TOPIC 1. LIABILITY FOR PROFESSIONAL NEGLIGENCE AND BREACH OF FIDUCIARY DUTY

Introductory Note

Section

Introductory Note: This Topic considers the damages remedy for professional negligence, that is, for breach of the duties of care that lawyers owe to their clients and in limited circumstances to certain nonclients. It also considers a client's damage remedy for breach of fiduciary duty. Other lawyer civil liabilities are considered in Topic 2. The law governing actions for professional negligence and breach of fiduciary duty is generally comparable to the law governing malpractice actions against other professionals and to the law governing ordinary negligence actions. Thus the rules set forth in Restatement Second, Torts, Division Two, and those in Restatement Second, Agency, Chapter 13, Topic 2, are in general applicable to such actions when not inconsistent with this Restatement.

§ 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.

Comment:

a. Scope and cross-references. This Section summarizes the issues arising in a legal-malpractice action for negligence. Those issues are then treated in more detail in §§ 50–54. The Section corresponds to the statement of the elements of a cause of action for negligence in

Restatement Second, Torts § 281. For breach of a lawyer's fiduciary duty to a client, see § 49.

Plaintiffs in professional-negligence actions under this Section may seek compensatory damages. In appropriate cases, courts may grant other remedies, such as injunctive relief, declaratory relief, rescission, restitution, and punitive damages (see §§ 6, 53, Comment *h*, & 55(3); Restatement Second, Agency § 399). Sometimes, acts giving rise to a legal-malpractice action for negligence will also support remedies discussed in other Chapters of this Restatement, for example, professional discipline (see § 5), fee forfeiture (see § 37), fee reduction (see §§ 34 & 39), litigation sanctions (see § 110), disqualification (see § 6, Comment *i*), denying admissibility of evidence (see § 6, Comment *j*) and criminal sanctions (see §§ 8 & 30(1)).

b. Rationale. The cause of action for legal malpractice based on professional negligence compensates clients and other plaintiffs for injury caused by a lawyer's improper action or inaction and discourages such conduct. Imposing liability inappropriately can undermine these goals, for example by inordinately increasing the cost of legal services or by creating pressure on lawyers to slight the proper concerns of clients in order to avoid liability to nonclients (see § 51, Comment *b*).

c. Theories of liability: tort and contract. The action for malpractice based on a lawyer's negligence has much in common with a tort action for negligence. Both require that the plaintiff establish that the defendant owed a duty to the plaintiff and that there has been a breach of such a duty, typically by showing that the defendant has acted without reasonable care; comparable principles of proximate cause and measure of damages apply; and both are subject to defenses such as contributory or comparative negligence. On indemnity and contribution, see § 53, Comment *i*.

A legal-malpractice action based on a lawyer's negligence also has some similarities to an action for breach of contract. The client-lawyer relationship is usually created by mutual consent (see § 14), and many of its features are shaped by agreement (see §§ 18, 19, 21, & 38). The lawyer's duty of care may be thought of as arising out of an implied term of the client-lawyer agreement. However, there are limits on the power of the client and lawyer to modify the agreement (see § 54); and the duty of care exists when there is no client-lawyer agreement in the ordinary sense, such as when the lawyer serves pursuant to a court appointment. For lawyer liability on contracts, see §§ 16(4), 18, 30(2), 55(1), and 56, Comment *d*. For client liability on contracts, see §§ 17(3), 18, and 27.

Ordinarily, a plaintiff may cast a legal-malpractice claim in the mold of tort or contract or both (see § 55, Comment *c*; Restatement Second, Agency §§ 400 & 401). Whether the claim is considered in tort or in contract is usually of practical significance when it must be decided whether it is subject to a tort or a contract statute of limitations in a jurisdiction having a different limitations period for each. Classification for this purpose depends on the language, structure, and policies of the jurisdiction's statutes of limitations and is beyond the scope of this Restatement. Some jurisdictions assign all legal-malpractice claims to one category, while others treat some claims as in contract and others as in tort, depending on the facts alleged or the relief sought. For other statute-of-limitations issues, see § 54, Comment *g*. In some jurisdictions, the classification of a malpractice claim as tort or contract also affects other issues such as the measure of damages.

When the conduct in question in a legal-malpractice action constitutes an intentional wrong, as distinct from negligence, the general principles for assessing damages applicable in the jurisdiction may call for a different measure of damages (see §§ 53 & 56). For other theories that may support claims against lawyers, see §§ 49, 55, and 56.

d. A lawyer who is liable in another capacity. Lawyers often act in a capacity such as that of a trustee, executor, escrow agent, broker, mediator, or expert witness. A lawyer acting in such a capacity is subject to liabilities that applicable law assigns to the capacity. If the lawyer is also representing a client or owes duties to a nonclient under § 51, the lawyer is also subject in appropriate circumstances to liability for professional negligence and breach of fiduciary duty. For example, if a lawyer representing a client in a transaction also acts as an escrow agent in the transaction and negligently exposes the property held in escrow to theft, the lawyer is subject to liability to the client both for legal malpractice and for breach of the duties of an escrow agent. On the other hand, if a lawyer joins a business partnership, without representing the partnership or partners as clients, and proceeds through negligence to expose partnership property to theft, the lawyer is subject to liability to the other partners for breach of duties under partnership law but not for legal malpractice. When those acting in a capacity are immune from certain civil liability, as are judges, arbitrators, and other neutrals who help resolve disputes, a lawyer acting in that capacity is likewise immune from malpractice and other liability. See Restatement Second, Torts §§ 585 and 895D(2); § 57, Comment *e* (prosecutors).

e. A nonlawyer or a lawyer not locally admitted. Some persons not authorized to do so purport to practice law. Such a person might

be a lawyer admitted to practice in another jurisdiction but not locally in a situation requiring local admission, a lawyer suspended or disbarred by disciplinary authorities, or a nonlawyer pretending to be a lawyer (see § 1, Comment *g*). Such a person is subject to liability for legal malpractice for negligence and breach of fiduciary duty and for that purpose is held to the same duty of care as a person locally admitted or otherwise authorized to practice law. A lawyer from another jurisdiction is held to the duty of care applied to local lawyers with respect to questions of the content and application of local law.

f. Choice of law. When the laws of relevant jurisdictions differ, the principles set forth in Restatement Second, Conflict of Laws govern the identification of the law governing the issues in lawyer-negligence and breach-of-fiduciary-duty actions (see generally § 1, Comment *e* (choice of law in lawyer regulation generally)). In applying those principles, courts should consider the undesirability of subjecting a lawyer to inconsistent duties of conduct in view of the inter-jurisdictional nature of many transactions involving lawyers and the variation between the disciplinary rules in different jurisdictions. On choice-of-law problems in lawyer-disciplinary proceedings, see § 5, Comment *h*.

g. Preventing malpractice. Lawyers and law firms may seek to prevent negligence, breach of fiduciary duty, and other grounds of liability through such measures as continuing legal education, supervision (see § 4), peer review, case-acceptance and conflict-avoidance procedures, calendaring systems, and professional-responsibility partners or committees. Although this Restatement does not offer advice on what precautions are prudent, lawyers may wish to consult materials that do so. In appropriate circumstances, failure of a lawyer or firm to have in place a particular preventive device, such as a conflict-avoidance procedure, may constitute evidence of failure to exercise the competence and diligence normally exercised by lawyers in similar circumstances within the meaning of § 52(1). On the scope of the prohibition against agreements prospectively limiting liability for malpractice, see § 54(2) and Comment *b* thereto. On liability insurance, see § 58, Comment *h*.

REPORTER'S NOTE

Comment a. Scope and cross-references. For other civil remedies, see Reporter's Notes to §§ 6, 30(1), 34, 37, 39, 49, 55, 94, and 97.

Comment b. Rationale. See C. Wolfram, Modern Legal Ethics 206–07 (1986). See also Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755 (1959); Standing Committee on Lawyers' Professional Liability, A.B.A., Profile of Legal Malpractice (1986) (on the incidence of malprac-

tice claims); cf. P. Weiler, Medical Malpractice on Trial (1991).

Comment c. Theories of liability: tort and contract. On the usual right of a plaintiff to choose either a tort or a contract theory, see Hale v. Groce, 744 P.2d 1289 (Or.1987); 1 R. Mallen & J. Smith, Legal Malpractice § 8.5 (4th ed.1996); 2 id. 69. For examples of different approaches to classifying legal-malpractice actions for statute-of-limitations purposes, where the relevant statutes provide different limitations periods for tort and contract actions, see Hutchinson v. Smith, 417 So.2d 926 (Miss.1982) (plaintiff may choose); Funnell v. Jones, 737 P.2d 105 (Okla.1985), cert. denied, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987) (always tort); MacLellan v. Throckmorton, 367 S.E.2d 720 (Va.1988) (always contract); Jones v. Wadsworth, 791 P.2d 1013 (Alaska 1990) (tort unless plaintiff alleges breach of express promise); Hall v. Nichols, 400 S.E.2d 901 (W.Va.1990) (tort unless plaintiff alleges breach of express or implied promise); Collins v. Reynard, 607 N.E.2d 1185 (Ill.1992) (plaintiff may choose; previous contrary decision rejected); Santulli v. Englert, Reilly & McHugh, P.C., 586 N.E.2d 1014 (N.Y. 1992) (contract claim allowed when plaintiff seeks only damages recoverable under contract law); Annot., 2 A.L.R.4th 284 (1980).

For consequences, in some jurisdictions, of the choice of theory other than the selection of the applicable statute of limitations, see Santulli v. Englert, Reilly & McHugh, supra (availability of tort damages); Asphalt Engineers, Inc. v. Galusha, 770 P.2d 1180 (Ariz.Ct.App.1989) (under breach-of-express-promise theory, no expert witness needed, and successful plaintiff recovers attorney fees under statute applicable to contract claims); Jackson State Bank v. King, 844 P.2d 1093 (Wyo.1993) (comparative-negligence statute inapplicable to contract and fiduciary-duty claims; dictum that all malpractice claims are such claims); 1 R. Mallen & J. Smith, Legal Malpractice §§ 5.2 & 7.6 (4th ed.1996) (former survival rules different for tort and contract claims).

Comment d. A lawyer liable in another capacity. See, e.g., John Deere Co. v. Walker, 764 F.Supp. 147 (D.Ariz.1991) (lawyer who is escrow agent liable as such for failure to follow instructions); Boisdore v. Bridgeman, 502 So.2d 1149 (La.Ct. App.1987) (client-stockholder could sue lawyer-director for legal malpractice, despite failure of previous derivative suit against same defendant in his capacity as director); Director Door Corp. v. Marchese & Sallah, P.C., 511 N.Y.S.2d 930 (N.Y.App.Div. 1987) (law firm holding its client's check in escrow had duty as escrowee to tell opposing party when it learned client's funds would not cover check); Saad v. Rodriguez, 506 N.E.2d 1230 (Ohio Ct.App.1986) (client's claim against lawyer for breach of escrow agreement not subject to malpractice statute of limitations); Morgan v. Baldwin, 450 N.W.2d 783 (S.D.1990) (when client and lawyer became business partners and gravamen of client's claim was breach of partnership agreement, claim governed by contract, not malpractice, statute of limitations); Galloway v. Cinello, 423 S.E.2d 875 (W.Va.1992) (liability of lawyer-notary for negligence as notary).

On acting in capacities in which the actor is immune from civil liability, see, e.g., Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (judge); Austern v. Chica-

go Bd. Options Exch., Inc., 898 F.2d 882 (2d Cir.), cert. denied, 498 U.S. 850, 111 S.Ct. 141, 112 L.Ed.2d 107 (1990) (arbitrator); Wagshal v. Foster, 28 F.3d 1249 (D.C.Cir.1994), cert. denied, 514 U.S. 1004, 115 S.Ct. 1314, 131 L.Ed.2d 196 (1995) (court-appointed case evaluator); Howard v. Drapkin, 271 Cal.Rptr. 893 (Cal.Ct. App.1990) (psychologist appointed by stipulation; others engaged in neutral dispute resolution); Berndt v. Molepske, 565 N.W.2d 549 (Wis.Ct.App. 1997), aff'd, 580 N.W.2d 289 (Wis. 1998) (guardian ad litem); § 57, Comment *e*, and Reporter's Note thereto (prosecutor).

Comment e. A nonlawyer or a lawyer not locally admitted. On application of the lawyer standard to nonlawyers, see Biakanja v. Irving, 320 P.2d 16 (Cal.1958) (notary who drew will liable for negligence); Wright v. Langdon, 623 S.W.2d 823 (Ark.1981) (broker drew closing documents; citing other cases); Ford v. Guarantee Abstract & Title Co., 553 P.2d 254 (Kan.1976) (title-insurance company); Bowers v. Transamerica Title Ins. Co., 675 P.2d 193 (Wash.1983) (escrow agent drew closing documents). On the requirement that a lawyer not locally admitted know local law, see Rekeweg v. Federal Mut. Ins. Co., 27 F.R.D. 431 (N.D.Ind.1961), aff'd in other respects, 324 F.2d 150 (7th Cir. 1963); Degen v. Steinbrink, 195 N.Y.S. 810 (N.Y.App.Div.1922), aff'd, 142 N.E. 328 (N.Y.1923) (lawyer who undertook to draw chattel mortgage on property in other states and to file requisite documents there cannot defend on ground that lawyer is presumed ignorant of law of other states). In medical-malpractice cases, one who unlawfully practices medicine is subject to the same duty of care as a licensed practitioner but the unlawful practice is not itself considered negligent. E.g., Correll v. Goodfellow, 125 N.W.2d 745 (Iowa 1964); Brown v. Shyne, 151 N.E. 197 (N.Y. 1926).

Comment f. Choice of law. See Waggoner v. Snow, Becker, Kroll, Klaris & Krauss, 991 F.2d 1501 (9th Cir.1993) (applicable privity rules); Santos v. Sacks, 697 F.Supp. 275 (E.D.La.1988) (availability of contract theory); Quetel Corp. v. Columbia Communications International, Inc., 787 F.Supp. 1 (D.D.C.1992) (applicable privity rules); Nelson v. Nationwide Mortgage Corp., 659 F.Supp. 611 (D.D.C.1987) (various issues); cf. Burns v. Geres, 409 N.W.2d 428 (Wis. Ct.App.1987) (law governing underlying action in which alleged malpractice occurred).

Comment g. Preventing malpractice. See A.B.A. Standing Committee on Lawyers' Professional Liability, The Lawyer's Desk Guide to Legal Malpractice (1992); 1 R. Mallen & J. Smith, Legal Malpractice, ch. 2 (4th ed.1996); D. Stern & J. Felix–Retzke, A Practical Guide to Preventing Legal Malpractice (1983); J. Smith, Preventing Legal Malpractice (1981); O'Malley, Preventing Legal Malpractice in Large Law Firms, 20 U. Tol. L. Rev. 325 (1989). There is little case law on the effectiveness of preventive procedures. Cf. Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F.Supp. 663, 673 (N.D.Ill.1983) (criticizing a firm's conflict-checking procedures, in passing on a disqualification motion). On circumstances in which informed consent or screening of certain lawyers can remove some conflict-of-interest problems, see §§ 122 and 124.

§ 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.

Comment:

a. Scope and cross-references. This Section summarizes the issues arising in a client's damages claim against a lawyer for breach of fiduciary duty, sometimes also described as constructive fraud. For a summary of a damages claim for a lawyer's negligence, see § 48. On when a lawyer is subject to civil liability for aiding a client to breach the client's fiduciary duty to another, see § 51, Comment *h*; § 56, Comment *h*. On civil liability arising from a lawyer's assumption of fiduciary duties, not as a lawyer, but in another capacity such as trustee, see § 48, Comment *d*, and § 56, Comment *h*. On the liability of one practicing law but not admitted in the jurisdiction, see § 48, Comment *e*. Other remedies such as disqualification, restitution, or injunctive or declaratory relief may be available without proof of negligence or intentional wrongdoing (see § 6; § 48, Comment *a*; & § 55(2); see also §§ 34 (limitation on fee recovery) & 37 (fee forfeiture)).

b. Rationale. A lawyer owes a client the fiduciary duties specified in § 16(3): safeguarding the client's confidences (as specified in Chapter 5, Topic 1) and property (as specified in §§ 44–46); avoiding impermissible conflicting interests (as specified in Chapter 8); dealing honestly with the client (as specified in § 20); adequately informing the client (see § 20); following instructions of the client (see § 21); and not employing adversely to the client powers arising from the client-lawyer relationship (as specified in § 16, Comment *e*, referring also to §§ 41, 126, & 127). See generally Restatement Second, Agency §§ 381–395; Restatement Second, Torts § 874 (liability for breach of fiduciary duty); § 16.

c. Classification: breach of fiduciary duty and professional negligence. Many claims brought by clients against lawyers can reasonably be classified either as for breach of fiduciary-duty or for negligence without any difference in result. For example, the duty of care enforced in a negligence action is also a fiduciary duty (§ 16(2)); likewise, the specific duties of lawyers help define both their fiduciary obligations and the contents of their duty of care. Most rules applica-

ble to negligence actions also apply to actions for breach of fiduciary duty. Pleaders typically add a fiduciary-duty claim to a negligence count for reasons of rhetoric or completeness. Whether classifying a claim as one for breach of fiduciary duty affects the applicable limitations period depends on the language, structure, and policies of a jurisdiction's statute of limitations and is beyond the scope of this Restatement.

d. Proving breach. The principles governing proof that a lawyer's acts constitute negligence apply generally to proving breach of fiduciary duty. E.g., § 52, Comment *g* (expert witnesses); § 52(2) (violation of rule or statute); § 48, Comment *f* (choice of law). When the fiduciary duty in question is that of competence or diligence or of proceeding in a manner reasonably calculated to advance the client's lawful objectives (§ 16(1, 2)), the standard of § 52(1) and Comments *b* and *c* thereto controls.

Breaches of some fiduciary duties, for example the duty not to use client confidences for the lawyer's profit (§§ 16(3), 60(2)), typically involve intentional conduct, in that the lawyer chooses to act knowing facts that make the act improper. However, a lawyer who violates fiduciary duties to a client is subject to liability even if the violation or the resulting harm was not intended. A lawyer who has acted with reasonable care is not liable in damages for breach of fiduciary duty, but other remedies such as disqualification, restitution, and injunctive or declaratory relief may be available. See Restatement Second, Trusts § 201, Comment *a*; §§ 6 and 55.

Illustrations:

1. Lawyer agrees to represent Client but Lawyer's firm does not search for possible conflicts of interest. Lawyer proceeds to file a complaint. Just before moving for a preliminary injunction, Lawyer discovers that one of Lawyer's partners formerly represented the opposing party in a substantially related matter, requiring Lawyer to withdraw from representing Client in the absence of client consents, which are not obtained (see § 132). A competent conflicts search would have revealed the conflict. As a result of Lawyer's withdrawal, the preliminary injunction is not obtained for several weeks, causing Client loss. Lawyer is subject to liability to Client for negligent breach of fiduciary duty.

