Restatement (Third) of the Law Governing Lawyers Case Notes

General Case Citations

—

D.Nev.Bkrtcy.Ct.

D.Nev.Bkrtcy.Ct.2008. Cit. generally in ftn. Bankrupt judgment debtors filed an adversary complaint against judgment creditor, alleging that creditor executed on too much property when collecting on the judgment. The bankruptcy court entered judgment in favor of debtors. Several years after learning of certain irregularities in creditor's defense of the adversary proceeding, debtors' attorney, without withdrawing from his representation of debtors, filed a motion on behalf of creditor against debtors, seeking relief from the judgment. This court publicly reprimanded attorney and delivered its opinion to the state bar disciplinary counsel for it to take whatever action it deemed appropriate, holding that attorney, by simultaneously representing the interests of two clients who were adverse parties in the same litigation, violated the Nevada Rules of Professional Conduct, as well as provisions of the Restatement Third and other relevant authorities. In re Rossana, 395 B.R. 697, 701.

S.D.N.Y.

S.D.N.Y.2017. Cit. generally in disc. After mutual association that provided protection-and-indemnity insurance to its members denied member's claim for losses arising from a shipping incident, and association's board upheld the denial of coverage, member sued association, seeking de novo review of the board's decision. This court granted summary judgment for association, holding that the board's decision was subject to a deferential standard of review and could not be vacated on the ground that it violated public policy. The court rejected member's argument that the award endorsed a violation of the Restatement Third of the Law Governing Lawyers, which required counsel to be independent and unconflicted when paid by a third party to represent a client, reasoning that the Restatement was not the kind of authority that could, in principle, support a public-policy vacatur under the New York Court of Appeals' articulation of the standard. TransAtlantic Lines LLC v. American Steamship Owners Mutual Protection and Indemnity Association, Inc., 253 F.Supp.3d 725, 733.

N.D.Ohio Bkrtcy.Ct.

N.D.Ohio Bkrtcy.Ct.2015. Cit. generally in case quot. in sup. In an adversary proceeding brought by Chapter 7 trustee for the recovery of two vehicles that debtor had transferred to his attorney or their value against debtor's attorney, this court granted plaintiff's motion for summary judgment, holding that there were no genuine issues of material fact. The court acknowledged that it could ascertain state law by considering the Restatements, and in this case, relied upon Restatement Third of the Law Governing Lawyers § 43, Comment *d*, to determine that defendant did not obtain an attorney's charging lien. In re Hadley, 541 B.R. 829, 838.

S.D.Tex.

S.D.Tex.2008. Cit. generally in ftn.; cit. generally in ftn. (Prop. Final Draft No. 2, 1998). Chapter 11 trustee of debtor oil and gas company that went bankrupt after its directors decided to pursue a high-risk venture that failed sued, among others, debtor's attorneys, alleging that attorneys failed to fully inform debtor of numerous conflicts of interest, provided legal advice to debtor while conflicted, and failed to withdraw based on the conflicts. Denying without prejudice summary judgment for attorneys on trustee's claims asserting intentional or negligent breach of fiduciary duty, this court held, inter alia, that questions of fact remained as to the extent of attorneys' conflicts. The court noted that, under Texas law, where, as here, a plaintiff sought fee forfeiture as an equitable remedy for breach of fiduciary duty, there was no requirement that the plaintiff prove causation or damages. Floyd v. Hefner, 556 F.Supp.2d 617, 661.

Del.

Del.2018. Quot. generally in treatise quot. in ftn. State bar disciplinary body filed a petition to discipline lawyer, alleging, inter alia, that lawyer failed to properly maintain his firm's books and records as required by state's ethical rules for lawyers. The disciplinary board found that lawyer had negligently violated the rules. This court affirmed, holding that rules that regulated attorney conduct had no state-of-mind requirement and therefore an attorney who violated them could be disciplined under strict-liability standards. The court cited a treatise that noted that the rules set out in the Restatement Third of the Law Governing Lawyers did not always explicitly have state-of-mind requirements even though they depended on them. Matter of Beauregard, 189 A.3d 1236, 1245.

Pa.Cmwlth.

Pa.Cmwlth.2017. Cit. generally in sup. In a derivative action filed by members of the boards of trustees of nonprofit corporations against other members, the trial court granted plaintiffs' motion to compel discovery of certain information from defendants, including legal opinions and advice that would otherwise be protected by the attorney—client privilege or the work-product doctrine. While vacating and remanding for further proceedings, this court affirmed the trial court's ruling that plaintiffs were entitled to assert the “good cause” exception to the attorney—client privilege under Restatement Third of the Law Governing Lawyers § 85, noting that the Pennsylvania Supreme Court had previously consulted the Restatement when dealing with the contours of the attorney—client privilege. Pittsburgh History and Landmarks Foundation, 161 A.3d 394, 407.

Tex.Crim.App.

Tex.Crim.App.2013. Cit. generally in ftn. Trial attorney whose former client had been sentenced to death for capital murder sought writs of mandamus to overturn orders of the trial court directing him to relinquish client's trial file to court-appointed postconviction counsel and holding him in contempt for his failure to do so. This court conditionally granted trial attorney relief on his petition for writs of mandamus, holding, inter alia, that client, not attorney, owned client's trial file, and that attorney, as client's agent, was obligated to follow the instructions of client, to whom he owed a fiduciary duty, not to release the trial file. In re McCann, 422 S.W.3d 701, 705.

Wash.

Wash.2014. Cit. generally in diss. op. (citing generally Prop. Final Draft No. 2, 1998). Limited-liability company that was formed by two lawyers who operated a law firm together sued debt-collection agency and its principal, who were law firm's former clients, alleging breach of contract, breach of fiduciary duty, and seeking declaratory relief in connection with a purported joint-venture agreement between limited-liability company and debt-collection agency. The trial court granted summary judgment for defendants, finding that the agreement had to be rescinded because one of the lawyers had violated the rules of professional conduct by simultaneously representing both parties to the agreement without obtaining informed consent from debt-collection agency's principal. The court of appeals affirmed. Affirming, this court held, as a matter of law, that the business transaction contemplated by the joint-venture proposal was unenforceable on public-policy grounds. The dissent argued that the rules of professional conduct were not intended to serve as the basis for civil-law actions or remedies. LK Operating, LLC v. Collection Group, LLC, 331 P.3d 1147, 1169.

Restatement (Third) of the Law Governing Lawyers Officers (2000)

ALI Officers and Council

The American Law Institute

OFFICERS †
Roswell B. Perkins, *Chair of the Council*
Charles Alan Wright, *President*
Michael Traynor, *1st Vice President and President Designate*
Conrad K. Harper, *2nd Vice President*
Bennett Boskey, *Treasurer*
Lance Liebman, *Director*
Elena A. Cappella, *Deputy Director*
Michael Greenwald, *Deputy Director*

COUNCIL †

Kenneth S. Abraham	Charlottesville	Virginia
Shirley S. Abrahamson	Madison	Wisconsin
Philip S. Anderson	Little Rock	Arkansas
Susan Frelich Appleton	St. Louis	Missouri
Richard Sheppard Arnold	Little Rock	Arkansas
Sheila L. Birnbaum	New York	New York
Allen D. Black	Philadelphia	Pennsylvania
Bennett Boskey	Washington	District of Columbia
Michael Boudin	Boston	Massachusetts
William M. Burke	New York	New York
Elizabeth J. Cabraser	San Francisco	California
Hugh Calkins	Cleveland	Ohio
Gerhard Casper	Stanford	California
William T. Coleman, Jr.	Washington	District of Columbia
Edward H. Cooper	Ann Arbor	Michigan
N. Lee Cooper	Birmingham	Alabama
Roger C. Cramton	Ithaca	New York
Lloyd N. Cutler	Washington	District of Columbia
George H.T. Dudley	St. Thomas	U.S. Virgin Islands
Christine M. Durham	Salt Lake City	Utah
William H. Erickson	Denver	Colorado
Thomas E. Fairchild	Madison	Wisconsin
John P. Frank	Phoenix	Arizona
George Clemon Freeman, Jr.	Richmond	Virginia
Paul L. Friedman	Washington	District of Columbia
Antonio García-Padilla	San Juan	Puerto Rico
Jamie S. Gorelick	Washington	District of Columbia
Conrad K. Harper	New York	New York

Geoffrey C. Hazard, Jr. *	Philadelphia	Pennsylvania
D. Brock Hornby	Portland	Maine
Vester T. Hughes, Jr.	Dallas	Texas
Mary Kay Kane	San Francisco	California
Nicholas deB. Katzenbach	Princeton	New Jersey
Herma Hill Kay	Berkeley	California
Carolyn Dineen King	Houston	Texas
Carolyn B. Lamm	Washington	District of Columbia
Pierre N. Leval	New York	New York
Betsy Levin	Washington	District of Columbia
Hans A. Linde	Salem	Oregon
Martin Lipton	New York	New York
Robert MacCrate	New York	New York
Margaret H. Marshall	Boston	Massachusetts
John W. Martin, Jr.	Boca Grande	Florida
John J. McKetta, III	Austin	Texas
Vincent L. McKusick	Portland	Maine
Daniel J. Meltzer	Cambridge	Massachusetts
Robert H. Mundheim	New York	New York
Roswell B. Perkins	New York	New York
Ellen Ash Peters	Hartford	Connecticut
Louis H. Pollak	Philadelphia	Pennsylvania
Roberta C. Ramo	Albuquerque	New Mexico
Ernest J. Sargeant	Boston	Massachusetts
Mary M. Schroeder	Phoenix	Arizona
Sherwin P. Simmons	Miami	Florida
Wm. Reece Smith, Jr.	Tampa	Florida
Robert A. Stein	Chicago	Illinois
John T. Subak	Philadelphia	Pennsylvania
Michael Traynor	San Francisco	California
Bill Wagner	Tampa	Florida
Patricia M. Wald	The Hague	Netherlands
Elizabeth Warren	Cambridge	Massachusetts
William H. Webster	Washington	District of Columbia
George Whittenburg	Amarillo	Texas
Herbert P. Wilkins	Boston	Massachusetts
James H. Wilson, Jr.	Atlanta	Georgia
Charles Alan Wright	Austin	Texas
Emeritus Council Members		
Joseph F. Johnston	Birmingham	Alabama
Hale McCown	Lincoln	Nebraska
Lawrence E. Walsh	Oklahoma City	Oklahoma

Footnotes

† *As of June 30, 2000*

* *Director Emeritus*

Restatement (Third) of the Law Governing Lawyers Reporters (2000)

Reporter and Advisers

REPORTER

CHARLES W. WOLFRAM, Cornell Law School, Ithaca, New York

ASSOCIATE REPORTERS

JOHN LEUBSDORF, Rutgers University Law School, Newark, New Jersey

THOMAS D. MORGAN, The George Washington University Law School, Washington, District of Columbia

LINDA S. MULLENIX, The University of Texas School of Law, Austin, Texas [from 1989 to 1993]

ADVISERS †

PHILIP S. ANDERSON, Little Rock, Arkansas

WILLIAM J. BRENNAN, III, Princeton, New Jersey [from 1993]

MILTON H. COHEN, Chicago, Illinois [from 1991]

N. LEE COOPER, Birmingham, Alabama

DANIEL R. COQUILLETTE, Boston College Law School, Newton, Massachusetts

ROGER C. CRAMTON, Cornell Law School, Ithaca, New York

DREW S. DAYS, III, Yale Law School, New Haven, Connecticut

CAROL E. DINKINS, Houston, Texas [from 1991 to 1996]

DAVID F. DUMOUCHEL, Detroit, Michigan

BETTY B. FLETCHER, Judge, United States Court of Appeals for the Ninth Circuit, Seattle, Washington

ELIOT LAZARUS FREIDSON, Department of Sociology, New York University, New York, New York [to 1990]

J. THOMAS GREENE, Judge, United States District Court for the District of Utah, Salt Lake City, Utah

MARJORIE E. GROSS, New York, New York [from 1991]

CONRAD K. HARPER, New York, New York [to 1993]

JUDITH S. KAYE, Chief Judge, New York Court of Appeals, New York, New York [from 1988]

WALTER LOEBER LANDAU, New York, New York

VICTOR B. LEVIT, San Francisco, California

SUSAN R. MARTYN, University of Toledo College of Law, Toledo, Ohio

L. PAIGE MARVEL, Judge, United States Tax Court, Washington, District of Columbia [from 1988]

NANCY J. MOORE, Boston University School of Law, Boston, Massachusetts [from 1989]

ADVISERS

MARTIN PETER MOSER, Baltimore, Maryland

ROBERT H. MUNDHEIM, New York, New York

ROBERT E. O'MALLEY, Washington, District of Columbia [from 1988]

LOUIS H. POLLAK, Judge, United States District Court for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania [from 1989]

STEWART G. POLLOCK, Morristown, New Jersey; formerly Justice, Supreme Court of New Jersey

DOUGLAS E. ROSENTHAL, Washington, District of Columbia

A. A. SOMMER, JR., Washington, District of Columbia [from 1992]

GEORGE WHITTENBURG, Amarillo, Texas

JOAN WOLFF, San Francisco, California

LIAISONS

LAWRENCE J. FOX, Philadelphia, Pennsylvania, for the American Bar Association Section of Litigation [from 1988]

JACKSON M. BRUCE, JR., Milwaukee, Wisconsin, for the American Bar Association Section of Real Property, Probate and Trust Law

MALCOLM A. MOORE, Seattle, Washington, for the American College of Probate Counsel

EX OFFICIO †

ROSWELL B. PERKINS, New York, New York

Chair of the Council, The American Law Institute

CHARLES ALAN WRIGHT, Austin, Texas

President, The American Law Institute

* GEOFFREY C. HAZARD, JR., Philadelphia, Pennsylvania

Director, The American Law Institute

Footnotes

† *As of May 12, 1998*

† *As of May 12, 1998*

* *Director Emeritus since May 20, 1999; succeeded as Director by Lance Liebman*

Restatement (Third) of the Law Governing Lawyers Members (2000)

Members Consultative Group

(as of May 12, 1998)

CHARLES W. ADAMS, Tulsa, Oklahoma

BURTON C. AGATA, Hempstead, New York

HOWARD J. AIBEL, New York, New York

ANTHONY V. ALFIERI, Coral Gables, Florida

JAMES J. ALFINI, DeKalb, Illinois

JACQUELINE ALLEE, Coral Gables, Florida

CHARLES C. ALLEN, Jr., St. Louis, Missouri

H. WILLIAM ALLEN, Little Rock, Arkansas

LYLE W. ALLEN, Peoria, Illinois

RICHARD B. ALLEN, Chicago, Illinois

RONALD J. ALLEN, Chicago, Illinois

WILLIAM H. ALLEN, Washington, D.C.

WILLIAM T. ALLEN, Delaware Court of Chancery, Wilmington, Delaware

ELEANOR B. ALTER, New York, New York

MYRIAM J. ALTMAN, New York Supreme Court, New York, New York

R GORDON APPLEMAN, Fort Worth, Texas

RICHARD J. ARCHER, Occidental, California

BERNARD F. ASHE, Delmar, New York

ROBERT H. A. ASHFORD, Syracuse, New York

KIM J. ASKEW, Dallas, Texas

GRADY AVANT, JR., Detroit, Michigan

LAWRENCE H. AVERILL, Jr., Little Rock, Arkansas

LUTHER J. AVERY, San Francisco, California

LARRY CATA BACKER, Tulsa, Oklahoma

C. RANDALL BAIN, Phoenix, Arizona

THOMAS E. BAKER, Des Moines, Iowa

MARGARET A. BANCROFT, New York, New York

JEFFREY BARIST, New York, New York

WILLIAM T. BARKER, Chicago, Illinois

MARVIN E. BARKIN, Tampa, Florida

HELAINE BARNETT, New York, New York

CURTIS H. BARNETTE, Bethlehem, Pennsylvania

JOHN J. BARRY, Newark, New Jersey

EDWARD J. BARSHAK, Boston, Massachusetts

LAURA B. BARTELL, Detroit, Michigan

RICHARD J. BARTLETT, Glens Falls, New York

GEORGE PATERSON BARTON, Wellington, New Zealand

PAUL M. BATIZA, Metairie, Louisiana

PETER V. BAUGHER, Chicago, Illinois

PHYLLIS W. BECK, Superior Court of Pennsylvania, Bala Cynwyd, Pennsylvania

WARREN BELMAR, Washington, D.C.

MARTIN H. BELSKY, Tulsa, Oklahoma

EDWARD B. BENJAMIN, Jr., New Orleans, Louisiana

MARIAN MAYER BERKETT, New Orleans, Louisiana

RICHARD L. BERKMAN, Philadelphia, Pennsylvania

GEORGE W. BERMANT, Snowmass Village, Colorado

JANIS M. BERRY, Boston, Massachusetts

LAWRENCE BILDER, New Jersey Superior Court, Appellate Division, Jersey City, New Jersey

ALLEN D. BLACK, Philadelphia, Pennsylvania

CHRISTOPHER L. BLAKESLEY, Baton Rouge, Louisiana

DENNIS JEFFREY BLOCK, New York, New York

ANTHONY J. BOCCHINO, Philadelphia, Pennsylvania

CARLILE BOLTON-SMITH, Washington, D.C.

STEPHEN V. BOMSE, San Francisco, California

LOUIS F. BONACORSI, St. Louis, Missouri

EMMET J. BONDURANT II, Atlanta, Georgia

DANIEL I. BOOKER, Pittsburgh, Pennsylvania

RICHARD A. BOOTH, Rockville, Maryland

JOHN J. BOUMA, Phoenix, Arizona

AUBREY R. BOWLES III, Richmond, Virginia

J. MICHAEL BRADFORD, Beaumont, Texas

RAYMOND J. BRADLEY, Philadelphia, Pennsylvania

ALEXANDRA A. BROOKSHIRE, Seattle, Washington

JAMES J. BROSNAHAN, San Francisco, California

DAVID A. BROWNLEE, Pittsburgh, Pennsylvania

HENRY SILL BRYANS, Philadelphia, Pennsylvania

BRITAIN H. BRYANT, St. Croix, U.S. Virgin Islands

STEPHEN B. BURBANK, Philadelphia, Pennsylvania

KATHLEEN B. BURKE, Cleveland, Ohio

W. AMON BURTON, JR., Austin, Texas

ELIZABETH J. CABRASER, San Francisco, California

GEORGE E. CAMPBELL, Little Rock, Arkansas

ELENA A. CAPPELLA, Philadelphia, Pennsylvania

MICHAEL H. CARDOZO, Washington, D.C.

DAVID CARLINER, Washington, D.C.

STEPHEN L. CARTER, New Haven, Connecticut

GEORGE J. CASPAR III, Avon, Connecticut

BERNARD CEDARBAUM, New York, New York

MIRIAM GOLDMAN CEDARBAUM, United States District Court for the Southern District of New York, New York, New York

HELEN DAVIS CHAITMAN, Somerset, New Jersey

ANSEL B. CHAPLIN, Boston, Massachusetts

LUNG-CHU CHEN, New York, New York

MARVIN CHERNER, Alabama Circuit Court, Birmingham, Alabama

YEE WAH CHIN, New York, New York

JOHN C. CHRISTIE, JR., Washington, D.C.

BENJAMIN R. CIVILETTI, Baltimore, Maryland

DAVID W. CLARK, Jackson, Mississippi

PHILIP CLAVERIE, New Orleans, Louisiana

JOHN E. CLUTE, Spokane, Washington

NEIL H. COGAN, Hamden, Connecticut

SHERMAN L. COHN, Washington, D.C.

THOMAS A. COLE, Chicago, Illinois

JOHN M. COLEMAN, Camden, New Jersey

LOVIDA H. COLEMAN, JR., Washington, D.C.

