a co-plaintiff with the driver of the car in a suit alleging negligence of the driver of the other car, but also be able to contend that the driver of the passenger's car was negligent as well, a conclusion that the driver would be motivated to deny. Where there are such possible claims, the lawyer must warn clients about the possibilities of such differences and obtain the consent of each before agreeing to represent them as co-claimants (see § 122).

When multiple claimants assert claims against a defendant who lacks sufficient assets to meet all of the damage claims, a conflict of interest might also be presented. Indeed, whether or not the defendant has assets sufficient to pay all claims, a proposed settlement might create conflicts because the plaintiffs differ in their willingness to accept the settlement. Before any settlement is accepted on behalf of multiple clients, their lawyer must inform each of them about all of the terms of the settlement, including the amounts that each of the other claimants will receive if the settlement is accepted. A similar conflict of interest can arise for a lawyer representing multiple defending parties.

Illustrations:

1. Lawyer represents A and B, pedestrians struck by an automobile as they stood at a street corner.

Each has sued C, the owner-driver, for \$150,000. C has \$100,000 in liability insurance coverage and no other assets with which to satisfy a judgment. Neither A nor B can be paid the full amount of their claims and any sum recovered by one will reduce the assets available to pay the other's claim. Because of the conflict of interest, Lawyer can continue to represent both A and B only with the informed consent of each (see § 122).

2. The same facts as in Illustration 1, except that C offers to settle A's claim for \$60,000 and B's claim for \$40,000. Lawyer must inform both A and B of all of the terms of the proposed settlement, including the amounts offered to each client. If one client wishes to accept and the other wishes to reject the proposed settlement, Lawyer may continue to represent both A and B only after a renewal of informed consent by each.

d(ii). Clients aligned as co-defendants in civil case. Clients aligned as co-defendants also can have conflicting interests. Each would usually prefer to see the plaintiff defeated altogether, but if the plaintiff succeeds, each will often prefer to see liability deflected mainly or entirely upon other defendants. Indeed, a plaintiff often sues multiple defendants in the hope that each of the defendants will take the position that another of them is responsible, thus enhancing the likelihood of the plaintiff's recovering. Such conflicts preclude joint representation, absent each co-defendant's informed consent (see § 122).

A contract between the parties can eliminate the conflict. When an employee injures someone in an incident arising out of the employment, for example, an employer that is capable of paying the judgment might agree in advance to hold the employee harmless in the matter so that only the employer will bear any judgment ultimately entered. If only one of the parties will ultimately be liable to the plaintiff, there is little reason to incur the expense of separate counsel. However, the initial conflict must be understood by both defendants and each must consent, particularly if the clients must negotiate an agreement governing who will bear ultimate liability (see § 130).

d(iii). Complex and multiparty litigation. Not all possibly differing interests of co-clients in complex and multiparty litigation involve material interests creating conflict. Determination whether a conflict of material interests exists requires careful attention to the context and other circumstances of the representation and in general should be based on whether (1) issues common to the clients' interests predominate, (2) circumstances such as the size of each client's interest make separate representation impracticable, and (3) the extent of active judicial supervision of the representation. For example, a lawyer might represent several unsecured creditors in a bankruptcy proceeding. In addition to general conflict-of-interest rules that may apply, a lawyer representing such multiple clients must also comply with statutory regulations if more stringent.

Similar considerations apply in representing multiple co-parties in class-action proceedings, due to the possible existence of different objectives or other interests of class members (see also § 125 on creation and settlement of class actions). A plaintiff class might agree, for example, that the local school system discriminates against a racial or ethnic minority, but there might be important differences within the class over what remedy is appropriate (see § 14, Comment f). As one possible corrective, under procedural law a class may be subdivided. Through that process objecting members of the class may be heard. However, such differences within the class do not necessarily produce conflicts requiring that the lawyer for the class not represent some or all members of the class or necessitate creation of subclasses. The tasks of a lawyer for a class may include monitoring and mediating such differences. In instances of intractable difference, the lawyer may proceed in what the lawyer reasonably concludes to be the best interests of the class as a whole, for example urging the tribunal to accept an appropriate settlement even if it is not accepted by class representatives or members of the class. In such instances, of course, the lawyer must inform the tribunal of the differing views within the class or on the part of a class representative.

e. Suing a present client in an unrelated matter. A lawyer's representation of Client A might require the lawyer to file a lawsuit against Client B whom the lawyer represents in an unrelated matter. Because the matters are unrelated, no confidential information is likely to be used improperly, nor will the lawyer take both sides in a single proceeding. However, the lawyer has a duty of loyalty to the client being sued. Moreover, the client on whose behalf suit is filed might fear that the lawyer would pursue that client's case less effectively out of deference to the other client. Thus, a lawyer may not sue a current client on behalf of another client, even in an unrelated matter, unless consent is obtained under the conditions and limitations of § 122. On identifying who is a present client, see § 14 and § 121, Comment d. On the possibility of

informed consent in advance to such suits in certain cases, see § 122, Comment d.

Illustrations:

3. Lawyer represents Client B in seeking a tax refund. Client A wishes to file suit against Client B in a contract action unrelated to the tax claim. Lawyer may not represent Client A in the suit against Client B as long as Lawyer represents Client B in the tax case, unless both clients give informed consent. On withdrawal, see § 121, Comment e.

4. The same facts as in Illustration 3, except that Client A's contract action is against corporation C, which is not Lawyer's client. After A's suit has been filed, C is acquired by and merged into Lawyer's client B, thus creating the conflict. Unauthorized use of confidential information would not be an issue in such a case, and any remedy imposed by a tribunal should minimize adverse impact on the parties. Because the action of B created the conflict, Lawyer might be permitted to withdraw from pursuing the tax claim on behalf of B, for example, but continue to pursue the contract action. Compare the discussion at § 132, Comment e.

f. Concurrently taking adverse legal positions on behalf of different clients. A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues.

However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If a conflict of interest exists, absent informed consent of the affected clients under § 122, the lawyer must withdraw from one or both of the matters. Informed client consent is provided for in § 122. On circumstances in which informed client consent would not allow the lawyer to proceed with representation of both clients, see § 122(2)(c) and Comment g(iv) thereto.

Illustrations:

5. Lawyer represents two clients in damage actions pending in different United States District Courts. In one case, representing the plaintiff, Lawyer will attempt to introduce certain evidence at trial and argue there for its admissibility. In the other case, representing a defendant, Lawyer will object to an anticipated attempt by the plaintiff to introduce similar evidence. Even if there is some possibility that one court's ruling might be published and cited as authority in the other proceeding, Lawyer may proceed with both representations without obtaining the consent of the clients involved.