2. The same facts as in Illustration 1, except that Lawyer performs an adequate search but no conflict is found because, unknown to the firm, the opposing party changed its name after the prior representation. A competently maintained conflicts sys-

tem would not have revealed the conflict. Lawyer is not liable to Client for negligent or intentional breach of fiduciary duty, although Lawyer may be required to withdraw from the representation.

e. Causation, damages, and defenses. The rules concerning causation, damages, and defenses that apply to lawyer negligence actions (see §§ 53 & 54) also govern actions for breach of fiduciary duty. Under generally applicable fiduciary law, a claim of intentional breach might render applicable different defenses and causation and damages rules than would otherwise control.

REPORTER'S NOTE

Comment a. Scope and cross-references. See § 48, Reporter's Note to Comment *d* (lawyer serving as escrow agent, etc.,); § 51, Reporter's Note to Comment *h* (intentionally assisting breach of client's fiduciary duties; duty of care to beneficiaries of some such duties); § 56, Reporter's Note to Comment *h* (fiduciary duty to nonclient).

Comment b. Rationale. For circumstances in which fiduciary duties are breached, see, e.g., Chrysler Corp. v. Carey, 186 F.3d 1016 (8th Cir.1999) (lawyers who formerly represented manufacturer used confidential information taken from former law firm to represent plaintiffs in substantially related litigation); Avianca, Inc. v. Corrica, 705 F.Supp. 666 (D.D.C.1989), aff'd mem., 70 F.3d 637 (D.C.Cir.1995) (opinion and judgment vacated on other grounds on court's own motion (Oct. 23, 1995)) (lawyer did not disclose conflicts with lawyer's own interests and misappropriated client funds); McDaniel v. Gile, 281 Cal.Rptr. 242 (Cal.Ct.App.1991) (lawyer withheld legal services when client rebuffed sexual advances); Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988) (lawyer advised client despite conflict of interest with other client); Phillips v. Carson, 731 P.2d 820 (Kan. 1987) (lawyer entered business transaction with client without giving proper advice); Goldman v. Kane, 329 N.E.2d 770 (Mass.App.Ct.1975) (lawyer overreached client in business transaction); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App. 1991) (lawyer misrepresented that communication would be confidential); § 50, Comment *d*, and Reporter's Note thereto; § 44, Comment *c*, and Reporter's Note thereto (mishandling client property); § 121, Comment *f*, and Reporter's Note thereto (conflicts of interest); 2 R. Mallen & J. Smith, Legal Malpractice §§ 15.18 & 16.23 (4th ed.1996) (same); Jorgenson & Sutherland, Fiduciary Theory Applied to Personal Dealings: Attorney–Client Sexual Dealings, 45 Ark. L. Rev. 459 (1992). See generally Easterbrook & Fischel, Contract and Fiduciary Duty, 36 J. L. & Econ. 425 (1993); Cooter & Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U. L. Rev. 1045 (1991); Frankel, Fiduciary Law, 71 Cal. L. Rev. 795 (1983).

Comment c. Classification: breach of fiduciary duty and professional negligence. For different approaches to the classification and treatment of breach-of-fiduciary-duty claims, see, e.g., Gerdes v. Estate of Cush, 953 F.2d 201 (5th Cir.1992) (self-dealing or disloyalty required to make applicable longer limitations period for fiduciary breach); Woodruff v. Tomlin, 616 F.2d 924 (6th Cir.), cert. denied, 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980) (claim for conflict of interest described as malpractice); Moguls of Aspen Inc. v. Faegre & Benson, 956 P.2d 618 (Colo.Ct.App. 1997) (fiduciary-duty claim based on carelessness and lack of attention should not be submitted to jury separately from negligence claim); Doe v. Roe, 681 N.E.2d 640 (Ill.App.Ct.1997) (lawyer who failed to seek fee recovery for client because he was having affair with her liable for breach of fiduciary duty, including in some circumstances emotional-distress damages); Kelly v. Foster, 813 P.2d 598 (Wash.Ct.App.1991) (claim for nondisclosure of conflict described as for breach of fiduciary duty, but all claims of such breach said to be included in negligence); David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339 (Cal.Ct.App.1988) (claim for misuse of confidential information described as for breach of fiduciary duty and not subject to malpractice statute of limitations). See generally Anderson & Steele, Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle, 47 S.M.U. L. Rev. 235 (1994).

Comment d. Proving breach. For cases recognizing a lawyer's liability for intentional breach of a fiduciary duty to a client, see, e.g., Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir.1994) (conflict of interest and misuse of confidential information); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal. Ct.App.1988) (misuse of confidential information); Tante v. Herring, 453 S.E.2d 686 (Ga.1994) (sexual relationship); Doe v. Roe, 681 N.E.2d 640 (Ill.App.Ct.1997) (lawyer failed to seek recovery of client's attorney fees from her former husband to avoid disclosure of his affair with her); Husted v. McCloud, 450 N.E.2d 491 (Ind.1983) (conversion); Owen v. Pringle, 621 So.2d 668 (Miss.1993) (lawyer did not disclose to client relationship with opposing party and disclosed confidences); Arana v. Koerner, 735 S.W.2d 729 (Mo.Ct.App.1987) (settling against client instructions); Baldasarre v. Butler, 604 A.2d 112 (N.J.Super.Ct.App.Div.1992) (failure to disclose to client), aff'd and rev'd on other grounds, 625 A.2d 458 (N.J. 1993); Hotz v. Minyard, 403 S.E.2d 634 (S.C.1991) (helping father client conceal will from daughter client); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (disclosure of confidences); Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283 (Utah Ct.App.1996) (conflict of interest). On recovery without proof that a lawyer intended to injure a client, see Strangman v. Arc-Saws, Inc., 267 P.2d 395 (Cal.Ct.App.1954); Klemme v. Best, 941 S.W.2d 493 (Mo.1997) (placing interests of co-clients before plaintiff's establishes breach without need for proof of intent); 1 R. Mallen & J. Smith, supra at § 11.3.

Comment e. Causation, damages, and defenses. On the possibility of relaxing the causation requirements in breach-of-fiduciary-duty cases, compare Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994) (approving such relaxation,

client need not show "but for" causation in breach-of-fiduciary-duty claim); Estate of Re v. Kornstein, Veisz & Wexler, 958 F.Supp. 907 (S.D.N.Y.1997) (similar); Barbara A. v. John G., 193 Cal.Rptr. 422 (Cal.Ct. App.1983) (approving limited relaxation, part of burden on deceit and battery claims shifted to defendant lawyer on client's proof of confidential relationship); Cooter & Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U. L. Rev. 1045 (1991), with Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283 (Utah Ct. App.1996) (rejecting relaxation, standard of causation in fiduciary-breach case against law firm same as that in negligence-based legal-malpractice action). See also Doe v. Roe, 681 N.E.2d 640 (Ill.App.Ct.1997) (emotional-injury damages recoverable in fiduciary-breach suit against lawyer).

§ 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.

Comment:

a. Scope and cross-references. This Section sets forth a lawyer's duty of care to a client. Duties to certain nonclients are set forth in § 51. The care required by these various duties is described in § 52, and subsequent Sections consider when damages caused by breach of duty may be recovered (see § 53) and what defenses are available (see § 54). On recovery for a lawyer's breach of fiduciary duty to a client, in which similar concepts may apply, see § 49. On a client's recovery for a lawyer's acts taken without authority, see § 27, Comment *f*. On other claims of a client against a lawyer, see § 56. On a client's obligations to a lawyer, see § 17. On the use of confidential client information by a lawyer defending against a former client's malpractice claim, see §§ 64 and 80.

The duties described in this and the following Section are duties within the meaning of tort law; that is, they denote the fact that the actor is required to act in a particular manner at the risk that otherwise the actor "becomes subject to liability to another to whom the duty is owed for any injury sustained by that other, of which that actor's conduct is a legal cause" (Restatement Second, Torts § 4). Whether a duty in this sense exists is not necessarily the same issue as whether there exists a duty enforceable by disciplinary sanctions or other remedies (see § 16 (summarizing a lawyer's duties to a client); § 52, Comment *f*).

b. Rationale. Among the grounds warranting recognition of a duty owed by a lawyer to a client are the lawyer's undertaking to

perform services for the client, the client's foreseeable reliance on that undertaking, and the social interest in fulfillment of the undertaking (cf. Restatement Second, Torts § 323 (duty of one undertaking to render services)). The provision of a civil remedy is also important because the lawyer owes special obligations to a client and because the proper functioning of the legal system depends on competent legal representation (see § 16, Comment *b*).

c. Clients and former clients. Section 14 sets forth the circumstances in which a client-lawyer relationship arises. As there stated, the manifested consent of both parties is ordinarily required for the relationship to exist, except that the lawyer's consent is not required when a tribunal appoints the lawyer to represent the client or in certain instances of reasonable reliance by the client on the lawyer (see § 14(1)(a) & (b) & § 14(2)). For duties owed by a lawyer to a prospective client who does not become a client, see § 15, Comment *e*, and § 51(1). The client's claim may be asserted by a receiver, trustee in bankruptcy, or other person who has succeeded to the client's interest. The general law of the jurisdiction determines whether and how a claim may be transferred by succession, assignment, subrogation, or otherwise, as well as such questions as the survival of defenses.

After a client-lawyer relationship ends (see § 31), a lawyer's duties to the former client drastically decrease (see § 33, Comment *h*). Yet a lawyer still owes certain duties to a former client, for example, to surrender papers and property to which the client is entitled (see § 33(1)), protect client confidences (see § 60), and avoid certain conflicts of interest (see §§ 132–133). Breach of such duties, which are summarized in § 33, may be remedied through a malpractice action in circumstances coming within this Section. Of course, a former client may also bring a malpractice action, subject to the applicable statute of limitations, to recover for a lawyer's breaches of duty during the relationship. On whether a client-lawyer relationship is a continuing one, see § 31, Comment *h*.

d. Client objectives. A lawyer must exercise care in pursuit of the client's lawful objectives in matters within the scope of the representation. The lawyer is not liable for failing to act beyond that scope (see § 16, Comment *c*). On agreements defining and limiting the scope of the representation, see § 19(1). The client's objectives are to be defined by the client after consultation (see § 16(1)), so the lawyer must appropriately inform and consult with the client (see § 20). A lawyer ordinarily has considerable leeway in choosing among alternative means of pursuing the client's objectives; within limits (see §§ 22–23) the client and lawyer may expand or contract that leeway by agreement or client instructions (see § 21). (On clients with diminished

capacity, see § 24.) A lawyer who negligently fails to pursue the lawful objectives properly specified by the client, disregards proper client instructions, fails to inform and consult appropriately, or acts without authority (see § 27, Comment *f*) is subject to liability to the client for damages thereby caused (see Restatement Second, Agency §§ 381, 383, 385, & 401).

e. Lawful objectives. A lawyer may not pursue a client objective or take or assist any act when the lawyer knows that the objective or act is prohibited by law, and the lawyer may decline to pursue objectives or to take or assist acts that the lawyer reasonably believes to be so prohibited (see §§ 23(1) & 94). A lawyer is hence not subject to liability to a client for malpractice for failing to pursue objectives or to take or assist acts that the lawyer reasonably believes to be prohibited by law (including professional rules) (see § 54(1)). Similarly, a lawyer is not subject to liability to a client for performing an act the lawyer reasonably believes to be required by law, even though it impedes the client's objectives. For example, if a lawyer has raised all nonfrivolous objections to discovery of a document in the lawyer's custody but the court has ordered discovery, the lawyer is not subject to malpractice liability for complying with the discovery order, even though the client wishes the lawyer to commit contempt of court by violating the order. The same principles also protect a lawyer from liability to nonclients (see § 51).

When a lawyer reasonably believes that an act or objective is immoral or violates professional courtesy, even if not unlawful, the lawyer may assume that the client would not want that act or objective to be pursued. The lawyer may also: urge a client to refrain from pursuing the act or objective (see § 94(3) & Comment *h* thereto); decline to accept the representation unless the client abandons the act or objective or agrees that the lawyer will not be obliged to perform such acts (see § 21); take morality and professional courtesy into account in making decisions reserved to the lawyer (see § 23); refuse to follow the client's instructions in the circumstances stated in § 21, Comment *e*; and withdraw from the representation in the circumstances stated in § 32(3)(e). None of those courses of conduct violates the duties described in this Section. However, a lawyer must, when it is reasonably feasible, give the client notice of the refusal to pursue an act or objective that the client has requested or directed.

REPORTER'S NOTE

Comment c. Clients and former clients. On the duty owed to clients, see § 52, Reporter's Note. On prospective clients, see § 15, Comment *e*, and Reporter's Note thereto. For assertion of a client's claim by a receiv-

er or trustee in bankruptcy or similar successor in interest, see, e.g., Stumpf v. Albracht, 982 F.2d 275 (8th Cir.1992); FDIC v. Clark, 978 F.2d 1541 (10th Cir.1992); FDIC v. Mmabat, 907 F.2d 546 (5th Cir.1990), cert. denied, 499 U.S. 936, 111 S.Ct. 1387, 113 L.Ed.2d 444 (1991); FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir.1992), rev'd on other grounds, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup.Ct. 1978). On an insurer's right to assert a malpractice claim against a lawyer it designated to defend a suit against an insured, whether by subrogation to the insured's claim or otherwise, see § 51, Comment *f*, and Reporter's Note thereto. On the assignability of malpractice claims, compare, e.g., Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith, 922 S.W.2d 865 (Tenn.), cert. denied, 519 U.S. 929, 117 S.Ct. 298, 136 L.Ed.2d 216 (1996) (assignment violates public policy), with, e.g., New Hampshire Ins. Co. v. McCann, 707 N.E.2d 332 (Mass.1999) (rejecting arguments against assignability); Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 539 A.2d 357 (Pa. 1988) (upholding assignment). See generally 1 R. Mallen & J. Smith, Legal Malpractice §§ 7.10–7.11 (4th ed.1996).

On former clients, compare Barry v. Ashley Anderson, P.C., 718 F.Supp. 1492 (D.Colo.1989) (lawyer who did not withdraw appearance not liable for dismissal of client's action, when at client's request case file had been transferred to new lawyer, and lawyer notified new lawyer of impending dismissal); Frazier v. Effman, 501 So.2d 114 (Fla.Dist.Ct.App. 1987) (lawyer not liable for failure to join defendant before statute of limitations expired when client had discharged and replaced lawyer months before expiration); Williams v. Consolvo, 379 S.E.2d 333 (Va.1989) (lawyer not liable for failing to advise client not to pay claim, when client paid only after retaining new lawyer), with Damron v. Herzog, 67 F.3d 211 (9th Cir.1995), cert. denied, 516 U.S. 1117, 116 S.Ct. 922, 133 L.Ed.2d 851 (1996) (lawyer liable for accepting substantially related matter adverse to former client); Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir.1986) (lawyer who neither took action to protect client nor notified client of withdrawal liable to client); Nolan v. Foreman, 665 F.2d 738 (5th Cir.1982) (liability for failing to return client documents after representation ended); Lama Holding Co. v. Shearman & Sterling, 758 F.Supp. 159 (S.D.N.Y.1991) (duty owed if partner told former client firm would inform of significant tax-law changes); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.Ct.App.1988) (liability for misuse of confidential information after representation ended); Central Cab Co. v. Clarke, 270 A.2d 662 (Md.1970) (similar to *Hanlin v. Mitchelson*, supra).

Comment d. Client objectives. For cases finding liability appropriate, see Arana v. Koerner, 735 S.W.2d 729 (Mo.Ct.App.1987) (lawyer settled medical-malpractice suit brought against client despite client's direction to defend case); S & D Petroleum Co. v. Tamsett, 534 N.Y.S.2d 800 (N.Y.App.Div.1988) (lawyer failed to file security agreement); Logalbo v. Plishkin, Rubano & Baum, 558 N.Y.S.2d 185 (N.Y.App.Div.1990) (client asked lawyer to cancel contract; lawyer gave oral notice of cancellation, but not timely written no-

tice required by contract); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988) (client asked lawyer to place property in joint tenancy with client's spouse, which lawyer failed to do before client's death); Pizel v. Zuspann, 795 P.2d 42 (Kan.), modified on denial of rehearing 803 P.2d 205 (Kan.1990) (lawyer liable for failing to put trust into proper operation); § 20, Reporter's Note (failure to inform or consult); § 21, Comment *d*, and Reporter's Noto thereto (failure to follow instructions); § 27, Comment *f*, and Reporter's Note thereto (acting without authority).

The lawyer's duty is limited by the scope of the representation. E.g., McLaughlin v. Sullivan, 461 A.2d 123 (N.H.1983) (lawyer retained to defend criminal proceeding has no duty to use care to avoid client's suicide); Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y.1992) (lawyer giving nonclient opinion letter that mortgage documents represented binding obligation not liable for misstatement of amount of mortgage); Pittsburgh Coal & Coke, Inc. v. Cuteri, 590 A.2d 790 (Pa.Super.Ct.1991) (lawyer retained for "lien search" not liable for failure to find nonlien flaw in title), rev'd on other grounds, 622 A.2d 284 (Pa.1993); § 19, Comment *c*, and Reporter's Note thereto.

Comment e. Lawful objectives. See Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark, 39 F.3d 812 (7th Cir.1994), cert. denied, 514 U.S. 1123, 115 S.Ct. 1990, 131 L.Ed.2d 876 (1995) (lawyer not liable for failing to throw sand in jury's eyes); Kirsch v. Duryea, 578 P.2d 935 (Cal.1978) (lawyer not liable for withdrawing from case that lawyer reasonably believed te lack merit); Mills v. Cooter, 647 A.2d 1118 (D.C.1994) (lawyer not liable for declining, after notice to client, to join party as defendant where lawyer reasonably believed claim was baseless and rule required lawyer to certify that pleading was well grounded); In re Marriage of Betts, 558 N.E.2d 404 (Ill.App.Ct. 1990), cert. denied, 567 N.E.2d 328 (Ill.1991) (dicta) (lawyer not subject to malpractice suit for performing an act required by court order); Competitive Food Systems, Inc. v. Laser, 524 N.E.2d 207 (Ill.App.Ct.1988) (lawyer sued for failing to produce offering circular on time may defend by showing circular would have been unlawful because of misleading financial projections furnished to lawyer); Harris v. Maready, 353 S.E.2d 656 (N.C.Ct. App.1987) (lawyer not liable for declining to bring suit lawyer considers abuse of process); §§ 23 and 94, Reporter's Notes; cf. Parksville Mobile Modular, Inc. v. Fabricant, 422 N.Y.S.2d 710 (N.Y.App.Div.1979) (dicta) (lawyer can he liable to client for recommending evasion of injunction).

§ 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. Compare § 14, describing when one becomes a client, and § 50, which sets forth a lawyer's duty to a client. On the meaning of the term "duty," see § 50, Comment *a*. Even when a duty exists, a lawyer is liable for negligence only if the lawyer violates the duty (see § 52), the violation is the legal cause of damages (see § 53), and no defense is established (see § 54).

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 te 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 incom-

petence. 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(1)). 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.