MICHAEL B. COLGAN, Tampa, Florida

LEWIS COLLENS, Chicago, Illinois

WAYNE DALE COLLINS, New York, New York

FREDERICK U. CONARD, JR., West Hartford, Connecticut

HARRY CLAYTON COOK, JR., Washington, D.C.

GEORGE W. COOMBE, JR., San Francisco, California

CHARLES J. COOPER, Washington, D.C.

MICHAEL A. COOPER, New York, New York

JOSEPH E. COUGHLIN, Chicago, Illinois

LOUIS A. CRACO, New York, New York

M. MICHAEL CRAMER, Rockville, Maryland

ROBERT A. CREAMER, Chicago, Illinois

JAMES J. CROMWELL, Rockville, Maryland

FRANK CUMMINGS, Washington, D.C.

MARGARET ELLEN CURRAN, Providence, Rhode Island

JOHN J. CURTIN, JR., Boston, Massachusetts

DENNIS E. CURTIS, New Haven, Connecticut

SAMUEL DASH, Washington, D.C.

PATRICK DAUGHERTY, Charlotte, North Carolina

JAMES C. DAUKSCH, Jr., Florida District Court of Appeal, Daytona Beach, Florida

ANTHONY E. DAVIS, New York, New York

GEORGE A. DAVIDSON, New York, New York

JOHN B. DAVIDSON, Chicago, Illinois

EVAN A. DAVIS, New York, New York

FRANK TRADEWELL DAVIS, JR., Atlanta, Georgia

WILLIAM B. DAWSON, Dallas, Texas

JACK G. DAY, Cleveland, Ohio

WALTER J. DICKEY, Madison, Wisconsin

CHARLTON DIETZ, St. Paul, Minnesota

THOMAS G. DIGNAN, JR., Boston, Massachusetts

ANTHONY M. DILEO, New Orleans, Louisiana

CAROL E. DINKINS, Houston, Texas

ANTHONY E. DIRESTA, Washington, D.C.

GORDON L. DOERFER, Trial Court of Massachusetts, Superior Court Department, Boston, Massachusetts

MITCHELL F. DOLIN, Washington, D.C.

J. CHRYS DOUGHERTY, Austin, Texas

VINCENT E. DOYLE, New York Supreme Court, Buffalo, New York

ROBERT F. DRINAN, Washington, D.C.

JOHN P. DRISCOLL, JR., Boston, Massachusetts

ALBERT W. DRIVER, JR., Mountainside, New Jersey

PHYLLIS KAY DRYDEN, San Francisco, California

ADRIANE J. DUDLEY, St. Thomas, U.S. Virgin Islands

KEVIN PATRICK DUFFY, Springfield, New Jersey

STEPHEN S. DUNHAM, Denver, Colorado

ANTOINETTE L. DUPONT, Appellate Court of Connecticut, Hartford, Connecticut

DIANE DURGIN, Atlanta, Georgia

J. HADLEY EDGAR, Lubbock, Texas

THOMAS A. EDMONDS, Richmond, Virginia

ERNEST L. EDWARDS, New Orleans, Louisiana

WILLIAM EICH, Wisconsin Court of Appeals, Madison, Wisconsin

DAVID N. ELLENHORN, New York, New York

RALPH G. ELLIOT, Hartford, Connecticut

SHELDON H. ELSEN, New York, New York

ALEX ELSON, Chicago, Illinois

JOANNE A. EPPS, Philadelphia, Pennsylvania

PATRICIA K. EPPS, Richmond, Virginia

ANTONIO ESCUDERO-VIERA, San Juan, Puerto Rico

JANE E. FAHEY, Atlanta, Georgia

DONALD J. FARAGE, Philadelphia, Pennsylvania

ZULIMA V. FARBER, Roseland, New Jersey

ANDREW NEWELL FARLEY, Pittsburgh, Pennsylvania

SANFORD B. FERGUSON, Pittsburgh, Pennsylvania

HENRY L. FEUERZEIG, St. Thomas, U.S. Virgin Islands

ARTHUR NORMAN FIELD, New York, New York

HENRY F. FIELD, Chicago, Illinois

TED J. FIFLIS, Boulder, Colorado

RALPH ADAM FINE, Wisconsin Court of Appeals, Milwaukee, Wisconsin

WILLIAM B. FISCH, Columbia, Missouri

CHARLOTTE MOSES FISCHMAN, New York, New York

RICHARD J. FITZGERALD, Minneapolis, Minnesota

SCOTT T. FITZGIBBON, Belmont, Massachusetts

JOHN P. FLAHERTY, The Supreme Court of Pennsylvania, Pittsburgh, Pennsylvania

JACK W. FLOYD, Greensboro, North Carolina

PETER FLYNN, Chicago, Illinois

LAURENCE S. FORDHAM, Weston, Massachusetts

BRIAN DEREK FORROW, Greenwich, Connecticut

C. ALLEN FOSTER, Washington, D.C.

LESLIE PICKERING FRANCIS, Salt Lake City, Utah

HARVEY FRANK, Philadelphia, Pennsylvania

MARVIN E. FRANKEL, New York, New York

MONROE H. FREEDMAN, Hempstead, New York

MILTON V. FREEMAN, Washington, D.C.

RICHARD M. FREEMAN, San Diego, California

WILLIAM FREIVOGEL, Chicago, Illinois

CHARLES FRIED, Massachusetts Supreme Judicial Court, Boston, Massachusetts

PAUL L. FRIEDMAN, United States District Court for the District of Columbia, Washington, D.C.

RICHARD D. FRIEDMAN, Ann Arbor, Michigan

VICTOR FUTTER, New York, New York

EDWARD MCGLYNN GAFFNEY, Valparaiso, Indiana

BRUCE E. GAGNON, Anchorage, Alaska

PAUL B. GALVANI, Boston, Massachusetts

MARVIN GARFINKEL, Philadelphia, Pennsylvania

VINCENT F. GARRITY, JR., Philadelphia, Pennsylvania

HERBERT S. GARTEN, Baltimore, Maryland

BRYANT G. GARTH, Chicago, Illinois

DAVID ALLAN GATES, Little Rock, Arkansas

GIBSON GAYLE, JR., Houston, Texas

JOHN L. GEDID, Harrisburg, Pennsylvania

JEROME A. GEIS, St. Paul, Minnesota

JANINE P. GESKE, Wisconsin Supreme Court, Madison, Wisconsin

L. BURDA GILBERT, Sacramento, California

A. SPENCER GILBERT III, Jackson, Mississippi

JEROME GILSON, Chicago, Illinois

W. JOHN GLANCY, Dallas, Texas

DENNIS E. GLAZER, New York, New York

DONALD W. GLAZER, Newton, Massachusetts

MARTIN GLENN, New York, New York

STANLEY GODOFSKY, Pompano Beach, Florida

ROGER J. GOEBEL, New York, New York

DANIEL L. GOELZER, Washington, D.C.

STEVEN H. GOLDBERG, White Plains, New York

PATRICIA J. GORENCE, United States District Court for the Eastern District of Wisconsin, Milwaukee, Wisconsin

HERVE GOURAIGE, Newark, New Jersey

SUSAN P. GRABER, Oregon Supreme Court, Salem, Oregon

DAVID J. GRAIS, New York, New York

HOWARD L. GREENBERGER, New York, New York

JOSEPH P. GRIFFIN, Washington, D.C.

SAMUEL B. GRONER, Washington, D.C.

DAVID A. GUBERMAN, Boston, Massachusetts

RICHARD E. GUTMAN, Irving, Texas

PAUL H. HAAGEN, Durham, North Carolina

SAM E. HADDON, Missoula, Montana

RALPH L. HALPERN, Buffalo, New York

JEAN C. HAMILTON, United States District Court for the Eastern District of Missouri, St. Louis, Missouri

ROY A. HAMMER, Boston, Massachusetts

EDWARD JACKSON HARDIN, Atlanta, Georgia

DONALD R. HARKLEROAD, Atlanta, Georgia

JOHN MATNEY HARMON, Austin, Texas

ROBERT E. HARRINGTON, New Orleans, Louisiana

RICHARD E.V. HARRIS, Piedmont, California

MARK I. HARRISON, Phoenix, Arizona

HARRIS L HARTZ, New Mexico Court of Appeals, Albuquerque, New Mexico

JOHN D. HASTIE, Oklahoma City, Oklahoma

RONALD J. HEDGES, United States District Court for the District of New Jersey, Newark, New Jersey

DOUGLAS R. HEIDENREICH, St. Paul, Minnesota

LAWRENCE K. HELLMAN, Oklahoma City, Oklahoma

ED HENDRICKS, Phoenix, Arizona

ANDREW D. HENDRY, New York, New York

J. MICHAEL HENNIGAN, Los Angeles, California

JOEL F. HENNING, Chicago, Illinois

FEDERICO HERNANDEZ-DENTON, Supreme Court of Puerto Rico, San Juan, Puerto Rico

DAVID F. HERR, Minneapolis, Minnesota

DALE HERSHEY, Pittsburgh, Pennsylvania

OTTO J. HETZEL, Washington, D.C.

ERNEST R. HIGGINBOTHAM, Dallas, Texas

DANIEL W. HILDEBRAND, Madison, Wisconsin

WILLIAM B. HILGERS, Austin, Texas

DONALD B. HILLIKER, Chicago, Illinois

KENNETH L. HIRSCH, Pittsburgh, Pennsylvania

LINDA R. HIRSHMAN, Chicago, Illinois

CASWELL O. HOBBS, Washington, D.C.

A. SIDNEY HOLDERNESS, JR., New York, New York

ERIC MILLS HOLMES, Grundy, Virginia

ROGER F. HOLMES, Anchorage, Alaska

THADDEUS HOLT, Point Clear, Alabama

ZONA FAIRBANKS HOSTETLER, Washington, D.C.

THOMAS WOODWARD HOUGHTON, Houston, Texas

DOUGLAS G. HOUSER, Portland, Oregon

DONALD L. HOWELL, Houston, Texas

JAMES S. HOYTE, Cambridge, Massachusetts

EDWIN E. HUDDLESON III, Washington, D.C.

JOHN A. HUMBACH, White Plains, New York

DANIEL H. HUYETT 3RD, United States District Court for the Eastern District of Pennsylvania, Reading, Pennsylvania

JOSEPH E. IRENAS, United States District Court for the District of New Jersey, Camden, New Jersey

DAVID B. ISBELL, Washington, D.C.

JACK B. JACOBS, Delaware Court of Chancery, Wilmington, Delaware

LESLIE WILLIAM JACOBS, Cleveland, Ohio

RICHARD L. JACOBSON, Washington, D.C.

MELVIN F. JAGER, Chicago, Illinois

MICHAEL L. JAMIESON, Tampa, Florida

PETER R. JARVIS, Portland, Oregon

LAURENCE M. JOHNSON, Boston, Massachusetts

VINCENT R. JOHNSON, San Antonio, Texas

FRANK C. JONES, Atlanta, Georgia

GREGORY P. JOSEPH, New York, New York

ARTHUR H. KAHN, New York, New York

EDWIN L. KAHN, Washington, D.C.

STEVEN R. KANES, Boston, Massachusetts

JAMES E. KAPLAN, Portland, Maine

DIANE L. KARPMAN, Los Angeles, California

JOSEPH A. KATARINCIC, Pittsburgh, Pennsylvania

RONALD S. KATZ, San Francisco, California

BRUCE W. KAUFFMAN, Philadelphia, Pennsylvania

ROBERT M. KAUFMAN, New York, New York

SIR KENNETH KEITH, Court of Appeal of New Zealand, Wellington, New Zealand

MICHAEL J. KELLY, Washington, D.C.

WILLIAM F. KENNEDY, Easton, Connecticut

JAMES J. KENNY, Miami, Florida

EDWIN A. KILBURN, Scottsdale, Arizona

STEPHEN O. KINNARD, Atlanta, Georgia

LAIRD C. KIRKPATRICK, Eugene, Oregon

MICHAEL R. KLEIN, Washington, D.C.

ALAN C. KOHN, St. Louis, Missouri

MEYER KRAMER, Brooklyn, New York

NOEL A. KRAMER, Superior Court of the District of Columbia, Washington, D.C.

STEVEN C. KRANE, New York, New York

SHELDON KRANTZ, Washington, D.C.

C. DOUGLAS KRANWINKLE, New York, New York

ABE KRASH, Washington, D.C.

PETER M. KREINDLER, Morristown, New Jersey

MILTON P. KROLL, Washington, D.C.

SEYMOUR KURLAND, Philadelphia, Pennsylvania

EDWARD LABATON, New York, New York

PHILIP A. LACOVARA, Washington, D.C.

EDWARD V. LAHEY, JR., Purchase, New York

DAVID LANDAU, New Jersey Superior Court, Appellate Division, Springfield, New Jersey

SYBIL H. LANDAU, New York, New York

ROBERT M. LANDIS, Philadelphia, Pennsylvania

HOWARD LANGER, Philadelphia, Pennsylvania

MICHELE LANGER, Philadelphia, Pennsylvania

MATTHEW L. LARRABEE, San Francisco, California

LYMAN L. LARSEN, Omaha, Nebraska

LAWRENCE J. LATTO, Washington, D.C.

KENNETH LAURENCE, Massachusetts Appeals Court, Boston, Massachusetts

LOUIS D. LAURINO, Bayville, New York

LEON D. LAZER, Dix Hills, New York

EDWARD R. LEAHY, McLean, Virginia

RICHARD D. LEE, Berkeley, California

NORMAN M. LEFSTEIN, Indianapolis, Indiana

J. THOMAS LENHART, Washington, D.C.

HOWARD LESNICK, Philadelphia, Pennsylvania

CHARLES L. LEVIN, Michigan Supreme Court, Detroit, Michigan

THEODORE A. LEVINE, New York, New York

L. HAROLD LEVINSON, Nashville, Tennessee

SANFORD LEVINSON, Austin, Texas

DAVID M. LEVITAN, New York, New York

TIMOTHY K. LEWIS, United States Court of Appeals for the Third Circuit, Pittsburgh, Pennsylvania

CLAIRE L'HEUREUX-DUBÉ, Supreme Court of Canada, Ottawa, Ontario

HAL R. LIEBERMAN, New York, New York

GEORGE W. LIEBMANN, Baltimore, Maryland

CARL D. LIGGIO, Chicago, Illinois

DAVID A. LOGAN, Winston-Salem, North Carolina

THOMAS R. LONG, New York, New York

HENRY R. LORD, Baltimore, Maryland

MARGARET COLGATE LOVE, Washington, D.C.

MITCHELL A. LOWENTHAL, New York, New York

CONSTANCE K. LUNDBERG, Provo, Utah

WILLIAM V. LUNEBURG, Pittsburgh, Pennsylvania

JOHN SHAFROTH LUTZ, Denver, Colorado

ROBERT E. LUTZ, II, Los Angeles, California

MYLES V. LYNK, Washington, D.C.

CHAMP LYONS, JR., Mobile, Alabama

W. CULLEN MACDONALD, New York, New York

HUGH G. E. MACMAHON, Portland, Maine

RONALD E. MALLEN, San Francisco, California

MORTON M. MANEKER, New York, New York

ROBERT T. MANN, Gainesville, Florida

HARRY K. MANSFIELD, Boston, Massachusetts

RICHARD L. MARCUS, San Francisco, California

STANLEY J. MARCUSS, Washington, D.C.

RONALD L. MARMER, Chicago, Illinois

E. GREGORY MARTIN, Denver, Colorado

JOHN ANDREW MARTIN, Dallas, Texas

JOHN W. MARTIN, JR., Dearborn, Michigan

MICHAEL M. MARTIN, New York, New York

R. EDEN MARTIN, Chicago, Illinois

DOUGLAS R. MARVIN, Washington, D.C.

ARTHUR F. MATHEWS, Washington, D.C.

JAMES B. MAY, Vero Beach, Florida

KIRK MCALPIN, Atlanta, Georgia

CHARLES E. MCCALLUM, Grand Rapids, Michigan

JOHN J. MCCANN, New York, New York

FRANK MCCLELLAN, Philadelphia, Pennsylvania

J. ROBERT MCCLURE, JR., Tallahassee, Florida

MARGARET D. MCGAUGHEY, Portland, Maine

JOHN J. MCGREGOR, Fresno, California

HUGH M. MCINTOSH, Washington, D.C.

KENNETH JAMES MCINTYRE, Detroit, Michigan

JOHN J. MCKETTA, III, Austin, Texas

MARY A. MCLAUGHLIN, Philadelphia, Pennsylvania

WILLIAM WALTER MEANS, Tulsa, Oklahoma

CARRIE J. MENKEL-MEADOW, Washington, D.C.

JAMES P. MERCURIO, Washington, D.C.

HERBERT L. MESCHKE, Minot, North Dakota

PETER J. MESSITTE, United States District Court for the District of Maryland, Greenbelt, Maryland

JUDITH A. MILLER, Washington, D.C.

ROGER J. MINER, United States Court of Appeals for the Second Circuit, Albany, New York

THEODORE N. MIRVIS, New York, New York

ERICA MOESER, Madison, Wisconsin

RICHARD N. MOLCHAN, Peoria, Illinois

GRAHAM B. MOODY, Sausalito, California

LIZABETH A. MOODY, St. Petersburg, Florida

STEVE MORRIS, Las Vegas, Nevada

HIROSHI MOTOMURA, Boulder, Colorado

CHRISTOPHER B. MUELLER, Boulder, Colorado

ROBERT J. MULDOON, JR., Boston, Massachusetts

RAMÓN MULLERAT-BALMAÑA, Barcelona, Spain

LUTHER T. MUNFORD, Jackson, Mississippi

DAVID A. MURDOCH, Pittsburgh, Pennsylvania

DANIEL T. MURPHY, Richmond, Virginia

DIANA E. MURPHY, United States District Court for the District of Minnesota, Minneapolis, Minnesota

ROBERT B. L. MURPHY, Madison, Wisconsin

FRED F. MURRAY, Washington, D.C.

PETER L. MURRAY, Portland, Maine

ARNOLD K. MYTELKA, Springfield, New Jersey

JOHN A. NADAS, Boston, Massachusetts

IRVIN B. NATHAN, Washington, D.C.

PHIL C. NEAL, Chicago, Illinois

BERT S. NETTLES, Birmingham, Alabama

RICHARD L. NEUMEIER, Boston, Massachusetts

JOEL NEWMAN, Winston-Salem, North Carolina

THOMAS R. NEWMAN, New York, New York

W. FRANK NEWTON, Lubbock, Texas

B. W. NIMKIN, New York, New York

RONALD K. NOBLE, Washington, D.C.

GEORGE H. NOFER, Philadelphia, Pennsylvania

JOHN S. NOLAN, Washington, D.C.

JOHN KRANZ NOTZ, JR., Chicago, Illinois

JOHN B. OAKLEY, Davis, California

TIM O'BRIEN, Washington, D.C.

CHARLES J. OGLETREE, JR., Cambridge, Massachusetts

ARTHUR S. OLICK, New York, New York

MICHAEL A. OLIVAS, Houston, Texas

OWEN OLPIN, Los Angeles, California

JOHN F. OLSON, Washington, D.C.