6. The same facts as in Illustration 5, except that the cases have proceeded to the point where certiorari has been granted in each by the United States Supreme Court to consider the common evidentiary question. Any position that Lawyer would assert on behalf of either client on the legal issue common to each case would have a material and adverse impact on the interests of the other client. Thus, a conflict of interest is presented. Even the informed consent of both Client A and Client B would be insufficient to permit Lawyer to represent each before the Supreme Court.

§ 129. Conflicts of Interest in Criminal Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in a criminal matter may not represent:

- (1) two or more defendants or potential defendants in the same matter; or
- (2) a single defendant, if the representation would involve a conflict of interest as defined in §

121.

Comment:

c. Multiple criminal-defense representations. Subsection (1) recognizes that the representation of co-defendants in criminal cases involves at least the potential for conflicts of interest. For example, if one defendant is offered favorable treatment in return for testimony against a co-defendant, a single lawyer could not give advice favorable to one defendant's interests while adhering to the duty of loyalty to the other. Similarly, individual defendants might have had different motives for and understandings of events, so that establishing a common position among them is difficult. Witnesses who would be favorable to one

defendant might be subject to cross-examination that would be unfavorable to another defendant. In closing argument, counsel must choose which facts to stress. For example, stressing the minor role of one defendant might imply the major role of another.

Because of such potential conflicts and the constitutional significance of the issues they raise, joint representation in criminal cases often has a material and adverse effect on the representation of each defendant and thus cannot be undertaken in the absence of client consent under the limitations and conditions stated in § 122.

Criminal defendants might nonetheless consider it in their interest to be represented by a single lawyer even when the financial cost of separate counsel is not a factor. A single lawyer can help assure a common position and increase the likelihood that none of the co-defendants will cooperate with the prosecution against the others. For such reasons, a criminal conviction involving joint representation ordinarily is not impeachable absent a showing of timely objection and actual prejudice. Were the rule otherwise, defendants could avoid raising a conflict issue before trial so as to create an issue for later appeal.

On the other hand, both the prosecutor and the trial judge have a responsibility to assure a fair trial for each defendant. When a defense lawyer would be required to assume an adverse position with respect to one or more of the clients, the conflict is nonconsentable (see § 122(2)(b) & Comment g(iii) thereto). Efficient operation of the judicial system requires that a verdict not be vulnerable to contentions that a defendant was disadvantaged by an undisclosed conflict of interest. A prosecutor might object to joint-representation arrangements to assure that a conflict possibility is resolved before trial. Even without objection by the prosecutor or defendant, the tribunal may raise the issue on its own initiative and refuse to permit joint representation where there is a significant threat to the interest in the finality of judgments.

Illustrations:

1. A and B are co-defendants charged with a felony offense of armed robbery. They are both represented by Lawyer. The prosecutor believes that A planned the crime and was the only one carrying a weapon. The prosecutor offers to accept B's plea of guilty to a misdemeanor if B will testify against A. Lawyer's loyalty to A causes Lawyer to persuade B that

the prosecutor's proposal should be rejected. Following a trial, both A and B are convicted of the felony. When plea negotiations involving B's separate interests began, B should have received independent counsel. In the circumstances, Lawyer could not properly represent A and B even with the informed consent of both clients (see § 122, Comment g(iii)).

2. The same facts as in Illustration 1, except that the evidence at trial is highly damaging to Defendant A but less so to Defendant B. Both defendants were represented by Lawyer, who did not consult with A and B concerning their conflicting interests. Lawyer spent most of the closing argument explaining away A's guilt and did not mention the weak case against B, because doing so would invite the jury to consider the greater likelihood of A's guilt. Lawyer could represent B only with the informed consent of B (see § 122).

d. A criminal-defense lawyer with conflicting duties to other clients. As required in Subsection (2), a conflict exists when a defense lawyer in a criminal matter has duties to clients in other matters that might conflict. A conflict exists, for example, if the lawyer also represents either a prosecutor or a prosecution witness in an unrelated matter. The conflict could lead the lawyer to be less vigorous in defending the criminal case in order to avoid offending the other client, or the lawyer might be constrained in cross-examining the other client (see § 60(1)). A lawyer who represents a criminal defendant may not represent the state in unrelated civil matters when such representation would have a material and adverse effect on the lawyer's handling of the criminal case.

Ordinarily, these conflicts may be waived by client consent under the limitations and conditions in § 122. Because the defendant's constitutional rights are implicated, court procedures often require that consent be made part of the formal record in the criminal case (see Comment c hereto).

§ 130. Multiple Representation in a Nonlitigated Matter

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients.

Comment:

b. Rationale. Whether a lawyer can function in a situation of conflict (see § 121) depends on whether the conflict is consentable (see § 122(2)), which in turn depends on whether it is "reasonably likely that the lawyer will be able to provide adequate representation" to all affected clients (see § 122(2)).

Conflicted but unconsented representation of multiple clients, for example of the buyer and seller of property, is sometimes defended with the argument that the lawyer was performing the role of mere "scrivener" or a similarly mechanical role. The characterization is usually inappropriate. A lawyer must accept responsibility to give customary advice and customary range of legal services, unless the clients have given their informed consent to a narrower range of the lawyer's responsibilities. On limitations of a lawyer's responsibilities, see § 19(1).

c. Assisting multiple clients with common objectives, but conflicting interests. When multiple clients have generally common interests, the role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results. Multiple representations do not always present a conflict of interest requiring client consent (see § 121). For example, in representing spouses jointly in the purchase of property as co-owners, the lawyer would reasonably assume that such a representation does not involve a conflict of interest. A conflict could be involved, however, if the lawyer knew that one spouse's objectives in the acquisition were materially at variance with those of the other spouse.

Illustrations:

1. Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent (see § 121). While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.

2. The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A,

appears to disagree with important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest. Lawyer may proceed to provide the requested legal assistance only with consent given under the limitations and conditions provided in § 122.