REPORTER'S NOTE

Comment c. Opposing parties. On the absence of any duty of care to an opposing litigant, see, e.g., Tappen v. Ager, 599 F.2d 376 (10th Cir.1979); Lamare v. Basbanes, 636 N.E.2d 218 (Mass.1994); Friedman v. Dozorc, 312 N.W.2d 585 (Mich.1981); Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 P.2d 118 (N.M.1988). For other examples, see Goodman v. Kennedy, 556 P.2d 737 (Cal.1976) (lawyer of corporation and officers who issued stock not liable to buyers for negligent advice not communicated to buyers); B.L.M. v. Sabo & Deitsch, 64 Cal.Rptr.2d 335 (Cal.Ct.App.1997) (lawyer not liable for negligent advice to client on which opposing party in transaction relied); Arnona v. Smith, 749 So.2d 63 (Miss.1999) (buyer's lawyer whose negligent title opinion causes buyers to cancel purchase not liable to sellers); Rose v. Summers, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683 (Mo.Ct.App.1994) (lawyer for limited partnership owes no duty to partners); Tipton v. Willamette Subscription Television, 735 P.2d 1250 (Or.Ct.App.1987) (lawyer who wrote claim letter not liable for negligent misrepresentation to recipient); Green Spring Farms v. Kersten, 401 N.W.2d 816 (Wis.1987) (seller's lawyer not liable to represented buyer for negligent misrepresentation in absence of opinion letter to buyer); Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990) (lessee's lawyer owed no duty to lessor); Annots., 61 A.L.R.4th 464 & 615 (1988). The leading United States case applying the privity doctrine to legal malpractice is National Savings Bank v. Ward, 100 U.S. 195, 10 Otto 195, 25 L.Ed. 621 (1879) (borrower's lawyer owes no duty of care to lending bank). See generally J. Feinman, Economic Negligence, ch. 9 (1994); 1 R. Mallen & J. Smith, Legal Malpractice, ch. 7 (4th ed.1996); Symposium, The Lawyer's Duties and Liabilities to Third Parties, 37 So. Tex. L. Rev. 957 (1996) (several authors); Probert & Hendricks, Lawyer Malpractice: Duty Relationships Beyond Contract, 55 Notre Dame Lawyer 708 (1980); Moore, Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations, 45 S.C. L. Rev. 659 (1994).

Comment d. Prospective clients (Subsection (1)). See § 15, Comment *e*, and Reporter's Note thereto.

Comment e. Inviting reliance of a nonclient (Subsection (2)). For situations in which one party to a transaction received an opinion from another's lawyer, who was held to owe a duty of care to the first party, see Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir.1987), cert. denied, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 862 (1988) (borrower required to furnish lawyer's no-lien letter to lender and lawyer issued opinion letter to lender in furtherance of borrower's obtaining loan); Vanguard Prod., Inc. v. Martin, 894 F.2d 375 (10th Cir.1990) (seller of lease was to select lawyer for title and closing work for whom buyer was to pay; buyer was not client, but was owed care when lawyer advised buyer on enforceability of third party's claim); Stock West Corp. v. Taylor, 942 F.2d 655 (9th Cir.1991) (duty to intended beneficiary of opinion letter), aff'd in part and vacated in relevant part on abstention grounds, 964 F.2d 912 (9th Cir.1992) (en banc); Trust Co. of Louisiana v. N.N.P. Inc., 104 F.3d 1478 (5th Cir. 1997) (negligent misrepresentation of

lawyer to nonclient that lawyer held collateral for loan to client); First Nat'l Bank v. Trans Terra Corp., 142 F.3d 802 (5th Cir.1998) (negligent misrepresentation liability for title opinion given to lender); Vereins-Und Westbank, AG v. Carter, 691 F.Supp. 704 (S.D.N.Y.1988) (lawyer for borrower who wrote opinion letter required by lender and its assignee owed assignee care); Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal.Rptr. 901 (Cal.Ct.App.1976) (borrower's lawyer who prepared opinion letter required by lender); Courtney v. Waring, 237 Cal.Rptr. 233 (Cal.Ct. App.1987) (franchisor's lawyer who prepared prospectus for franchisees); Home Budget Loans, Inc. v. Jacoby & Meyers, 255 Cal.Rptr. 483 (Cal.Ct. App.1989) (when mortgage broker required borrower to consult lawyer and provide letter stating that lawyer had explained transaction to borrower, lawyer owed duty to broker to explain transaction; borrower later sued for rescission); Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230 (Colo. 1995) (bond counsel and town counsel provided opinion letters to bank lending to town's redevelopment authority that litigation against town lacked merit); Security Nat'l Bank v. Lish, 311 A.2d 833 (D.C.1973) (borrower's lawyer made written and oral representations to lender as to prior liens); Geaslen v. Berkson, Gorov & Levin Ltd., 581 N.E.2d 138 (Ill.App.Ct.1991) (buyer required to provide lawyer's opinion letter to seller), aff'd in part & rev'd in part on other grounds, 613 N.E.2d 702 (Ill.1993); Capital Bank & Trust Co. v. Core, 343 So.2d 284 (La. Ct.App.1977) (seller's lawyer wrote title opinion to be relied on by lender); Kirkland Constr. Co. v. James, 658 N.E.2d 699 (Mass.App.Ct.1995), appeal denied, 661 N.E.2d 935 (Mass. 1996); Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y.1992) (lawyer who provided opinion letter to client's creditor to obtain refinancing); McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests, 991 S.W.2d 787 (Tex.1999) (nonclient that obtained opinion of another party's lawyer as condition of contract may sue lawyer for negligent misrepresentation, not malpractice). On construction of opinion letters, see Tri Bar Opinion Committee, Third-Party "Closing" Opinions, 53 Bus. Law. 591 (Feb. 1998). See generally § 95, Reporter's Note; 31 C.F.R. § 10.33 (tax-shelter opinions); S. FitzGibbon & D. Glazer, Legal Opinions (1992).

Under the doctrine of Ultramares v. Touche, 174 N.E. 441 (N.Y.1931), an accountant owes no duty of care to members of a class of unknown investors or lenders to whom the accountant's client foreseeably circulates financial statements negligently audited by the accountant. For differing approaches, compare, e.g., Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co., 597 N.E.2d 1080 (N.Y.1992) (following *Ultramares*), with, e.g., Touche Ross v. Commercial Union Ins., 514 So.2d 315 (Miss.1987) (rejecting *Ultramares*), with Bily v. Arthur Young & Co., 834 P.2d 745 (Cal.1992) (following *Ultramares*, but recognizing under Restatement Second, Torts § 552 liability for negligent misrepresentation to one of limited number of persons to whom client, with accountant's knowledge, intends to supply financial statements). Jurisdictions following *Ultramares* apply it to lawyers. E.g., Alpert v. Shea Gould Climenko & Casey, 559 N.Y.S.2d 312 (N.Y.App.Div.1990). Jurisdictions rejecting or modifying *Ultramares* ap-

ply similar rules to lawyers. Molecular Technology Corp. v. Valentine, 925 F.2d 910 (6th Cir.1991) (lawyer owes duty to buyers that lawyer should reasonably have foreseen would rely on securities offering statement); Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir.), cert. denied, 474 U.S. 946, 106 S.Ct. 342, 88 L.Ed.2d 290 (1985) (lawyer-principal liable to buyers for negligent misrepresentation in offering memorandum); In re American Continental Corp./Lincoln S. & L. Securities Litigation, 794 F.Supp. 1424 (D.Ariz.1992) (firm liable to securities buyers for negligence in opinion letter); Norman v. Brown, Todd & Heyburn, 693 F.Supp. 1259 (D.Mass.1988) (lawyer who wrote tax-shelter opinion owes duty to buyers of tax-shelter units); Century 21 Deep South Properties, Ltd. v. Corson, 612 So.2d 359 (Miss. 1992) (dicta) (lawyer who does title work owes duty to later purchaser who foreseeably relies); Petrillo v. Bachenberg, 655 A.2d 1354 (N.J. 1995) (negligence of seller's lawyer in providing misleading information); Century 21 Deep South, Inc. v. Corson, 612 So.2d 359, 372–74 (Miss. 1992) (lawyer performing title work liahle to third parties who foreseeably rely on opinion); United Leasing Corp. v. Miller, 263 S.E.2d 313, 317 (N.C.Ct.App.), rev. denied, 267 S.E.2d 685 (N.C.1980) (nonclient lender had cause of action against lawyer for borrower who misrepresented state of title); Bradford Sec. Processing Services, Inc. v. Plaza Bank & Trust, 653 P.2d 188 (Okla. 1982) (bond counsel liable to buyer and pledgee of bond); Haberman v. Washington Pub. Power Supply Sys., 744 P.2d 1032 (Wash.1987), appeal dism'd, 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988) (bond-offering statement).

On the effect of qualifications and disclaimers in an opinion, see Kline v. First W. Gov't Secs., Inc., 24 F.3d 480 (3d Cir.), cert. denied, 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994) (under federal securities laws, statement that opinion based on assumed facts does not bar rule 10b–5 liability or prevent reasonable reliance on part of represented party as a matter of law, when lawyer had good reason to know of material inaccuracy); Fortson v. Winstead, McGuire, Sechrest & Minick, 961 F.2d 469 (4th Cir.1992) (similar disclaimer with other circumstances negated any possible obligation to ensure accuracy of statements found not in lawyer's opinion but in accompanying documents); Resolution Trust Corp. v. Latham & Watkins, 909 F.Supp. 923 (S.D.N.Y. 1995) (author of opinion letter on Florida law not liable for failure to discuss other states); Washington Elec. Co-op. Inc. v. Massachusetts Munic. Wholesale Elec. Co., 894 F.Supp. 777 (D.Vt.1995) (statement that legal obligations were subject to judicial discretion absolved lawyer from any liability for not predicting changes in law); In re Colonial Ltd. Partnership Litigation, 854 F.Supp. 64 (D.Conn.1994) (cautions in accountant's projections precluded reliance on predictions of future performance, but did not preclude claim that projections concealed present fraud); Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg, 651 F.Supp. 877 (D.Conn.1986) (accountant had no liability for projections of future performance when report stated that accountant did not verify data and noted risks that could prevent projected performance); Mark Twain Kansas City Bank v. Jackson, Brouillette, Pohl & Kirley, P.C., 912 S.W.2d 536 (Mo.Ct.App.1995) (negligent-misrepresentation liability barred where

bank could not reasonably rely on lawyer's opinion stating "we take no responsibility to [sic] any information of opinion contained herein" and bank was aware of irregularities); Ark. Code Ann. § 16–114–303(2) (effectiveness of written statement that only stated persons are intended to rely); cf., ABA Formal Opin. 346 (1982). In federal-securities litigation, the effect of disclaimers has often been considered under the "bespeaks caution" doctrine, e.g., In re Trump Casino Sec. Litig., 7 F.3d 357 (3d Cir.1993), cert. denied, 510 U.S. 1178, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994); see generally 2 R. Mallen & J. Smith, Legal Malpractice § 12.25, at 118–22 (4th ed.1996), and is now governed by the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z–2, 78u–5.

For instances in which a lawyer has been held to owe a duty of care to a nonclient who had been invited to rely on the lawyer's services and has reasonably done so, see Trust Co. of Louisiana v. N.N.P., Inc., 92 F.3d 341 (5th Cir.1996) (lawyer agreed with perpetrators of fraud to provide custodial services for customers); Nelson v. Nationwide Mortgage Corp., 659 F.Supp. 611 (D.D.C.1987) (lender's lawyer volunteered at closing to explain documents to unrepresented buyers and responded to questions); Jurgens v. Abrabam, 616 F.Supp. 1381 (D.Mass.1985) (lawyer told nonclient that $500,000 of proceeds of attachment were set aside for nonclient); Simmerson v. Blanks, 254 S.E.2d 716 (Ga.Ct.App.1979) (buyer's lawyer volunteered to file financing statement); Jones v. Kootenai County Title Ins. Co., 873 P.2d 861 (Idaho 1994) (lawyer accepted money without repudiating instructions to transmit it and handle transaction in payor's best interests); Stewart v. Sbarro, 362 A.2d 581 (N.J.Super.Ct.App.Div.1976) (seller's lawyer undertook to obtain signatures on bond and mortgage and did not tell buyer's lawyer that this had not been done); McEvoy v. Helikson, 562 P.2d 540 (Or.1977) (lawyer agreed to secure client's passport so client could not leave jurisdiction with children in custody dispute); Collins v. Binkley, 750 S.W.2d 737 (Tenn. 1988) (seller's lawyer prepared deed with defective acknowledgment form, knowing that form was for use of buyer); Bohn v. Cody, 832 P.2d 71 (Wash.1992) (lawyer helped arrange loan to client from client's parents and misleadingly answered parents' question); Al–Kandari v. JR Brown & Co., [1988] 2 W.L.R. 671 (C.A.) (Eng.) (court ordered husband's solicitor to have custody of husband's passport as condition for husband's access to children; solicitor liable to wife for negligently letting husband have passport, which husband used to remove children from country); see § 14, Comment *e*, and Reporter's Note thereto.

Comment f. A nonclient enforcing duties of a lawyer to a client (Subsection (3)). On a lawyer's liability to a will beneficiary for negligence in the drafting and execution of the will, see, e.g., Lucas v. Hamm, 364 P.2d 685 (Cal.1961); Hesser v. Central Nat'l Bank, 956 P.2d 864 (Okla.1998); Hale v. Groce, 744 P.2d 1289 (Or. 1987); Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987); Ross v. Caunters, [1980] Ch. 297 (Eng.); Markesinis, Doctrinal Clarity in Tort Litigation: A Comparative Lawyer's Viewpoint, 25 Int'l Law. 953 (1991). Contra, McDonald v. Pettus, 988 S.W.2d 9 (Ark.1999) (statute bars beneficiary's suit but personal repre-

sentative may sue); Barcelo v. Elliott, 923 S.W.2d 575 (Tex.1996); Noble v. Bruce, 709 A.2d 1264 (Md.1998).

For cases similar to Illustration 3, compare Espinosa v. Sparber, 612 So.2d 1378 (Fla.1993) (no liability when no frustration of testator's intent, as set forth in will); Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987) (similar); Kirgan v. Parks, 478 A.2d 713 (Md.Ct.Spec.App.1984) (similar); Mieras v. DeBona, 550 N.W.2d 202 (Mich.1996) (similar), with Heyer v. Flaig, 449 P.2d 161 (Cal.1969) (allowing suit for failure to advise inclusion of post-testamentary marriage clause in will or postmarriage will change); Stowe v. Smith, 441 A.2d 81 (Conn. 1981) (allowing suit for failure to fulfill testators' intent, even though intent does not appear within four corners of will); Teasdale v. Allen, 520 A.2d 295 (D.C.1987) (similar); Ogle v. Fuiten, 466 N.E.2d 224 (Ill.1984) (similar); Simpson v. Calivas, 650 A.2d 318 (N.H.1994) (similar); Hale v. Groce, 744 P.2d 1289 (Or.1987) (similar).

Illustration 4 is based on Gonsalves v. Alameda County Superior Court, 24 Cal.Rptr.2d 52 (Cal.Ct.App.1993). See also Radovich v. Locke–Paddon, 41 Cal.Rptr.2d 573 (Cal.Ct.App.1995) (no liability for failure to secure timely execution of will where testator wanted to confer with sister before executing); Krawczyk v. Stingle, 543 A.2d 733 (Conn.1988) (no liability for negligent delay in writing estate-planning instrument). But see White v. Jones, [1995] W.L.R. 187 (Eng.) (H.L.1995) (solicitor liable to beneficiaries for negligent failure to draw up will).

On whether the theory of the will cases permits recovery in other situations, see, e.g., Bucquet v. Livingston, 129 Cal.Rptr. 514 (Cal.Ct.App. 1976) (beneficiary of trust may sue settlor's lawyer after settlor's death for failure to advise settlor of adverse estate-tax consequences of trust provision); Pelham v. Griesheimer, 440 N.E.2d 96 (Ill.1982) (when divorce decree required husband to maintain children as prime beneficiaries of life insurance, wife's lawyer not liable to children for negligence in enforcing requirement, because benefiting children was not wife's primary purpose in retaining lawyer); Holsapple v. McGrath, 521 N.W.2d 711 (Iowa 1994) (lawyer for donor owes duty to donee, where donor died after executing invalid deed); Pizel v. Zuspann, 795 P.2d 42 (Kan.), modified on denial of rehearing 803 P.2d 205 (Kan.1990) (lawyer liable after settlor's death to beneficiaries of inter vivos trust that lawyer negligently failed to put into proper operation); Nevin v. Union Trust Co., 726 A.2d 694 (Me.1999) (personal representative but not beneficiaries may sue decedent's lawyer for negligent estate planning that increased estate taxes); Flaherty v. Weinberg, 492 A.2d 618 (Md.1985) (mortgagee bank's lawyer not liable to unrepresented buyer unless buyer proves bank intended to benefit buyer in retaining counsel); Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261 (Minn.1992) (lawyer representing corporation may be liable to related corporation if related corporation was intended beneficiary, where client corporation had few assets, and lawyer knew that, if lawyer was unsuccessful, related corporation would bear large liability); CPJ Enters., Inc. v. Gernander, 521 N.W.2d 622 (Minn.Ct. App.1994) (lawyer for agent not liable to undisclosed principal); Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo.1995) (trus-

tor's lawyer liable to beneficiaries for acts after trustor's death); cf. Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86 (3d Cir.), cert. denied, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 227 (1985) (considering suit by class member against class counsel).

Comment g. A liability insurer's claim for professional negligence. On whether an insurer may maintain an action for negligence against a lawyer designated by the insurer to defend the insured, see Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322 (9th Cir.1995) (allowing suit for failure to transmit settlement offer on theory that insurer is client when there is no insurer-insured conflict of interest); Paradigm Ins. Co. v. Langerman Law Offices, P.A., 1999 WL 672662 (Ariz.Ct.App.1999) (insurer may sue so long as interests of company and insured are parallel); Unigard Ins. Group v. O'Flaherty & Belgum, 45 Cal.Rptr.2d 565 (Cal.Ct.App. 1995) (insurer may sue lawyer for not raising affirmative defense where there is no conflict of interest with insured); Assurance Co. of America v. Haven, 38 Cal.Rptr.2d 25 (Cal.Ct. App.1995) (malpractice suit not allowed when defense of suit against insured was under reservation of rights and insured and insurer had separate counsel; but insurer may sue lawyer for insured for failure to keep it informed of facts indicating that statute of limitations defense was available); Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich.1991) (insurer is not client, but when lawyer failed to raise comparative-negligence defense, insurer may assert rights of insured against lawyer by equitable subrogation because insured and insurer have common interests); 3 R. Mallen & J. Smith, Legal Malpractice § 28.8 (4th ed.1996); Silver & Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke L.J. 255 (1995); Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev. 1583 (1994); cf. Credit Gen. Ins. Co. v. Midwest Indem. Corp., 872 F.Supp. 523 (N.D.Ill.1995) (party that had promised to indemnify defendant may sue defendant's lawyer for negligent representation causing loss to party). Among the cases opposed, see, e.g., Lavanant v. General Accident Ins. Co., 561 N.Y.S.2d 164 (N.Y.App.Div.1990), aff'd, 595 N.E.2d 819 (N.Y.1992) (due to lack of privity, insurer may not maintain claim for negligence against counsel designated for insured); Safeway Managing Gen. Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166 (Tex.Ct.App.1998) (lawyer who arranged settlement that released only portion of judgment above policy limit liable to insurer for negligent misrepresentation, but not malpractice).