MARK O'NEILL, Cleveland, Ohio

MARIAN P. OPALA, Supreme Court of Oklahoma, Oklahoma City, Oklahoma

DAVID ORENTLICHER, Indianapolis, Indiana

GEORGE W. OVERTON, Chicago, Illinois

PRISCILLA R. OWEN, Texas Supreme Court, Austin, Texas

ANTHONY J. PAGANO, San Francisco, California

ROGER PARK, Minneapolis, Minnesota

JEFFREY A. PARNESS, DeKalb, Illinois

LAWRENCE B. PEDOWITZ, New York, New York

KENNETH L. PENEGAR, Dallas, Texas

JEFFREY N. PENNELL, Atlanta, Georgia

DENNIS M. PERLUSS, Los Angeles, California

BERNARD PETRIE, San Francisco, California

CHARLES W. PETTY, JR., Washington, D.C.

CARTER G. PHILLIPS, Washington, D.C.

JERRY J. PHILLIPS, Knoxville, Tennessee

MARY KRISTINA PICKERING, Las Vegas, Nevada

PHILIP C. PINSKY, Syracuse, New York

BETTINA B. PLEVAN, New York, New York

JACK W. PLOWMAN, Pittsburgh, Pennsylvania

JUDD N. POFFINBERGER, JR., Pittsburgh, Pennsylvania

DONALD J. POLDEN, Memphis, Tennessee

LEON B. POLSKY, New York, New York

F. WALLACE POPE, JR., Clearwater, Florida

ALAN E. POPKIN, St. Louis, Missouri

ROBERT C. POST, Berkeley, California

FRANKLIN POUL, Philadelphia, Pennsylvania

BURNELE V. POWELL, Chapel Hill, North Carolina

H. JEFFERSON POWELL, Durham, North Carolina

JAMES Y. PRESTON, Charlotte, North Carolina

EDGAR ALLEN PRICHARD, McLean, Virginia

FREDERICK A. PROVORNY, Washington, D.C.

ROGER V. PUGH, JR., New York, New York

CHARLES J. QUEENAN, JR., Pittsburgh, Pennsylvania

SHELDON RAAB, NEW YORK, New York

ROBERT D. RACHLIN, Burlington, Vermont

MYRNA SHARON RAEDER, Los Angeles, California

GERALD S. REAMEY, San Antonio, Texas

BERNARD D. REAMS, JR., New Rochelle, New York

THOMAS M. REAVLEY, United States Court of Appeals for the Fifth Circuit, Austin, Texas

BRIAN J. REDDING, Chicago, Illinois

NORMAN REDLICH, New York, New York

JOE R. REEDER, Washington, D.C.

CURTIS R. REITZ, Philadelphia, Pennsylvania

DOUG RENDLEMAN, Lexington, Virginia

HUGH E. REYNOLDS, JR., Indianapolis, Indiana

PATRICK W. RICHARDSON, Huntsville, Alabama

MARTIN F. RICHMAN, New York, New York

BRETT A. RINGLE, Dallas, Texas

KENNETH F. RIPPLE, United States Court of Appeals for the Seventh Circuit, South Bend, Indiana

ARVID E. ROACH II, Washington, D.C.

A. JAMES ROBERTSON, II, Superior Court of San Francisco, San Francisco, California

JAMES L. ROBERTSON, Jackson, Mississippi

JAMES K. ROBINSON, Detroit, Michigan

RUSSELL M. ROBINSON, II, Charlotte, North Carolina

WM. T. ROBINSON III, Covington, Kentucky

EDWARD B. ROCK, Philadelphia, Pennsylvania

H. C. ROEMER, Winston-Salem, North Carolina

RONALD S. ROLFE, New York, New York

JONATHAN ROSE, Tempe, Arizona

JEFFREY A. ROSEN, Washington, D.C.

LEE H. ROSENTHAL, United States District Court for the Southern District of Texas, Houston, Texas

SETH ROSNER, Greenwich, New York

RONALD D. ROTUNDA, Champaign, Illinois

THOMAS F. RYAN, Chicago, Illinois

JAMES D. ST. CLAIR, Boston, Massachusetts

JOHN L. SALTONSTALL, JR., Brookline, Massachusetts

STEPHEN L. SALTONSTALL, Manchester Village, Vermont

L. F. SAMS, JR., Tupelo, Mississippi

PETER M. SAPAROFF, Boston, Massachusetts

MARK SARGENT, Baltimore, Maryland

LEONARD SARNER, Philadelphia, Pennsylvania

JAMES E. SCARBORO, Denver, Colorado

JOHN D. SCARLETT, Winston-Salem, North Carolina

DEBORAH H. SCHENK, New York, New York

DAVID A. SCHLUETER, San Antonio, Texas

DANIEL M. SCHNEIDER, DeKalb, Illinois

THEODORE J. SCHNEYER, Tucson, Arizona

SOL SCHREIBER, New York, New York

EDWARD L. SCHRENK, San Antonio, Texas

CHARLES W. SCHWARTZ, Houston, Texas

HERBERT F. SCHWARTZ, New York, New York

MARVIN SCHWARTZ, New York, New York

VICTOR E. SCHWARTZ, Washington, D.C.

JOHN J. SCIULLO, Pittsburgh, Pennsylvania

MARY DAVIES SCOTT, United States Bankruptcy Courts for the Eastern and Western Districts of Arkansas, Little Rock, Arkansas

L. P. SCRIGGINS, Baltimore, Maryland

IRVING R. SEGAL, Philadelphia, Pennsylvania

CARL M. SELINGER, Morgantown, West Virginia

MARC M. SELTZER, Los Angeles, California

MICHAEL L. SHAKMAN, Chicago, Illinois

NORMA L. SHAPIRO, United States District Court for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania

STEPHEN M. SHAPIRO, Chicago, Illinois

GARY E. SHERMAN, Port Wing, Wisconsin

DEANNE C. SIEMER, Washington, D.C.

CAROLINE M. SIMON, Philadelphia, Pennsylvania

JOSEPH SIMS, Washington, D.C.

MARSHALL L. SMALL, San Francisco, California

LINDA O. SMIDDY, South Royalton, Vermont

BEVERLY MCQUEARY SMITH, Huntington, New York

GERALD K. SMITH, Phoenix, Arizona

JEFFREY M. SMITH, Atlanta, Georgia

RICHARD B. SMITH, New York, New York

RODNEY K. SMITH, Missoula, Montana

WM. REECE SMITH, JR., Tampa, Florida

CHRISTINA A. SNYDER, United States District Court for the Central District of California, Los Angeles, California

JEROLD S. SOLOVY, Chicago, Illinois

THEODORE M. SPACE, Hartford, Connecticut

MARGARET POLES SPENCER, General District Court—Civil Division, Richmond, Virginia

JONATHAN M. STEIN, Philadelphia, Pennsylvania

MARC I. STEINBERG, Dallas, Texas

JEFFREY W. STEMPEL, Tallahassee, Florida

EDWIN H. STERN, New Jersey Superior Court, Appellate Division, Morristown, New Jersey

JOEL H. STERNS, Trenton, New Jersey

CHARLES H. STILL, Houston, Texas

SHALE D. STILLER, Baltimore, Maryland

DONALD I STRAUBER, New York, New York

JAMES A. STRAZZELLA, Bala Cynwyd, Pennsylvania

GUY MILLER STRUVE, New York, New York

CLINTON A. STUNTEBECK, Philadelphia, Pennsylvania

JOHN T. SUBAK, Philadelphia, Pennsylvania

ELI H. SUBIN, Orlando, Florida

BARRY SULLIVAN, Lexington, Virginia

PATRICK JAMES SULLIVAN, San Diego, California

STEPHEN D. SUSMAN, Houston, Texas

RICHARD L. SUTTON, Wilmington, Delaware

KENT D. SYVERUD, Ann Arbor, Michigan

BLAKE TARTT, Houston, Texas

MICHELE TARUFFO, Pavia, Italy

H. SIMMONS TATE, JR., Columbia, South Carolina

CAROLYN ENGEL TEMIN, Pennsylvania Court of Common Pleas, First Judicial District, Philadelphia, Pennsylvania

PARKER D. THOMSON, Miami, Florida

GRAY THORON, Ithaca, New York

DAVID G. TRAGER, Brooklyn, New York

WILLIS R. TRIBLER, Chicago, Illinois

J. RONALD TROST, New York, New York

BOWEN H. TUCKER, Chicago, Illinois

BARBARA D. UNDERWOOD, New York, New York

JAMES A. URDAN, Milwaukee, Wisconsin

JAMES M. VACHÉ, Spokane, Washington

DEBRA A. VALENTINE, Washington, D.C.

ANTHONY VAN WESTRUM, Denver, Colorado

JOHN KAZAR VILLA, Washington, D.C.

DONALD H. VISH, Lexington, Kentucky

CHARLES S. VOGEL, California Court of Appeal, Los Angeles, California

HERBERT M. WACHTELL, New York, New York

MANNING GILBERT WARREN III, Louisville, Kentucky

MARGERY WAXMAN, Washington, D.C.

RUTH WEDGWOOD, New Haven, Connecticut

HARVEY WEINER, Boston, Massachusetts

DAVID H. WEINSTEIN, Philadelphia, Pennsylvania

CAROL WEISBROD, Hartford, Connecticut

DAVID WEISSBRODT, Minneapolis, Minnesota

MARY MOERS WENIG, Hamden, Connecticut

RONALD P. WERTHEIM, District of Columbia Superior Court, Washington, D.C.

EDWIN J. WESELY, New York, New York

MARIANNE WESSON, Boulder, Colorado

WAYNE W. WHALEN, Chicago, Illinois

JAMES B. WHITE, Ann Arbor, Michigan

CLAY R. WILLIAMS, Milwaukee, Wisconsin

MICHAEL A. WILLIAMS, Denver, Colorado

PARHAM H. WILLIAMS, JR., Birmingham, Alabama

VAUGHN C. WILLIAMS, New York, New York

CAROLYN B. WITHERSPOON, Little Rock, Arkansas

G. ROBERT WITMER, JR., Rochester, New York

NICHOLAS J. WITTNER, Torrance, California

DOUGLAS P. WOODLOCK, United States District Court for the District of Massachusetts, Boston, Massachusetts

WILLIAM A. WORTHINGTON, Houston, Texas

L. KINVIN WROTH, South Royalton, Vermont

DOM H. WYANT, Atlanta, Georgia

RICHARD C. WYDICK, Davis, California

ADAM YARMOLINSKY, Washington, D.C.

ROBERT B. YEGGE, Denver, Colorado

BURTON YOUNG, North Miami Beach, Florida

GORDON G. YOUNG, Baltimore, Maryland

FRED C. ZACHARIAS, San Diego, California

JAMES B. ZAGEL, Chicago, Illinois

WILLIAM KNIGHT ZEWADSKI, Tampa, Florida

End of Document

Restatement (Third) of the Law Governing Lawyers Foreword (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Foreword

The publication of the Restatement of the Law Governing Lawyers is an event of major significance. The work is independently important as a contribution to the norms of the legal profession, standing beside the American Bar Association Model Rules of Professional Conduct (1983) and Model Code of Professional Responsibility (1969). It is a major piece of legal scholarship, in the best tradition of the Institute, particularly reflecting the contributions of both legal scholars and practicing lawyers. The subject matter represents something of a departure in the Institute's agenda, focusing as it does on a specific vocation. (I do not think the Institute would contemplate a Restatement of the Law Governing Physicians, or of Accountants, for example.) It seems safe to predict that the text of the rules stated herein and the accompanying Comments will be salient as guidance for lawyers and sources for judges in the years ahead.

The scope of this Restatement goes well beyond the scope of the ethics codes in all jurisdictions, whether those codes are based on the ABA Model Rules of Professional Conduct or the Model Code of Professional Responsibility or, as in California and New York, drawn to an important extent from specific local tradition. The Restatement addresses the formation of the client-lawyer relationship, primarily but not exclusively a contract arrangement, whereas the ethics codes presuppose that such a relationship has been established. The Restatement addresses issues of civil liability of lawyers—legal malpractice—whereas the ethics codes carefully skirt the relationship between ethical standards and malpractice liability. The Restatement recognizes that lawyers can be civilly liable to third parties—"nonclients"—whereas the ethics codes recognize very limited responsibilities in that direction. Perhaps most important, the Restatement recognizes what everyone involved with the ethics codes knows (but which the codes properly do not address), namely that the remedy of malpractice liability and the remedy of disqualification are practically of greater importance in most law practice than is the risk of disciplinary proceedings.

There is another important relationship between the Restatement and the ethics codes. This is the relationship between decisional law and statutory law. The Restatement draws heavily on decisional law, while the ethics codes in almost all jurisdictions have the form and force of statutes, or at least administrative regulation. Of course, on subjects addressed in the ethics codes the Restatement began with the statutory language and usually tracked it literally, or at least without material change. In many instances, however, the Restatement significantly departs from the code formulations. These departures are carefully considered and were extensively debated. As those of us involved in the drafting of the codes will testify, many of these departures simply clarify the intendment of the code provisions and others seek to supersede drafting mistakes. Other departures reflect recognition that experience with the codes revealed that better resolutions were to be had on a variety of issues.

Many of these departures from the codes are now being incorporated by the ABA Ethics 2000 Commission into suggested revisions of the code formulations in the Rules of Professional Conduct. Thus, the beat goes on. Law reform, certainly in the age of relentless social change, is not merely "no undertaking for the short-winded," as has often been remarked. In larger historical perspective law reform is an endless undertaking.

Perhaps, indeed, to the Reporters this very project appeared to be an endless undertaking. The proposal for the project was conceived over 15 years ago, and the project itself required 13 years of devoted effort. The Institute expresses its deepest thanks to the Reporters, Professors Wolfram, Leubsdorf, and Morgan, and particularly to Mr. Wolfram as the chief Reporter. Their sustained attention to the enterprise is evidence of their commitment to the highest values of the profession. A similar measure of thanks is expressed to the Advisers, Consultants, and other critics and commentators who gave of their efforts to the enterprise. Special appreciation is due to Philip S. Anderson, Allen D. Black, Bennett Boskey, Roger C. Cramton, Lawrence J. Fox, Walter Loeber Landau, Susan R. Martyn, Robert H. Mundheim, Robert E. O'Malley, Sherwin P. Simmons, and Wm. Reece Smith, Jr., all of whom served diligently on a special ad hoc committee appointed to assist the Director in overseeing the final revisions and their integration into the official text. All members of the Institute join in celebrating this publication.

GEOFFREY C. HAZARD, JR.
DIRECTOR EMERITUS
THE AMERICAN LAW INSTITUTE

April 13, 2000

Restatement (Third) of the Law Governing Lawyers Rep. Preface (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Reporter's Preface

Any Restatement, and assuredly this one, is not the work of only one person, or even a small group. In this instance, I can attest, the work of a very large number of people carried the project through to its publication. If ethics and justice are to be served, one must start with Co-Reporters John Leubsdorf and Tom Morgan, who have contributed the most in knowledge and good sense—along with sheer hard work and untold and untellable hours of patient labor. During her stint with the project, Professor Linda S. Mullenix also did the same in her crafting of the work-product material in Chapter 5.

The project would not have existed or, at moments, survived were it not for the interest and support of Geoff Hazard, who, as newly appointed Director, suggested in 1985 the idea of a "minirestatement" on confidentiality —a concept that soon grew to this much larger work. Geoff has trod the sometimes precarious lines between supporter and critic, negotiator and intellectual stimulus, and grim taskmaster and cheerful accommodator with grace and friendliness for which the Reporters are all most grateful.

Two groups within the Institute played traditional roles of the finest kind. The Advisers to the project were unstinting in giving of their time, experience, and advice. We will treasure always the grand professional friendships that have grown out of this common work with a common purpose over the last decade and a half. Critical help was provided by the Institute's Council, particularly those members who served as liaison to the Advisers, those who served on the ad hoc committee that shepherded the work during its final editing, or those who simply took special interest in the project as it progressed. The staff of the Institute has also earned our deep appreciation.

A new tradition of Institute member participation in the drafting of a Restatement was also established with this project, the Members Consultative Group arrangement. The MCG was the brainchild of the late Paul Wolkin, whose work as the ALI's Executive Vice President in the early years of this Restatement was enthusiastic and much-appreciated. The MCG has now, rightly, become institutionalized as a feature of all ALI projects. The MCG for this effort, near its end, comprised a number of ALI members large enough to suffice as a quorum at an Institute Annual Meeting. Included were some of the most learned, perceptive, and helpful readers of drafts imaginable. Because any attempt to name individuals would risk invidious exclusion, it must suffice to say only that you know who you are and that we are most grateful for the hundreds of hours of close reading, careful written analysis, attendance at very well-attended MCG meetings, and valuable personal communications.

I must sadly speak in the past tense of the contributions of the Institute's late President Charlie Wright. Charlie was to thousands a beloved teacher and mentor. He was also a kind and friendly source of encouragement to all of us as the Restatement unfolded. His recent passing has left a large void in the ranks of the foremost American legal scholars. His predecessor as President, Rod Perkins, is from the same mold. He was friendly, supportive, and endlessly kind and helpful during the critical early years of the Restatement.

Three deans and many faculty colleagues at the Cornell Law School have been extraordinarily generous and supportive of my own work on the project. For their contributions and those of all others who helped, certainly

including my beloved family and my family of student research assistants, I have enormous gratitude. I'm sure I speak for each of my Co-Reporters in thanking all those who have played similarly helpful roles for each of them. As a final tribute, I confidently send any reader who is curious about what the Restatement might say on a subject to the end of Volume 2, where will be found the excellent index skillfully prepared almost singlehandedly by Martha Crowe.

CHARLES W. WOLFRAM
CHARLES FRANK REAVIS SR.
PROFESSOR EMERITUS
CORNELL LAW SCHOOL

July 10, 2000

Restatement (Third) of the Law Governing Lawyers Intro. (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Introduction

Lawyers are regulated by moral, professional, and legal constraints in discharging their several responsibilities as representatives of clients, officers of the legal system, and public citizens having special responsibilities for the quality of justice. This Restatement addresses only those constraints imposed by law—that is, official norms enforceable through a legal remedy administered by a court, disciplinary agency, or similar tribunal. Remedies against lawyers include professional discipline, an award of damages, denial of a fee claim or an order of restitution of fees already paid, disqualification from a representation, and conviction for crime (see Chapter 1, Topics 2-4).

Other constraints, such as ideals and habits of morality, will often guide conduct of a good person who also aspires to serve as an honorable and public-spirited lawyer, and much more powerfully and pervasively than merely legal obligations. A good lawyer is also guided by ideals of professionalism and by an understanding of sound professional practice. Extensive consideration of such nonlegal factors is not undertaken here. However, they have obvious significance in a good lawyer's life and in the self-concept of the legal profession. On occasion reference will be made in this Restatement to such nonlegal factors when relevant in explaining the rationale for a rule of law or in stating, for example, what factors a lawyer may legitimately take into account in deciding whether and how to act (see, e.g., § 32(3)(f) & Comment *j* thereto) or what advice a lawyer may provide to a client (see § 94(3) & Comment *h* thereto).

This Restatement undertakes to restate much of the law governing lawyers, but not all of it. Again, the criteria for selecting some topics and excluding others had nothing to do with any weighing of the intrinsic importance of the included and omitted topics. For a variety of other reasons, this Restatement omits extensive consideration of issues relating to lawyer advertising and solicitation, the right to the assistance of counsel, group legal services, and similar practice situations. The Restatement also omits extensive consideration of some issues that are importantly grounded in complex statutory regulations, such as that of court-awarded attorney fees (compare § 38(3)(b) and Comment *f* thereto (allocation of court-awarded fee between client and lawyer); § 125, Comment *f* (conflict-of-interest problems raised by feeshifting); § 110, Comment *g* (fee-shifting as a procedural sanction)), and the question of the application of provisions of federal securities statutes and regulations to lawyers practicing in that realm (compare § 51, Comment *a* (consideration of federal securities-law issues as beyond the scope of the Restatement's discussion of the duty of care to nonclients) and § 95, Comment *a* (similar exclusion in instance of lawyer opinion letters)). The Restatement also does not deal extensively with areas in which governing law is, for many purposes, applied to lawyers no differently than to others, such as is true of regulation of a law partnership or professional corporation under partnership and corporate law (compare § 9, Comment *b* (law applicable to questions of internal structure, management, and operation of various forms of law firms)).