3. The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).

Clients might not fully understand the potential for conflict in their interests as the result of ignorance about their legal rights, about possible alternatives to those that the clients have considered prior to retaining the lawyer, or about the uncommunicated plans or objectives of another client. In other situations, prospective clients might agree on objectives when they first approach the common lawyer, but it should be reasonably apparent that a conflict is likely to develop as the representation proceeds. A client's right to communicate in confidence with the attorney should not be constrained by concern that discord might result (cf. § 75). A lawyer is not required to suggest or assume discord where none exists, but when a conflict is reasonably apparent or foreseeable, the lawyer may proceed with multiple representation only after all affected clients have consented as provided in § 122.

Illustration:

4. A, B, and C are interested in forming a partnership in which A is to provide the capital, B the basic patent, and C the management skill. Only C will spend significant amounts of time operating the business. A, B, and C jointly request Lawyer to represent them in creating the partnership. The different contributions to be made to the partnership alone indicate that the prospective partners have conflicts of interest with respect to the structure and governance of the partnership (see § 121). With

the informed consent of each (see § 122), Lawyer may represent all three clients in forming the business. Lawyer may assist the clients in valuing their respective contributions and suggest arrangements to protect their respective interests. With respect to conflicts and informed consent in representing the partnership as well as the partners once the business is established, see § 131.

Comment e.

d. Clients with known differences to be resolved. Multiple prospective clients might already be aware that their interests and objectives are antagonistic to some degree. The lawyer must ascertain at the outset what kind of assistance the clients require. Service by the lawyer or another person as an arbitrator or mediator (and not as a lawyer representing clients), for example, might well serve the clients' interests.

When circumstances reasonably indicate that the prospective clients might be able to reach a reasonable reconciliation of their differences by agreement and with the lawyer's assistance, the lawyer may represent them after obtaining informed consent (see § 122). In particular, the lawyer should explain the effect of joint representation on the lawyer's ability to protect each client's confidential information (see § 75). If the joint representation is undertaken, the lawyer should help the clients reach agreement on outstanding issues but should not advance the interests of one of the clients to the detriment of another (see § 122, Comment h).

Relations among multiple clients can develop into adversarial, even litigated, matters. Even if the possibility of litigation is substantial and even though the consent does not permit the lawyer to represent one client against the other if litigation does ensue (see § 122(2)(b) & § 128), with informed consent a lawyer could accept multiple representation in an effort to reconcile the differences of the clients short of litigation. The lawyer should inform the clients that the effort to overcome differences might ultimately fail and require the lawyer's complete withdrawal from the matter, unless the clients agreed that the lawyer thereafter could continue to represent less than all clients (see § 121, Comment e(i)). The lawyer is not required to encourage each client to obtain independent advice about being jointly represented, but the lawyer should honor any client request for such an opportunity.

Illustrations:

5. The same facts as in Illustration 4, except that the partnership of A, B, and C is formed and commences business. The business encounters difficulty in securing customers and controlling costs, and it shortly appears that the business will fail unless additional funding is obtained. No outside funds are available, and A announces unwillingness to provide additional capital unless B and C agree to increase A's interest in the business. B and C believe that A is requesting an unreasonably large additional share. A, B, and C seek Lawyer's assistance in resolving their disagreements. A conflict

clearly exists between the clients (§ 121). Lawyer may agree to represent the three clients in seeking to arrive at a mutually satisfactory resolution, but only after Lawyer obtains the informed consent of each client and there is a clear definition of the services that Lawyer will provide. In representing the clients, Lawyer may not favor the position of any client over the others (see § 122, Comment h).

6. Husband and Wife have agreed to obtain an uncontested dissolution of their marriage. They have consulted Lawyer to help them reach an agreement on disposition of their property. A conflict of interest clearly exists between the prospective clients (§ 121). If reasonable prospects of an agreement exist, Lawyer may accept the joint representation with the effective consent of both (see § 122). However, in the later dissolution proceeding, Lawyer may represent only one of the parties (see § 128, Comment c), and Lawyer must withdraw from representing both clients if their efforts to reach an agreement fail (see § 121, Comment e(i)).

§ 131. Conflicts of Interest in Representing an Organization

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.

Comment:

c. A challenge to the policy of a client organization. Individuals having responsible roles in an organization can disagree about the definition of its interests. However, that does not by itself indicate that a lawyer representing the organization has a conflict of interest within the meaning of § 121. If conduct of the organization is challenged as unlawful, the lawyer for the organization generally may defend at least until it is ruled upon by the tribunal or changed pursuant to the procedures of the organization. Such a change can occur, for example, because the lawyer is directed to settle the controversy as instructed by the

agent (see § 21).

On the lawyer's duty if the responsible agent is acting in violation of a duty to the organization, see § 96(2). On the lawyer's duty if the organization engages in a crime or fraud, see § 67. On the lawyer's right to withdraw from representation because of disagreement with the organizational policy, see § 32. On the lawyer's right to take public positions inconsistent with those of the lawyer's client, see § 125, Comment e.

d. Conflicting interests of affiliated organizations. Whether a lawyer represents affiliated organizations as clients is a question of fact determined under § 14 (see Comment f thereto). When a lawyer represents two or more organizations with some common ownership or membership, whether a conflict exists is determined primarily on the basis of formal organizational distinctions. If a single business corporation has established two divisions within the corporate structure, for example, conflicting interests or objectives of those divisions do not create a conflict of interest for a lawyer representing the corporation. Differences within the organization are to be resolved through the organization's decisionmaking procedures.

Illustration:

2. A Corporation owns 60 percent of the stock of B Corporation. All of the stock of A Corporation is publicly owned, as is the remainder of the stock in B Corporation. Lawyer has been asked by the President of A Corporation to act as attorney for B in causing B to make a proposed transfer of certain real property to A at a price whose fairness cannot readily be determined by reference to the general real-estate market. Lawyer may do so only with effective informed consent of the management of B (as well as that of A). The ownership of A and B is not identical and their interests materially differ in the proposed transaction.

e. Representation of an organization and an individual constituent. Representation of a client organization often is facilitated by a close working relationship between the lawyer and the organization's officers, directors, and employees. However, unless the lawyer and such an individual person enter into a client-lawyer relationship (see § 14, Comment f), the individual is not a client of the lawyer (see § 121, Comment d). With respect to the attorney-client privilege attaching to communications with a person affiliated with an organization, see § 73, Comment j.