Comment h. Duty based on knowledge of a breach of fiduciary duty owed by a client (Subsection (4)). On a lawyer's duty of care to a beneficiary when the lawyer's client is a fiduciary, compare, e.g., Fickett v. Superior Court, 558 P.2d 988 (Ariz.Ct.App. 1976) (liability for failure to use care in detecting and preventing conservator's misappropriation of assets of incompetent person); Morales v. Field, DeGoff, Huppert & MacGowan, 160 Cal.Rptr. 239 (Cal.Ct.App.1979) (lawyer for trustee-executor and others had duty to disclose conflict to beneficiaries); Home Ins. Co. v. Wynn, 493 S.E.2d 622 (Ga.Ct.App.1997) (lawyer for parent who brought wrongful-death suit for children liable for helping parent divide proceeds wrongly); Pizel v. Zuspann, 795 P.2d 42 (Kan.),

modified on denial of rehearing 803 P.2d 205 (Kan.1990) (settlor's lawyer had duty to trust beneficiaries; suit brought when trust invalidated after settlor died); Charleson v. Hardesty, 839 P.2d 1303 (Nev.1992) (lawyer for trustee owes duty of care and fiduciary duties to beneficiaries); Leyba v. Whitley, 907 P.2d 172 (N.M.1995) (lawyer for personal representative bringing wrongful-death action owes duty to minor beneficiary to advise representative to hold proceeds in trust for beneficiaries); Jenkins v. Wheeler, 316 S.E.2d 354 (N.C.Ct. App.1984) (lawyer for executor had duty to beneficiary), with, e.g., Weingarten v. Warren, 753 F.Supp. 491 (S.D.N.Y.1990) (trustee's lawyer liable to beneficiary for aiding trustee's conversion, but not for malpractice); Goldberg v. Frye, 266 Cal.Rptr. 483 (Cal.Ct.App.1990) (administrator's lawyer owed no duty to independently represented legatees); Hopkins v. Akins, 637 A.2d 424 (D.C.1993) (lawyer of personal representative owes no duty to heir); Rutkoski v. Hollis, 600 N.E.2d 1284 (Ill.App.Ct.1992) (executor's lawyer owes no duty of care to beneficiary); Spinner v. Nutt, 631 N.E.2d 542 (Mass.1994) (trustee's lawyer owes no duty to beneficiaries); Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734 (Minn. Ct.App.1995) (lawyer for personal representative owes no duty to estate beneficiaries); Kramer v. Belfi, 482 N.Y.S.2d 898 (N.Y.App.Div.1984) (similar, absent fraud, collusion, or malice); Roberts v. Fearey, 986 P.2d 690 (Or.Ct.App.1999) (trustee's lawyer owes beneficiary no duty); Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex.Ct.App.1993) (similar); Trask v. Butler, 872 P.2d 1080 (Wash.1994) (lawyer for personal representative owed beneficiary no duty); Anderson v. McBurney, 467 N.W.2d 158 (Wis.Ct.App.1991) (lawyer for personal representative owes heir no duty to use care in searching for heir); Ohio R.C. § 1339.18 (fiduciary's lawyer owes beneficiary no duty absent express agreement). The position of the Section and Comment does not agree with that espoused in ABA Formal Op. 94–380 (1994) (obligations of lawyer under ABA Model Rules of Professional Conduct (1983) not affected when client is fiduciary).

Consistent with the position of the Section and Comment, an apparent majority of recent decisions holds that a lawyer for a limited partnership does not owe a duty of care to partners. Compare, e.g., Wanetick v. Mel's of Modesto, Inc., 811 F.Supp. 1402, 1409 (N.D.Cal.1992) (lawyer for limited partnership not liable for fraudulent concealment from limited partners as such lawyer owes no fiduciary duty to limited partners); Morin v. Trupin, 711 F.Supp. 97, 103 (S.D.N.Y.1989) (same); Rose v. Summers, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683 (Mo.Ct.App. 1994) (same); cf. Johnson v. Superior Court, 45 Cal.Rptr.2d 312, 320 (Cal. Ct.App.1995) (representation of partnership does not per se constitute representation of partners; 5–factor test described to determine whether such duty exists on particular facts), with, e.g., Arpadi v. First MSP Corp., 628 N.E.2d 1335 (Ohio 1994) (lawyer for general partners owed duty to limited partners).

See generally Symposium, The Lawyer's Duties and Liabilities to Third Parties, 37 So. Tex. L. Rev. 957 (1996) (several authors); Hazard, Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. J. Legal Ethics 15 (1987); Phelps, Representing Trusts and Trustees–Who Is the Client and Do Notions of Privity Pro-

tect the Client Relationship?, 66 Conn. B.J. 211 (1992); cf. Wash. Rules Prof. Conduct, Rule 1.6(c) (authorizing lawyer for court-appointed fiduciary to disclose fiduciary's breach to court).

For cases upholding liability of a lawyer to a nonclient for affirmatively aiding a client to breach fiduciary duties owed to the nonclient, see, e.g., Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir.1988), cert. denied, 490 U.S. 1089, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989) (lawyer participated in pension-plan trustee's purchase of overvalued property); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir.1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978) (partner's lawyer helped breach of trust to other partners by issuing false opinion letter, threatening suit in bad faith, etc.); Weingarten v. Warren, 753 F.Supp. 491 (S.D.N.Y.1990) (trustee's lawyer helped pay out principal as income, in furtherance of lawyer's self-interest); Bouton v. Thompson, 764 F.Supp. 20 (D.Conn.1991) (lawyer's misrepresentation helped client keep converted funds, creating ERISA liability); Pierce v. Lyman, 3 Cal.Rptr.2d 236 (Cal.Ct.App.1991) (lawyer helped trustees conceal risky investments from probate court); Albright v. Burns, 503 A.2d 386 (N.J.Super.Ct.App.Div.1986) (lawyer helped client who had power of attorney over nonclient's property, which client had sold, lend proceeds of sale to client without security; not a defense that lawyer had advised client not to do this); Granewich v. Harding, 985 P.2d 788 (Or.1999) (lawyer helped two shareholders of close corporation squeeze out third); 4 A. Scott & W. Fratcher, Trusts § 326.4 (4th ed.1988); Restatement Second, Trusts § 326. But see Mertens v. Hewitt Assocs., 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (nonfiduciary not liable in damages under ERISA for knowingly aiding fiduciary's breach; but ERISA would make anyone exercising discretionary control over assets or management liable as a statutory fiduciary for such aid). On equitable relief against lawyers participating in ERISA violations, compare Concha v. London, 62 F.3d 1493 (9th Cir.1995) (available), with Reich v. Continental Cas. Co., 33 F.3d 754 (7th Cir.1994), cert. denied, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995) (unavailable).

The Council and Members rejected a provision that would have recognized a lawyer's duty to affirmatively act to protect a nonclient when circumstances known to the lawyer make it clear that action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent the client from committing a crime imminently threatening death or serious bodily harm to an identifiable person who is unaware of the risk, and the lawyer's act has facilitated the crime. See § 66, Comment *g*. For the text of the rejected provision, see § 73[(5)] & Comment [*i*] (Tentative Draft No. 8, 1997). On the duty of psychotherapists when their clients threaten injury to a nonclient, see, e.g., Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal.1976); Peck v. Counseling Service of Addison County, Inc., 499 A.2d 422 (Vt.1985); Petersen v. State, 671 P.2d 230 (Wash. 1983); Annot., 83 A.L.R.3d 1201 (1978). There are few cases involving lawyers. See Hawkins v. King County, 602 P.2d 361 (Wash.Ct.App.1979) (lawyer not liable to victim when lawyer knew, as did victim, that client

was dangerous, but had no information that client planned to assault anyone); cf. Seibel v. City & County of Honolulu, 602 P.2d 532 (Haw.1979) (prosecuting attorney not liable for murder committed by released defendant); Merton, Confidentiality and the "Dangerous" Patient: Implications of *Tarasoff* for Psychiatrists and Lawyers, 31 Emory L. Rev. 263 (1982). As of February 1996, the professional rules of approximately 10 states required lawyers to disclose confidences when necessary to prevent a crime likely to cause death or serious bodily injury, while virtually every other stato permitted but did not require such disclosure. See § 66, Comment *b*, and Reporter's Note thereto.

§ 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 hreach of fiduciary duty;

(h) 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.

Comment:

a. Scope and cross-references. This Section defines the duty of care a lawyer owes to clients and to nonclients to whom a duty of care is owed under § 51. A lawyer must exercise such care in pursuing a client's objectives and in fulfilling fiduciary duties owed to a client (see § 50). On the application of the duty to nonclients, see Comment *e* hereto. For a lawyer to be liable for malpractice, the lawyer's violation of this duty must be a legal cause of injury (see § 53) to a person to whom the lawyer owes a duty of care (see §§ 50 & 51), and the lawyer must have established no defense (see § 54). Whether a lawyer has failed to exercise the care required by this Section is not necessarily

the same issue as whether the lawyer is subject to professional discipline, litigation sanctions, or other remedies other than legal-malpractice liability. On a lawyer's liability to a client for breach of contract, see § 55. On the applicability of this Section in a client's action for breach of a lawyer's fiduciary duty, see § 49, Comment *d*. On the use of confidential client information by a lawyer defending against a former client's claim of malpractice, see §§ 64 and 80.

b. Competence. The duty of competence set forth in this Section is that generally applicable to practitioners of a profession, that is, "the skill and knowledge normally possessed by members of that profession or trade in good standing . . . " (Restatement Second, Torts § 299A). Informed clients expect services of this kind; it is practical for lawyers to provide them; and the practice of the profession will most often be evidence of what clients need. As is generally true for professions, the legal duty refers to normal professional practice to define the ordinary standard of care for lawyers, rather than referring to that standard as simply evidence of reasonableness.

The competence duty, like that for diligence, does not make the lawyer a guarantor of a successful outcome in the representation (see § 55(1)). It does not expose the lawyer to liability to a client for acting only within the scope of the representation (see § 19 & § 54, Comment *b*) or following the client's instructions (see § 21(2) & § 54, Comment *h*). It does not require a lawyer, in a situation involving the exercise of professional judgment, to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways. The duty also does not require "average" performance, which would imply that the less skillful part of the profession would automatically be committing malpractice. The duty is one of reasonableness in the circumstances.

A trier of fact applying the standard may consider such circumstances as time pressures, uncertainty about facts or law, the varying means by which different competent lawyers seek to accomplish the same client goal, and the impossibility that all clients will reach their goals. Such factors are especially prevalent in litigation. They warrant caution in evaluating lawyers' decisions, although they do not warrant the view, still occasionally asserted, that all decisions taken in good faith are exempt from malpractice liability. Expert testimony by those knowledgeable about the legal subject matter in question is relevant in applying the standard (see Comment *g* hereto). In appropriate circumstances, a tribunal passing on a motion for summary judgment or directed verdict may determine whether a lawyer has satisfied the duty.

The professional community whose practices and standards are relevant in applying this duty of competence is ordinarily that of lawyers undertaking similar matters in the relevant jurisdiction (typically, a state). (On conflict-of-laws problems, see § 5, Comment *h* (lawyer discipline); § 48, Comment *f*.) The narrower "locality test," under which the standards of a local community governed, has seldom been recognized for lawyers. Restatement Second, Torts § 299A, Comment *g*. The locality test is now generally rejected for all professions, because all professionals can normally obtain access to standard information and facilities, because clients no longer limit themselves to local professionals, and because of the practicalities of proof in malpractice cases (see Comment *g* hereto). In many fields of legal practice, for example the preparation of securities-registration statements or the representation of clients in federal court in litigation under federal legislation, there exists a national practice with national standards. In applying the competence duty, however, it may be appropriate to consider factors such as the unavailability of particular research sources in the community where a lawyer practices in light of the difficulty and probable value in the circumstances of having done further research.

c. Diligence. A lawyer must devote reasonable diligence to a representation. The lawyer must perform tasks reasonably appropriate to the representation, including, where appropriate, inquiry into facts, analysis of law, exercise of professional judgment, communication with the client, rendering of practical and ethical advice, and drafting of documents. What kind and extent of effort is appropriate depends on factors such as the scope of the representation (see § 19(1)), the client's instructions (see § 21(2)), the importance of the matter to the client (which may be indicated by the client's own assertions as well as by the matter's probable impact on the client's affairs), the cost of the effort, customary practice, and the time available. A lawyer who informs a client that the lawyer will undertake a specifically described activity is required to do so, as is one properly instructed by a client to take a particular step (see § 21(2)). Circumstances might make it necessary to provide more than one lawyer for a client's matter or to provide appropriate supervision of subordinate lawyers (see § 11) or certain corresponding counsel (see § 58, Comment *e*). When paralegals or other nonlawyers are used, they must be properly supervised. See Restatement Second, Torts § 213; § 58 (vicarious liability of firm and partners); § 11(4) (duty to supervise). Even when a lawyer has been inadequately diligent, the lawyer's breach of duty might not be the legal cause of compensable damage (see § 53), for example if without required investigation the lawyer

recommended that the client accept a settlement offer that was in fact a good one.

d. Similar circumstances. A lawyer's representations or disclaimers and qualifications may constitute circumstances affecting what a client is entitled to expect from the lawyer. Thus, a lawyer who represents to a client that the lawyer has greater competence or will exercise greater diligence than that normally demonstrated by lawyers in good standing undertaking similar matters is held to that higher standard, on which such a client is entitled to rely. See Restatement Second, Torts § 299A, Comment *d*. Likewise, a lawyer must "exercise any special skill that he has." Restatement Second, Agency § 379(1). A representation may be made directly, for example when a lawyer claims to be an expert or specialist in a given field through an advertisement or listing or by an assertion of specialization on a letterhead. The representation may be on behalf of the lawyer in question or of a law firm in which the lawyer practices. A lawyer's duty to a nonclient under § 51(2) is governed by a duty of greater competence only when the standard is known to the nonclient. Such a representation has no bearing on a lawyer's liability to a nonclient under § 51(4).

A lawyer may disclaim greater than ordinary competence or possession of specialized knowledge or skill. When a matter is of a kind normally undertaken by specialists, a nonspecialist generally must make such a disclaimer to avoid being held to the specialist duty. If a nonspecialist exercising normal competence would not undertake such a representation, a nonspecialist must (except in an emergency) either refer the case to or associate with a specialist or acquire the competence of an ordinary specialist. For those purposes, a specialty is one so recognized by authorities regulating the bar of the jurisdiction or one generally so recognized by lawyers.

In the limited circumstances stated in § 19 and subject to § 18 when it applies, a client and lawyer may specify the level of competence or diligence that the lawyer is to provide. For example, a sophisticated client may insist on receiving a trusted lawyer's opinion in a field in which the lawyer is unskilled. Similarly, a properly informed client and lawyer can agree that the lawyer will provide services only within an agreed-upon budget or according to an agreed-upon timetable (see also § 54(2), on the unenforceability of agreements prospectively limiting a lawyer's malpractice liability). If a properly informed client instructs a lawyer to take or not take a specified act (see § 21(2)), the client may not later claim that the lawyer's compliance constituted malpractice (see § 54, Comment *h*).

e. Suit by a nonclient. The duty of care of this Section is applied in actions brought by nonclients to whom a lawyer owes a duty of care under § 51, but it must be applied in light of the scope and rationale of the duty in question. For example, the duty under § 51(4) does not require a lawyer to use care to protect the nonclient from harms other than those specified in that subsection. Likewise, a lawyer owes no duty of loyalty to the nonclients described in § 51 except to the extent described by § 15(1).

Illustrations:

1. Client instructs Lawyer to write a will leaving a bequest in trust to Beneficiary and to do so within one day because Client is gravely ill. Lawyer does so. After Client's death, the bequest is set aside for a defect that a lawyer of ordinary competence in preparing wills could not reasonably have been expected to discover within one day. Beneficiary sues Lawyer for professional negligence. Beneficiary may not recover. Although Lawyer owes a duty of care to Beneficiary under § 51(3), that duty is recognized to enforce Lawyer's duty to Client to implement Client's wishes, which in this instance included acting with great urgency. Lawyer reasonably complied with Client's request that Lawyer complete the will immediately (see § 19). Time constraints reasonably incurred are relevant to what constitutes ordinary competence (see Comment *b*). Beneficiary cannot exact from Lawyer greater care than Lawyer owed Client (see § 51, Comment *f*).

2. Client and Buyer agree that, as a condition to closing a sale of Client's personal property to Buyer, Client will provide an opinion letter by Lawyer regarding liens on the property. Lawyer is aware of the agreement. Client privately instructs Lawyer to rely on Client's own factual assertions in preparing the opinion letter, rather than searching relevant public lien records as customary practice would require. Lawyer relies on Client's assertions and as a result Lawyer's opinion letter does not mention a recorded lien that Buyer discovers only after consummating the purchase. Lawyer is liable to Buyer for lack of diligence. Lawyer's duty of care to Buyer under § 51(2) is based on Buyer's reasonable reliance, invited by Client, on Lawyer's opinion letter. Although Client and Lawyer might agree, as between themselves, that Lawyer would base the opinion only on facts supplied by Client, that private agreement does not excuse Lawyer from conducting the investigation called for by customary practice in rendering such an opinion. Lawyer might have avoided liability to Buyer by declining to provide the opinion or by making clear to

Buyer that Lawyer had relied entirely on Client for information about liens (see § 51, Comment *e*). On a lawyer's obligations in furnishing an opinion, see § 95, Comments *f* and *g*.

f. Rules and statutes. A rule or statute regulating the conduct of lawyers but not providing a damages remedy does not give rise to an implied cause of action for lack of care or fiduciary breach. A claimant may recover damages under § 48 only if a lawyer owed the claimant a duty of care (see §§ 50 & 51), the lawyer's failure to exercise care within the meaning of this Section was the legal cause of damages (see § 53), and no defense is established (see § 54). Likewise, a client may recover damages under § 49 for breach of fiduciary duty only if the client's lawyer committed breach of fiduciary duties (see § 16), the breach was the legal cause of damages, and no defense is established. The jurisdiction's general rules concerning implied causes of action and the like govern the effect of statutes regulating lawyers on civil liability for intentional violations. This Section does not impair civil liability arising under statutes and rules expressly making lawyers liable.

Under Subsection (2), the trier of fact may consider the content and construction of a relevant statute or rule, for example a statute or a rule of professional conduct (see § 1, Comment *b*) designed for the protection of persons in the position of the claimant. Such a provision is relevant to whether a lawyer has failed to exercise the competence and diligence required under this Section or has violated a fiduciary duty recognized in § 16. Compare Restatement Second, Torts § 288B(2) (relevance, as evidence of negligent conduct, of unexcused violation of statute or regulation even if not adopted by court as per se definition of duty). Such a provision tends to show how lawyers conduct themselves and how the promulgating authority concludes they should act. Typically, such rules are formulated on the basis of extensive consideration of what conduct is practical and desirable for lawyers, including consultation involving the bench and bar and comparison with similar standards adopted in other jurisdictions. The rules state minimum standards with which all lawyers should comply (see § 2) and often implement preexisting legal standards applicable to lawyers and other fiduciaries. If not implementing such a preexisting requirement, a new rule applies only to conduct occurring after the effective date of the rule. The use of the rules in malpractice litigation can also protect lawyers, for example when showing that a lawyer was compelled by rule to act in the way challenged by the plaintiff (see § 54(1) (defense that lawyer reasonably believed conduct to be required by law)). Were the rules inadmissible in evidence, jurors would have no guidance in applying the duty of care except for often-

conflicting expert testimony (sometimes inconsistent with the rules) as to how lawyers do or should act.

