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Restatement (3d) of the Law Governing Lawyers

Chapter 1. Regulation Of The Legal Profession

Topic 1. Regulation of Lawyers—In General

§ 1. Regulation of Lawyers—In General

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

Comment:

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

The lawyer codes and much general law remain complementary. The lawyer codes draw much of their moral force and, in many particulars, the detailed description of their rules from preexisting legal requirements and concepts found in the law of torts, contracts, agency, trusts, property, remedies, procedure, evidence, and crimes. Thus, lawyer codes particularize some general legal rules in the

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

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

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

d. The role of bar associations. Beginning in the early decades of the 20th century, bar associations have played an increasingly active role in regulating the conduct of lawyers. Together with lawyers who work on disciplinary and similar committees within state- and federal-court systems, bar associations have become the chief embodiment of the concept that lawyers are a self-regulated profession. Self-regulation provides protection of lawyers against political control by the state. However, self-regulation also carries its own risk of under-regulation of lawyers as a whole, regulation (however strict) that is in the interest of lawyers as a group and not the public, or regulation that focuses disproportionately on groups of lawyers disfavored within the controlling bar association or committee.

In a number of states, membership in the state's bar association is compulsory, in the sense that a lawyer otherwise appropriately admitted to practice must maintain active membership in the bar association as a condition of retention of a valid license to practice law within the jurisdiction. (Such mandatory bars are sometimes called "integrated" bars.) Decisions of the United States Supreme Court have limited the extent to which a member of such a mandatory bar association can be required to pay any portion of dues that supports activities not germane to the organization's functions in providing self-regulation. Those generally include activities of a political or ideological

nature not directly connected to the regulation of lawyers and maintenance of the system of justice. Under those decisions, the bar must maintain a system for allocating dues payments for permissible and noncovered purposes and a process to permit lawyers to regain the portion of dues collected for noncovered purposes.

Topic 2. Process of Professional Regulation

§ 2. Admission to Practice Law

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

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

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

(1) at any place within the admitting jurisdiction;

(2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and

(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Comment:

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

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

of establishing a permanent in-state branch office. Results approaching that rule may arguably be required under the federal interstate commerce clause and the privileges and immunities clause. The approach of the Section is more guarded. However, its primary focus is appropriately on the needs of clients.

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

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

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

Transactional and similar out-of-court representation of clients may raise similar issues, yet there is no equivalent of temporary admission pro hac vice for such representation, as there is in litigation. Even activities that bear close resemblance to in-court litigation, such as representation of clients in arbitration or in administrative hearings, may not include measures for pro hac vice appearance. Some activities are clearly permissible. Thus, a lawyer conducting activities in the lawyer's home state may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law. It is also clearly permissible for a lawyer from a home-state office to direct

communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telecopier, or other forms of electronic communication. On the other hand, as with litigation, it would be impermissible for a lawyer to set up an office for the general practice of nonlitigation law in a jurisdiction in which the lawyer is not admitted as described in § 2.

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

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

Illustrations:

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

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

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

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

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

§ 4. Unauthorized Practice by a Nonlawyer

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

Comment:

a. Scope and cross-references.

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

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

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

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

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

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

price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.

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

e. Unauthorized practice for and by entities. A limitation on pro se representation (see Comment d) found in many jurisdictions is that a corporation cannot represent itself in litigation and must accordingly always be represented by counsel. The rule applies, apparently, only to appearances in litigated matters. Thus a nonlawyer officer of a corporation may permissibly draft legal documents, negotiate complex transactions, and perform other tasks for the employing organization, even if the task is typically performed by lawyers for organizations. With respect to litigation, several jurisdictions except representation in certain tribunals, such as landlord-tenant and small-claims courts and in certain administrative proceedings (see Comment c hereto), where incorporation (typically of a small owner-operated business) has little bearing on the prerogative of the person to provide self-representation. Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters. Included within the powers of a lawyer retained by an organization (see § 3, Comment f) should be the capacity to perform legal services for all entities within the same organizational family. It has proved controversial whether a lawyer employed full time by an insurance company (see § 134) may represent policyholders of the company in covered matters.

§ 5. Professional Discipline

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

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

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

Topic 3. Civil Judicial Remedies in General

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

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

(1) awarding a sum of money as damages;
(2) providing injunctive relief, including requiring specific performance of a contract or

enjoining its nonperformance;

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

Comment:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) is appropriate under applicable law governing the remedy; and

(2) does not put the lawyer in a position prohibited by an applicable lawyer code.

Topic 4. Lawyer Criminal Offenses

§ 8. Lawyer Criminal Offenses

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

Topic 5. Law-Firm Structure and Operation

§ 9. Law-Practice Organizations—In General

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

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

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

(a) prior to leaving the firm:

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

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

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

§ 10. Limitations on Nonlawyer Involvement in a Law Firm

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

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

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

(a) an agreement by a lawyer with the lawyer's firm or another lawyer in the firm may provide for payment, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

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

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

§ 11. A Lawyer's Duty of Supervision

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

assurance that all lawyers in the firm conform to applicable lawyer-code requirements.

(2) A lawyer who has direct supervisory authority over another lawyer is subject to

professional discipline for failing to make reasonable efforts to ensure that the other lawyer

conforms to applicable lawyer-code requirements.

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

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

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

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

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

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

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

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

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

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

§ 12. Duty of a Lawyer Subject to Supervision

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

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

§ 13. Restrictions on the Right to Practice Law

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

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