When a lawyer proposes to represent both an organization and a person associated with it, such as an officer, director, or employee, whether a conflict exists is determined by an analysis of the interests of the organization as an entity and those of the individuals involved. That is true whether the multiple representation involves civil (see § 128) or

criminal (see § 129) litigation or a nonlitigated matter (see § 130). The interests of the organization are those defined by its agents authorized to act in the matter (see § 96, Comment d). For example, when an organization is accused of wrongdoing, an individual such as a director, officer, or other agent will sometimes be charged as well, and the lawyer representing the organization might be asked also to represent the individual. Such representation would constitute a conflict of interest when the individual's interests are materially adverse to the interests of the organization (see § 121). When there is no material adversity of interest, such as when the individual owns all of the equity in the organization or played a routine role in the underlying transaction, no conflict exists. In instances of adversity, concurrent representation would be permissible with the consent of all affected clients under the limitations and conditions stated in § 122.

Consent by an organization can be given in any manner consistent with the organization's lawful decisionmaking procedures. Applicable corporate law may provide that an officer who is personally interested in the matter may not provide consent in the matter. In deciding whether to consent to multiple representation by outside counsel, the organization might rely upon the advice of inside legal counsel. Issues concerning informed consent by public organizations to otherwise conflicted representations are discussed in § 122, Comment c.

Illustrations:

3. President, the chief executive officer of Corporation, has been charged with discussing prices with the president of a competing firm. If found guilty, both President and Corporation will be subject to civil and criminal penalties. Lawyer, who is representing Corporation, has concluded after a thorough investigation that no such pricing discussions occurred. Both Corporation and President plan to defend on that ground. President has asked Lawyer to represent President as well as Corporation in the proceedings. Although the factual and legal defenses of President and Corporation appear to be consistent at the outset, the likelihood of conflicting positions in such matters as plea bargaining requires Lawyer to obtain the informed consent of both clients before proceeding with the representation (see § 129, Comment c).

4. The same facts as in Illustration 3, except that after further factual investigation both President and Corporation now concede that the pricing discussions took place. One of President's defenses will be that the former general counsel of Corporation told President that discussion of general pricing practices with a competitor was not illegal. Corporation denies that such was the advice given and asserts that President acted without authority. The conflict between President and Corporation is so great that the same lawyer could not provide adequate legal services to both in the matter. Thus, continued representation of both is not subject to consent (see § 122, Comment g(iii), & §§ 128 & 129).

If a person affiliated with an organization makes an unsolicited disclosure of information to a lawyer who represents only the organization, indicating the person's erroneous expectation that the lawyer will keep the information confidential from the organization, the lawyer must inform the person that the lawyer does not represent the person (see § 103, Comment e). The lawyer generally is not prohibited from sharing the communication with the organization. However, the requirements stated in § 15, Comment c, with respect to safeguarding confidential information of a prospective client may apply. That would occur when the person reasonably appeared to be consulting the lawyer as present or prospective client with respect to the person's individual interests, and the lawyer failed to warn the associated person that the lawyer represents only the organization and could act against the person's interests as a result (see § 103, Comment e). With respect to a lawyer's duties when a person associated with the organization expressed an intent to act wrongfully and thereby threatens harm to the organization client, see § 96(2) and Comment f thereto.

Issues considered in this Comment may be particularly acute in the case of close corporations, small partnerships, and similar organizations in which, for example, one person with substantial ownership interests also manages. Such a manager may have a corresponding tendency to treat corporate and similar entity distinctions as mere formalities. In such instances, when ownership is so concentrated that no nonmanaging owner exists and in the absence of material impact on the interests of other nonclients (such as creditors in the case of an insolvent corporation), a lawyer acts reasonably in accepting in good faith a controlling manager's position that the interests of all controlling persons and the entity should be treated as if they were the same. Similar considerations apply when a close corporation or similar organization is owned and managed by a small number of owner-managers whose interests are not materially in conflict.

f. A challenge by a client organization to the action of an associated person. Both Subsections of this Section can be applicable when the organization challenges the action of one or more of its associated persons, such as an officer, director, or employee. The policy of the organization in the matter will be that established according to the organization's decisionmaking procedures (see § 96(1)(a)). Because the interests of the organization and the associated person are necessarily adverse, the conflict of interest ordinarily will not be subject to consent (see § 122(2)(c)). On the lawyer's dealing with threatened wrongdoing by a person associated with an organizational client, see § 96(2); see also §§

66-67.

Illustration:

5. Treasurer, the chief financial officer of Club, a private investment trust, has been accused of converting \$25,000 of Club's assets for personal use. Responsible other officers of Club, acting on Club's behalf, retain Lawyer to recover the money from Treasurer. They direct Lawyer not to reveal the loss or file suit until other collection efforts have been exhausted. Lawyer may properly represent Club and in doing so must proceed in the manner directed. Further, although the matter is not yet in litigation, the interests of Club and Treasurer are so adverse that even informed consent of both would not permit their common representation by Lawyer in the matter (see § 122, Comment g).

g. Derivative action. When an organization such as a business corporation is sued in a derivative action, the organization is ordinarily aligned as an involuntary plaintiff. Persons associated with the organization who are accused of breaching a duty to the organization, typically officers and directors of the organization, are ordinarily named as defendants. The theory of a derivative action is that relief is sought from the individuals for the benefit of the organization. Even with informed consent of all affected clients,

the lawyer for the organization ordinarily may not represent an individual defendant as well (see § 128, Comment c). If, however, the disinterested directors conclude that no basis exists for the claim that the defending officers and directors have acted against the interests of the organization, the lawyer may, with the effective consent of all clients, represent both the organization and the officers and directors in defending the suit (see § 122).

In a derivative action, if the advice of the lawyer acting for the organization was an important factor in the action of the officers and directors that gave rise to the suit, it is appropriate for the lawyer to represent, if anyone, the officers and directors and for the organization to obtain new counsel. Because the lawyer would be representing clients with interests adverse to the corporation, consent of the corporation would be required. That would be true even if the lawyer withdrew from representing the corporation in order to represent the individuals (see § 132, Comment c). Whom the lawyer should represent in the matter, if anyone, should be determined by responsible agents of the organization. Ordinarily, those will be persons who are not named and are not likely to be named parties in the case.

If an action challenging an act of an organization is not a derivative action, whether a conflict exists is determined under § 128, Comment d(ii).

h. Proxy fights and takeover attempts. Outsiders or insiders might challenge incumbent management for control of organizations. Incumbent management, shareholders, creditors, and employees will all be affected by such a contest in various ways. When the challenge to incumbent management comes from outside the management group, the role of the lawyer representing the organization must be to follow policies adopted by the organization, in accordance with the organization's decisionmaking procedures. Persons authorized to act on behalf of the organization determine the organization's interest in responding to the challenge (see § 96(i)).