Illustration:

3. Client sues Lawyer for legal malpractice, alleging that Lawyer improperly withdrew during a representation, to Client's harm. Lawyer defends on the ground that Lawyer properly withdrew because of a conflict of interest that developed without Lawyer's fault during the representation. Client denies that there was any conflict requiring withdrawal. Either party may use expert testimony or other means allowed by the jurisdiction to inform the trier of fact of professional rules or standards concerning withdrawal and conflicts of interest. Either party may also introduce expert evidence on the bearing of those rules or standards on the circumstances in question, in the case of Client to show that Lawyer's withdrawal was improper, and in the case of Lawyer to show that withdrawal was appropriate or required (see § 54(1)).

If a statute or rule is not designed for the protection of persons in the position of the claimant, this Section does not warrant its invocation by a claimant in an action under § 48 or § 49. A statute or rule designed to protect the general public or nonclients to whom no duty is owed under § 51 does not delineate the care lawyers owe to clients or to a nonclient to whom they owe duties. However, in appropriate circumstances such a provision may be admissible under general principles of relevance because the violation created an unreasonable risk of harm to a client, for example if a lawyer were to cause a mistrial harmful to the client by unlawfully communicating with a juror (see § 115). A lawyer may rely on such a provision to show the propriety of the lawyer's behavior.

Several jurisdictions have enacted so-called civility codes, many of which urge conduct by lawyers (for example, treating clients and others with courtesy) that is not otherwise required by law. Such a code, while intended by its promulgators to influence the conduct of lawyers, is not a statute or rule whose violation is independently relevant as before described.

When a lawyer attempts to invoke a provision of a lawyer code defensively, for example, to support a defense of invalidity of an agreement on the ground of violation of public policy, other considerations may apply. Because the lawyer codes are directed solely at the disciplinary responsibilities of lawyers, they do not by their terms

establish rules governing nonlawyers who deal with lawyers. In such situations, a tribunal may determine that an activity or relationship can be the basis of a claim by a nonlawyer against a lawyer even though the lawyer's involvement was prohibited under the lawyer codes.

Illustration:

4. Lawyer hires Paralegal under a written agreement that provides for an annual salary plus a commission of $500 for every new client that Paralegal brings into the office. Lawyer defends Paralegal's subsequent suit to recover $5,000 for 10 clients that Paralegal brought in on the ground that a lawyer is prohibited from fee-splitting with a nonlawyer (see § 10(3)). No other applicable law invalidates such agreements. Because Paralegal violated no prohibition binding on Paralegal, a court may determine that the agreement should be enforced, although Lawyer remains subject to professional discipline for entering into the agreement in the first instance.

Proof concerning a statute or rule does not preclude other proof of the standard of care or the content of the fiduciary duty. Cf. Restatement Second, Torts §§ 286, 287, and 288B(1) (considering when court will adopt statutes or regulations as the standard of conduct of a reasonable person). The defendant lawyer may thus contend that, in the circumstances, the lawyer's conduct fulfilled the duty of care even though inconsistent with a rule or statute. The lawyer may also contend that the lawyer's conduct was consistent with the rule or statute or was otherwise excusable (see Restatement Second, Torts § 288A).

When the trier of fact may consider under this Section the content and construction of a statute or rule, a qualified witness may rely on it in forming an expert opinion and may testify as to its construction and application to the circumstances in question. Such a witness may rely on the usual aids to construction, such as official comments, judicial and ethics-committee opinions construing the rule or statute, and professional literature. The procedural law of the jurisdiction determines such issues as the qualifications required for such a witness and whether the party calling the witness has satisfied its burden of coming forward as to the issues in question. The court may instruct the jury as to the content and construction of the statute or rule and its bearing on the issue of care, under the general principles governing

jury instructions. A dispute as to whether a statute or rule may properly be considered by the trier of fact is decided by the tribunal.

g. Expert testimony. The application of this Section's definition of care or of fiduciary duties usually involves situations and requirements of legal practice unknown to most jurors and often not familiar in detail to judges. Accordingly, a plaintiff alleging professional negligence or breach of fiduciary duty ordinarily must introduce expert testimony concerning the care reasonably required in the circumstances of the case and the lawyer's failure to exercise such care. Such expert testimony is unnecessary when it would be plain to a nonlawyer or is established as a matter of law that the lawyer's acts constitute negligence (for example, when a lawyer allegedly let the statute of limitations expire or withdrew without notifying a client) or breach of fiduciary duty. A defending lawyer may also introduce expert evidence on what constitutes care in the circumstances of the case or to support a defense under § 54(1).

An expert opinion on what constitutes proper conduct in the circumstances of the case may be based on the expert's own experience and judgment and on the expert's knowledge of applicable rules and statutes (see Comment *f* hereto), of literature discussing how lawyers do or should behave, and of the conduct and beliefs of lawyers. The party introducing the opinion must comply with the jurisdiction's evidentiary requirements as to qualifying the expert, the form of the testimony, the materials the expert may rely on in forming an opinion, and the like. As permitted by such rules, parties may also introduce expert evidence on such matters as the range of professional opinion on a legal issue resolved by a lawyer, issues of causation, and damages.

h. Confidential information. Information relevant to a claim of lack of care, or to another issue in a professional-negligence or breach-of-fiduciary-duty case, may comprise material that a lawyer normally is required to keep confidential, including material protected by the attorney-client privilege or the work-product doctrine (see Chapter 5). A plaintiff who is a client or former client can waive those requirements and protections (see §§ 62, 78, & 91). A lawyer defending against a negligence or breach-of-fiduciary-duty action may use or disclose such material to the extent that the lawyer reasonably believes necessary to the defense (see §§ 41, 64, 80, 83, & 92). A nonclient plaintiff (see § 51) may obtain material protected by the attorney-client privilege only to the extent that an exception to that privilege applies. (As to work-product protection, see § 92.)

REPORTER'S NOTE

Comment b. Competence. For varying formulations of the duty, see, e.g., Smith v. Lewis, 530 P.2d 589 (Cal. 1975) ("such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise"); Mayol v. Summers, Watson & Kimpel, 585 N.E.2d 1176 (Ill.App.Ct. 1992) (liability "when the combined wisdom of the bar is that a reasonably competent attorney would not have exercised his or her judgment in that manner"); Fishman v. Brooks, 487 N.E.2d 1377 (Mass.1986) ("the degree of care and skill of the average qualified practitioner" unless lawyer holds self out as specialist); Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992) ("reasonable knowledge, skill, and diligence"); Martinson Bros. v. Hjellum, 359 N.W.2d 865 (N.D.1985) ("that degree of skill, care, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in the State"); 2 R. Mallen & J. Smith, Legal Malpractice §§ 18.2 & 18.3 (4th ed.1996); 2 id. § 183 at 558 ("The ultimate test of competence is reasonable conduct, which is determined by the standard of care that requires the exercise of skill and knowledge ordinarily possessed by attorneys under similar circumstances.") (emphasis in original).

On a lawyer's not warranting success, in the absence of specific undertaking to the contrary, see § 55, Comment c, and Reporter's Note thereto. On absence of liability when a lawyer employing proper competence and diligence exercises judgment differently from the way some other lawyers would, see, e.g., Goldstein v. Lustig, 507 N.E.2d 164 (Ill. App.Ct.1987) (advising client as to whether to resign or wait to be discharged, when there were considerations supporting each course); Simko v. Blake, 532 N.W.2d 842 (Mich.1995) (failure to call witnesses because lawyer thought their testimony would not help client); Rosner v. Paley, 481 N.E.2d 553, 554 (N.Y.1985) (selecting one among several reasonable courses of action does not constitute malpractice); Halvorsen v. Ferguson, 735 P.2d 675 (Wash.Ct.App.1986) (choosing which legal theory to emphasize at hearing).

Some decisions, but not this Section, categorically exempt from liability a lawyer acting in good faith in litigation situations, apparently regardless of negligence. See, e.g., Hudson v. Windholz, 416 S.E.2d 120 (Ga.Ct.App.1992); Cook v. Connolly, 366 N.W.2d 287 (Minn.1985); cf. Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, 1348 (Pa.), cert. denied, 502 U.S. 867, 112 S.Ct. 196, 116 L.Ed.2d 156 (1991) (in view of state policy favoring settling litigation, former client's claim of lawyer's negligence in settling claim in behalf of client barred unless client can show actionable fraud by lawyer). Contra, e.g., Builders Square, Inc. v. Saraco, 868 F.Supp. 748 (E.D.Pa.1994) (distinguishing *Muhammad*, supra, lawyer may be liable to client for failure to communicate settlement offer); Smith v. Lewis, 530 P.2d 589 (Cal.1975) (advice as to unsettled legal issue); Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. 1992) (advising settlement); Bobbitt v. Weeks, 774 S.W.2d 638 (Tex.1989) (reversible error to instruct jury that lawyer was not negligent for good-faith honest belief that acts in litigation were well founded and in best interests of client); C. Wolfram, Modern Legal Ethics 216–17 (1986) (criti-

cizing good-faith formulations). Compare Rondel v. Worsley, [1967] 3 A.E.R. 993 (Eng.) (H.L.1967) (barrister not liable for malpractice to client), with Saif Ali v. Sidney Mitchell & Co., [1978] 3 W.L.R. 849 (Eng.) (H.L.1978) (barrister liable for negligent advice on choice of defendant).

On the ordinary statewide standard of competence, see Kellos v. Sawilowsky, 325 S.E.2d 757 (Ga.1985) (either statewide standard or standard of the legal profession generally is acceptable); Klein v. Greenwood, 450 N.W.2d 738 (N.D.1990); Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E.2d 612 (S.C.1996); Cleckner v. Dale, 719 S.W.2d 535 (Tenn.Ct.App.1986); Russo v. Griffin, 510 A.2d 436 (Vt.1986); Cook, Flanagan & Berst v. Clausing, 438 P.2d 865 (Wash.1968); 2 R. Mallen & J. Smith, supra § 18.5. But see La. Rev. Stat. tit. 6 § 1352(A) (adopting locality rule for lawyers and accountants for federally insured financial institutions). The application of a nationwide standard for fields in which uniformity is appropriate, such as federal tax law, securities law, patent law, and bankruptcy law, is favorably discussed in the *Russo* case and Mallen & Smith treatise. See also Walker v. Bangs, 601 P.2d 1279 (Wash.1979) (not reaching this issue, but admitting expert testimony on care required in maritime litigation from a lawyer not admitted in the state but with maritime and other litigation experience elsewhere). On the obsolescence of the locality standard in medical-malpractice litigation, see, e.g., Logan v. Greenwich Hospital Assoc., 465 A.2d 294 (Conn.1983); Shilkret v. Annapolis Emergency Hospital Assoc., 349 A.2d 245 (Md.1975) (reviewing cases); Paintiff v. City of Parkersburg, 345 S.E.2d 564 (W.Va.1986); Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 L. & Contemp. Probs. 5, 23 (1986).

Comment c. Diligence. On the exercise of diligence, see, e.g., Anderson v. Hall, 755 F.Supp. 2 (D.D.C.1991) (supervision of associate); Aloy v. Mash, 696 P.2d 656 (Cal.1985) (reasonable legal research and analysis); Singleton v. Stegall, 580 So.2d 1242 (Miss.1991) (reasonable promptness); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis.1985) (reasonable factual investigation). The requirement of diligence is also frequently discussed in authority cited in the Reporter's Note to Comment *b*, supra.

Comment d. Similar circumstances. On the duty of a lawyer who is held out to be a specialist in an area of law to meet the standard of those who so specialize, see FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir.1992), rev'd on other grounds, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); Wright v. Williams, 121 Cal.Rptr. 194 (Cal.Ct. App.1975) (admiralty law); Rodriguez v. Horton, 622 P.2d 261 (N.M.Ct.App. 1980) (workers' compensation); Walker v. Bangs, 601 P.2d 1279 (Wash. 1979); Duffey Law Office, S.C. v. Tank Transp., Inc., 535 N.W.2d 91 (Wis.Ct.App.1995) (labor and pension-fund law). See also Horne v. Peckham, 158 Cal.Rptr. 714 (Cal.Ct.App. 1979) (lawyer not specializing in tax law must refer client to specialist, consult specialist, or provide care and skill of specialist); 1 R. Mallen & J. Smith, Legal Malpractice § 18.4 (4th ed.1996). But see Battle v. Thornton, 646 A.2d 315 (D.C.1994) (no special standard for defending Medicaid fraud cases, which no jurisdiction recognizes as specialty for advertising purposes); Hizey v. Carpenter, 830

P.2d 646 (Wash.1992) (no abuse of discretion to deny jury instruction on real-estate specialists).

Comment e. Suit by a nonclient. See Fortson v. Winstead, McGuire, Sechrest & Minick, 961 F.2d 469 (4th Cir.1992) (lawyer providing opinion letter not required to ensure client's disclosure of other facts not relevant to that letter); Geaslen v. Berkson, Gorov & Levin, Ltd., 581 N.E.2d 138 (Ill.Ct.App.1991) (similar), aff'd in part & rev'd in part on other grounds, 613 N.E.2d 702 (Ill.1993); Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood, 605 N.E.2d 318 (N.Y.1992) (lawyer not liable beyond scope of opinions set forth in opinion letter). See § 51, Comment *f*, and Reporter's Note thereto.

Comment f. Rules and statutes. On the admissibility of professional rules as evidence of the standard of care, see Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.), cert. denied, 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980) (conflicts rules); Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir.1988) (violation not negligence per se but witness could testify about it); Elliott v. Videan, 791 P.2d 639 (Ariz.Ct.App.1989) (court's instruction may describe rules and state that jury may consider them as evidence); Mirabito v. Liccardo, 5 Cal. Rptr.2d 571 (Cal.Ct.App.1992) (witness may rely on rules to establish content of fiduciary duties; jury instruction may be patterned on them); Waldman v. Levine, 544 A.2d 683 (D.C.1988) (witness may testify to considering rules in determining standard of care); Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719 (Ga.1995) (trier may consider rules with other circumstances); Mayol v. Summers, Watson & Kimpel, 585 N.E.2d 1176 (Ill.App.Ct.1992) (jury instruction may quote rules and state that their violation may be considered as evidence); Fishman v. Brooks, 487 N.E.2d 1377 (Mass.1986) (in forming opinion on standard of care, witness may rely on violation of rule intended to protect one in plaintiff's position; jury should be told of rule in charge, not testimony); Lipton v. Boesky, 313 N.W.2d 163 (Mich.Ct. App.1981) (rule violation rebuttable evidence of malpractice); Albright v. Burns, 503 A.2d 386 (N.J.Super.App.Div.1986) (rules set minimum standard of competence; violation is evidence of malpractice; directed verdict for defendant improperly granted); Booher v. Frue, 394 S.E.2d 816 (N.C.Ct.App.1990); Martinson Bros. v. Hjellum, 359 N.W.2d 865 (N.D. 1985) (rule violation merely constituted evidence of malpractice; judge's finding of fact for defendant not clearly erroneous); Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E.2d 612 (S.C.1996) (error to exclude expert testimony on rules intended to protect one in plaintiff's position); see Krischhaum v. Dillon, 567 N.E.2d 1291 (Ohio 1991) (will challenge; rule violation admissible to show lawyer's undue influence but evidence that lawyer was disciplined properly excluded); Kidney Assoc. of Oregon, Inc. v. Ferguson, 843 P.2d 442 (Or.1992) (whether lawyer violated rules relevant but not conclusive to whether lawyer violated fiduciary duty so that fee should be reduced by court); Braunmer v. Taylor, 338 S.E.2d 207 (W.Va.1985) (bank officer who supervised signing of will codicil; unauthorized practice constitutes prima facie proof of negligence); 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.1:201 (1991); Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability

in Civil Litigation, 30 S.C. L. Rev. 281 (1979); Annot., 111 A.L.R. Fed. 403 (1993) (admissibility in criminal prosecution). But see Ala. Code § 6–5–578 (effort to comply with rules admissible only in defense), applied, Ex parte Toler, 710 So.2d 415 (Ala. 1998); Orsini v. Larry Moyer Trucking, Inc., 833 S.W.2d 366 (Ark.1992) (exclusion of copy of rule not error); Bross v. Denny, 791 S.W.2d 416 (Mo. Ct.App.1990) (lawyer's reference to rules error but harmless here); Hizey v. Carpentor, 830 P.2d 646 (Wash. 1992) (witness may rely on rules in forming opinion, but they should not be mentioned to jury in testimony or instructions), but compare Eriks v. Denver, 824 P.2d 1207 (Wash.1992) (violation of rules and fiduciary duty warrants disgorgement of fee); cf. Lazy Seven Coal Sales v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991) (expert evidence that lawyer violated code not enough by itself to go to jury in absence of testimony of violation of standard of care); but compare Roy v. Diamond, 16 S.W.3d 783 (Tenn. Ct. App.1999) (proper in malpractice action based on same events to introduce evidence formerly introduced at disciplinary hearing at which lawyer was disbarred for violation of code).

Some authorities state that rules define professional duties as a matter of law. Nolan v. Foreman, 665 F.2d 738 (5th Cir.1982); Avianca, Inc. v. Corriea, 705 F.Supp. 666, 679 (D.D.C. 1989), aff'd mem., 70 F.3d 637 (D.C.Cir.1995); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.Ct.App.1988); Griva v. Davison, 637 A.2d 830 (D.C.1994); Mayol v. Summers, Watson & Kimpel, 585 N.E.2d 1176 (Ill.App.Ct.1992); Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987) (expert testimony as to standards not required); cf. Crawford v. Logan, 656 S.W.2d 360 (Tenn.1983) (when lawyer violates rules to client's harm, court may require total or partial fee forfeiture); Luban, Ethics and Malpractice, 12 Miss. C. L. Rev. 151 (1991).

On the other hand, proof of violation of a professional rule does not by itself give rise to a cause of action or, by itself, make out a violation of the applicable duty of care. E.g., Pressley v. Farley, 579 So.2d 160 (Fla.Dist.Ct. App.1991) (rule violations not negligence per se, although admissible as some evidence of negligence); Hill v. Willmott, 561 S.W.2d 331 (Ky.Ct.App. 1978) (rule violation gives rise to no claim by opposing litigant); Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 750 P.2d 118 (N.M.1988) (similar); Peck v. Meda-Care Ambulance Corp., 457 N.W.2d 538 (Wis.Ct. App.1990) (that lawyer testified for client in case in which lawyer represented client not negligence per se); Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990) (lessor has no claim for rule violation by lessee's lawyer). Contra, Shaw v. Everett, 582 So.2d 195 (La. Ct.App.1988) (recognizing cause of action for negligent rule violation), but compare La. Rev. Stat. § 6:1352(B) (failure to comply with professional rules not malpractice per se) (enacted 1991).