Restatement (Third) of the Law Governing Lawyers § 1 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) 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:

a. *Scope and cross-references.* This Section describes generally the most important structural elements of lawyer regulation. For the most part, consideration of a lawyer's legal duties and privileges in subsequent Chapters will assume applicability of the concepts and will employ certain of the definitions stated herein.

On admission to practice, see § 2. On authorized practice by a lawyer, see § 3.

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 legal effect of officially adopted lawyer codes is fundamental and diverse. Lawyer codes are promulgated and applied primarily for the purpose of establishing mandatory standards for the assessment of a lawyer's conduct in the course of a professional-discipline proceeding brought against the lawyer (see Topic 2). Such lawyer codes also typically include commentary containing, among other things, nonbinding advice on how a lawyer may address particular issues or, in general, better practice law. Lawyer-code provisions may also be relevant with respect to the definition of substantive rights or the articulation of factors relevant in granting remedies in other areas. For example, courts have held that lawyer-code provisions may be relevant in determining the reasonableness of a lawyer's fee (see § 34, Comment *d*), in determining questions of fee forfeiture (see § 37, Comment *c*), in defining the appropriate standard of care in legal malpractice (see § 52, Comment *f*), in determining a lawyer's fiduciary duty to a client (see § 48) in determining whether a conflict of interest exists (see § 121, Comment *c*) or has appropriately been consented to by affected clients (see generally § 122), or for the purpose of a motion to disqualify the lawyer. Lawyer-code provisions may also be relevant as an expression of the public policy of the jurisdiction with respect to such issues as the enforceability of transactions entered into in violation of them (e.g. § 47 & Comment *i* thereto).

Lawyer codes in turn reflect other law. Prior to the adoption by states of versions of the 1969 ABA Model Code of Professional Responsibility, many states had no officially adopted lawyer code, although most state bar associations considered the 1908 ABA Canons of Ethics as relevant to guide lawyers. (Some few states had adopted the Canons as explicitly disciplinary rules, although they were not designed for that purpose and in certain respects ill-served it.) There was, however, no regulatory vacuum, for courts had historically asserted plenary power to regulate lawyers (see Comment *c*) and did so through the common-law process. For example, most of the core concepts of lawyer conflicts of interest (see Chapter 8) were already well developed and applied through common-law decisions in disciplinary, disqualification, and legal-malpractice proceedings long before jurisdictions officially adopted lawyer codes stating rules about the same concepts. The drafters of lawyer codes, in turn, have drawn heavily on such decisions in articulating lawyer obligations.

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. Nonetheless, other tribunals, such as hearing bodies in administrative agencies, perform the important role of implementing the lawyer codes in adjudicating disputes when and to the extent their provisions are relevant (see Comment *b* hereto & Topic 3, Introductory Note).

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.

Federal courts have also affirmed an inherent role in regulating lawyers. That is reflected in enactment of disciplinary rules in each federal court and, often, in creation of a disciplinary apparatus. It is also implicated when federal courts apply provisions of lawyer codes in deciding cases, as in ruling on disqualification motions or requests for fees. There is, however, no body of federal decisional law broadly asserting that federal courts have inherent power to regulate lawyers to the exclusion of the federal legislative and executive branches. Similarly, the regulatory power of federal courts over lawyers practicing before them does not extend into judicial regulation of activities of lawyers appearing before or otherwise dealing with the other branches of the federal government or the public.

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.

The three lawyer codes promulgated in this century by the American Bar Association have served as models for regulations adopted in most of the states and the federal courts (see Comment *b*). Even in states—such as California and, to a lesser extent, Texas—in which the form of the lawyer code is markedly different from the ABA models, examination of the code shows significant borrowing in many rules. (By the same token, the two most recent ABA model rules often borrowed from preexisting state codes, such as the code then in effect in California. The 1908 ABA Canons were copied with little change from a preexisting state code.)

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.

e. Choice of law in lawyer regulation. In general, traditional choice-of-law principles, such as those set out in the Restatement Second of Conflict of Laws, have governed questions of choice of law in nondisciplinary litigation involving lawyers. With respect to choice-of-law issues in professional discipline, see § 5, Comment *h*.

f. Civil remedies. In general, lawyers are subject to the same civil liability as others (see § 56), as well as to malpractice liability that differs in some ways from that of persons providing nonlegal services (see §§ 48- 55).

A lawyer may have an absolute or conditional privilege against civil liability to a third person with respect to the lawyer's action or inaction on behalf of a client causing harm to the third person (see generally § 57). With respect to claims of a nonclient, a lawyer is generally immune from liability for harm caused unintentionally except in limited circumstances (see § 51). On remedies generally available to a client for acts of a lawyer, see § 6, and for those available to a lawyer for acts of a client, see § 7.

g. *Procedural and evidence law.* When functioning as advocate on behalf of a client (see generally Chapter 7), a lawyer is privileged by virtue of that office to perform acts that either would otherwise be beyond the customary powers of a private individual functioning as agent (such as procuring the issuance of compulsory process and examining witnesses under oath) or, if performed by a nonlawyer, would constitute actionable wrong (such as filing a suit on behalf of a client (see Comment *f* hereto)). In doing so, a lawyer is constrained by the rules of procedure and evidence applicable to the proceeding and may be subject to sanction in the same or a collateral proceeding in court through contempt (see § 6, Comment *g*) or through the imposition of procedural sanctions (see § 110, Comment *g*), in addition to professional discipline administered in a separate proceeding (see § 5).

h. *Criminal law.* On the general applicability of the criminal law to other acts of a lawyer, see § 8. In some circumstances, a lawyer is privileged to perform acts that, if performed by a nonlawyer, would constitute a crime. Thus, a lawyer may legitimately take possession of an implement of a client crime for the purpose of performing nonintrusive tests and the like (see § 119, Comment *c*).

Reporter's Note

*Comment b. Lawyer codes and background law.*Discussion in the Comment of the relationship between lawyer codes and general law draws on the Director's Foreword to Proposed Final Draft No. 1 of the Restatement (1996). The converse point, which can unfortunately be neglected in a too-technical consideration of the dictates of lawyer codes, is that the lawyer codes are only an incomplete and inadequate outline of how law practice can be personally fulfilling and socially valuable. See Rostain, Ethics Lost: Limitations of Current Approaches to Lawyer Regulation, 71 S. Cal. L. Rev. 1273 (1998).

In the decades after promulgation in 1908 of the ABA Canons of Ethics, courts in some states adopted the Canons as enforceable disciplinary rules, while other jurisdictions referred to them merely for guidance in applying what amounted to common-law concepts of appropriate lawyer conduct. See generally C. Wolfram, Modern Legal Ethics § 2.6.2, at 55-56 (1986). For the first time, the 1969 ABA Model Code of Professional Responsibility contained Disciplinary Rules that were explicitly stated to be mandatory in the sense that their violation could result in professional discipline. See Code, Preliminary Statement. The 1983 ABA Model Rules of Professional Conduct, Scope ¶ [5] (1983), take a similar approach with respect to its rules. See 2 G. Hazard & W. Hodes, The Law of Lawyering § 206 (2d ed. 1990 & supp. 1996); C. Wolfram, supra §§ 2.6.3-.4.

Typical of agencies that have a highly developed set of internal lawyer-code rules and a system and procedures for enforcing them, including debarment from practice before the agency, is the Patent and Trademark Office. See Patent & Trademark Director of Enrollment & Discipline, 37 C.F.R. § 10.2; id., Director of Enrollment & Discipline, 37 C.F.R. § 10.4; id., Code of Professional Responsibility, 37 C.F.R. § 10.20-.129; id., Investigations & Disciplinary Proceedings, 37 C.F.R. § 10.130-.170.

*Comment c. The inherent power of courts.*See, e.g., C. Wolfram, Modern Legal Ethics § 2.2 (1986); ABA/BNA Law. Manual Prof. Conduct §§ 201:101-109 (1996); Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 801 (1992); Wolfram, Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine, 12 U. Ark. Little Rock L.J. 1 (1989); Gressman, Inherent Judicial Power and Disciplinary Due Process, 18 Seton Hall L. Rev. 541 (1988); Alpert, The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis, 32 Buffalo L. Rev. 525 (1983).

The Comment describes, without taking a position, the question of the proper form of rules dealing with the inherent powers of state courts to regulate lawyers. The ABA has insisted on continuation of a strong form of the claim that courts have the exclusive power to regulate lawyers. See, e.g., ABA Model Rules for Lawyer Disciplinary Enforcement, Preamble (as amended, 1992) (model rules for adoption by state supreme court would declare "it has the exclusive responsibility within this state for the structure and administration of the lawyer discipline and disability system and that it has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline …"); ABA Recommendations for the Evaluation of Disciplinary Enforcement, Recommendation 1 (approved February 1992) ("Regulation of the legal profession should remain under the authority of the judicial branch of government."); compare ABA Model Rules of Professional Conduct, Preamble ¶ [9] (1983) ("ultimate authority over the legal profession is vested largely in the courts").

Claims of such sweeping judicial power over lawyers, exclusive of the other branches of government, are unpersuasive. They first appear in American jurisprudence only late in the 19th century. The concept has sometimes been asserted in situations in which there was no discernibly vital interest of the judicial branch in the claim of regulatory power over lawyers. Those extreme assertions are probably rooted in inter-branch politics in a jurisdiction and in its particular traditions of state constitutional law. They are undoubtedly often a reflection of the view of the court that the particular legislative intervention is an excessive or simplistic response to a complex problem. In some few states, a claim of exclusive competence to regulate lawyers is more firmly based on state constitutional provisions explicitly conferring on the judiciary the power to regulate lawyers.

On the other hand, a claim of exclusive judicial power to regulate lawyers is well-founded as a general proposition of American constitutional law when intrusion by the executive or legislative branch into the court's power to regulate would significantly prejudice the judicial branch in its essential activity of adjudicating disputes. It should not be considered such an intrusion for an administrative agency to regulate the conduct of lawyers in matters pending before the agency or for the legislative branch to regulate the activities of lawyers who appear before or are members of it. Moreover, general regulation of lawyers by the legislative or executive branch that does not substantially differ from similar regulation applicable to members of other professions should not be considered to violate separation-of-powers principles. The legislature speaks for the whole electorate and can coordinate state policies concerning lawyers with other policies, although it cannot provide the continuing, detailed, and informed involvement that courts can, and it may be swayed by transient complaints.

On extravagantly broad judicial claims of exclusive inherent powers to regulate lawyers, see, e.g., Mississippi Bar v. McGuire, 647 So.2d 706 (Miss.1994) (statute providing for disbarment on conviction of lawyer for any felony, with exception for violations of federal Internal Revenue Code, unconstitutionally conflicted with court-adopted lawyer code, which contained no tax-violation exception); In re Wallace, 574 So.2d 348 (La.1991) (statute providing that executor of estate can discharge lawyer designated in testator's will "only for just cause" unconstitutionally conflicts with court-promulgated lawyer-code rule providing that lawyer representing client in any matter is required to withdraw when discharged, whether with or without cause); Washington State Bar Ass'n v. State, 890 P.2d 1047 (Wash.1995) (statute that required mandatory collective bargaining between bar association and employees, in conflict with court rule that merely permitted such, violates separation-of-powers limitations); State ex rel. Fiedler v. Wisconsin Senate, 454 N.W.2d 770 (Wis.1990) (although legislature may prescribe minimum qualifications of persons appointed as guardian ad litem, statute requiring such appointees to take specified continuing-legal-education courses unconstitutionally intruded on prerogative of judicial branch to regulate bar); cf., also, e.g., Squillace v. Kelley, 990 P.2d 497 (Wyo.1999) (in reversing sanctions against lawyer under statute so providing (see § 110), statute imposing sanctions for litigation abuses in ways significantly inconsistent with court's own rule on same subject unconstitutionally invades exclusive judicial power to prescribe procedural rules). In almost every state, there is extensive legislation applicable specifically to lawyers, contained in procedural, evidence, and similar enactments. A prominent example is the attorney-client privilege (see § 68 and following), which is typically found in a legislatively enacted evidence code.

Perhaps a majority of courts that have spoken have asserted a strong form of the inherent-powers doctrine with respect to regulating lawyers. Other decisions more persuasively take the position that courts will share the power

to regulate lawyers with other branches of government so long as this poses no threat to the continued vitality of the judicial branch. E.g., Heslin v. Connecticut Law Clinic of Trantolo & Trantolo, 461 A.2d 938, 943-47 (Conn.1983); Ratterman v. Stapleton, 371 S.W.2d 939, 941 (Ky.1963); Clark v. Austin, 101 S.W.2d 977, 986-96 (Mo.1937) (concurring opinion); North Carolina State Bar v. Frazier, 302 S.E.2d 648 (N.C. App.Ct.1983), review denied, 303 S.E.2d 546 (N.C.1983); State ex rel. Robeson v. Oregon St. Bar, 632 P.2d 1255 (Or.1981). See generally Note, The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation, 60 Minn. L. Rev. 783, 799-803 (1976).

Separation-of-powers considerations that may regulate branches of state government do not control the applicability to lawyers, wherever admitted, of federal constitutional, statutory, or administrative requirements. If constitutional, such requirements apply by virtue of the supremacy clause of the federal Constitution. On the more-limited concept of exclusive inherent powers followed by the federal courts with respect to questions of separation of powers vis-à-vis other branches of the federal government, see, e.g., Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 796, 107 S.Ct. 2124, 2131, 95 L.Ed.2d 740 (1987) (dicta) (federal courts are empowered, as aspect of inherent power of federal court to punish for contempt, to appoint lawyer other than United States attorney to prosecute contempt; power is not subject to veto of coordinate branch); cf. also, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (act of Congress having effect of requiring federal courts to reopen judgments that had become final before enactment unconstitutional as contravening separation of powers).

*Comment d. The role of bar associations.*See C. Wolfram, Modern Legal Ethics § 2.3 (1986). On the validity of requiring all members of a state bar to belong to a mandatory bar association, see Levine v. Heffernan, 864 F.2d 457 (7th Cir.1988), cert. denied, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989) (upholding constitutional validity of mandatory membership in state bar association); In re State Bar of Wisconsin, 485 N.W.2d 225 (Wis.1992) (reinstating mandatory bar, which had been suspended pending decision in *Levine v. Heffernan*, supra, and associated litigation). For criticism of the mandatory-bar concept, see, e.g., Schneyer, The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case, 1983 Am B. Found. Res. J. 1; Levine, Time to Move to a Voluntary Bar, 1990 Wis. L. Rev. 213. On decisions restricting collection of dues from objecting members of mandatory bars, see, e.g., Keller v. State Bar of California, 496 U.S. 1, 14, 110 S.Ct. 2228, 2235, 110 L.Ed.2d 1 (1990) (bar may require contributions only for purposes of regulating legal profession and improving quality of legal services available to people of state), quoting and relying on Lathrop v. Donohue, 367 U.S. 820, 843, 81 S.Ct. 1826, 1838, 6 L.Ed.2d 1191 (1961). The process of determining which bar functions can be funded with involuntary dues payments has often proved difficult and time-consuming. See, e.g., Gibson v. Florida Bar, 906 F.2d 624 (11th Cir.1990) (approving Florida bar's objection procedures for dissenting bar members), cert. dism'd as improvidently granted, 502 U.S. 104, 112 S.Ct. 633, 116 L.Ed.2d 432 (1991); County of Ventura v. State Bar of California, 41 Cal.Rptr.2d 794 (Cal.Ct.App.1995) (upholding standing of county and district attorney to challenge portion of bar dues paid on behalf of employee lawyers that was devoted to political or ideological activities); The Florida Bar Re Frankel, 581 So.2d 1294 (Fla.1991) (lobbying for child-welfare legislation beyond permissible scope). On the unsettled state of the law following *Keller,* see, e.g., Luban, The Disengagement of the Legal Profession: Keller v. State Bar of California, 1990 Sup. Ct. Rev. 163.

*Comment e. Choice of law in lawyer regulation.*See generally § 5, Comment *h,* Reporter's Note; 2 G. Hazard & W. Hodes, Law of Lawyering § 8.5:102 (2d ed. 1990 & supp. 1996); C. Wolfram, Modern Legal Ethics § 2.6.1, at 50-51 (1986). Decisions are few and have involved largely nondisciplinary choice-of-law issues. E.g., X Corp. v. Doe, 805 F.Supp. 1298, 1304-05 n.11 (E.D.Va.1992), aff'd, 17 F.3d 1435 (4th Cir.1994) (in action by client for injunction against lawyer, federal court in diversity applies sitting state's conflicts rules, which here, in dispute involving question of ethical duties of confidentiality, require application of law of place of allegedly wrongful taking of documents by lawyer rather than place of lawyer's admission to practice); Ackerman v. Schwartz, 733 F.Supp. 1231, 1240-41 (N.D.Ind.1989), aff'd on relevant point, 947 F.2d 841, 846 (7th Cir.1991) (Indiana law governs questions of liability for Michigan lawyers who prepared allegedly misleading opinion letter for Indiana client); Kracht v. Perrin, Gartland & Doyle, 268 Cal.Rptr. 637, 641-43 (Cal.Ct.App.1990) (under Restatement of Conflict of Laws most-significant-relationship test, California law governs assignability of legal-malpractice claim); In re Hoffman, 379 N.W.2d 514 (Minn.1986) (Alaska law, place of worker injury and worker-compensation

adjudication, applies with respect to permissible size of fee between Minnesota lawyer and client); Bernick v. Frost, 510 A.2d 56 (N.J.Super.Ct.App.Div.1986) (in view of specific selection of New Jersey law in fee contract and fact that most of work was performed there, New Jersey fee schedule governs permissible fee rather than more rigorous schedule of state where litigation occurred); In re Istim, Inc. v. Chemical Bank, 581 N.E.2d 1042 (N.Y.1991) (New York law applies to determine New York lawyer's lien against New York client with respect to Illinois litigation); but cf. Norris v. Kunes, 305 S.E.2d 426, 428 (Ga.Ct.App.1983) (contingent-fee contract between Georgia lawyer and client enforceable, despite fact that work involved worker-compensation proceeding in Maine, whose law prohibited such contracts). See also § 5, Reporter's Note to Comment *h*.

Case Citations - by Jurisdiction

—

C.A.7
C.A.9
D.Minn.Bkrtcy.Ct.
D.Or.

C.A.7

C.A.7, 1998. Cit. in disc. (citing § 1 of Prop. Final Draft No. 2, 1998, which is now § 1 of the Official Text). A defendant gang member who was charged with drug and conspiracy crimes moved for recusal of the judge, whose son had, as a supervised third-year law student, assisted in the earlier prosecution of the gang's leader. Illinois federal district court denied the defendant's motion. This court granted the defendant's petition for a writ of mandamus and ordered that the district court judge recuse himself pursuant to 28 U.S.C. § 455(a), because the prior case was so closely related to this defendant's case. The court determined that the judge was not required to recuse himself under § 455(b)(5), because the prior case in which the judge's son participated was not the same proceeding as defendant's case. It stated that the judge's son was “acting as a lawyer” in the prior proceeding, and that he bore the same ethical responsibilities to his client and to the court that a full-fledged member of the bar would have. Matter of Hatcher, 150 F.3d 631, 636.