When all or part of incumbent management seeks to obtain control of the organization, typically by restructuring ownership of and authority in the organization, a conflict of interest is presented between the individual interests of those members of management and the holders of ownership and authority. Because of their personal interests, those members of management ordinarily would not be appropriate agents to direct the work of a lawyer for the organization with respect to the takeover attempt. Whether a lawyer's personal interests, for example, those based on longtime association with incumbent management, preclude the lawyer from representing the organization or the managers seeking control depends on whether the lawyer's personal interests create a substantial risk of material and adverse effect on the representation (see § 125).

Similar considerations apply when a contest over ownership or control arises within a closely held corporation or similar small organization such as a two-person partnership. If the lawyer also represents a principal in such an enterprise personally, the possibility of conflict is increased if the lawyer undertakes to represent that person in such a contest. When it reasonably appears that the lawyer can serve effectively in the role of conciliator between contending factions, the lawyer may undertake to do so with effective consent of all affected clients (see § 130, Comment d). In other cases, however, the lawyer will be required to withdraw from representing all of the individual interests (see § 132).

Topic 4. Conflicts of Interest with a Former Client

§ 132. A Representation Adverse to the Interests of a Former Client

Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 122, a lawyer who has represented a client in a matter may

not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:

- (1) the current matter involves the work the lawyer performed for the former client; or
- (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Comment:

b. *Rationale.* The rule described in this Section accommodates four policies. First, absent the rule, a lawyer's incentive to serve a present client might cause the lawyer to compromise the lawyer's continuing duties to the former client (see § 33). Specifically, the lawyer might use confidential information of the former client contrary to that client's interest and in violation of § 60. The second policy consideration is the converse of the first. The lawyer's obligations to the former client might constrain the lawyer in representing the present client effectively, for example, by limiting the questions the lawyer could ask the former client in testimony. Third, at the time the lawyer represented the former client, the lawyer should

have no incentive to lay the basis for subsequent representation against that client, such as by drafting provisions in a contract that could later be construed against the former client. Fourth, and pointing the other way, because much law practice is transactional, clients often retain lawyers for service only on specific cases or issues. A rule that would transform each engagement into a lifetime commitment would make lawyers reluctant to take new, relatively modest matters.

c. The relationship between current-client and former-client conflicts rules. The difference between a former-client conflict under this Section and a present-client conflict considered in Topic 3 (§§ 128-130) is that this Section applies only to representation in the same or a substantially related matter. The present-client conflict rules prohibit adverse representation regardless of the lack of any other relationship between them. If the two representations overlap in time, the rules of §§ 128-130 apply.

Withdrawal is effective to render a representation "former" for the purposes of this Section if it occurs at a point that the client and lawyer had contemplated as the end of the representation (see § 32, Comment c). The representation will also be at an end for purposes of this Section if the existing client discharges the lawyer (other than for cause arising from the improper representation) or if other grounds for mandatory or permissive withdrawal by the lawyer exist (see § 32), and the lawyer is not motivated primarily by a desire to represent the new client.

If a lawyer is approached by a prospective client seeking representation in a matter adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer's withdrawal from the representation of the existing client. A premature withdrawal violates the lawyer's obligation of loyalty to the existing client and can constitute a breach of the client-lawyer contract of employment (see § 32, Comment c). On withdrawal when a dispute arises between two or more of the lawyer's clients, see § 121, Comment e(i). On advance consent, see id. and § 122, especially Comment d.

d. The same or a substantially related matter. As indicated in the Section, three types of former-client conflicts are prohibited.

d(i). *Switching sides in the same matter.* Representing one side and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client's confidences. Similar considerations apply in nonlitigated matters. For example, a lawyer negotiating a complex agreement on behalf of Seller could not withdraw and represent Buyer against the interests of Seller in the same transaction. Switching sides in a litigated matter can also risk confusing the trier of fact. Just as a lawyer may not represent both sides concurrently in the same case (see §§ 128-130), the lawyer also may not represent them consecutively.

d(ii). *Attacking a lawyer's own former work.* Beyond switching sides in the same matter, the concept of substantial relationship applies to later developments out of the original matter. A matter is substantially related if it involves the work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor.

Illustration:

1. Lawyer has represented Husband in a successful effort to have Wife removed as beneficiary of his life insurance policy. After Husband's death, Wife seeks to retain Lawyer to negotiate with the insurance company to set aside the change of beneficiary and obtain the proceeds of the policy for Wife. The subsequent representation would require that Lawyer attack the work Lawyer performed for Husband. Accordingly, Lawyer may not accept Wife as a client in the matter.

d(iii). The substantial-relationship test and the protection of confidential information of a former client. The substantial-relationship standard is employed most frequently to protect the confidential information of the former client obtained in the course of the representation. A subsequent matter is substantially related to an earlier matter within the meaning of Subsection (2) if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client obtained in the course of the representation in violation of § 60. "Confidential information" is defined in § 59. Substantial risk exists where it is reasonable to conclude that it would materially advance the client's position in the subsequent matter to use confidential information obtained in the prior representation.

A concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. The interests of subsequent clients also militate against extensive inquiry into the precise nature of the lawyer's representation of the subsequent client and the nature of exchanges between them.

The substantial-relationship test avoids requiring disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation. The inquiry into the issues involved in the prior representation should be as specific as possible without thereby revealing the confidential client information itself or confidential information concerning the second client. When the prior matter involved litigation, it will be conclusively presumed that the lawyer obtained confidential information about the issues involved in the litigation. When the prior matter did not involve litigation, its scope is assessed by reference to the work that the lawyer undertook and the array of information that a lawyer ordinarily would have obtained to carry out that work. The information obtained by the lawyer might also be proved by inferences from redacted documents, for example. On the use of in camera procedures to disclose confidential material to the tribunal but not to an opposing party, see § 86, Comment f.

Illustrations:

2. Lawyer represented Client A for a period of five years lobbying on environmental issues relating to uranium production. In the course of the representation in one matter, Lawyer learned the basis for Client A's uranium-production decisions. Lawyer now has been asked to represent Client B, a purchaser of uranium, in an antitrust action against A and others alleging a conspiracy to impose limits on production. It is likely that Client B's claims against A would include addressing the same production decisions about which Lawyer earlier learned. Use of confidential information concerning A's production decisions learned in the earlier representation would materially advance the position of Client B in the antitrust matter. The matters are substantially related, and Lawyer may not represent Client B without effective consent of both A and B (see § 122).