The introductory Scope section to the ABA Model Rules of Professional Conduct (1983) states: "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability...." (Id.

¶ [18].) This does not comment on, and is not inconsistent with, the use of rules as evidence of violation of an existing duty of care. The Preliminary Statement to the ABA Model Code of Professional Responsibility (1969) states: "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct."

On the impact of violation of a statute, see Rubin v. Green, 847 P.2d 1044 (Cal.1993) (lawyer is privileged by litigation-privilege statute against claim of opposing party that lawyer solicited suit in violation of statute, but others may have statutory cause of action); Tingle v. Arnold, Cate & Allen, 199 S.E.2d 260 (Ga.Ct.App. 1973) (opposing party has no claim for solicitation of suit in violation of statute); Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840 (Or.1981) (opposing litigant has no claim for lawyer's violation of statutory oath); Newton v. Cox, 878 S.W.2d 105 (Tenn.1994), cert. denied, 513 U.S. 869, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994) (client has claim for recovery of fee over statutory maximum); Brammer v. Taylor, 338 S.E.2d 207 (W.Va.1985) (unauthorized practice of law prima facie proof of negligence); cf. Humphers v. First Interstate Bank, 696 P.2d 527 (Or.1985) (physician liable for disclosing, in violation of statute, identity of mother who gave child for adoption). Compare Restatement Third, Torts: Products Liability § 4 (noncompliance with governmental safety regulation renders product defective; compliance is properly considered but does not preclude finding of defect).

For statutes expressly creating lawyer liability, see, e.g., 28 U.S.C. § 1927 (court may hold lawyer who vexatiously multiplies proceedings liable for resulting expenses); La. Stat. Ann. § 37:217 (lawyer liable to client for damages when nonsuit entered through lawyer's neglect); N.D.C.C. § 27-13-08 (treble damages for lawyer deceit or collusion or willful delay of client); N.Y. Judic. L. § 487 (treble damages for deceit or collusion); Tex. Civ. Stats. art. 317 (lawyer retaining client's property liable for amount withheld plus 10%–20% damages).

Comment g. Expert testimony. On the usual need for expert testimony, see, e.g., Geiserman v. MacDonald, 893 F.2d 787 (5th Cir.1990); Barth v. Reagan, 564 N.E.2d 1196 (Ill.1990); Pongonis v. Saab, 486 N.E.2d 28 (Mass.1985); Carlson v. Morton, 745 P.2d 1133 (Mont.1987) (expert required unless misconduct so obvious that no reasonable juror could fail to comprehend breach, as when lawyer fails to appear in court, does not file suit within limitations period, fails to notify client of withdrawal, etc.); Cleckner v. Dale, 719 S.W.2d 535 (Tenn.Ct.App.1986) (error for judge to exclude expert testimony and charge jury on standard). For situations where expert testimony was held unnecessary, see, e.g., Wagenmann v. Adams, 829 F.2d 196 (1st Cir.1987) (doing nothing to prevent sane client's commitment); Collins v. Greenstein, 595 P.2d 275 (Haw.1979) (failure to raise affirmative defense); Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995) (reporting same tract of land twice in death-tax return); Jarnagin v. Terry, 807 S.W.2d 190 (Mo. Ct.App.1991) (failure to follow instructions of husband and wife as to content of their separation agreement); Rizzo v. Haines, 555 A.2d 58

(Pa.1989) (failure to communicate settlement offer to client and engaging in improper financial transaction with client); Olfe v. Gordon, 286 N.W.2d 573 (Wis.1980) (failure to obey client's instructions to obtain first mortgage security). See generally 4 R. Mallen & J. Smith, Legal Malpractice § 32.16 (4th ed.1996); Ambrosio & McLaughlin, The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases, 61 Temple L. Rev. 1351 (1988); Brewer, Expert Witness Testimony in Legal Malpractice Cases, 45 S.C. L. Rev. 727 (1994); Annot., 14 A.L.R.4th 170 (1982).

§ 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:

a. Scope and cross-references. Legal-malpractice actions (for negligence under § 48 and for fiduciary breach under § 49) are subject to generally applicable principles of causation and damages. Those are set forth in Restatement Second, Torts §§ 430–461 and 901–932. The term "legal cause" is defined in Restatement Second, Torts § 9 and is equivalent to "proximate cause."

As with the rest of this Chapter, this Section does not consider remedies other than damages, such as atterney-fee forfeiture (see § 37), fee reduction (see §§ 34 & 39), litigation sanctions (§ 110), and professional discipline (see § 5). For restitutionary, injunctive, and declaratory relief, see §§ 6 and 55(2).

The Comment on this Section sets forth certain general principles generally applicable to negligence (see § 48) and fiduciary-breach (see § 49) litigation. The Section presupposes that the defendant lawyer in a malpractice case owes a duty of care to the plaintiff (see §§ 50 & 51), has been found not to have provided such care (see § 52), and has no defense (see § 54). Likewise, in a breach-of-fiduciary-duty case the Section presupposes that the defendant lawyer has committed a breach of fiduciary duties owed to the plaintiff client (§ 49) and has no defense. On the application of this Section to breach-of-fiduciary-duty cases, see § 49, Comment *e*.

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*.

Illustration:

1. Plaintiff retains Lawyer to bring a contract action seeking to recover $40,000, at a fee of $150 per hour. After working 10 hours, Lawyer withdraws without cause just before the trial. As a result, Plaintiff's case is dismissed with prejudice. When Plaintiff then sues Lawyer for malpractice and shows that Plaintiff would have prevailed in the contract action but for Lawyer's withdrawal, Plaintiff is entitled to recover $40,000. Lawyer is not entitled to deduct either attorney fees for hours devoted to the case before the withdrawal or hours that would have been devoted to the trial, for both were forfeited by Lawyer's improper and harmful withdrawal (see §§ 37 & 40, 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. See Restatement Second, Judgments §§ 27–29. Some jurisdictions hold public defenders immune from malpractice suits.

e. Nonlitigated matters. Generally applicable principles of causation and damages apply in malpractice actions arising out of a nonlitigated matter. When a lawyer is subject to liability to a nonclient under § 51(2) for negligence in preparing an opinion letter on which the nonclient reasonably relied, recovery is ordinarily governed by the causation and damages rules applicable to negligent misrepresentation actions, unless the lawyer has undertaken greater responsibility to the nonclient (see Restatement Second, Torts § 552B).

f. Attorney fees as damages. Like other civil litigants, the winning party in a malpractice action ordinarily cannot recover its attorney fees and other expenses in the malpractice action itself, except to

the limited extent that the jurisdiction allows the recovery of court costs. The rule barring fee recovery has exceptions, which may be applicable in a malpractice action in appropriate circumstances. For example, many jurisdictions allow recovery of attorney fees against a plaintiff or defendant that litigates in bad faith (see also § 110, Comment *g* (litigation sanctions)).

The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred outside the malpractice action itself as a result of a lawyer's misconduct. For example, if a lawyer's negligent title search causes a client to buy land with an unclear title and as a result to incur legal expenses defending the title against a challenger, the client may recover those expenses from the negligent lawyer.

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.

i. Joint and several liability; contribution; claims against successor counsel. The principles of joint and several or several liability generally applicable to negligence actions apply to professional-negligence and fiduciary-breach actions (see Chapter 4, Introductory Note). If, for example, a seller and the seller's lawyer both participate in negligent misrepresentations to a buyer, and if the lawyer owes a duty of care to the buyer under § 51(2), general principles of law make the seller and lawyer jointly and severally liable for resulting damages. See also § 56, Comment *d* (liability for advising and assisting clients);

Restatement Second, Torts §§ 875–886B. Generally applicable law also governs whether one tortfeasor who has been held liable can obtain contribution or indemnity from another. On a client's obligation to indemnify a lawyer for liabilities to which the client has exposed the lawyer without the lawyer's fault, see § 17(2). On vicarious liability of law firms and their partners for certain torts of firm lawyers, see § 58.

When the damage caused by the negligence or fiduciary breach of a lawyer is increased by the negligence or fiduciary breach of successor counsel retained by the client, the first lawyer is liable to the client for the whole damage if the conditions set forth in Restatement Second, Torts § 447 are satisfied. The successor lawyer is also directly liable to the client for damage caused by that lawyer's negligence or fiduciary breach. The first lawyer, however, may not seek contribution or indemnity from the successor lawyer in the same action in which the successor lawyer represents the client, for that would allow the first lawyer to create or exacerbate a conflict of interest for the second lawyer and force withdrawal of the second lawyer from the action. The first lawyer may, however, dispute liability in the negligence or fiduciary breach action for the portion of the damages caused by the second lawyer on the ground that the conditions of Restatement Second, Torts § 447 are not satisfied. The client may then choose whether to accept the possibility of such a reduction in damages or to assert a second claim against successor counsel, with the resultant necessity of retaining a third lawyer to proceed against the first two. Regardless of whether the client asserts a second claim, such three-sided disputes may raise problems involving client confidences (see § 52, Comment *h*), conflicts of interest (see § 125), lawyer duties of disclosure (see § 20, Comment *c*), and lawyer witnesses (see § 108) that require lawyers and judges to act carefully to protect the rights of clients and lawyers.

REPORTER'S NOTE

Comment b. Action by a civil litigant: loss of a judgment. On the "trial within a trial," see, e.g., Winskunas v. Birnbaum, 23 F.3d 1264 (7th Cir. 1994) (summary-judgment context); Honeywell, Inc. v. American Standards Testing Bureau, Inc., 851 F.2d 652 (3d Cir.), cert. denied, 488 U.S. 1010, 109 S.Ct. 795, 102 L.Ed.2d 787 (1989) (discussing use of expert testimony to establish what result should have been); Glencore, Ltd. v. Ince, 972 P.2d 376 (Utah 1998) (issue is how case should have been decided, not what would in fact have happened); Vahila v. Hall, 674 N.E.2d 1164 (Ohio 1997) (seemingly rejecting traditional requirement); Lewandowski v. Continental Cas. Co., 276 N.W.2d 284 (Wis.1979); 3 R. Mallen & J. Smith, Legal Malpractice § 29.13 (4th ed.1996); C. Wolfram, Modern Legal Ethics 218–22 (1986); Annot., 90 A.L.R.4th 1033 (1991). On the sub-

mission to the jury of the question whether the plaintiff would have prevailed and the prohibition of testimony by the judge who would have heard the original case, see, e.g., Justice v. Carter, 972 F.2d 951 (8th Cir. 1992); Phillips v. Clancy, 733 P.2d 300 (Ariz.Ct.App.1986); Pickett, Houlon & Berman v. Haislip, 533 A.2d 287 (Md. Ct.Spec.App.1987); Chocktoot v. Smith, 571 P.2d 1255 (Or.1977) (jury decides issues of fact, even those that would have been tried by judge in defective first suit, but not issues of law); Brust v. Newton, 852 P.2d 1092 (Wash.Ct.App.1993); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis.1985). There is a similar requirement that a client whose lawyer has negligently failed to appeal must show that the client would have prevailed on appeal in order to recover from the lawyer the sum which plaintiff would have received had the appeal prevailed; whether the client would have prevailed on appeal is decided by the court as a matter of law. See, e.g., Oteiza v. Braxton, 547 So.2d 948 (Fla.Dist.Ct.App.1989); Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773 (Mich.1994); Goldstein v. Kaestner, 413 S.E.2d 347 (Va. 1992); Daugert v. Pappas, 704 P.2d 600 (Wash.1985).

On recovery for "loss of a chance," see Singleton v. Stegall, 580 So.2d 1242 (Miss.1991) (declining to dismiss on pleadings); Kitchen v. Royal Air Force Assoc., [1958] 1 W.L.R. 563 (C.A.) (Eng.); J. Hamelin & A. Damien, Les Regles de la Profession d'Avocat 548–49 (7th ed.1992) (France); Comment, Loss of Chance in Legal Malpractice, 61 Wash. L. Rev. 1479 (1986). Contra, Daugert v. Pappas, 704 P.2d 600 (Wash.1985); Sheppard v. Krol, 578 N.E.2d 212 (Ill.App.Ct.1991). For such recovery in suits against physicians and hospitals for medical malpractice, see, e.g., Perez v. Las Vegas Medical Center, 805 P.2d 589 (Nev.1991); Scafidi v. Seiler, 574 A.2d 398 (N.J.1990) (citing authorities).

On recovery for failure to settle, see Moores v. Greenberg, 834 F.2d 1105 (1st Cir.1987) (lawyer did not transmit settlement offer to client); Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992); McConwell v. FMG, Inc., 861 P.2d 830 (Kan.Ct.App.1993) (failure to inform clients or negotiate actively, but no proximate cause when client did not show that an acceptable offer was or would have been made); 3 R. Mallen & J. Smith, supra § 29.38. Compare Schlomer v. Perina, 485 N.W.2d 399 (Wis.1992) (rejecting as speculative claim of harm resulting from negligent delay in settling). On recovery for negligently inadequate settlement, see Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, 646 A.2d 195 (Conn.1994); Fishman v. Brooks, 487 N.E.2d 1377 (Mass.1986); Cook v. Connolly, 366 N.W.2d 287 (Minn.1985); Malfabon v. Garcia, 898 P.2d 107 (Nev.1995); Ziegelheim v. Apollo, 607 A.2d 1298 (N.J.1992); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis.1985); 3 R. Mallen & J. Smith, Legal Malpractice, supra; Annot., 87 A.L.R.3d 168 (1978); cf. Weiss v. Manfredi, 639 N.E.2d 1122 (N.Y.1994). Contra, Muhammad v. Strassburger, McKenna, Messer, Shilobod, & Gutnick, 587 A.2d 1346 (Pa.), cert. denied, 502 U.S. 867, 112 S.Ct. 196, 116 L.Ed.2d 156 (1991) (no liability for negligent settlement in absence of fraud by lawyer), limited in McMahon v. Shea, 688 A.2d 1179 (Pa. 1997) (liability for negligent advice on terminibility of support payments under settlement); see McKay v. Owens,

937 P.2d 1222 (Id.1997) (client estopped from suing lawyer on grounds she explicitly contradicted before settlement court). On damages other than the loss of the case, see Spering v. Sullivan, 361 F.Supp. 282 (D.Del. 1973) (costs of attempt to reinstate original claim); Salley v. Childs, 541 A.2d 1297 (Me.1988) (emotional distress of defendant who lost suit; but see Comment *h*); McInnis v. Hyatt Legal Clinics, 461 N.E.2d 1295 (Ohio 1984) (loss of business caused by lawyer's use of service by publication in violation of client instructions); Annot., 90 A.L.R.4th 1033 (1991).

On the burden of proving uncollectibility of the judgment in the original suit, compare Smith v. Haden, 868 F.Supp. 1 (D.D.C.1994) (defendant lawyer has burden of proving judgment in underlying case uncollectible); Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20 (Alaska 1998) (same); Jourdain v. Dineen, 527 A.2d 1304 (Me.1987) (same); Teodorescu v. Bushnell, Gage, Reizen & Byington, 506 N.W.2d 275 (Mich.Ct.App. 1993) (same); Hoppe v. Ranzini, 385 A.2d 913 (N.J.Super.Ct.App.Div.1978) (same); Kituskie v. Corbman, 714 A.2d 1027 (Pa.1998) (same), with, e.g., Klump v. Duffus, 71 F.3d 1368 (7th Cir.1995), cert. denied, 518 U.S. 1004, 116 S.Ct. 2523, 135 L.Ed.2d 1047 (1996) (plaintiff's burden); Jernigan v. Giard, 500 N.E.2d 806 (Mass.1986) (same, unless lawyer's negligence made proof of collectibility more difficult); Eno v. Watkins, 429 N.W.2d 371 (Neb.1988) (same); 3 R. Mallen & J. Smith, supra § 29.13 (same), with Wagner v. Tucker, 517 F.Supp. 1248 (S.D.N.Y.1981) (lawyer has burden of producing evidence of uncollectibility, after which plaintiff has burden of persuading trier of collectibility); Fernandes v. Barrs, 641 So.2d 1371 (Fla.Dist.Ct.App.1994) (lawyer has burden when lawyer's negligence makes it impossible for plaintiff to prove collectibility).

Comment c. Action by a civil litigant: attorney fees that would have been due. The approaches taken by courts have varied considerably. Compare, e.g., Kane, Kane & Kritzer, Inc. v. Altagen, 165 Cal.Rptr. 534 (Cal.Ct.App.1980) (no deduction of fees); McCafferty v. Musat, 817 P.2d 1039 (Colo.Ct.App.1990) (same); Winter v. Brown, 365 A.2d 381 (D.C.1976) (same); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (same); Campagnola v. Mulholland, Minion & Roe, 555 N.E.2d 611 (N.Y.1990) (same), with, e.g., Moores v. Greenberg, 834 F.2d 1105 (1st Cir. 1987) (allowing deduction, but noting that lawyer had done work to earn fee); Sitton v. Clements, 257 F.Supp. 63 (E.D.Tenn.1966), aff'd, 385 F.2d 869 (6th Cir.1967) (allowing deduction), overruled by Foster v. Duggin, 695 S.W.2d 526 (Tenn.1985); Childs v. Comstock, 74 N.Y.S. 643 (N.Y.App. Div.1902) (same), overruled by Campagnola v. Mulholland, Minion & Roe, supra; 2 R. Mallen & J. Smith, Legal Malpractice § 19.18 (4th ed.1996) (approving this approach), with Jenkins v. St. Paul Fire & Mar. Ins. Co., 393 So.2d 851 (La.Ct.App.1981), aff'd in other respects, 422 So.2d 1109 (La. 1982) (plaintiff may recover excess of attorney fees in malpractice suit over those that would have been due in previous suit); Saffer v. Willoughby, 670 A.2d 527 (N.J.1996) (court may deduct fee in exceptional case; plaintiff recovers legal costs of malpractice action itself); Foster v. Duggin, supra (lawyer may receive credit for expenses benefiting client); cf. FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir.1992), rev'd on other

grounds, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (successful malpractice plaintiff may obtain restitution of attorney fees already paid).

Comment d. Action by a criminal defendant. Compare, e.g., Glenn v. Aiken, 569 N.E.2d 783 (Mass.1991) (defendant must show innocence); State ex rel. O'Blennis v. Adolf, 691 S.W.2d 498 (Mo.Ct.App.1985) (same); Wiley v. San Diego County, 966 P.2d 983 (Cal.1998) (same); Moore v. Owens, 698 N.E.2d 707 (Ill.App.Ct.1998) (same); Carmel v. Lunney, 511 N.E.2d 1126 (N.Y.1987) (defendant must allege colorable claim of innocence); Morgano v. Smith, 879 P.2d 735 (Nev.1994) (same); Harris v. Bowe, 505 N.W.2d 159 (Wis.Ct.App. 1993) (defendant must prove innocence, which guilty plea precludes), with, e.g., Williams v. Callaghan, 938 F.Supp. 46 (D.D.C.1996) (defendant must show result would have been different but for malpractice); Hines v. Davidson, 489 So.2d 572 (Ala.1986) (defendant must show he would have been acquitted but for malpractice); Fischer v. Longest, 637 A.2d 517 (Md.Ct.Spec.App.1994) (defendant may recover for collateral harm such as failure to release on bail); Cooper v. Simon, 719 S.W.2d 463 (Mo.Ct.App. 1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3194, 96 L.Ed.2d 681 (1987) (defendant must show result would have been different); cf. Levine v. Kling, 123 F.3d 580 (7th Cir.1997) (innocence must be shown when defendant claims he would have been acquitted but for malpractice, but not when defendant challenges failure to press defense such as double jeopardy); Shaw v. State, 861 P.2d 566 (Alaska 1993) (lawyer may raise client's guilt as defense).