C.A.9

C.A.9, 2002. Com. (c) cit. in ftn. After defendant's state-court murder conviction and sentence of death were affirmed, defendant petitioned for federal habeas relief. The district court denied motion to dismiss. Remanding, and answering the district court's question on interlocutory appeal, this court held that Arizona's mechanism for the timely appointment and compensation of postconviction counsel in all capital cases facially complied with the Antiterrorism and Effective Death Penalty Act, but that, because the appointment of counsel for defendant petitioner did not comply with the timeliness requirement of that mechanism, Arizona was not entitled in this case to benefit from the Act's expedited procedures. Spears v. Stewart, 283 F.3d 992, 1014, cert. denied 537 U.S. 977, 123 S.Ct. 468, 154 L.Ed.2d 335 (2002).

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Com. (b) quot. in sup. In one of two consolidated adversary proceedings, Chapter 7 trustee of estate of loan-placement agent brought claim for breach of fiduciary duty against law firm that agent hired to prepare loan documents for a multimillion dollar casino loan that agent arranged. This court held, inter alia, that law firm violated its duty to disclose and its duty of loyalty to agent, because, although participant lenders for the casino loan were the actual clients represented by firm in an action against a third party in which agent was the named plaintiff, firm agreed to represent agent in a closely related action by one loan participant against agent without seeking informed consent from either agent or that participant. The court pointed out that the fiduciary

duties owed by firm were also articulated under the Court's Rules of Conduct governing attorneys, which could be used as a guide and to provide case law for analyzing law firm's conduct. In re SRC Holding Corp., 352 B.R. 103, 189, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

D.Or.

D.Or.2019. Com. (b) quot. in sup. Owners association for a planned residential community sued, among others, former members of association's board of directors, alleging fraud, negligent misrepresentation, breach of fiduciary duty, and unlawful trade practices. This court denied defendants' motion to disqualify plaintiff's law firm, holding that it was not disqualified from representing plaintiff under the Oregon Rules of Professional Conduct. The court noted that, according to Restatement Third of the Law Governing Lawyers § 1, many district courts had adopted the standards and rules governing the professional conduct of lawyers that applied in the jurisdiction in which the court sat and that the Oregon Supreme Court had adopted the Oregon Rules of Professional Conduct. Quatama Park Townhomes Owners Association v. RBC Real Estate Finance, Inc., 365 F.Supp.3d 1129, 1136.

End of Document

Restatement (Third) of the Law Governing Lawyers 1 2 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Introductory Note

Introductory Note: This Topic considers how the law regulates who may become a lawyer and provide legal services (Title A), "unauthorized practice" restrictions on both lawyers and nonlawyers (Title B), and the process of professional discipline (Title C). From colonial times, the prevailing norm has been that a person assisting others in litigation must be a lawyer, and a lawyer must be admitted to practice before the court in question. From that arrangement has grown a general system for admitting persons to law practice for both in-court and out-of-court legal services (see Title A). Correlatively, beginning in the early part of the 20th century, the organized bar made substantial efforts to restrict the out-of-court activities of nonlawyers under what became known as rules of unauthorized practice (see Title B; § 4). Similar to such regulation are restrictions imposed on lawyers with respect to when and where they may practice (§ 3). The two areas—admission and unauthorized practice—are generally designed to ensure that only competent individuals properly credentialed as lawyers provide legal services. That is done on the justification of ensuring that clients, the legal system, and the public are not harmed by incompetent or corrupt practitioners.

Admission to practice is a right subject to abrogation. Like members of other professions, lawyers are subject to legal sanctions directly affecting their right to practice, such as disbarment or suspension, for violation of an applicable lawyer code. The process by which lawyers are disciplined is considered in Title C.

Restatement (Third) of the Law Governing Lawyers 1 2 A Intro. Note (2000)

Introductory Note

Introductory Note: In general, a jurisdiction's requirements for admission and for renewal of a license to practice law are best designed when directed primarily toward protecting prospective clients and the legal system against incompetent practitioners or those whose professional acts would predictably cause harm to clients, the legal system, or the public. Admission rules and procedures are typically established by the highest court of the jurisdiction under its inherent power to regulate law practice (see § 1, Comment *c*), acting through judicially appointed or bar-association committees on admission. On local admission as the traditional basis for lawyer discipline, see § 5, Comment *h*.

In most states, initial admission to practice as a lawyer results from successful completion of a process of college and legal education, bar examination, submission of a bar application with supporting indications of compliance with the state's requirements, including good moral character, and scrutiny by a committee on admission. Formal admission to practice customarily takes the form in most states of a swearing-in ceremony before the state's highest court.

Thereafter, maintenance of a lawyer's admitted status may require annual renewal of the license by certifying that the lawyer has complied with requirements such as those involving continuing legal education and books and records for client funds and property (see § 44, Comments *c* & *d*) as well as financial records of the operation of the lawyer's office. Almost all jurisdictions require payment of periodic dues or registration fees, and most require compliance with continuing-legal-education requirements. A large majority of states require membership in the state's bar association, to which dues must be paid for permissible bar functions (see § 1, Comment *d*). Most states also maintain “client security funds,” from which a client injured by a lawyer's unfaithful dealings with client funds may seek compensation.

Restatement (Third) of the Law Governing Lawyers § 2 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 1. Regulation of the Legal Profession

Topic 2. Process of Professional Regulation

Title A. Admission to Practice Law

§ 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.

Comment:

a. *Scope and cross-references.* This Section addresses the principal requirements of admission to the bar and maintenance of a license to practice law. The rules that apply vary significantly from one jurisdiction to another.

b. *Admission to practice in general.* Admission to practice and maintenance of a license to practice law in a condition of good standing authorizes a lawyer to perform all functions of other lawyers so admitted, both in the law office and in all of the courts of the state (see § 3). Each state administers a separate system for admission of applicants to the state's bar. There is theoretically no limit on the number of jurisdictions in which a lawyer may be admitted to practice, although the difficulty and expense of complying with multiple-admission and good-standing requirements impose practical limits.

Beyond matter-by-matter admission through pro hac vice arrangements (see § 3, Comment *e*), approximately half of the states permit a lawyer in good standing in the bar of another state to gain permanent admission (admission "on motion") without the need for any, or at least for a full, bar examination. Some states condition on-motion eligibility on comity—requiring that a state in which the lawyer is currently admitted accord a substantially similar privilege to lawyers from the on-motion state. After compliance with applicable requirements, those states accord the admitted lawyer the full powers of a lawyer regularly admitted.

Each federal district court, court of appeals, specialized federal court, and the Supreme Court presently maintains a separate bar. While separate admission and maintenance of membership is required as a condition to practice in each of those courts, that is readily accomplished on application, except in those courts that impose an additional requirement of admission to the local bar. In each, admission to the bar of a state is necessary and suffices for most purposes. In addition, as in most state courts, admission to the bar of a federal court pro hac vice (see § 3, Comment *e*) is available to a lawyer in good standing in another bar. Some federal administrative agencies maintain their own bars, but by statute admission to the bar of a state suffices as qualification to practice before almost all federal agencies.

c. *Educational requirements.* Some of the earliest efforts of bar associations in the United States in the latter part of the 19th century consisted of persuading jurisdictions to impose educational requirements on those seeking admission to practice. Most states now require a minimum of an undergraduate degree from an accredited college as well as a degree from an approved law school. Approved law schools are defined in the great majority of states as only those accredited by the American Bar Association. Some few states recognize other law schools separately accredited by the state or by other accrediting agencies. An alternative form of education popular in the 19th century consisted of "reading law" in a lawyer's office for an extended period of time prior to taking a bar examination. Again under the urging of bar associations, most states have limited or eliminated that alternative.

d. *Character requirements.* A license to practice law confers great power on lawyers to do good or wrong. Lawyers practice an occupation that is complex and often, particularly to nonlawyers, mysterious. Clients and others are vulnerable to wrongdoing by corrupt lawyers. Hence, as far back as the first bars in medieval England efforts have been made to screen candidates for the bar with respect to their character. The process has occasionally been controversial because of the difficulty of defining the standards of character thought to be minimal, the difficulty of ensuring fair application of any standards that may be agreed upon, the risk of either invasive inquiry or invidious application of standards under the claim of rigorous examination, and the overriding difficulty of predicting future professional conduct from a necessarily abbreviated personal history and the committee's access to such past activities as are sufficiently public to be checked. The standard stated in the Section of moral character appropriate for a lawyer reflects the basis on which most states pursue inquiry into the present character of an applicant. The central inquiry concerns the present ability and disposition of the applicant to practice law competently and honestly.

Most "character-and-fitness" committees function mainly on the basis of personal questionnaires that must be completed by each candidate, sometimes supplemented by required affidavits or letters of reference from existing bar members or others attesting to the candidate's good character, attestation of a lack of a significant disciplinary record by the administration of the candidate's law school (where formal discipline is extremely rare), and occasional checks of public records. Courts have imposed limitations on questions that seek information about political associations or that offend federal laws, such as those regarding disabilities. The effort in many states is coordinated through a national clearinghouse for general information about bar candidates, which detects some applications by lawyers suspended or disbarred in other jurisdictions.

e. *Competence requirements—bar examination.* Bar examinations have evolved from oral examinations before judges or experienced lawyers to written examinations on a large number of legal subjects. (A small number of jurisdictions will admit without examination persons who have graduated from a law school in the state.) The examinations are typically preceded by voluntary supplementary courses of instruction by bar-review companies. Lawyers, legal educators, and the public have debated the need for bar examinations (in view of the requirement of graduation from college and law school), as well as their utility in testing subjects of importance in law practice. Bar examinations have also had both direct and indirect influence on the curricula of law schools graduating many students who will sit for particular bars. Occasionally, bar examination committees will attempt to specify particular courses or kinds of instruction that candidates must successfully complete. Less directly, announcement that a subject will be examined creates pressure on students to take a course in the subject. In their favor, it can be said that bar examinations provide a unique opportunity for recent law graduates to review a large sweep of

legal subjects and to gain at least passing familiarity with bodies of law and particular legal rules that the student may not have studied while in law school.

f. Residence requirements. Under federal constitutional decisions, local residence may not be required as a condition of admission or continued membership; similarly, United States citizenship may not be required as a condition of admission to or membership in a state's bar. In contrast, some courts have upheld the requirement of maintenance of an in-state office.

g. Foreign legal consultants. A substantial number of American jurisdictions also provide arrangements for admission to practice of law-trained persons admitted to practice in non-United States jurisdictions. The arrangements arose from both international and American bar concern to provide an appropriate response to the requirements of transborder law practice and commerce. In some states, the admission is limited to advising clients on the applicability of the law of the lawyer's home jurisdiction. In each state, the lawyer is admitted subject to the lawyer code of the admitting state. Similarly, other nations are increasingly providing methods by which American and other countries' lawyers may gain admission to practice.

Reporter's Note

*Comment b. Admission to practice in general.*See generally C. Wolfram, Modern Legal Ethics § 15.2.1 (1986); id., § 15.2.4 (admission in federal courts); id. § 15.2.5 (admission in administrative agencies); id. § 5.4 (continuing legal education). On such requirements as bar-dues payment, satisfaction of continuing-legal-education requirements, and the like, see, e.g., In re Alexander, 807 S.W.2d 70 (Mo.1991) (application to board of bar examiners for registration as law student); Kentucky Bar Ass'n v. Towles, 786 S.W.2d 874 (Ky.1990) (CLE); In re Bragdon, 438 N.W.2d 226 (Wis.1989) (dues and CLE). Although the requirement is quite common in other countries, including most of the provinces of Canada, very few American states require maintenance of legal-malpractice insurance of any lawyer, bonding of lawyers who deal with clients' funds, or annual nonpublic auditing of a law firm's books.

On admission-on-motion, see, e.g., In re Horton, 462 N.W.2d 661 (Wis.1990) (period of practice as inside legal counsel counts toward durational requirement); Lane v. State Bd. of Law Examiners, 295 S.E.2d 670 (W.Va.1982) (application of requirement that rules of state of original admission be "substantially the same" as local rules). On the requirement of association with local counsel, see, e.g., Architectural & Engineered Prods. Co. v. Whitehead, 869 P.2d 766 (Kan.Ct.App.1994). On post-admission conditions, see, e.g., Scariano v. Justices of Supreme Court of Indiana, 38 F.3d 920 (7th Cir.1994) (local rule requiring that predominant place of practice be maintained in-state for minimum of 5 years constitutional).

Federal appellate courts have approved the restrictive requirement in local rules of some federal district courts that any lawyer applying for membership in the bar of the district court be admitted to the bar of the sitting state. See Giannini v. Real, 911 F.2d 354 (9th Cir.), cert. denied, 498 U.S. 1012, 111 S.Ct. 580, 112 L.Ed.2d 585 (1990), and authorities cited; In re Roberts, 682 F.2d 105 (3d Cir.1982). The requirement seems particularly inappropriate in the context of a system of national courts. The statute providing that no federal agency may establish a requirement for admission of a lawyer to the bar of the agency beyond admission to a state's bar is 5 U.S.C. § 500. The Patent and Trademark Office is statutorily empowered to require an examination. 35 U.S.C. § 31; see 37 C.F.R. §§ 10.6(a) and 10.7(a)(2) (1997) (lawyers as among those who must complete examination to demonstrate technical qualifications).

*Comment c. Educational requirements.*See generally C. Wolfram, Modern Legal Ethics § 15.2.2 (1986). On ABA accreditation, see, e.g., In re Tocci, 600 N.E.2d 577 (Mass.1992) (applicant who chose to complete legal education at unaccredited law school (which became accredited by ABA 2 years after applicant's graduation) after completing 2 years at accredited school did not qualify for waiver of rule requiring graduation from accredited law school to sit for bar examination, notwithstanding acceptance by another state of applicant's same argument for waiver), and authorities cited; In re Altshuler, 490 N.W.2d 1 (Wis.1992) (not abuse of discretion for board of law

examiners to refuse to waive rule requiring graduation from U.S. law school); but cf., e.g., Bennett v. State Bar of Nevada, 746 P.2d 143 (Nev.1987) (record sufficiently demonstrated that education received at unaccredited law school was functionally equivalent to that provided at ABA-accredited school). Cf., e.g., Baccus v. Karger, 692 F.Supp. 290 (S.D.N.Y.1988) (state requirement that age of bar applicant be over 21 constitutional; but requirement that applicant commence legal education after 18th birthday violates equal protection). On "reading law," seven states still permit that method of preparing for a bar examination. See Curriden, Lawyers Who Skip Law School, ABA J. 28 (Feb.1995).

*Comment d. Character requirements.*See generally C. Wolfram, Modern Legal Ethics § 15.3.2 (1986); Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985); Stone, The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study, 15 No. Ill. U. L. Rev. 331 (1995); McDowell, The Usefulness of "Good Moral Character," 33 Washburn L.J. 323 (1994).

In a series of decisions, the United States Supreme Court limited the extent to which bar-admissions committees could inquire into the political beliefs and associations of bar applicants and use the responses to deny an application. See Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); In re Stolar, 401 U.S. 23, 91 S.Ct. 713, 27 L.Ed.2d 657 (1971); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971); see also Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961) (inquiry into membership in Communist Party permissible); In re Anastaplo, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961) (same); see generally C. Wolfram, Modern Legal Ethics § 12.2.3 (1986). For decisions limiting the scope of inquiry under the Americans with Disabilities Act, see, e.g., Clark v. Virginia Bd. Bar Examiners, 880 F.Supp. 430 (E.D.Va.1995) (questions on bar-admission application on prior treatment of applicant for mental illness violate Act); Ellen S. v. Florida Bd. Of Bar Examiners, 859 F.Supp. 1489 (S.D.Fla.1994) (similar); In re Petition and Questionnaire for Admission to the Rhode Island Bar, 683 A.2d 1333 (R.I.1996) (similar, plus similar holding as to questions regarding drug or alcohol dependency; questions modified to ask only about current usage of substances or current suffering from mental disorders to extent that ability to practice law would be impaired).

On particular areas of good character, see, e.g., In re Parker, 838 P.2d 54 (Or.1992), cert. denied, 508 U.S. 950, 113 S.Ct. 2440, 124 L.Ed.2d 658 (1993) (impersonation of employer to obtain credit from lender warrants denial of application); In re Noske, 470 N.W.2d 116 (Minn.1991) (involvement in tax-shelter fraud and similar acts warrants finding of lack of good character); In re Childress, 561 N.E.2d 614 (Ill.1990) (under circumstances, failure to show degree of rehabilitation necessary to admission to bar after 15-year-old convictions for rape and robbery); In re Johnson, 384 S.E.2d 668 (Ga.1989) (failure to disclose on application default on student loans and unsatisfied money judgments); In re Wright, 690 P.2d 1134 (Wash.1984) (insufficient time since release from parole for convictions for second-degree murder and heroin possession). On denial of admission for plagiarism as a student, compare, e.g., In re Widdison, 539 N.W.2d 671 (S.D.1995) (admission denied); Radtke v. Board of Bar Examiners, 601 N.W.2d 642 (Wis.1999) (admission denied), with e.g., In re Zbiegien, 433 N.W.2d 871 (Minn.1988) (admission granted, where ready admission of plagiarism and apology). On denial of admission for student-loan defaults, compare, e.g., In re Taylor, 647 P.2d 462 (Or.1982) (admission denied); In re Gahan, 279 N.W.2d 826 (Minn.1979) (same), with, e.g., In re S.M.D., 609 So.2d 1309 (Fla.1992) (under circumstances, student who entered law school already heavily in debt not financially irresponsible in continuing to borrow to extent that inability to find legal employment after law school and continuing pressures from creditors led to bankruptcy filing).

*Comment e. Competence requirements—bar examination.*See generally C. Wolfram, Modern Legal Ethics § 5.3 (1986); Note, Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives, 45 Case W. Res. L. Rev. 1191 (1995).

*Comment f. Residence requirements.*On the constitutional prohibition against an admission requirement of in-state residence, see New Hampshire v. Piper, 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985); Sommermeyer v. Supreme Court of Wyoming, 871 F.2d 111 (10th Cir.1989); see also Barnard v. Thorstenn, 489 U.S. 546, 109 S.Ct. 1294, 103 L.Ed.2d 559 (1989) (unconstitutional for Virgin Islands to require bar applicant to live there for

year before applying for admission and to state intent to reside there after admission); but cf. Frazier v. Heebe, 788 F.2d 1049 (5th Cir.1986) (local federal court rule requiring residence and maintenance of office within district constitutional). On the constitutional prohibition against requiring United States citizenship of a bar applicant, see In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973); Virginia v. Friedman, 487 U.S. 59, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988); but cf., e.g., In re J.E.G.R., 720 So.2d 244 (Fla.1998) (bar board properly denied admission to foreign national convicted of court-martial offense of desertion; reapplication properly conditioned on applicant becoming eligible for U.S. citizenship). See generally C. Wolfram, Modern Legal Ethics § 15.2.3 (1986). On the requirement of maintenance of an office in the state as a requirement for bar membership, see, e.g., Tolchin v. Supreme Court of New Jersey, 111 F.3d 1099 (3d Cir.), cert. denied, 522 U.S. 977, 118 S.Ct. 435, 139 L.Ed.2d 334 (1997) (constitutionality of state rule requiring admitted lawyer to maintain bona fide office for law practice in state).

*Comment g. Foreign legal consultants.*See generally Needham, The Licensing of Foreign Legal Consultants in the United States, 21 Fordham Int'l L.J. 1126 (1998); Daly, The Ethical Implications of the Globalization of the Legal Profession, 21 Fordham Int'l L.J. 1239 (1998). On the growing state acceptance of licensure of foreign legal consultants, see, e.g., Cal. R. Ct., Rule 988 (1996); Fla. Stat. Ann., Rules Regulating Fla. Bar, ch. 16, Rule 16-1.1 (1994); N.Y. Rules of Ct., Rules Ct. App. For Licensing of Legal Consultants § 521.1 (1999).