3. Lawyer was general inside legal counsel to Company A for many years, dealing with all aspects of corporate affairs and management. Lawyer was dismissed from that position when Company A hired a new president. Company B has asked Lawyer to represent it in an antitrust suit against Company A based on facts arising after Lawyer left Company A's employ but involving broad charges of anti-competitive practices of Company A that, if true, were occurring at the time that Lawyer represented Company A. Lawyer may not represent Company B in the antitrust action. Because of the breadth of confidential client information of Company A to which Lawyer is likely to have had access during the earlier representation and the breadth of issues open in the antitrust claim of Company B, a substantial risk exists that use of that information would materially advance Company B's position in the later representation.

4. Lawyer represented Client A, a home builder, at the closings of the sales of several homes Client A had built in Tract X. Lawyers performing such work normally might encounter issues relating to marketability of title. A is now represented by other counsel. Client B has asked Lawyer to represent him in a suit against A in connection with B's sale to A of Tract Y, a parcel of land owned by Client B on which A plans to build homes. The present suit involves the marketability of the title to Tract Y. Although both representations involve marketability of title, it is unlikely that Lawyer's knowledge of marketability of Tract X would be relevant to the litigation involving the marketability of title

to Tract Y. Accordingly, the matters are not substantially related. Lawyer may represent Client B against A without informed consent of A.

As used in this Section, the term “matter” includes not only representation in a litigated case, but also any representation involving a contract, claim, charge, or other subject of legal advice (compare § 133, Comment e). The term “matter” ordinarily does not include a legal position taken on behalf of a former client unless the underlying facts are also related. For example, a lawyer who successfully argued that a statute is constitutional on behalf of a former client may later argue that the statute is unconstitutional on behalf of a present client in a case not involving the former client, even though the lawyer’s success on behalf of the present client might adversely affect the former client (compare § 128, Comment f).

Information that is confidential for some purposes under § 59 (so that, for example, a lawyer would not be free to discuss it publicly (see § 60)) might nonetheless be so general, readily observable, or of little value in the subsequent representation that it should not by itself result in a substantial relationship. Thus, a lawyer may master a particular substantive area of the law while representing a client, but that does not preclude the lawyer from later representing another client adversely to the first in a matter involving the same legal issues, if the matters factually are not substantially related. A lawyer might also have learned a former client’s preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.

e. A subsequent client with interests “materially adverse” to the interests of a former client. A later representation is prohibited if the second client’s interests are materially adverse to those of the former client (see § 121, Comments c(i) (adverseness) & c(ii) (materiality)). The scope of a client’s interests is normally determined by the scope of work that the lawyer undertook in the former representation. Thus, a lawyer who undertakes to represent a corporation with respect to the defense of a personal-injury claim involving only issues of causation and damages does not represent the corporation with respect to other interests. The lawyer may limit the scope of representation specifically for the purpose of avoiding a future conflict (see § 16). Similarly, the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client.

Illustration:

5. Lawyer formerly represented Client A in obtaining FDA approval to market prescription drug X for treating diseases of the eye. Client B has now asked Lawyer for legal assistance to obtain FDA approval for sale of prescription drug Y for treating diseases of the skin. Client B is also interested in possibly later application for FDA approval to market a different form of drug Y to treat diseases of the eye, thus significantly reducing the profitability of Client A’s drug X. Confidential information that Lawyer gained in representing Client A in the earlier matter would be substantially related to work that Lawyer would do with respect to any future application by Client B for use of drug Y for eye diseases (although the information would not relate to the use of drug Y for treating diseases of the skin). Client B and Lawyer agree that Lawyer’s work will relate only to FDA approval for use of drug Y to treat diseases of the skin. Thus limited, Lawyer’s work for Client B does not involve representation adverse to former Client A on a substantially related matter.

f. A lawyer’s subsequent use of confidential information. Even if a subsequent representation does not involve the same or a substantially related matter, a lawyer may not disclose or use confidential information of a former client in violation of § 60.

Illustration:

6. Lawyer, now a prosecutor, had formerly represented Client in defending against a felony charge. During the course of a confidential interview, Client related to Lawyer a willingness to commit perjury. Lawyer is now prosecuting another person, Defendant, for a matter not substantially related to the former prosecution. In the jurisdiction, a defendant is not required to serve notice of defense witnesses that will be called. During the defense case, Defendant’s lawyer calls Client as an alibi witness. Lawyer could not reasonably have known previously that Client would be called. Because of the lack of substantial relationship between the matters, Lawyer was not prohibited from undertaking the prosecution. Because Lawyer’s knowledge of Client’s statement about willingness to lie is confidential client information under § 59, Lawyer may not use that information in cross-examining Client, but otherwise Lawyer may cross-examine Client vigorously.

g. A lawyer’s duties of confidentiality other than to a former client. The principles in this Section presuppose that the lawyer in question has previously represented the person adversely affected by the present representation. Whether

a client-lawyer relationship exists is considered in § 14 and § 121, Comment d. Two situations present analogous problems—communications with a prospective client and confidential information about a nonclient learned in representing a former client.

g(i). Duties to a prospective client. A lawyer's obligation of confidentiality with respect to information revealed during an initial consultation prior to the decision about formation of a lawyer-client relationship is considered in § 15, Comment c.

g(ii). Duties to a person about whom a lawyer learned confidential information while representing a former client. A lawyer might have obligations to persons who were not the lawyer's clients but about whom information was revealed to the lawyer under circumstances obligating the lawyer not to use or disclose the information. Those obligations arise under other law, particularly under the law of agency. For example, a lawyer might incur obligations of confidentiality as the subagent of a principal whom the lawyer's client serves as an agent (see Restatement Second, Agency §§ 5, 241, & 396). An important difference between general agency law and the law governing lawyers is that general agency law does not normally impute a restriction to other persons. Thus, when a lawyer's relationship to a nonclient is not that of lawyer-client but that, for example, of subagent-principal, imputation might not be required under the law governing subagents.