Most jurisdictions allow a criminal defendant to sue for legal malpractice only after having the underlying criminal conviction set aside, on appeal or by collateral attack. That position is reflected in the Comment, but two of the Reporters disagree, believing that ordinary principles of causation should apply. Cases consistent with the Comment are: Shaw v. State, supra; Kramer v. Dirksen, supra; Carmel v. Lunneyu, supra; Steele v. Kehoe, 747 So.2d 931 (Fla. 1999); Stevens v. Bispham, 851 P.2d 556 (Or.1993); Bailey v. Tucker, 621 A.2d 108 (Pa.1993) (also requiring that lawyer acted recklessly); Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex.1995); Adkins v. Dixon, supra; see Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (Civil Rights Act suit against police and prosecutors for unconstitutional state conviction subject to habeas corpus requirement of exhaustion of state remedies). Contra, Williams v. Callaghan, supra; Silvers v. Brodeur, 682 N.E.2d 811 (Ind.Ct. App.1997); Gebhardt v. O'Rourke, 510 N.W.2d 900 (Mich.1994); Duncan v. Campbell, 936 P.2d 863 (N.M.Ct.App. 1997) (dictum); Kralm v. Kinney, 538 N.E.2d 1058 (Ohio 1989); cf. Glenn v. Aiken, 569 N.E.2d 783 (Mass.1991) (conviction need not have been set aside for inadequate assistance of counsel).

Collateral relief is not required when it is unavailable, for example because the malpractice plaintiff does not challenge the conviction. Fischer v. Longest, 637 A.2d 517 (Md. Spec.Ct.App.1994) (where claim is limited to damages from malpractice that caused pretrial detention, no need to have later conviction set aside) (dictum); see Bowman v. Doherty, 686 P.2d 112 (Kan.1984) (lawyer's negligence caused plaintiff's arrest for nonappearance in court);

Geddie v. St. Paul Fire & Marine Ins. Co., 354 So.2d 718 (La.Ct.App.1978) (plaintiff received 4-year sentence for crime with 2-year maximum and sued after serving sentence). There is sparse and contradictory authority on whether, when collateral relief is a prerequisite to recovery, the statute of limitations starts running only after relief is obtained. Compare Stevens v. Bispham, 851 P.2d 556 (1993) (yes) with Seevers v. Potter, 537 N.W.2d 505 (Neb.1995) (no).

On the issue-preclusion effect of a judgment in a postconviction proceeding on a later malpractice suit, see, e.g., McCord v. Bailey, 636 F.2d 606 (D.C.Cir.1980), cert. denied, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981); Schlumm v. O'Hagan, 433 N.W.2d 839 (Mich.Ct.App.1988); Belford v. McHale Cook & Welch, 648 N.E.2d 1241 (Ind. Ct. App.1995); Adkins v. Dixon, supra.

See generally 3 R. Mallen & J. Smith, Legal Malpractice § 25.3 (4th ed.1996); Koniak, Through the Looking Glass of Ethics and the Wrong with Rights We Find There, 9 Geo. J. Leg. Ethics 1 (1995); Kaus & Mallen, The Misguiding Hand of Counsel–Reflections on "Criminal Malpractice," 21 U.C.L.A. L. Rev. 1191 (1974); Annot., 4 A.L.R.5th 273 (1992). On whether public defenders are immune from malpractice liability, compare, e.g., Dziubak v. Mott, 503 N.W.2d 771 (Minn.1993) (yes), with, e.g., Donigan v. Finn, 290 N.W.2d 80 (Mich.Ct.App. 1980) (no).

Comment e. Nonlitigated matters. See, e.g., Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 833 P.2d 11 (Alaska 1992) (lawyer who failed to comply with statute arguably applicable to adoption liable for costs of defending adoption against challenge); Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983) (lawyer's failure to advise client to disclaim interest in estate rendered lawyer liable for resulting gift taxes); Kushner v. McLarty, 300 S.E.2d 531 (Ga.Ct. App.1983) (lawyer liable for misdrafting contract even though client read it before signing, when meaning was unclear to nonlawyer and lawyer did not explain it); Wartzman v. Hightower Productions Ltd., 456 A.2d 82 (Md. Ct.Spec.App.1983) (when lawyer's malpractice prevented client corporation from selling stock, corporation recovered reliance damages); Tilly v. Doe, 746 P.2d 323 (Wash.Ct.App. 1987) (when seller's lawyer failed to perfect security interest in sold business and buyers defaultod, seller could recover from lawyer by proving collectibility and value the security interest would have had); Hazel & Thomas, P.C. v. Yavari, 465 S.E.2d 812 (Va.1996) (no liability for failing to propose contractual clause without showing that other party would have accepted it); Keistor v. Talbott, 391 S.E.2d 895 (W.Va.1990) (when lawyer's title search for buyer of land failed to reveal that mineral rights had already been conveyed, buyer recovered from lawyer difference between price paid and market value of land without mineral rights); Estate of Campbell v. Chaney, 485 N.W.2d 421 (Wis.Ct.App.1992) (when client settled challenge to prenuptial agreement negligently drafted by lawyer without proper disclosures to prospective spouse, client can recover without proving that challenge would have succeeded).

Comment f. Attorney fees as damages. On the applicability to malpractice suits of the "American Rule" barring recovery of attorney fees expended in the malpractice action itself, see, e.g., Dalo v. Kivitz, 596 A.2d

35 (D.C.1991); Whitney v. Buttrick, 376 N.W.2d 274 (Minn.Ct.App.1985); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988); Kelly v. Foster, 813 P.2d 598 (Wash.Ct.App.1991). But see Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So.2d 851 (La.Ct.App.1981), aff'd, 422 So.2d 1109 (La.1982); Saffer v. Willoughby, 670 A.2d 527 (N.J. 1996). On the recovery of attorney fees and other litigation expenses as damages when a lawyer's malpractice causes the client to incur such expenses in matters other than litigating the malpractice claim, see, e.g., De Pantosa Saenz v. Rigau & Rigau, P.A., 549 So.2d 682 (Fla.Dist.Ct.App. 1989) (lawyer sold client's land at unauthorized low price; client recovers expenses of rescission suit); Ramp v. St. Paul Fire & Marine Ins. Co., 269 So.2d 239 (La.1972) (expenses of setting aside estate settlement improperly advised by lawyer); First Nat'l Bank of Clovis v. Diane, Inc., 698 P.2d 5 (N.M.Ct.App.1985) (lawyer liable for expenses of defending suit to which client was exposed by lawyer's improper advice); Krahn v. Kinney, 538 N.E.2d 1058 (Ohio 1989) (expenses of setting aside default order entered because lawyer did not appear); 2 R. Mallen & J. Smith, Legal Malpractice § 19.6 (4th ed.1996); cf. Glamann v. St. Paul Fire & Mar. Ins. Co., 424 N.W.2d 924 (Wis.1988) (client entitled to fees, including fees on appeal, incurred in legal-malpractice action proving, as case-within-case, lost entitlement to employment-discrimination recovery). See generally Leubsdorf, Recovering Attorney Fees as Damages, 38 Rutgers L. Rev. 439 (1986); D. Dobbs, Handbook on the Law of Remedies 195–97 (1973).

Comment g. Damages for emotional distress. For differing rules about when such damages are recoverable, see, e.g., Wehringer v. Powers & Hall, P.C., 874 F.Supp. 425 (D.Mass.), aff'd, 65 F.3d 160 (1st Cir.1995) (not recoverable when malpractice involves only property rights, in suit for damages for tape recording client's voice); Timms v. Rosenblum, 713 F.Supp. 948 (E.D.Va.1989), aff'd, 900 F.2d 256 (4th Cir.1990) (only when client suffers physical injury or lawyer engaged in intentional and outrageous conduct; not here, where lawyer's negligence and misrepresentations deprived client of custody of children for 2 years); Boros v. Baxley, 621 So.2d 240 (Ala.1993), cert. denied, 510 U.S. 997, 114 S.Ct. 563, 126 L.Ed.2d 463 (1993) (recoverable only for affirmative wrongdoing, not neglect); Pleasant v. Celli, 22 Cal. Rptr.2d 663 (Cal.Ct.App.1993) (not when emotional distress was not foreseeable result of failure to bring timely medical-malpractice action, and lawyer did not act recklessly); Merenda v. Superior Court, 4 Cal. Rptr.2d 87 (Cal.Ct.App.1992) (not when lawyer's negligence causes only injury to economic interest, here the right to recover for sexual battery); Tara Motors v. Superior Court, 276 Cal.Rptr. 603 (Cal.Ct.App.), appeal dism'd, 812 P.2d 563 (Cal.1991) (recoverable when lawyer's negligence causes substantial economic loss); Cummings v. Pinder, 574 A.2d 843 (Del.1990) (recoverable for outrageous and intentional conduct; lawyer stopped payment on settlement check, unilaterally increased fee, failed to give proper advice); Person v. Behnke, 611 N.E.2d 1350 (Ill.App. Ct.1993) (lawyer whose egregious malpractice deprived client of custody of children liable for loss of society but not mental anguish); Salley v. Childs, 541 A.2d 1297 (Me.1988) (recoverable when pecuniary loss also

shown, here temporary suspension of horse-training license); Gore v. Rains & Block, 473 N.W.2d 813 (Mich.Ct. App.1991) (generally recoverable, here when lawyer failed to pursue medical-malpractice claim); Gautam v. DeLuca, 521 A.2d 1343 (N.J.Super.Ct.App.Div.1987) (only in extraordinary circumstances, not for failure to pursue medical-malpractice claim); Hilt v. Bernstein, 707 P.2d 88 (Or.Ct. App.1985) (not for negligence injuring economic interest, here rights in marital property); 2 R. Mallen & J. Smith, Legal Malpractice § 19.11 (4th ed.1996); cf. Person v. Behnke, 611 N.E.2d 1350 (Ill.App.Ct.), cert. denied, 622 N.E.2d 1226 (Ill.1993) (where malpractice led to loss of parental custody, lawyer liable for damages for loss of children's society).

A number of cases have allowed emotional-distress damages for malpractice causing the client's imprisonment, probably because distress is likely and financial damages difficult to prove. E.g., Wagenmann v. Adams, 829 F.2d 196 (1st Cir.1987); Bowman v. Doherty, 686 P.2d 112 (Kan.1984); Singleton v. Stegall, 580 So.2d 1242 (Miss.1991). In other instances, recovery seems to reflect the egregious misconduct of the lawyer as well as the client's harm. E.g., Cummings v. Pinder, 574 A.2d 843 (Del.1990) (lawyer raised fee without notice, stopped check, etc.; punitive damages also allowed); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (lawyer disclosed confidential information to district attorney).

Comment h. Punitive damages. For different formulations of the standard, see, e.g., Cummings v. Pinder, 574 A.2d 843 (Del.1990) (outrageous and intentional conduct); Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988) (actual or legal malice); Arana v. Koerner, 735 S.W.2d 729 (Mo.Ct. App.1987) (reckless indifference); Rodriguez v. Horton, 622 P.2d 261 (N.M.Ct.App.1980) (wanton disregard of client's rights); Patrick v. Ronald Williams, P.A., 402 S.E.2d 452 (N.C.Ct.App.1991) (gross negligence); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988) (oppression, fraud, or malice); 2 R. Mallen & J. Smith, Legal Malpractice § 19.16 (4th ed.1996); Annot., 13 A.L.R.4th 95 (1982); see Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (possible constitutional limits to punitive-damage awards); Bernier v. Burris, 497 N.E.2d 763 (Ill.1986) (upholding constitutionality of legislation eliminating punitive damages for legal and medical malpractice); Bjorgen v. Kinsey, 466 N.W.2d 553 (N.D.1991) (when statute provided for treble damages against lawyer guilty of deceit or collusion, punitive damages not also recoverable). For recovery of punitive damages that a client would have obtained in an underlying action but for a lawyer's malpractice, see Ingram v. Hall, Roach, Johnston, Fisher & Bollman, 1996 WL 54206 (N.D.Ill.1996); Elliott v. Videan, 791 P.2d 639 (Ariz. Ct.App.1989); Merenda v. Superior Court, 4 Cal.Rptr.2d 87 (Cal.Ct.App. 1992); Haberer v. Rice, 511 N.W.2d 279 (S.D.1994); Patterson & Wallace v. Frazer, 79 S.W. 1077 (Tex.Civ.App. 1904); 2 R. Mallen & J. Smith, supra, at § 19.7. Contra, Cappetta v. Lippman, 913 F.Supp. 302 (S.D.N.Y.1996).

Comment i. Joint and several liability; contribution; claims against successor counsel. On the application of general principles of joint and several liability in legal-malpractice actions, see, e.g., Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992) (joint and

several liability of lawyer and insurer in malpractice action arising out of earlier action against insured client); Faier v. Ambrose & Cushing, P.C., 609 N.E.2d 315 (Ill.1993) (settling lawyer entitled to contribution and indemnity from nonsettling codefendant); Arana v. Koerner, 735 S.W.2d 729 (Mo.Ct.App.1987) (similar; settlement with insurer did not release lawyer); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988) (2 lawyers who joined in improper advice jointly and severally liable); Considine Co. v. Shadle, Hunt & Hagar, 232 Cal.Rptr. 250 (Cal.Ct.App.1986) (division of liability between lawyer and client who participated in negligent misrepresentations to third person); Brown v. La Chance, 477 N.W.2d 296 (Wis.Ct.App. 1991) (contribution between 2 lawyers who represented client in same matter); Annot., 20 A.L.R.4th 338 (1983) (lawyer may not obtain contribution from defendant sued in underlying action); § 58, Reporter's Note; cf. Faison v. Nationwide Mortgage Corp., 839 F.2d 680 (D.C.Cir.1987), cert. denied, 488 U.S. 823, 109 S.Ct. 70, 102 L.Ed.2d 46 (1988) (joint and several liability of lawyer and other participants in fraudulent scheme); Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101 (4th Cir.1989) (§ 12(2) of Securities Act of 1933 does not create right of contribution or indemnity, but does not preempt any such right under state law).

On whether a legal-malpractice plaintiff may recover from the originally negligent lawyer an increase in damages caused by negligent successor counsel, see Restatement Second, Torts § 447 (negligence of a second person not a supervening cause if: actor should have realized a second person might so act; a reasonable observer would not regard it as highly extraordinary for a second person so to act; or intervening act was a normal consequence of the situation created by actor's conduct). On whether a lawyer may seek, through impleader, indemnity or contribution from successor counsel, compare, e.g., Austin v. Superior Court, 85 Cal. Rptr.2d 644 (Cal.Ct.App.1999) (no); Waldman v. Levine, 544 A.2d 683 (D.C.1988) (no); Roberts v. Heilgeist, 465 N.E.2d 658 (Ill.App.Ct.1984) (no); Melrose Floor Co. v. Lechner, 435 N.W.2d 90 (Minn.Ct.App.1989) (no); Hughes v. Housley, 599 P.2d 1250 (Utah 1979) (no); 1 R. Mallen & J. Smith, Legal Malpractice § 7.15 (4th ed.1996) (supporting this result), with, e.g., Brown–Seydel v. Mehta, 666 N.E.2d 800 (Ill.App.Ct. 1996) (yes); Maddocks v. Ricker, 531 N.E.2d 583 (Mass.1988) (yes; upholding disqualification of successor counsel, but noting potential for abuse); Hansen v. Brognano, 524 N.Y.S.2d 862 (N.Y.App.Div.1988) (yes; without discussing conflict problem); Costin v. Wick, 1996 WL 27974 (Ohio Ct.App. 1996) (yes); cf. Schauer v. Joyce, 429 N.E.2d 83 (N.Y.1981) (first lawyer may obtain contribution from second lawyer in malpractice suit in which client is represented by third lawyer).

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

(1) 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.

Comment:

a. Scope and cross-references. Subsection (1) of this Section considers defenses to a negligence or fiduciary-breach action. They presuppose that the plaintiff sufficiently establishes a duty owed by defendant to plaintiff (see §§ 16, 50, & 51), the defendant's violation of that duty (see §§ 48 & 52), and resulting damages (see § 53). No attempt is made to consider here every defense that might be available in a legal-malpractice action. For defenses available in actions against lawyers by nonclients, see § 57. On judicial and quasi-judicial immunity, see § 48, Comment *d*. As stated in the Introductory Note to the Chapter, the terms "legal malpractice" and "malpractice" refer to theories of both professional negligence (§ 48) and breach of a fiduciary duty (§ 49).

Subsections (2) and (3) state the circumstances in which settlements of lawyer-liability claims are unenforceable over the objection of the client or former client. Subsection (4) states the broader set of

circumstances in which entering into certain prospective limitations and settlements is impermissible.

b. Prospectively limiting liability. An agreement prospectively limiting a lawyer's liability to a client under §§ 48–54 is unenforceable and renders the lawyer subject to professional discipline. The rule derives from the lawyer codes, but has broader application. Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement (see § 19). The same principles apply also to agreements prospectively waiving the liabilities of lawyers to clients set forth in §§ 33(1), 37, 55, and 56.

However, a lawyer and client may properly take certain measures that may have the effect of narrowing or otherwise affecting the lawyer's liability (se generally § 19 & § 52, Comment *d*). A client and lawyer may agree in advance, subject to §§ 18 and 19, to arbitrate claims for legal malpractice, provided that the client receives proper notice of the scope and effect of the agreement and if the relevant jurisdiction's law applicable to providers of professional services renders such agreements enforceable (see also § 6, Comment *h*; compare § 42, Comment *b(iv)* (fee arbitration)). A lawyer may also obtain liability insurance, protecting against the cost of defending and paying claims for legal malpractice, obtain an indemnity arrangement from an employer, or incorporate (see § 58).

c. Settlement of a client's claim. This Section sets forth two rules concerning settlement of a dispute between a lawyer and a client or former client concerning the lawyer's performance. They supplement the law generally applicable to the settlement of civil disputes.

First, under Subsection (3) the settlement is not enforceable over the objection of the client or former client if it was the product of improper pressure, such as the lawyer's improper refusal to return documents or funds except upon release of the malpractice claim (see §§ 33(1), 45, & 46). This is so even if the client was independently represented, because representation does not necessarily dispel improper pressure.

Even absent improper pressure, such a settlement will not be enforced if the client or former client was not independently represented and, in addition, the settlement was not fair and reasonable to the client or former client. Independent counsel includes a lawyer serving as inside legal counsel. The client or former client may, however, elect to enforce a settlement voidable under this Section.

Second, and regardless of the enforceability of the agreement, under Subsection (4)(b) the lawyer is subject to disciplinary sanctions unless the client or former client was independently represented or the lawyer, before the settlement, informed the client or former client in writing that independent representation was appropriate in connection therewith.