Restatement (Third) of the Law Governing Lawyers 1 2 B Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Introductory Note

Introductory Note: The law governing the unauthorized practice of law limits the provision of legal services by both lawyers and nonlawyers. Practice limitations on lawyers are primarily a function of state lines or the consequence of discipline (see § 3). With respect to nonlawyers, beginning in the early part of the 20th century, particularly during and after the Great Depression, and continuing until the 1980s, the organized bar made a concerted effort to prohibit nonlawyers from competing with lawyers to provide any service that lawyers had traditionally provided to clients for a fee. At the end of that period, under threat of antitrust prosecution, the organized bar repealed various understandings that it had entered into over prior years with professional organizations of persons who perform legal services or provide services closely connected to law. At the same time, broad support for deregulation has drawn into question formerly accepted restrictions on business activity in general, such as stringent versions of the law of unauthorized practice, that may be maintained for anti-competitive purposes or with such an effect.

Restatement (Third) of the Law Governing Lawyers § 3 (2000)

§ 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:

a. *Scope and cross-references.* This Section concerns jurisdictional limits on permissible practice by a lawyer. On choice-of-law issues generally involved in the regulation of lawyers, see § 1, Comment *e.* On jurisdictional and choice-of-law issues involved in lawyer discipline, see § 5, Comment *h.* On unauthorized practice by a nonlawyer or on a lawyer's aiding such unauthorized practice, see § 4.

The state in which a lawyer is admitted is referred to herein as the lawyer's home state. A lawyer who practices law in violation of the rules stated in the Section is susceptible to a variety of sanctions, including professional discipline, injunction, and denial of recovery of fees otherwise earned (see § 49).

b. *Rationale.* As reflected in this Section, jurisdictional limitations on practice applicable to lawyers are primarily a function of state lines (see Introductory Note). For many purposes, lawyers must respect those lines—limiting their general practice to the territory of the one or more jurisdictions in which the lawyer is admitted—although pro hac vice admission (see Comment *e* hereto) and admission to practice in federal courts and before federal agencies (see Comment *e* hereto) authorize extraterritorial practice. Occasionally, proposals are put forward for removal of state-line limitations on practice, as by means of a national bar-admission process. However, local interest in maintaining regulatory control of lawyers practicing locally is strong and historically has prevented adoption of such proposals. Nonetheless, the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns requires that jurisdictions not erect unnecessary barriers to interstate law practice (see Comment *e*).

c. *Required maintenance of a lawyer's admitted status.* In general, only a lawyer who is in current compliance with applicable legal requirements in the admitting jurisdiction (see § 2) for maintaining the lawyer's law license in a currently effective status is qualified to practice law there. Those conditions vary by jurisdiction and can be technical in nature. In some few jurisdictions, for example, maintenance of a valid license is conditioned on maintaining an office within the jurisdiction for the practice of law (see § 2, Comment *f*). Many jurisdictions now require a minimum number of hours per year of qualifying continuing legal education.

A lawyer who was once admitted to practice in a state violates the prohibition against unauthorized practice by continuing to practice law in the state notwithstanding disbarment or suspension, lapse of the lawyer's license to practice in the state (for example, for failure to pay mandatory bar dues or, as indicated above, to comply with applicable continuing-legal-education requirements), resignation, or assumption of nonactive status (as when the lawyer retires or moves to another state). Lapse can occur for failure to file an annual renewal application with self-certification of compliance with the indicated requirements. Any such unauthorized practice by a lawyer is a violation of the state's lawyer code and thus subjects the lawyer to discipline. It may also violate a statutory prohibition in the state against unauthorized practice of law. Such impermissible practice by a lawyer may also lead, among other remedies, to forfeiture of an otherwise valid claim for legal fees (see § 37). When lapse of license for such reasons is not directly related to continuing competence to practice, it does not by itself indicate either legal malpractice or incompetent representation in a criminal-defense representation.

d. *Definition of practice by a lawyer.* What constitutes the practice of law for the purposes of defining unauthorized practice by a lawyer varies with the reason for which the lawyer is no longer authorized to practice. Either by rule, decisional law, or specific order, a jurisdiction may, for example, prohibit a disbarred or suspended lawyer from functioning as a paralegal in a law firm (compare § 4, Comment *g*), even beyond the prohibition against practicing as a lawyer or holding oneself out as such. The concern is not only that a disbarred lawyer functioning as a paralegal will harm the interests of clients by performing services incompetently, but also that a lawyer who has committed a violation sufficiently serious to warrant substantial discipline and who as a result has been deprived of a law license and the income that it represents is in a position and may be motivated to use such a role as a subterfuge to continue law practice.

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.

f. Multistate practice by inside legal counsel. States have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client (compare § 4, Comment *e*) and does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer may deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation.

g. Authorized practice in a federal agency or court. A lawyer properly admitted to practice before a federal agency or in a federal court (see § 2, Comment *b*) may practice federal law for a client either at the physical location of the agency or court or in an office in any state, so long as the lawyer's practice arises out of or is reasonably related to the agency's or court's business. Such a basis for authorized practice is recognized in Subsection (2). Thus, a lawyer registered with the United States Patent and Trademark Office could counsel a client from an office anywhere about filing a patent or about assigning the ensuing patent right, matters reasonably related to the lawyer's admission to the agency. (The permissible scope of practice of a nonlawyer patent agent may be less, since admission to the agency does not suggest competence to deal with matters, such as the assignment of patents, beyond the jurisdiction of the agency.)

A lawyer admitted in one state who is admitted to practice in a United States district court located in another state, but who is not otherwise admitted in the second state, can practice law in the state so long as the practice is limited to cases filed in that federal court. Local rules in some few federal district courts additionally require admission to the bar of the sitting state as a condition of admission to the federal court. The requirement is inconsistent with the federal nature of the court's business.

A lawyer or law firm similarly may employ a lawyer or nonlawyer who practices pursuant to such a limited license from a federal agency or court to perform services permissible under the license. Because the person's practice is authorized, the employing lawyer is not engaged in assisting unauthorized practice (compare § 4, Comments *f* & *g*). On the other hand, the employing lawyer or law firm would be so engaged if the unadmitted lawyer or nonlawyer engaged in practice not reasonably related to the work the person is authorized to conduct.

Reporter's Note

*Comment b. Rationale.*See generally ABA Model Rules of Professional Conduct, Rule 5.5(a) (1983) ("A lawyer shall not … (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction …"); ABA Model Code of Professional Responsibility, DR 3-101(B) (1969) (similar). E.g., In re Burrell, 882 P.2d 1257 (Alaska 1994) (definition of prohibited practice of law by disbarred or suspended lawyer); In re Kasdan, 623 A.2d 228 (N.J.1993) (continuing to practice during 3-month suspension warrants 3-year additional suspension); Florida Bar v. Neckman, 616 So.2d 31 (Fla.1993) (practice of law by lawyer who resigned license in face of pending disciplinary proceedings); Toledo Bar Ass'n v. Doyle, 623 N.E.2d 37 (Ohio 1993) (suspension for, inter alia, practicing law after failing to renew registration as lawyer); Carter v. Peotrowski, 568 A.2d 1032 (R.I.1990) (refusal to reinstate lawyer who practiced law following disbarment); State ex rel. Nebraska St. Bar Ass'n v. Frank, 363 N.W.2d 139 (Neb.1985) (suspended lawyer who practiced law by preparing documents in connection with assessing inheritance tax against grandfather's estate ordered disbarred). On injunctive relief, see, e.g., In re Banks, 561 A.2d 158 (D.C.1987) (injunction against impermissible practice of law and advertising of ability to do so by law-school graduate who had never completed process of bar admission); Florida Bar v. Kaiser, 397 So.2d 1132 (Fla.1981) (injunction against out-of-state lawyer placing advertisements suggesting ability to practice law in-state).

On refusing to permit a lawyer to recover fee charges for unauthorized practice, see, e.g., Martin & Martin v. Jones, 541 So.2d 1 (Ala.1989).

*Comment e. Extra-jurisdictional practice by a lawyer.*See generally Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 So. Tex. L. Rev. 665 (1995); Sutton, Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on "Ethics and the Multijurisdictional Practice of Law," 36 Tex. L. Rev. 1027 (1995); Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335 (1994); Needham, Negotiating Multistate Transactions: Reflections on Prohibiting the Unauthorized Practice of Law, 12 St. Louis U. Pub. L. Rev. 113 (1993); Brakel & Loh, Regulating the Multistate Practice of Law, 50 Wash. L. Rev. 699 (1975). On the lawyer-code provisions, see Reporter's Note to Comment *b* hereto. On the growth of trans-border practice by lawyers in Europe under European Community auspices, see, e.g., Siskind, Freedom of Movement for Lawyers in the New Europe, 26 Int'l Law. 899 (1992).

On admission pro hac vice, see, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 277 n.2, 105 S.Ct. 1272, 1274, 84 L.Ed.2d 205 (1985) (described as discretionary); Leis v. Flynt, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979) (lawyer had no due process right to admission pro hac vice and thus no right to hearing on denial of application); Schlumberger Technologies, Inc. v. Wiley, 113 F.3d 1553 (11th Cir.1997) (trial court's denial of pro hac vice motion requires clear demonstration of unethical conduct that would require disbarment); Kirkland v. National Mortgage Network, 884 F.2d 1367 (11th Cir.1989) (once admitted pro hac vice, lawyer is entitled to same procedural rights as other admitted lawyers); Huff v. State, 569 So.2d 1247 (Fla.1990) (proper grounds for denial include matter of record indicating doubt whether applicant is member in good standing of another state's bar); State ex rel. H.K. Porter Co. v. White, 386 S.E.2d 25 (W.Va.1989) (application of prohibition against "numerous or frequent" such appearances for purposes of consolidated actions). For a rare instance in which a distant state of admission disciplines an in-state lawyer for appearing in another jurisdiction in violation of that jurisdiction's requirements on pro hac vice practice, see In re Schrader, 523 S.E.2d 327 (Ga.1999). Inexplicable conditions are sometimes imposed. E.g., Largeteau v. Smith, 603 N.Y.S.2d 62 (N.Y.App.Div.1993) (lawyer's admission pro hac vice extends only to actual trial, precluding involvement in pretrial discovery in same matter).

On the permissibility of pre-suit investigative work in a state in which a suit will be filed by a then-unadmitted lawyer, see, e.g., Somuah v. Flachs, 721 A.2d 680, 689-90 (Md.1998).

There are few decisions dealing with the question of permissible out-of-state practice. Several involve clear instances of impermissible practice, through setting up an office in a state in which the lawyer is not admitted. E.g., Kennedy v. Bar Ass'n of Montgomery County, 561 A.2d 200 (Md.1989) (out-of-state lawyer could not open local office for practice of federal law); Ranta v. McCarney, 391 N.W.2d 161 (N.D.1986); Cleveland Bar Ass'n v. Misch, 695 N.E.2d 244 (Ohio 1998) (injunction against Ohio practice by Ohio resident, admitted only in Illinois and in federal court in Ohio, who, under "consulting" agreement with Ohio firm, performed extensive services in Ohio for several clients); Ginsburg v. Kovrak, 139 A.2d 889 (Pa.1958) (similar to *Kennedy,* supra). Some decisions dealing with the right of an out-of-state lawyer to recover a fee from an in-state client seem unduly restrictive, in ways not followed in the Section or Comment. E.g., Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal.1998), as modified 17 Cal.4th 643a (1998) (New York law firm retained there by New York and California corporations to conduct arbitration of contract dispute governed by California law, entailing several brief trips to California, engaged in unauthorized practice of law in California); Spivak v. Sachs, 211 N.E.2d 329 (N.Y.1965) (4-3 decision) (although "incidental and innocuous" in-state practice would be permissible, California divorce lawyer, called there by New York acquaintance to come to New York to assist her in developing strategy to resist husband's attempts to gain custody in Connecticut proceeding, could not recover fee for 14 days of work advising client and her local counsel in New York); cf., e.g., Appell v. Reiner, 204 A.2d 146 (N.J.1964) (New York lawyer could recover for legal work done in New Jersey for New Jersey client on peculiar facts here, where New York aspects of work dominated and New Jersey aspect was inseparable from them).

In response to the *Birbrower* decision, supra, the California legislature passed legislation permitting an out-of-state lawyer to conduct in-state arbitration if associated with local counsel who was designated as counsel of record and if the out-of-state lawyer agreed to be subject to local jurisdiction for disciplinary purposes. See Cal. Code Civ. Pro. § 1284.4 (1999). Other courts have reached a result contrary to *Birbrower*, supra, allowing an out-of-state lawyer to conduct an in-state arbitration at the request of a client. E.g., Williamson v. John D. Quinn Constr. Corp., 537 F.Supp. 613 (S.D.N.Y.1982).

On the permissibility of an out-of-state lawyer dealing on a noncontinuous basis with an in-state client from the lawyer's distant office, by telephone, letter, or occasional visit, see, e.g., Estate of Condon, 64 Cal.Rptr.2d 789 (Cal.Ct.App.1997) (*Birbrower* distinguished; Colorado lawyer not in violation of statute prohibiting practice of law "in" state when, from office in Colorado, lawyer advised on California law, sent letters and directed telephone calls to opposing counsel and co-counsel in California, and visited California to confer with clients and co-counsel and negotiate with opposing side); El Gemayel v. Seaman, 533 N.E.2d 245 (N.Y.1988) (permissible for lawyer, expert in law of Lebanon, to call and write client from office in District of Columbia and while traveling in Massachusetts, giving New York client advice about enforceability of Massachusetts custody decree in Lebanon). For some courts, association with local counsel may be highly important. E.g., Fought & Co. v. Steel Eng'g & Erection, Inc., 951 P.2d 487 (Hawaii 1998) (Oregon lawyer who, on behalf of Oregon-based client for whom firm served as outside general counsel, hired and directed local counsel in in-state litigation not precluded from recovering court-awarded fees); In re Opinion 33, 733 A.2d 478 (N.J.1999) (New Jersey lawyers could hire out-of-state bond counsel to function as such in state, but only if local lawyers retain overall responsibility; bond issuers could retain out-of-state bond counsel when complex, novel, or untested legal issues or theories presented).

For decisions following an approach similar to that of the Section, see, e.g., Estate of Condon, supra; Cowen v. Calabrese, 41 Cal.Rptr. 441 (Cal.Dist.Ct.App.1964) (Illinois lawyer who came to California to advise client residing there about federal bankruptcy law could recover fee).

*Comment f. Multistate practice by inside legal counsel.*Several jurisdictions have established arrangements exempting inside legal counsel employed from some of the admission requirements otherwise applicable. E.g., Idaho Rules Governing Admission to Practice, rule 220 (amended effective 1997) ("house counsel license" established for lawyers with exclusive employment agreement with organization, avoiding necessity of passing state's bar examination); Mo. S. Ct. Rules, Rule 8.105 (effective 1996, as amended 1996) (establishing limited

license for inside legal counsel, without need to take state's bar examination); In re Amendments to Rules Regulating the Florida Bar (I), 593 So.2d 1035 (Fla.1991) (rejecting bar's proposed rule requiring all inside counsel for corporations to be locally admitted as "not … drafted to meet the legitimate needs of business in a modern economy"); In re Amendments to Rules Regulating the Florida Bar (II), 635 So.2d 968 (Fla.1994) (adopting rule 17-1.1 of Florida Rules, permitting lawyer licensed to practice in any other jurisdiction to practice in Florida while exclusively employed by business organization without requirement of taking state's bar examination).

*Comment g. Authorized practice in a federal agency or court.*In the seminal case, Sperry v. Florida State Bar, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963), the Court held that Florida's attempt to regulate (as unauthorized practice under state law) the practice of a nonlawyer patent agent before what is now the United States Patent and Trademark Office violated the supremacy clause in view of an act of Congress authorizing the Office to admit nonlawyers to practice there and implementing regulations doing so. The nonlawyer there maintained an office within the state from which to conduct his practice. The Court refused to read into the federal statute or regulation a condition that practice could be conducted only in the physical premises of the federal agency. Instead, it held that the nonlawyer's practice at an office in Florida for the limited purposes of accomplishing Patent Office work was also immune from state regulation. See 373 U.S. at 385-402, 83 S.Ct. at 1325-1334. The Court noted that the ABA and many local bar associations had unsuccessfully urged that nonlawyers not be permitted to practice before federal agencies. See 373 U.S. at 399, 83 S.Ct. at 1333.

The federal Administrative Procedure Act provides generally that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in any agency proceeding." See 5 U.S.C. § 555(b). In effect, the APA leaves to the constitutive statutes and regulations of each agency the determination whether a person is "duly qualified." Bar associations generally opposed the provision before its original enactment to the extent to which it authorized nonlawyer practitioners before a federal agency (see Sperry v. Florida State Bar, supra, 373 U.S. at 396, 83 S.Ct. at 1331). With respect to lawyer practitioners, a related provision of the Act requires federal agencies to impose no admission requirement on a lawyer currently admitted to practice before the bar of any state. See id. § 500; see also § 2, Comment *b*.

On impermissibly appearing in a federal-court action without being admitted to the bar of the federal court, see, e.g., Office of Disciplinary Counsel v. Scuro, 522 N.E.2d 572 (Ohio 1988) (discipline of Ohio lawyer for appearing in federal action in Texas without federal bar admission).

Case Citations - by Jurisdiction

D.Md.
D.Mass.
Fla.App.
Ill.App.
Md.Spec.App.
Mass.
Minn.

D.Md.

D.Md.2003. Com. (e) quot. in sup. Attorneys who were not admitted to practice in state sued clients' employer for intentional interference with their contractual relationship after employer communicated with attorneys' clients and negotiated settlements of their discrimination claims without notifying attorneys. Denying in part employer's

motion for summary judgment, this court held, inter alia, that state law allowed retainer agreement between clients and attorney not yet admitted pro hac vice. Dorsey v. Home Depot U.S.A., Inc., 271 F.Supp.2d 726, 729.

D.Mass.

D.Mass.2002. Rptr's Note cit. in ftn. After law firm allegedly utilized law professor's expertise on tobacco litigation to win massive settlements for its clients against the tobacco industry, law professor sued law firm to enforce an oral fee-splitting agreement. Denying defendant's motion for summary judgment, the court held, inter alia, that, even though the oral fee-splitting agreement was made in contravention of the rules of professional conduct, it was nonetheless enforceable. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 188 F.Supp.2d 115, 120, reversed 290 F.3d 42 (1st Cir.2002).

D.Mass.2001. Rptr's Note (e) cit. in ftn. Massachusetts law professor, licensed to practice in New York, sought to enforce oral fee-splitting agreement allegedly formed in Illinois with law firms from South Carolina and Mississippi that profited from tobacco industry's settlement of numerous lawsuits. This court denied in part South Carolina defendants' motion for summary judgment, but it took motion under advisement as to enforceability of fee-splitting agreement, inviting parties to brief issues raised by the laws of the various jurisdictions as to fee-splitting agreements. It noted that if plaintiff was considered a nonlawyer, then no state would allow him to share fees with a lawyer. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 178 F.Supp.2d 9, 26.

Fla.App.

Fla.App.2001. Quot. in disc. Condominium association brought suit against property insurer for breach of contract in connection with insurance claims arising out of property damage caused by hurricane. The trial court entered an order requiring parties, already represented by Florida lawyers, to retain associated local counsel. Granting insurer's motion for writ of certiorari and quashing the trial court's order, this court held, inter alia, that the additional economic burden of associating local counsel would constitute irreparable harm. The court said that a lawyer currently admitted to practice in a jurisdiction could provide legal services to a client at any place within the admitting jurisdiction. St. Paul Fire and Marine Ins. Co. v. Marina Bay Resort Condominium Ass'n, Inc., 794 So.2d 755, 757.