Illustrations:

7. Lawyer has represented Hospital in several medical-malpractice cases. In the course of preparing to defend one such case, Lawyer reviewed the confidential medical file of Patient who was not a party in the action. From the file, Lawyer learned that Patient had been convicted of a narcotics offense in another jurisdiction. Patient is now a material witness for the defense in an unrelated case that Lawyer has filed on behalf of Plaintiff. Adequate representation of Plaintiff would require Lawyer to cross-examine Patient about the narcotics conviction in an effort to undermine Patient's credibility. Lawyer may not reveal information about Patient that Hospital has an obligation to keep confidential. That limitation in turn may preclude effective representation of Plaintiff in the pending case. However if, without violating the obligation to Patient, Lawyer can adequately reveal to Plaintiff the nature of the conflict of interest and the likely effect of restricted cross-examination, Lawyer may represent Plaintiff with Plaintiff's informed consent (see § 122, Comment c).

8. Lawyer represents Underwriter in preparing to sell an issue of Company's bonds; Lawyer does not represent Company. Several questions concerning facts have arisen in drafting disclosure documents pertaining to the issue. Under applicable law, Underwriter must be satisfied that the facts are not material. Lawyer obtains confidential information from Company in the course of preparing

Lawyer's opinion for Underwriter. Among the information learned is that Company might be liable to A for breach of contract. Unless the information has become generally known (see § 59), Lawyer may not represent A in a breach of contract action against Company because the information was learned from Company in confidence.

In the circumstances described in Illustration 8, standards of agency law or other law might permit the underwriter to provide services to another customer in a subsequent transaction so long as the underwriter takes appropriate steps to screen its employees. A lawyer affiliated with the disqualified lawyer could represent the underwriter in the second transaction after appropriate screening of the disqualified lawyer (compare § 124).

A lawyer's duties as fiduciary to nonclient third persons might create a conflict of interest with clients of the lawyer (see § 135).

A lawyer who learns confidential information from a person represented by another lawyer pursuant to a common-interest sharing arrangement (see § 76) is precluded from a later representation adverse to the former sharing person when information actually shared by that person with the lawyer or the lawyer's client is material and relevant to the later matter (see Illustration 8, above). Such a threatened use of shared information is inconsistent with the undertaking of confidentiality that is part of such an arrangement.

h. A lawyer with only a minor role in a prior representation. The specific tasks in which a lawyer was engaged might make the access to confidential client information insignificant. The lawyer bears the burden of persuasion as to that issue and as to the absence of opportunity to acquire confidential information. When such a burden has been met, the lawyer is not precluded from proceeding adversely to the former client (see § 124, Comment d, Illustration 3).

i. Withdrawal from representing an "accommodation" client. With the informed consent of each client as provided in § 122, a lawyer might undertake representation of another client as an accommodation to the lawyer's regular client, typically for a limited purpose in order to avoid duplication of services and consequent higher fees. If adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the "accommodation" client understood and impliedly consented to the lawyer's continuing to represent the regular client in the matter. Circumstances most likely to evidence such an understanding are that the lawyer has represented the regular client for a long period of time before undertaking

representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client. On obtaining express consent in advance to later representation of the regular client in such circumstances, see § 122, Comment d. The lawyer bears the burden of showing that circumstances exist to

warrant an inference of understanding and implied consent. On other situations of withdrawal, see § 121, Comment e.

j. Cure of conflicts created by transactions of a client. A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients. An example is a client's acquisition of an interest in an enterprise against which the lawyer is proceeding on behalf of another client. However, if the client's acquisition of the other enterprise was reasonably foreseeable by the lawyer when the lawyer undertook representation of the client, withdrawal will not cure the conflict. In any event, continuing the representation must be otherwise consistent with the former-client conflict rules.

§ 133. A Former Government Lawyer or Officer

(1) A lawyer may not act on behalf of a client with respect to a matter in which the lawyer participated personally and substantially while acting as a government lawyer or officer unless both the government and the client consent to the representation under the limitations and conditions provided in § 122.

(2) A lawyer who acquires confidential information while acting as a government lawyer or officer may not:

(a) if the information concerns a person, represent a client whose interests are materially adverse to that person in a matter in which the information could be used to the material disadvantage of that person; or

(b) if the information concerns the governmental client or employer, represent another public or private client in circumstances described in § 132(2).

Comment:

b. Rationale. Prohibitions on the activities of former government lawyers are based on concerns similar to those protecting former private clients. Because those concerns apply somewhat differently to government clients, however, the rule of this Section is both broader and narrower than that of § 132.

First, the protection accorded government confidential information is parallel to that for confidential information of private clients. As discussed in § 74, however, statutes requiring openness in government operations might limit the government information that is given protection. Second, since government agencies have special powers to allocate public benefits and burdens, it is reasonable to prohibit a lawyer while in government from taking action designed to improve the lawyer's opportunities upon leaving government service.

On the other hand, government agencies must be able to recruit able lawyers. If the experience gained could not be used after lawyers left government service, recruiting lawyers would be more difficult. There is also a public interest in having lawyers in private practice who have served in government and understand both the substance and rationale of government policy. The experience of such lawyers might sometimes enable clients to achieve higher levels of compliance with law. Thus, this Section protects three government functions, those of client, recruiter of able employees, and law enforcer.

c. Personal and substantial involvement. This Section forbids former government lawyers or officers from taking on matters on which they worked personally and substantially while in government. Former government lawyers are not forbidden to work on matters solely because the matters were pending in the agency during the period of their employment.

The standard of "substantiality" is both formal and functional. A lawyer who signed a complaint on behalf of the government is substantially involved in the matter even if the lawyer knew few of the underlying facts. An action undertaken by a lawyer in the name of a superior is also within the rule.

e. Definition of a "matter." The term "matter," as applied to former government employees, is often defined as a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy,

investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties. Drafting of a statute or regulation of general applicability is not included under that definition, nor is work on a case of the same type (but not the same parties) as the one in which the lawyer seeks to be involved. The definition is narrower than that governing former-client conflicts of interest under § 132 (see *id.*, Comment d(iii)).

Illustrations:

4. While serving in the general counsel's office of the state revenue department, Lawyer was involved in the drafting of regulations to implement new amendments to the state tax law. The regulations affected a large number of taxpayers. When Lawyer returns to private practice, Lawyer may advise taxpayers seeking to determine how the regulations apply, suing to have the regulations construed or challenging the constitutionality of the statute or regulations.

5. In the capacity of city corporation counsel, Lawyer participated in drafting and negotiating the terms of an ordinance to rezone a specific tract of land of a major developer. Now that Lawyer has returned to private practice, the developer has sought to retain Lawyer in a lawsuit to construe the ordinance to permit more housing density than the city asserts the ordinance permits. Lawyer may not accept the case. The work by Lawyer on behalf of city was not of general application and was analogous to representation of the city in a case involving a particular party and parcel of land.