The rules stated in the Section apply because a client or former client may continue to rely on the good faith of the client's lawyer or former lawyer and thus surrender a valid claim for inadequate consideration. Also, many clients without independent representation cannot confront a legally knowledgeable adversary on an equal footing in a situation where their interests directly conflict. Lastly, lawyers should treat clients and former clients fairly and without deriving improper benefit from their knowledge of client confidences or from other advantage (see §§ 16 & 41).

The same rules apply also to settlement of claims against lawyers under §§ 55 and 56 by clients or former clients. For purposes of this Section, a claim includes requests for damages, fee forfeiture (see § 37), or the like but not disputes as to disposition of documents or the amount of a lawyer's fee. (For resolution of fee disputes, see §§ 18(1)(b) & 42.) Whatever the nature of the claim, once a settlement has been implemented in court through such means as entry of a judgment, it can be challenged only as permitted by applicable procedural rules.

d. Comparative and contributory negligence. In jurisdictions in which comparative negligence is a defense in negligence and fiduciary-breach actions generally, it is generally a defense in legal-malpractice and fiduciary-breach actions based on negligence to the same extent and subject to the same rules. The same is true of contributory negligence and comparative or contributory fault generally. See Restatement Second, Torts §§ 463–496; Restatement Second, Agency § 415. (On intentional torts, see § 56.) In appraising those defenses, regard must be had to the special circumstances of client-lawyer relationships. Under fiduciary principles, clients are entitled to rely on their lawyers to act with competence, diligence, honesty, and loyalty (see § 16), and to fulfill a lawyer's duty to notify a client of substantial malpractice claims (see § 20, Comment *c*). The difficulty many clients face in monitoring a lawyer's performance is one of the main grounds for imposing a fiduciary duty on lawyers. Except in unusual circumstances, therefore, it is not negligent for a client to fail to investigate, detect, or cure a lawyer's malpractice until the client is aware or should reasonably be aware of facts clearly indicating the basis for the client's claim (see also Comment *g* hereto). Whether a client should

reasonably be so aware may depend, among other factors, on the client's sophistication in relevant legal or factual matters.

Those considerations are weaker when a nonclient asserts a claim based on a duty of care under § 51. In those circumstances, no fiduciary relationship ordinarily exists. Accordingly, it is often more appropriate to conclude that, under general legal principles, a nonclient has been comparatively or contributorily negligent, for example in unreasonably accepting without investigation a lawyer's representation about facts that are also readily available to the nonclient.

e. Failure to mitigate damages; assumption of the risk. To the extent that applicable law recognizes them in other negligence actions, the partial defense of failure to mitigate damages and the defense of assumption of the risk apply to legal-malpractice claims. However, their availability is subject to considerations of lawyer fiduciary duties and the characteristics of client-lawyer relationships (see generally Comment *d* hereto).

f. In pari delicto. The defense of in pari delicto bars a plaintiff from recovering from a defendant for a wrong in which the plaintiff's conduct was also seriously culpable. To the extent recognized by the jurisdiction for other actions, the defense is available in legal-malpractice actions, subject to consideration of lawyer fiduciary duties and the characteristics of client-lawyer relationships (see generally Comment *d* hereto). The defense is thus available only in circumstances in which a client may reasonably be expected to know that the activity is a wrong despite the lawyer's implicit endorsement of it, for example when a client claims to have followed the advice of a lawyer to commit perjury.

g. Statute of limitations. Claims against a lawyer may give rise to issues concerning statutes of limitations, for example, which statute (contract, tort, or other) applies to a legal-malpractice action, what the limitations period is, when it starts to run, and whether various circumstances suspend its running. Such issues are resolved by construing the applicable statute of limitations. Three special principles apply in legal-malpractice actions, although their acceptance and application may vary in light of the particular wording, policies, and construction of applicable statutes.

First, the statute of limitations ordinarily does not run while the lawyer continuously represents the client in the matter in question or a substantially related matter. Until the representation terminates, the client may assume that the lawyer, as a competent and loyal fiduciary, will deflect or repair whatever harm may be threatened. Cf. §§ 32(2)(a) and 125 (lawyer's duty to withdraw to avoid certain conflicts between lawyer and client interests). That principle does not apply if the client knows or reasonably should know that the lawyer

will not be able to repair the harm, or if client and lawyer validly agree (see Subsection (3) hereto) that the lawyer's continuing the representation will not affect the running of the limitations period.

Second, even when the statute of limitations is generally construed to start to run when the harm occurs, the statute does not start to run against a fiduciary such as a lawyer until the fiduciary discloses the arguable malpractice to the client or until facts that the client knows or reasonably should know clearly indicate that malpractice may have occurred. Until then, the client is not obliged to look out for possible defects (see Comment *d* hereto) and may assume that the lawyer is providing competent and loyal service and will notify the client of any substantial claim (see § 20, Comment *c*).

Third, the statute of limitations does not start to run until the lawyer's alleged malpractice has inflicted significant injury. For example, if a lawyer negligently drafts a contract so as to render it arguably unenforceable, the statute of limitations does not start to run until the other contracting party declines to perform or the client suffers comparable injury. Until then, it is unclear whether the lawyer's malpractice will cause harm. Moreover, to require the client to file suit before then might injure both client and lawyer by attracting the attention of the other contracting party to the problem. Whether significant injury has been inflicted by a lawyer's errors at trial when appeal or other possible remedies remain available is debated in judicial decisions. Compliance with decisions holding that injury occurs prior to affirmance on appeal (or similar unsuccessful outcome) may require that a protective malpractice action be filed pending the outcome of the appeal or other remedy.

h. Lawyer action or inaction required by law or client instructions. A lawyer is not liable under § 48 or § 49 for any action or inaction that the lawyer reasonably believed to be required by law, including applicable professional rules and court orders (see § 50, Comment *e*; § 23). When, for example, a jurisdiction's professional rule requires a lawyer to disclose a client's proposed crime when necessary to prevent death or serious bodily harm (compare § 66), a lawyer who reasonably believes that disclosure is required is not liable to a client for disclosing. Similarly, if the rule forbids disclosure of a client's proposed unlawful act not constituting a crime or fraud, a lawyer who reasonably believes that disclosure is forbidden is not liable to a nonclient under § 51. A client may not recover from a lawyer for any action or inaction that the client, after proper advice, instructed the lawyer to take (see § 21(2) & § 52, Comments *c* & *e*). The defense of reasonable belief that a lawyer's acts were required by law does not, however, apply to a claim against a lawyer for restitution under provisions other than §§ 48 and 49, such as § 55, or based on a

violation of § 60 or § 121. Whether such a defense applies to such claims depends on the general law governing the claim in question.

When a lawyer relies on a professional rule or other legal requirement as a defense, the trier of fact may be informed, by instruction and through testimony, of its content and construction, and an expert witness may rely on that law in forming an opinion whether the lawyer acted with the care required by § 52(1) (see § 52, Comments *f* & *g*). Whether expert testimony is required for a lawyer to raise such a defense is determined by the principles set forth in § 52, Comment *g*.

Professional rules and other law allow but do not require many acts, either by stating that a lawyer may perform them or by not prohibiting them. Although the permissibility of an act under a professional rule does not constitute a defense to liability under § 48 or § 49, a defending lawyer may, when and to the extent provided by § 52(2) and Comment *f* thereto, use the rule to show the care required in the circumstances.

REPORTER'S NOTE

Comment b. Prospectively limiting liability. ABA Model Rules of Professional Conduct, Rule 1.8(h) (1983) states:

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or 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.

The "unless" clause in Rule 1.8(h) was apparently based on the assumption that law in some jurisdictions expressly permitted agreements prospectively limiting malpractice liability. Other than in the senses noted in Comment *b*, no such law exists. Accordingly, Subsection (3) states a general prohibition against such agreements—essentially the rule that would result in every jurisdiction from application of ABA Model Rule 1.8(h).

ABA Model Code of Professional Responsibility, DR 6–102(A) (1969) provides: "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:900 (2d ed.1991); C. Wolfram, Modern Legal Ethics 238–39 (1986); Ass'n Bar City of N.Y. Committee on Professional Responsibility, Developments in the Ethical Rule Governing Limitations of Lawyers' Liability, 45 The Record 693 (1990); Gross, Contractual Limitations on Attorney Malpractice Liability: An Economic Approach, 75 Ky. L.J. 793 (1986–87). For the comparable invalidity of agreements prospectively limiting medical-malpractice liability,

see, e.g., P. Weiler, Medical Malpractice on Trial, ch. 5 (1991); Annot., 6 A.L.R.3d 704 (1966).

E.g., Iowa St. Bar Ass'n Comm. Prof. Ethics v. Hall, 463 N.W.2d 30 (Iowa 1990) (discipline for including "hold-harmless" clause in retainer agreement); In re Carson, 991 P.2d 896 (Kan.1999) (discipline for settling fee dispute with client in return for client's release of lawyer, notwithstanding that client had not previously asserted claim for malpractice); Swift v. Choe, 674 N.Y.S.2d 17 (N.Y.App.Div.1998) (clause in retention agreement asserted by lawyer to preclude later malpractice action could not serve as defense because such would violate lawyer code).

On the enforceability of arbitration clauses covering legal-malpractice claims, see McGuire, Cornwell & Blakey v. Grider, 765 F.Supp. 1048 (D.Colo.1991) (enforcing arbitration clause against sophisticated client with other lawyer); Monahan v. Paine Webber Group, Inc., 724 F.Supp. 224 (S.D.N.Y.1989) (enforcing arbitration clause in employment contract as to malpractice suit against employer's house counsel); Powers v. Dickson, Carlson & Campillo, 63 Cal.Rptr.2d 261 (Cal.Ct.App.1997) (clause enforceable against wealthy client who switched lawyers and renegotiated contract); Lawrence v. Walzer & Gabrielson, 256 Cal.Rptr. 6 (Cal.Ct.App. 1989) (arbitration clause construed not to cover malpractice claim when client not given adequate notice); Haynes v. Kuder, 591 A.2d 1286 (D.C. 1991) (enforcing arbitration agreement entered into prior to D.C. Opinion 211); D.C. Formal Op. 211 (1990) (lawyer may not agree with client to submit any future malpractice claim to arbitration unless client independently represented); S.C. Code Ann. § 15–48–10(b)(3) (arbitration statute does not cover predispute agreement between lawyer and client). Compare Cal. Code Civ. Pro. § 1295 (permitting medical-malpractice arbitration clause if notice is given in required form and patient may rescind prospectively).

For authority on malpractice insurance and compulsory insurance requirements in some jurisdictions, see § 58, Comment *h*, and Reporter's Note thereto.

Comment c. Settlement of a client's claim. See Cohen v. Surrey, Karasik & Morse, 427 F.Supp. 363 (D.D.C. 1977) (upholding release by wealthy and sophisticated clients, one a lawyer, given in exchange for reduction in unpaid fee); Donnelly v. Ayer, 228 Cal.Rptr. 764 (Cal.Ct.App.1986) (upholding release given after client-lawyer relationship ended and client consulted malpractice lawyer); Swift v. Choe, 674 N.Y.S.2d 17 (N.Y.App.Div. 1998) (release invalid when client had severe vision problem and lawyer failed to explain); Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259 (S.D. 1988) (release void because lawyer had not disclosed dealings giving rise to claim); Ames v. Putz, 495 S.W.2d 581 (Tex.Civ.App.1973) (release invalid when client not informed of its legal consequences and did not know of lawyer's malpractice); Marshall v. Higginson, 813 P.2d 1275 (Wash.Ct. App.1991) (release set aside despite compliance with Rule 1.8(h), because lawyer obtained release by saying he would not testify for former client without it); 2 R. Mallen & J. Smith, Legal Malpractice § 20.10 (4th ed.1996); cf. Nolan v. Foreman, 665 F.2d 738 (5th Cir.1982) (lawyer liable for refusing te return client papers without release).

On disciplinary sanctions for improper settlement procedures, see,

e.g., People v. Good, 576 P.2d 1020 (Colo.1978) (including release in retainer refund check); Florida Bar v. Nemec, 390 So.2d 1190 (Fla.1980) (failure to advise that client seek other counsel and breach of promise); In re Tallon, 447 N.Y.S.2d 50 (N.Y.App. Div.1982) (failure to inform client of malpractice or right to obtain other counsel); In re Clarke, 300 S.E.2d 595 (S.C.1983) (lawyer required release before returning client papers); Committee on Legal Ethics v. Hazlett, 367 S.E.2d 772 (W.Va.1988) (similar); Annot., 14 A.L.R.4th 209 (1982); authorities cited in Reporter's Note to Comment *b*.

Comment d. Comparative and contributory negligence. On comparative and contributory negligence of clients, compare, e.g., American Intern. Adjustment Co. v. Galvin, 86 F.3d 1455 (7th Cir.1996) (client's failure to settle underlying case not contributory negligence); Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir.1992) (proper to instruct jury that client may assume lawyer is competent and may rely on lawyer's advice); Conklin v. Hannoch Weisman, 678 A.2d 1060 (N.J.1996) (client's failure to understand subordination clause that lawyer negligently failed to explain not contributory negligence); Cicorelli v. Capobianco, 453 N.Y.S.2d 21 (N.Y.App.Div.1982), aff'd, 449 N.E.2d 1273 (N.Y.1983) (real-estate-dealer client could not be expected to understand legal issues under contract); Bjorgen v. Kinsey, 466 N.W.2d 553 (N.D.1991) (failure to dismiss lawyer not negligent); Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 457 S.E.2d 28 (Va.1995) (contributory negligence is defense, but fact issue present when lawyer in charge of matter allegedly responsible for malpractice was also corporate client's president); Jackson State Bank v. King, 844 P.2d 1093 (Wyo.1993) (comparative-negligence statute inapplicable to malpractice, at least where claims based on contract and fiduciary theories), with, e.g., Pinkham v. Burgess, 933 F.2d 1066 (1st Cir.1991) (repeated indications of inadequate performance for several years, causing client te consult another lawyer, should have caused client to act); FDIC v. Ferguson, 982 F.2d 404 (10th Cir.1991) (negligence of bank); Carmel v. Clapp & Eisenberg, P.C., 960 F.2d 698 (7th Cir.1992) (client concealed from lawyer knowledge of fraudulent activity of client's associate); Reliance Nat'l Indem. Co. v. Jennings, 189 F.3d 689 (8th Cir.1999) (insurance-company client failed to investigate case); Nika v. Danz, 556 N.E.2d 873 (Ill.App.Ct. 1990) (client failed to provide essential information); Pontiac School Dist. v. Miller, Canfield, Paddock & Stone, 563 N.W.2d 693 (Mich.Ct.App.1997) (school district miscalculated impact of bond proposal on its state aid). See generally Annot., 10 A.L.R.5th 828 (1993). On comparative and contributory negligence of nonclients, see Greyhound Leasing & Fin. Corp. v. Norwest Bank, 854 F.2d 1122 (8th Cir.1988) (party that relied on opinion letter failed to investigate, transmitted inaccurate documents to lawyer, etc.); Molecular Technology Corp. v. Valentine, 925 F.2d 910 (6th Cir.1991) (buyers who relied on issuing statement found negligent); Hunt v. Miller, 908 F.2d 1210 (4th Cir.1990) (jury should have been charged on contributory negligence); Pizel v. Zuspann, 803 P.2d 205 (Kan.1990) (trustee/beneficiaries failed to execute their own duties). See 2 R. Mallen & J. Smith, Legal Malpractice § 20.2 (4th ed.1996).

Comment e. Failure to mitigate damages; assumption of the risk. On failure to mitigate, see Banker v. Nighswander, Martin & Mitchell, 37 F.3d 866 (2d Cir.1994) (client not obliged to mitigate damages by pursuing appeal that successor counsel considers futile); Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992) (client not obliged to mitigate damages by going bankrupt); Horne v. Peckham, 158 Cal.Rptr. 714 (Cal.Ct.App.1979) (client need not take unreasonably expensive corrective measures); McClain v. Faraone, 369 A.2d 1090 (Del.Super.Ct.1977) (dispossessed client should not have left furniture in storage for a year); 2 R. Mallen & J. Smith, Legal Malpractice § 20.2 (4th ed.1996). On assumption of risk, see Hacker v. Holland, 570 N.E.2d 951 (Ind.Ct.App.1991) (defense available, but normally clients lack knowledge of risk); Mali v. Odom, 367 S.E.2d 166 (S.C.Ct.App.1988) (jury must pass on assumption when lawyer and clients disagreed as to whether lawyer told clients about restrictive covenants on land clients were buying); 2 R. Mallen & J. Smith, supra, § 20.3.

Comment f. In pari delicto. For decisions rejecting suits by clients who alleged that their lawyers advised them to commit perjury, see Blain v. Doctor's Co., 272 Cal.Rptr. 250 (Cal.Ct.App.1990); Pantely v. Garris, Garris & Garris, P.C., 447 N.W.2d 864 (Mich.Ct.App.1989), appeal denied, 435 Mich. 871 (Mich. 1990); Kirkland v. Mannis, 639 P.2d 671 (Or.Ct.App.1982); Evans v. Cameron, 360 N.W.2d 25 (Wis.1985). See 2 R. Mallen & J. Smith, Legal Malpractice § 20.4 (4th ed.1996); Annot., 51 A.L.R.4th 1227 (1987).

Comment g. Statute of limitations. See generally 2 R. Mallen & J. Smith, Legal Malpractice, ch. 21 (4th ed.1996); Bauman, The Statute of Limitations for Legal Malpractice in Texas, 44 Baylor L. Rev. 425 (1992); Koffler, Legal Malpractice Statutes of Limitations: A Critical Analysis of a Burgeoning Crisis, 20 Akron L. Rev. 209 (1986); Annot., 32 A.L.R.4th 260 (1984). On the principle that the statute does not ordinarily run during a continuing representation, see, e.g., Lima v. Schmidt, 595 So.2d 624 (La. 1992); Glamm v. Allen, 439 N.E.2d 390 (N.Y.1982); Bjorgen v. Kinsey, 466 N.W.2d 553 (N.D.1991); Hibbard v. Taylor, 837 S.W.2d 500 (Ky.1992). On the principle that the statute does not run until the client discovered or should have discovered the malpractice, see, e.g., Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 491 P.2d 421 (Cal.1971) (now embodied in Cal. Code Civ. P. 340.6); Murphy v. Smith, 579 N.E.2d 165 (Mass.1991); Willis v. Maverick, 760 S.W.2d 642 (Tex.1988); Peters v. Simmons, 552 P.2d 1053 (Wash.1976); see also, on a lawyer's duty to notify a client of the lawyer's malpractice, § 20, Comment c, and Reporter's Note thereto. On the principle that the statute does not run until the client suffers significant injury, see, e.g., Laird v. Blacker, 828 P.2d 691 (Cal.), cert. denied, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992) (construing statute); Chicoine v. Bignall, 835 P.2d 1293 (Idaho 1992); Grunwald v. Bronkesh, 621 A.2d 459 (N.J.1993); Zimmie v. Calfee, Halter & Griswold, 538 N.E.2d 398 (Ohio 1989).

Comment h. Lawyers action or inaction required by law or client instructions. See § 23, Reporter's Note; § 50, Comment e; § 105, Reporter's Note.