Ill.App.

Ill.App.2003. Quot. and cit. in sup., com. (e) cit. and quot. in sup. Movie producer sought to vacate arbitration award that dismissed its claims against movie distributor as having been addressed and decided in previous arbitration. Trial court granted movie distributor's motion to dismiss, affirming arbitration award. Affirming, this court held, inter alia, that fact that movie distributor's out-of-state attorney represented distributor during arbitration did not violate rules prohibiting unauthorized practice of law. Colmar, Ltd. v. Fremantlemedia North America, Inc., 344 Ill.App.3d 977, 986, 987, 989, 280 Ill.Dec. 72, 79-81, 801 N.E.2d 1017, 1024-1026.

Md.Spec.App.

Md.Spec.App.1999. Quot. in disc., com. (e) quot. in disc. (citing § 3 of Prop. Final Draft No. 2, 1998. § 3 has since been revised; see Official Text). In attorney-disciplinary proceeding, the court ordered 30-day suspension of attorney, who was admitted to bar of federal district court of state, but not to state bar, for engaging in unauthorized practice of law by holding herself out to public as general practitioner and failing to disclose limitation of her practice to bankruptcy law and the federal district. Attorney Grievance Com'n of Maryland v. Harris-Smith, 356 Md. 72, 737 A.2d 567, 572, 573.

Mass.

Mass.2006. Subsec. (3) cit. in disc. and quot. in ftn. Advertising sales agent commenced arbitration against producer of radio program under a contract requiring arbitration in Massachusetts. The arbitration panel, rejecting agent's argument that producer's representation by a licensed out-of-state attorney constituted unauthorized practice of law, awarded discovery sanctions to producer. The trial court entered a judgment confirming the award but the appeals court reversed and vacated the award. Affirming the award, this court held that unauthorized practice of law, even if present here, was insufficient grounds to vacate the award. The court noted that, under the Restatement, an out-of-state attorney was generally permitted to provide legal services in another jurisdiction to a client in matters reasonably related to the attorney's home-state practice. Superadio Ltd. Partnership v. Winstar Radio Productions, LLC, 446 Mass. 330, 336, 844 N.E.2d 246, 251.

Minn.

Minn.2016. Subsec. (3) quot. in diss. op.; com. (e) cit. and quot. in sup., quot. in diss. op. Director of state Office of Lawyers Professional Responsibility issued a private admonition against Colorado-licensed attorney for engaging in the unauthorized practice of law by representing his in-laws in negotiating a settlement regarding their ability to pay a Minnesota judgment; a panel of the Lawyers Professional Responsibility Board affirmed the admonition. This court affirmed, holding that the panel's decision that defendant violated the Minnesota Rules of Professional Responsibility even though he was not physically present in Minnesota was not clearly erroneous. Citing Restatement Third of the Law Governing Lawyers § 3, the court explained that defendant was not permitted to provide legal services on a temporary basis under the rule's exception, because the provided services did not arise out of or reasonably relate to his Colorado practice; the dissent argued that the services related to his practice's collection work. In re Charges of Unprofessional Conduct in Panel File No. 39302, 884 N.W.2d 661, 668, 670-672.

End of Document

Restatement (Third) of the Law Governing Lawyers § 4 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 1. Regulation of the Legal Profession

Topic 2. Process of Professional Regulation

Title B. Authorized and Unauthorized Practice

§ 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.* This Section addresses legal restrictions on the practice of law by a person not admitted to practice as described in § 2. On somewhat similar restrictions on disbarred or suspended lawyers or on lawyers practicing in a jurisdiction in which the lawyer is not admitted, see § 3.

To some, the expression "unauthorized practice of law" by a nonlawyer is incongruous, because it can be taken to imply that nonlawyers may engage in some aspects of law practice, but not others. The phrase has gained near-universal usage in the courts, ethics-committee opinions, and scholarly writing, and it is well understood not to imply any necessary area of permissible practice by a nonlawyer. Moreover, a nonlawyer undoubtedly may engage in some limited forms of law practice, such as self-representation in a civil or criminal matter (see Comment *d*). See also, e.g., § 3, Comment *g*; Comments *c, e,* and *g* hereof. It thus would not be accurate for the black letter to state flatly that a nonlawyer may not engage in law practice. On defining unauthorized practice, see Comment *c* hereto.

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.

f. Lawyer assistance to nonlawyer unauthorized practice. The lawyer codes have traditionally prohibited lawyers from assisting nonlawyers in activities that constitute the unauthorized practice of law. That prohibition is stated in the Section. The limitation supplements requirements that lawyers provide adequate supervision to nonlawyer employees and agents (see Comment *g* hereto; § 11, Comment *e*). By the same token, it has prevented lawyers from sponsoring non-law-firm enterprises in which legal services are provided mainly or entirely by nonlawyers and in which the lawyer gains the profits (see generally § 10).

g. Nonlawyer employees of law firms. For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain nonlawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision (see § 11, Comment *e*), and so long as the nonlawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm (see § 10).

Reporter's Note

*Comment b. Unauthorized practice by a nonlawyer—in general.*See generally 2 G. Hazard & W. Hodes, Law of Lawyering § 5.5:201 (2d ed. 1990 & supp. 1996); C. Wolfram, Modern Legal Ethics § 15.1 (1986); Rhode, Policing the Professional Monopoly, 34 Stan. L. Rev. 1 (1981); Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors-Or Even Good Sense?, 1980 Am. B. Found. Res. J. 159. On the general decline in unauthorized-practice enforcement during the last third of the 20th century, see ABA Comm'n on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations: A Report with Recommendations 23-32 (1995) (recommending more permissive stance toward nonlawyer services, particularly in areas in which client needs are not being adequately met by lawyers).

*Comment c. Delineation of unauthorized practice.*See, e.g., A. Abbott, The System of Professions: An Essay on the Division of Expert Labor (1988); C. Wolfram, Modern Legal Ethics 824-49 (1986); Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1 (1981); Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors —Or Even Good Sense?, 1980 Am. B. Found. Res. J. 159.

Courts have occasionally attempted to define unauthorized practice by general formulations, none of which seems adequately to describe the line between permissible and impermissible nonlawyer services, such as a definition based on application of difficult areas of the law to specific situations. See, e.g., Gardner v. Conway, 48 N.W.2d 788, 795-96 (Minn.1951); cf., e.g., ABA Model Code of Professional Responsibility EC 3-5 ("the practice of law relates to the rendition of services for others that call for the professional judgment of the lawyer [consisting of lawyer's] ability to relate the general body and philosophy of law to a specific legal problem of a client"). Many courts refuse to propound comprehensive definitions, preferring to deal with situations on their individual facts. E.g., Miller v. Vance, 463 N.E.2d 250, 251 (Ind.1984); In re Campaign for Ratepayers' Rights, 634 A.2d 1345, 1351 (N.H.1993); In re Unauthorized Practice of Law Rules, 422 S.E.2d 123, 124 (S.C.1992).

Courts are often divided over whether a particular area of nonlawyer practice is unauthorized, for example in the situation of banks, real-estate agents, or similar nonlawyers filling in blanks in standard contract forms as a part of transactions in which they are otherwise involved, although in recent years courts have shown a pronounced inclination to hold that a particular activity by nonlawyers is in the public interest and thus justified. Compare, e.g., Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark.1981) (real-estate brokers may complete standardized forms for simple real-estate transactions); Miller v. Vance, 463 N.E.2d 250 (Ind.1984) (both banks and real-estate agencies may fill in blanks on approved mortgage forms, so long as no individual advice given or charge made for that service); In re First Escrow, Inc., 840 S.W.2d 839 (Mo.1992) (escrow closing companies, real-estate brokers, lenders, and title insurers may use standard forms for standardized real-estate transactions, so long as no advice given or separate fee charged for that service); In re Opinion No. 26 of the Comm. on Unauthorized Practice, 654 A.2d 1344 (N.J.1995) (despite fact that many aspects of residential real-estate transaction involves practice of law, real-estate brokers and title-company officers may control and handle all aspects of such transactions, after fully informing parties of risks of proceeding without lawyers), with, e.g., Arizona St. Bar Ass'n v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz.1961) (real-estate agents may not fill out standardized forms in land-sale transactions); Kentucky St. Bar Ass'n v. Tussey, 476 S.W.2d 177 (Ky.1972) (bank officer's act of filling out mortgage forms constitutes unauthorized practice).

Several courts have stated in very broad terms that the definition of unauthorized practice, because it involves regulation of the legal profession, is ultimately a question reserved by the state's constitution exclusively to the courts, precluding inconsistent legislative or administrative regulation. E.g., In re First Escrow, Inc., 840 S.W.2d 839, 843 n.7 (Mo.1992) (dicta) (definition of unauthorized practice is responsibility of judiciary; only role for state legislature is assisting judiciary through providing penalties for unauthorized practice); Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc., 635 P.2d 730, 732-33 (Wash.1981) (invalidating legislation liberalizing rules applicable to escrow agents). On the more limited definition of inherent powers favored in this Restatement, see § 1, Comment *c*.

*Comment d. Pro se appearance.*See generally C. Wolfram, Modern Legal Ethics § 14.4 (1986). In federal courts, the right of appearing pro se has long been recognized by statute. See 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively are permitted to manage and conduct causes therein."). The seminal decision extending the federal constitutional right of pro se representation to an accused in a criminal case is Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In effectuating the right, the court is required to warn a defendant adequately of the dangers and disadvantages of self-representation in order that the waiver of the right to counsel be knowing and voluntary. Faretta v. California, supra, 422 U.S. at 835, 95 S.Ct. at 2541; e.g., United States v. Sandles, 23 F.3d 1121 (7th Cir.1994), and authority cited. On the power of the court to appoint "standby counsel" for an accused proceeding pro se, even over objection by the accused, see Faretta v. California, supra, 422 U.S. at 834 n.46, 95 S.Ct. at 2541; McKaskle v. Wiggins, 465 U.S. 168, 184, 104 S.Ct. 944, 954, 79 L.Ed.2d 122 (1984). On the general desirability of doing so, see, e.g., United States v. Moya-Gomez, 860 F.2d 706, 740 (7th Cir.1988), cert. denied, 492 U.S. 908, 109 S.Ct. 3221, 106 L.Ed.2d 571 (1989). There is, however, no constitutional right to the assistance of standby counsel. E.g., United States v. Betancourt-Arretuche, 933 F.2d 89 (1st Cir.), cert. denied, 502 U.S. 959, 112 S.Ct. 421, 116 L.Ed.2d 441 (1991); United States v. La Chance, 817 F.2d 1491, 1498 (11th Cir.), cert. denied, 484 U.S. 928, 108 S.Ct. 295, 98 L.Ed.2d 255 (1987). An accused also has no right to a "hybrid" representation, part pro se and part standby counsel. See McKaskle v. Wiggins, supra, 465 U.S. at 178, 104 S.Ct.

at 951. On the rule that a mid-trial election by an accused to invoke the right to proceed pro se does not relieve long-standing counsel from responsibility to continue as standby counsel, see United States v. Cannistraro, 799 F.Supp. 410 (D.N.J.1992).

There is no corresponding federal constitutional right to pro se representation in civil matters (because of the absence of a constitutional right to the assistance of counsel in civil matters), but some jurisdictions have found such a right in state statutory or constitutional law. E.g., Bullard v. Morris, 547 So.2d 789 (Miss.1989) (state constitution); Blair v. Maynard, 324 S.E.2d 391 (W.Va.1984) (state constitution). Obviously, the so-called advocate-witness rule is inapplicable to a pro se litigant who also wishes to testify. E.g., Curtis v. J.J. Duffy Adjustment Serv., Inc., 581 N.E.2d 493 (Mass.Ct.App.1991); see generally § 108, Comment *d*.

On the general rule that a pro se litigant may not represent any other party, no matter what their relationship, see, e.g., Brown v. Ortho Diagnostic Sys., Inc., 868 F.Supp. 168 (E.D.Va.1994) (nonlawyer father could represent himself in products-liability suit, but could not represent infant son), and authority cited; Murphy v. International Bus. Machs. Corp., 810 F.Supp. 93 (S.D.N.Y.1992) (pro se litigant may not represent another party as counsel); Johnson v. Ivimey, 488 A.2d 1275 (Conn.App.Ct.1985) (pro se husband could not represent wife as counsel). Cf. § 108, Reporter's Note to Comment *d* (on correlative rule that pro se lawyer may not both represent other parties in same matter and testify).

*Comment e. Unauthorized practice for and by entities.*See generally C. Wolfram, Modern Legal Ethics § 13.7 (1986). On the rule that a corporation or similar entity can appear in court only through a lawyer, see, e.g., Osborn v. Bank, 22 U.S. (9 Wheat.) 738, 830, 6 L.Ed. 204 (1824); Commercial & R.R. Bank v. Slocomb, Richards & Co., 39 U.S. (14 Pet.) 60, 65, 10 L.Ed. 354 (1840); Capital Group, Inc. v. Gaston & Snow, 768 F.Supp. 264 (E.D.Wis.1991) (president and sole shareholder of professional-services corporation could represent himself pro se, but could not represent corporation in either of those capacities or by assignment of its cause of action), citing authority; Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753 (Minn.1992) (corporation appearing in trial court must be represented by lawyer, despite fact that court proceeding originated in small-claims court where no such rule applied); Salman v. Newell, 885 P.2d 607 (Nev.1994) (trust could not proceed pro se, and nonlawyer trustee could not represent trust); E & A Assocs. v. First Nat'l Bank, 899 P.2d 243 (Colo.Ct.App.1994) (nonlawyer general partner could not represent partnership). Some courts have made narrow exceptions where the proceeding would not be unduly impaired, in view of the nature of the litigation, or where enforcing the rule would effectively exclude the entity from court. E.g., In re Unauthorized Practice of Law Rules, 422 S.E.2d 123 (S.C.1992) (business may be represented in civil-magistrate proceedings by nonlawyer); Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corp., 621 A.2d 225 (Vt.1992), and authority cited.

On the general prohibition against a lawyer employed by an organization providing legal services to customers of the entity, see, e.g., In re First Escrow, Inc., 840 S.W.2d 839, 849 (Mo.1992), and authorities cited; Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 199-200 (Wash.1983). On the division among the states over whether salaried employees of an insurance company may, under various arrangements, represent policyholders, compare, e.g., In re Youngblood, 895 S.W.2d 322 (Tenn.1995) (permissible); In re Rules Governing Conduct of Attorneys, 220 So.2d 6 (Fla.1969) (same); ABA Informal Opin. 1370 (1976) (same), with, e.g., American Insur. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky.1996) (prohibiting); Gardner v. North Carolina St. Bar, 341 S.E.2d 517 (N.C.1986) (same); Oh. Bd. Comm'rs on Grievances & Discipline, Opin. 95-14, 1995 WL 813802 (Dec. 1, 1995) (same).

*Comment f. Lawyer assistance to nonlawyer unauthorized practice.*See generally ABA Model Rules of Professional Conduct, Rule 5.5(b) (1983) ("A lawyer shall not … (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."); ABA Model Code of Professional Responsibility, DR 3-101(A) (1969) (similar); e.g., In re Field, 613 N.Y.S.2d 922 (N.Y.App.Div.1994) (disbarment for employing disbarred lawyer in law office in way plainly constituting practice of law); People v. Felker, 770 P.2d 402 (Colo.1989) (discipline, among other things, for permitting nonlawyer (suspended lawyer) in office to give legal advice to clients); In re Jones, 779 P.2d 1016 (Or.1989) (discipline for permitting nonlawyer operating dissolution-processing business to use lawyer's name on papers nonlawyer filed); In re Yamaguchi,

515 N.E.2d 1235 (Ill.1987) (discipline for signing blank documents or uninspected documents, knowing that nonlawyer would use them for clients in legal proceedings); Florida Bar v. James, 478 So.2d 27 (Fla.1985) (discipline for forming collection-agency partnership with nonlawyer, where part of activities constituted practice of law).

*Comment g. Nonlawyer employees of law firms.*E.g., In re Opinion No. 24 of Comm. On Unauthorized Practice, 607 A.2d 962 (N.J.1992); Louisiana St. Bar Ass'n v. Edwins, 540 So.2d 294 (La.1989) (disbarment on facts here); see also Reporter's Note to Comment *e* hereto (decisions prohibiting employing disbarred or suspended lawyer as office assistant). See generally § 10, Reporter's Note.

Case Citations - by Jurisdiction

—

C.A.7
Mass.
N.C.App.

C.A.7

C.A.7, 1998. Com. (c) cit. in disc. (citing § 4 of Prop. Final Draft No. 2, 1998, which is now § 4 of the Official Text). A defendant gang member who was charged with drug and conspiracy crimes moved for recusal of the judge, whose son had, as a supervised third-year law student, assisted in the earlier prosecution of the gang's leader. Illinois federal district court denied the defendant's motion. This court granted the defendant's petition for a writ of mandamus and ordered that the district court judge recuse himself pursuant to 28 U.S.C. § 455(a), because the prior case was so closely related to this defendant's case. The court determined that the judge was not required to recuse himself under § 455(b)(5), because the prior case in which the judge's son participated was not the same proceeding as defendant's case. It stated that the judge's son was "acting as a lawyer" in the prior proceeding, and that he bore the same ethical responsibilities to his client and to the court that a full-fledged member of the bar would have. Matter of Hatcher, 150 F.3d 631, 636.

Mass.

Mass.2010. Com. (g) quot. in sup. In attorney disciplinary proceedings, this court, after reviewing the findings of the Board of Bar Overseers, ordered that attorney be suspended for one year and one day for, among other violations, assisting a nonlawyer, a law-school graduate who had not passed the bar examination, in the unauthorized practice of law. The court stated that lawyers who employed nonattorneys were required to supervise the delegated work and retain responsibility for the nonattorney's work, and that, under the Massachusetts Rules of Professional Conduct, failure to do so could result in a charge of assistance in the unauthorized practice of law; here, attorney allowed nonlawyer to run his own unsupervised discrimination-law practice from attorney's law office. In re Hrones, 457 Mass. 844, 852, 933 N.E.2d 622, 630.

N.C.App.

N.C.App.2002. Com. (e) quot. in disc. After plaintiff sued corporation for breach of contract, and corporation counterclaimed, the trial court entered an order permitting corporation to be represented pro se by its chief executive officer (CEO). The superior court dismissed the counterclaim, and plaintiff voluntarily dismissed its claim. On plaintiff's appeal of the trial court's order permitting corporation's CEO to represent corporation, this court reversed in part, holding that in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law, and could not proceed pro se by its agent. LEXIS-NEXIS, Div. of Reed Elsevier, Inc. v. Travishan Corp., 155 N.C.App. 205, 207, 573 S.E.2d 547, 549.

End of Document

Restatement (Third) of the Law Governing Lawyers 1 2 C Intro. Note (2000)

Introductory Note

Reporter's Note

Introductory Note: From colonial times until late in the 19th century, lawyer discipline was almost entirely a function of courts and voluntary bar associations. A lawyer would be proceeded against in a show-cause proceeding before a court, at the suit either of an injured client, an adversary lawyer, or a voluntary bar association. A trial by the judge would ensue, with the most extreme sanction available being expulsion from the bar of the court. A lawyer admitted to several courts could, and often did, continue to practice before the other courts, unless and until successfully proceeded against there as well.