Topic 5. Conflicts of Interest Due to a Lawyer's Obligation to a Third Person

§ 134. Compensation or Direction of a Lawyer by a Third Person

(1) A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in § 122 and knows of the circumstances and conditions of the payment.

(2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if:

- (a) the direction does not interfere with the lawyer's independence of professional judgment;
- (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
- (c) the client consents to the direction under the limitations and conditions provided in § 122.

Comment:

c. Third-person fee payment. This Section accommodates two values implicated by third-person payment of legal fees. First, it requires that a lawyer's loyalty to the client not be compromised by the third-person source of payment. The lawyer's duty of loyalty is to the client alone, although it may also extend to any co-client when that relationship is either consistent with the duty owing to each co-client or is consented to in accordance with § 122. Second, however, the Section acknowledges that it is often in the client's interest to have legal representation paid for by another. Most liability-insurance contracts, for example, provide that the insurer will provide legal representation for an insured who is charged with responsibility for harm to another (see also Comment f hereto). Lawyers paid by civil-rights organizations have helped citizens pursue their individual rights and establish legal principles of general importance. Similarly, lawyers in private practice or in a legal-services organization may be appointed or otherwise come to represent indigent persons pursuant to arrangements under which their fees will be paid by a governmental body (see Comment g).

d. Third-person direction of a representation. The principle that a lawyer must exercise independent professional judgment on behalf of the client (Subsection (2)(a)) is reflected in the requirement of the lawyer codes that no third person control or direct a lawyer's professional judgment on behalf of a client. Consistent with that requirement, a third person may, with the client's consent and otherwise in the circumstances and to the extent stated in Subsection (2), direct the lawyer's representation of the client. When the conditions of the Subsection are satisfied, the client has, in effect, transferred to the designated third person the client's prerogatives of directing the lawyer's activities (see § 21(2)). The third person's directions must allow for effective representation of the client, and the client must give informed

consent to the exercise of the power of direction by the third person. The direction must be reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer. Such directions are reasonable in scope and character if, for example, the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome. Informed client consent may be effective with respect to many forms of direction, ranging from informed consent to particular instances of direction, such as in a representation in which the client otherwise directs the lawyer, to informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction (see Comment f).

Illustration:

1. Resettle, a nonprofit organization, works to secure better living conditions for refugees. Resettle's board of directors believes that a case should be filed to test whether a federal policy of detaining certain refugees is legally justified. Client is a refugee who has recently been detained under the federal policy, and Resettle has offered to pay Lawyer to seek Client's release from detention. With the informed consent of Client, Lawyer may accept payment by Resettle and may agree to make contentions that Resettle wishes to have tested by the litigation.

Just as there are limits to client consent in § 122, there are limits to the restrictions on scope of the representation permitted under this Section. See § 122, Comment g (nonconsentable conflicts).

Illustrations:

2. Client is charged with the crime of illegally selling securities. Client's employer, Brokerage, has offered to pay Lawyer to defend Client on the condition that Client agree not to implicate Brokerage or any of its other employees in the crimes charged against Client. Lawyer may not accept the representation on those terms. Whether to accept a plea bargain, for example, and whether to implicate others in the wrongdoing are matters about which the client, not the person paying for the defense, must have the authority to make decisions (see § 22).

3. Same facts as stated in Illustration 2, except that there is no substantial factual or legal basis for implicating Brokerage or any of its other employees and Client consents to accept Lawyer's representation on the condition stated by Brokerage under the limitations and conditions provided in § 122, including knowledge that Brokerage has stated the condition. Under such circumstances, Client's consent authorizes Lawyer to accept payment from Brokerage and adhere to the described conditions.

e. Preserving confidential client information. Although a legal fee may be paid or direction given by a third person, a lawyer must protect the confidential information of the client. Informed client consent to the third-person payment or direction does not by itself constitute informed consent to the lawyer's revealing such information to that person. Consent to reveal confidential client information must meet the separate requirements of § 62.

Illustration:

4. Employer has agreed to pay for representation of Employee in defending a claim involving facts arguably arising out of pursuit of Employer's business. Employer asks Lawyer what Employee intends to testify about the circumstances of Employee's actions. Without consent of Employee as provided in § 62, Lawyer may not give Employer that information.

On a lawyer's discretion to disclose confidential information of a client to a co-client in the representation, see § 60, Comment l.

f. Representing an insured. A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense. The law governing the relationship between the insured and the insurer is, as stated in Comment a, beyond the scope of the Restatement. Certain practices of designated insurance-defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are

subject to the privilege. Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. Compare § 51, Comment g.

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment d hereto. With respect to client consent (see Comment b hereto) in insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence of the client-insured to an informative letter to the client-insured at the outset of the representation should be all that is required. The lawyer should either withdraw or consult with the client-insured (see § 122) when a substantial risk that the client-insured will not be fully covered becomes apparent (see § 121, Comment c(iii)).

Illustration:

5. Insurer, a liability-insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of \$5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 52), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent (see § 122(2)(c)), the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 122.

When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question (see § 60) without explicit informed consent of the insured (see § 62). That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured (compare § 60, Comment l (confidentiality in representation of co-clients in general)).

With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (see § 94) and, if applicable, consistent with the lawyer's duties to the insurer as co-client (see § 60, Comment l). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 32 (see also § 60, Comment l). The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement (see Comment a hereto).

g. Legal service and similarly funded representations. Lawyers who provide representation to indigent persons may do so pursuant to various arrangements under which their fees or other compensation will be paid by a governmental agency or similar funding organization. For example, a lawyer may represent clients as a staff attorney of a legal aid, military legal assistance, or similar organization, with compensation in the form of a salary paid by the organization. Lawyers in private practice may be appointed by a court, defender or legal-service organization, or bar association to represent a person accused of crime or a person involved in a civil matter (see § 14, Comment g), with the lawyer's fee to be paid by the government or

organization, often pursuant to a schedule of fees. Certain for-profit legal-service arrangements have also

been approved, under which individual private practitioners provide assistance to participants who pay a flat charge to the legal-service organization for limited legal services. Regardless of the method of appointment, the form of compensation, or the nature of the paying organization (for example, whether governmental or private or whether

nonprofit or for-profit), the lawyer's representation of and relationship with the individual client must proceed as provided for in this Section.

§ 135. A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient

Unless the affected client consents to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's obligation.