Disciplinary proceedings became increasingly formalized in the 20th century. Critical findings about the state of lawyer discipline were made by the 1979 ABA Special Committee on Evaluation of Disciplinary Enforcement, "Problems and Recommendations in Disciplinary Enforcement," chaired by Justice Tom Clark. In response, the ABA began work on what became, through a series of interim publications, the ABA Model Rules for Lawyer Disciplinary Enforcement (as amended 1996).

Some administrative agencies, particularly in the federal government, have disciplinary procedures, separate from those of the states, that are applicable to lawyers admitted to practice in the agency (see § 3, Comment *e*). The procedures are typically administered by a department of the agency with disciplinary powers and involve contested hearings before hearing officers who make findings and recommendations for dismissal or various types of discipline, which may include debarment from the agency's list of admitted practitioners.

In most states and the District of Columbia, lawyer disciplinary proceedings are similar to and must comply with due-process standards applicable to administrative-enforcement proceedings. Many states have followed all or most of the recommended procedures and institutional arrangements specified in the ABA's Model Rules for Lawyer Disciplinary Enforcement, which were devised in light of applicable due process and similar constraints. Thereunder, a professional, independent disciplinary counsel is charged with responsibility to prosecute offenses, often following review by a screening body to determine whether probable cause exists warranting formal charges. Formal charges are heard by a neutral panel, composed primarily of lawyers but often having significant nonlawyer membership, appointed by the court and often without involvement of any bar association. Written charges make known to the lawyer the nature of the offense and its circumstances. Rules governing depositions in civil actions are applied; other discovery is conducted informally, subject to superintendence by the hearing panel. Beyond discovery, proceedings are governed by the rules of procedure and evidence applied in civil litigation. Some jurisdictions open the record of proceedings, including the hearing, once a determination of probable cause is made. The standard of proof in most jurisdictions is clear and convincing evidence, that is, evidence establishing the truth of the charged offense beyond a mere preponderance of the evidence but not necessarily beyond a reasonable

doubt. Matters on which a responding lawyer bears the burden of persuasion must be proved by a preponderance of the evidence (on readmission, see below). Review is typically available in the highest court of the jurisdiction, which exercises independent judgment with respect to both findings of fact and conclusions of law on all issues, including the sanction imposed.

The sanctions imposed in lawyer-discipline proceedings seek to protect clients and the public, to deter wrongful conduct by other lawyers, and specifically to deter future wrongful conduct seemingly threatened by the lawyer found to have violated mandatory rules. Many disciplinary tribunals, either by decision or rule, look to the ABA Standards for Imposing Lawyer Sanctions for guidance in structuring appropriate sanctions. Traditional sanctions create a present or prospective impediment to the lawyer's right to practice, ranging in ascending severity from informal or formal admonition to suspension or, in most jurisdictions, permanent disbarment. Other sanctions may be available either in general, such as a requirement to pay costs, or in specific instances apparently warranting them, such as ordering restitution or suspending sanctions during a period of probation during which the lawyer will submit to guidance of a lawyer mentor or other monitoring of the lawyer's practice. Interim suspension may be available when the charge is shown to be supported by probable cause and the acts charged indicate clearly that the lawyer would present a danger to clients or others if permitted to continue practicing pending final outcome.

A lawyer suspended in a disciplinary proceeding for a limited period (60 days under the ABA Model Standards for Disciplinary Enforcement) is typically reinstated automatically on expiration of the stated time. A lawyer suspended for a longer period or who has been disbarred must apply for readmission to the bar and bears the burden of demonstrating rehabilitation. Given the adjudicated basis for interrupting the lawyer's practice, readmission requires a higher showing of ability to practice law and to comply with professional standards than in the case of a recent law-school graduate applying for initial admission. The lawyer must show specific facts indicating that the lawyer is rehabilitated and currently able and willing to practice law in compliance with professional responsibilities. Testimonials from lawyers are relevant only if they demonstrate thorough familiarity both with the conduct causing suspension and with specific steps the lawyer has taken to achieve rehabilitation. Voluntary testimonials from judges would violate the judicial code of most jurisdictions and should not be accepted.

Lawyers incapacitated due to impairments such as those caused by substance abuse may pose particular risk of harm to clients, the public, and legal institutions. Many bar associations maintain programs of intervention and support for lawyers who are afflicted with substance abuse but are able to continue practice. When a lawyer's work is seriously affected by disability rather than by a state of mind warranting a finding of a disciplinary violation (see § 5, Comment *d*), most jurisdictions provide for lawyer disability proceedings. Procedures generally follow those in lawyer disciplinary actions (see id., Comment *i*), with interim suspension, procedures for psychiatric or other appropriate evaluation, and diversion into rehabilitation programs. A finding of disability results in suspension from practice until the lawyer can demonstrate rehabilitation from the impairing condition.

Reporter's Note

See generally C. Wolfram, Modern Legal Ethics 143-44 (1986); ABA Comm'n on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century 14-21 (1992) (recommendations of McKay Commission for restructuring lawyer-discipline and ancillary agencies); ABA Model Rules for Lawyer Disciplinary Enforcement (1989, as amended 1993) (ABA's recommended structure and procedures for lawyer-disciplinary agencies, as amended in reaction to suggestions of McKay Commission); Towery, Johnson, Forsyth & Genesen, Lawyer Discipline Reform in California, The Professional Lawyer (Nov.1995), at 9 (description of series of lawyer-regulatory reforms in California system). E.g., In re Kennedy, 430 N.W.2d 833 (Minn.1988) (structure of state's lawyer-disciplinary system sufficiently avoided creation of conflicts of interest in instance of complaint against lawyer-employee of office of lawyers professional responsibility).

Among federal administrative agencies, the Patent and Trademark Office has the oldest and most active system. See 37 C.F.R. § 10.130 et seq. The authority of the PTO to discipline is explicitly conferred in 35 U.S.C. § 32. The SEC also claims the power to discipline lawyers who practice within its jurisdiction. See 17 C.F.R. § 201.10-2(e)

(known as Rule 2(e)). The SEC's power to do so is apparently based solely on the general statutory power to engage in rulemaking. See 15 U.S.C. §§ 77s(a) and 78w(a). The Administrative Procedure Act expresses neutrality. See 5 U.S.C. § 500(d)(2) (statute does not authorize or limit discipline, including disbarment, of individuals appearing in representative capacity before agency).

On procedures followed in lawyer-disciplinary proceedings, see generally 2 G. Hazard & W. Hodes, Law of Lawyering §§ 8.1:102-103 and 8.1:303-304 (2d ed. 1990 & supp. 1996); C. Wolfram, Modern Legal Ethics § 3.4 (1986). E.g., ABA Model Rules for Lawyer Disciplinary Enforcement (as amended 1993), in ABA/BNA Law. Manual Prof. Conduct § 01:601 (supp. 1994); In re Stone, 672 A.2d 1032 (D.C.1995) (appropriate standard to determine cause to bring disability proceeding based on evidence of alcoholic impairment).

On the clear-and-convincing standard, see, e.g., Arden v. State Bar, 739 P.2d 1236, 1241 (Cal.1987); In re Schmidt, 402 N.W.2d 544, 545 (Minn.1987); Attorney Q v. Mississippi State Bar, 587 So.2d 228, 231 (Miss.1991), cert. denied, 502 U.S. 1098, 112 S.Ct. 1179, 117 L.Ed.2d 423 (1992); ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 18(C) (as revised 1992); cf., e.g., Committee on Professional Ethics v. Horn, 480 N.W.2d 861, 862 (Iowa 1992) ("convincing preponderance of the evidence" standard, which apparently is same as clear-and-convincing); In re Allotta, 748 P.2d 628, 630-31 (Wash.1988) ("clear preponderance" standard; same). On the "preponderance" standard followed in New York, see In re Seiffert, 480 N.E.2d 734, 736 (N.Y.1985); In re Bigman, 636 N.Y.S.2d 799, 803 (N.Y.App.Div.1995) (finding in federal-court civil action that fraud by lawyer had been established by clear and convincing evidence obviated need for evidentiary hearing in state disciplinary proceeding, where standard was merely "fair preponderance of the evidence"). A defending lawyer's burden of proof on affirmative defenses and matters submitted in mitigation is typically the usual civil standard. E.g., Attorney Grievance Comm'n v. Powell, 614 A.2d 102, 108 (Md.1992).

Decisions have uniformly held that disciplinary proceedings are not criminal in nature, so that rights of a criminal defendant, such as proof beyond a reasonable doubt, are inapplicable. E.g., Walker v. State Bar, 783 P.2d 184, 188-89 (Cal.1989) (no right to effective assistance); In re Bell, 588 N.E.2d 1093, 1101 (Ill.), cert. denied, 506 U.S. 861, 113 S.Ct. 180, 121 L.Ed.2d 126 (1992) (ex post facto restriction inapplicable); Mississippi St. Bar v. Young, 509 So.2d 210, 212 (Miss.1987) (noncriminal proof standard plus no double-jeopardy limitation). The common description is that they are "quasi-criminal" in nature, which for due-process purposes at least roughly equates to civil adversarial proceedings. E.g., In re Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222, 1225, 20 L.Ed.2d 117 (1968) (pre-hearing notice of charges); In re Medrano, 956 F.2d 101, 102 (5th Cir.1992); Statewide Grievance Comm. v. Botwick, 627 A.2d 901, 906 (Conn.1993); In re Webster, 661 A.2d 144, 148 (D.C.1995); State ex rel. Oklahoma Bar Ass'n v. Lobaugh, 781 P.2d 806, 811 (Okla.1988); cf., e.g., In re Logan, 358 A.2d 787, 790 (N.J.1976) (lawyer-disciplinary proceedings are not criminal proceedings, but are "sui generis"). The leading case is In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (violation of due process for lawyer to be disciplined on ground not charged, but supported by one reading of proof offered); see also, e.g., Bar Ass'n of Baltimore City v. Posner, 339 A.2d 657, 660 (Md.) (lawyer entitled to "full and fair hearing"), cert. denied, 423 U.S. 1016, 96 S.Ct. 451, 46 L.Ed.2d 388 (1975); Board of Overseers of Bar v. Dineen, 557 A.2d 610, 613 (Me.1989) (lawyer in disciplinary proceeding entitled "to be heard on the charges and statements made against him and he must further be afforded the exercise of his right of confrontation by, and cross-examination of, the witnesses who supply the information adverse to him") (quoting In re Feingold, 296 A.2d 492, 498 (Me.1972)).

On sanctions in lawyer-disciplinary proceedings, see generally C. Wolfram, Modern Legal Ethics § 3.5 (1986); ABA Standards for Imposing Lawyer Sanctions (as amended 1992), in ABA/BNA Law. Manual Prof. Conduct § 01:801 (supp. 1992). On restitution ordered as a sanction, see, e.g., People v. Flores, 804 P.2d 192 (Colo.1991) (lawyer found to have neglected matter after client prepaid fee ordered to make restitution of most of fee); In re Johnson, 826 P.2d 186 (Wash.1992) (restitution of loan amounts ordered of lawyer who twice borrowed funds from client without disclosure of precarious financial condition); Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (W.Va.1988) (restitution of clearly excessive fee); see generally ABA Standards, supra, Rule 2.8(a). Restitution as a sanction is normally limited to reimbursement of money or other things of value entrusted by a client to a lawyer. E.g., In re Robertson, 612 A.2d 1236 (D.C.1992) (following Restatement Second, Contracts § 370, Comment *a*).

On the judicial code prohibition against judges providing testimonials, see ABA Model Code of Judicial Ethics, Canon 2B (1990) ("… A judge shall not testify voluntarily as a character witness."); see generally C. Wolfram, Modern Legal Ethics § 17.5.2, at 985 (1986), and authority cited.

On reinstatement, see generally ABA Standards for Imposing Lawyer Sanctions, rule 2.10, in ABA/BNA Law. Manual Prof. Conduct § 01:801, at 01:814 (supp. 1992) (disbarred lawyer should not be considered for readmission for at least 5 years; lawyer must show by clear and convincing evidence rehabilitation, compliance with all applicable rules relating to suspension or disbarment, and present fitness to practice); C. Wolfram, Modern Legal Ethics § 3.5.5 (1986). On the various standards for reinstatement articulated, see, e.g., In re Robbins, 836 P.2d 965 (Ariz.1992) (lawyer must show by clear and convincing evidence that lawyer is rehabilitated, is presently competent, and poses no further threat to members of public), and authority cited; In re Brown, 617 A.2d 194 (D.C.1992) (5 factors relevant: nature and circumstances of offense; whether lawyer acknowledges seriousness of misconduct; conduct in interim, including steps taken to remedy past wrong; present character; and present competence); The Florida Bar re Janssen, 643 So.2d 1065 (Fla.1994) (to carry heavy burden of showing rehabilitation, must show: full compliance with conditions of suspension; unimpeachable character; reputation for professional ability; lack of malice toward those who sponsored initial prosecution; repentant attitude toward previous wrongdoing; strong resolution to adhere to principles of correct conduct; and restitution); In re Parker, 595 N.E.2d 549, 554 (Ill.1992) (quoting 6-factor Illinois rule); In re Gutman, 599 N.E.2d 604, 605-06 (Ind.1992) (7-factor rule); Grievance Comm'n v. August, 475 N.W.2d 256, 260-61 (Mich.1991) (9-factor rule); In re Stroh, 739 P.2d 690, 693 (Wash.1987) (8 factors); see also, e.g., In re Trygstad, 472 N.W.2d 137, 140 (Minn.1991) (deference given to sister-state determination not to readmit).

On lawyer disability, see generally ABA Standards for Lawyer Discipline & Disability Proceedings (1979); Model Law Firm/Legal Department Personnel Impairment Policy & Guidelines (ABA 1990); Survey of State & Local Lawyer Assistance Programs (ABA 1989); Lawy. Man. Prof. Conduct 101:3301 (supp. 1991). On the relevance of mental illness of a lawyer, compare, e.g., In re Hoover, 745 P.2d 939 (Ariz.1987) (even if insanity met test for purposes of avoiding criminal-law sanctions, lawyer still susceptible to bar discipline for protection of public, bar, and legal institutions), with, e.g., In re Bailey, 527 N.W.2d 274, 277 (N.D.1995) (if disabled from practice by mental illness, lawyer will be transferred to inactive status). On impairment by reason of substance abuse, see, e.g., ABA Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines, in ABA/BNA Law. Manual Prof. Conduct § 101:3312 (supp. 1991); see also, e.g., Columbus Bar Association v. Elsass, 713 N.E.2d 421 (Ohio 1999) (federal disabilities legislation no bar to discipline of lawyer who was recovering drug addict).

Restatement (Third) of the Law Governing Lawyers § 5 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 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.

Comment:

a. *Scope and cross-references.* This Section states in general terms the grounds on which professional discipline is imposed on lawyers. See the foregoing Introductory Note to this Title C on the procedures followed in lawyer-discipline proceedings, the standards for imposing sanctions, and the process and standards governing reinstatement. On the liability of a lawyer under criminal law, see Topic 4. On the choice-of-law approach recommended for lawyer-discipline issues, see Comment *h* hereto.

b. *Grounds for lawyer discipline-in general.* In all jurisdictions, the process of professional regulation has generally been closely connected to courts, the bodies that traditionally, and now, also control admission to practice (see § 1, Comments *a* & *d*). The traditional standard for measuring the propriety of the lawyer's conduct was that of "conduct unbecoming a lawyer" as elaborated in decisions ruling on such disciplinary proceedings. In the decades after adoption by the ABA of its 1908 Canons of Ethics, some jurisdictions began to rely on provisions of the

Canons as stating grounds for discipline. In 1969 and 1983, the ABA adopted explicitly regulatory approaches to stating the grounds for lawyer discipline (see § 1, Comment *b*). Today, every state has adopted a lawyer code defining sanctionable offenses, and in general discipline is administered only for a violation so defined. States also maintain relatively formal codes of procedure for adjudicating a charge of a disciplinary violation, most of which are modeled on the ABA Model Rules for Lawyer Disciplinary Enforcement (as amended 1996) and similar predecessor compilations. Those procedures are subject to constitutional and statutory constraints under both federal and state law. In selecting among available disciplinary sanctions, many states are also guided by the ABA Standards for Imposing Lawyer Sanctions (adopted 1986, as amended 1992).

Lawyers are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court. The lawyer codes contain both specific regulation of described lawyer conduct as well as general provisions (see Comment *c*). References in this Restatement to a duty of a lawyer do not necessarily refer to disciplinary offenses, but may instead refer, for example, to standards enforceable through a legal-malpractice recovery by an injured client. In any event, disciplinary offenses are authoritatively specified only in the lawyer code to which the lawyer is subject (see Comment *h* on jurisdiction and choice-of-law considerations). However, this Restatement could be consulted with respect to doubtful questions of interpretation of uncertain lawyer-code language and in connection with code drafting or revision. Similarly, opinions of ethics committees in an applicable jurisdiction provide guidance to lawyers and tribunals in disciplinary matters.

Professional duties defined in lawyer codes are mainly concerned with lawyer functions performed by a lawyer in the course of representing a client and causing harm to the client, to a legal institution such as a court, or to a third person. Those duties extend further, however, and include some lawyer acts that, even if not directly involving the practice of law, draw into question the ability or willingness of the lawyer to abide by professional responsibilities. Every jurisdiction, for example, reserves the power to subject a lawyer to professional discipline following conviction of a serious crime (see Comment *g*), regardless of whether the underlying acts occurred in the course of law practice. Such acts are a proper basis for discipline regardless of where they occur.

For the most part, lawyer codes prohibit stated offenses by individual lawyers. Law firms as such are not subject to professional discipline, although at least two states now impose the obligations of their lawyer codes on law firms as well as on individual lawyers.

c. *General provisions of lawyer codes.* Modern lawyer codes contain one or more provisions (sometimes referred to as "catch-all" provisions) stating general grounds for discipline, such as engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" (ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983)) or "in conduct that is prejudicial to the administration of justice" (id. Rule 8.4(d)). Such provisions are written broadly both to cover a wide array of offensive lawyer conduct and to prevent attempted technical manipulation of a rule stated more narrowly. On the other hand, the breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent (see Comment *h*) and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it. That is particularly true of the "appearance of impropriety" principle (stated generally as a canon in the 1969 ABA Model Code of Professional Responsibility but purposefully omitted as a standard for discipline from the 1983 ABA Model Rules of Professional Conduct). Tribunals accordingly should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code.

No lawyer conduct that is made permissible or discretionary under an applicable, specific lawyer-code provision constitutes a violation of a more general provision so long as the lawyer complied with the specific rule. Further, a specific lawyer-code provision that states the elements of an offense should not, in effect, be extended beyond its stated terms through supplemental application of a general provision to conduct that is similar to but falls outside of the explicitly stated ground for a violation. For example, a lawyer whose office books and accounts are in conformity with lawyer-code provisions specifying requirements for them should not be found in violation of a general provision proscribing "dishonesty" for failure to have even more detailed or complete records.

d. *State of mind.* As with criminal offenses, disciplinary offenses are defined in terms of a particular mental state of a lawyer actor. On familiar legal principles, a lawyer's claimed ignorance of a lawyer-code rule is no defense to a charged violation. Most disciplinary offenses involve acts that, in themselves, reflect a concern with moral blameworthiness and thus require that the lawyer's conduct be knowing. An example is the prohibition against introduction of perjured testimony (see § 120). What a lawyer knows may be inferred from the circumstances. Accordingly, a finding of knowledge does not require that the lawyer confess to or otherwise admit the state of mind required for the offense.

Some disciplinary offenses do not require knowledge. Some few offenses, such as those requiring maintenance of office books and records (see § 44, Comment *c*), are absolute in form, thus warranting a finding of a violation if the requirement is not met, no matter what the lawyer's state of mind. Some few other offenses are sufficiently proved by evidence that the lawyer was negligent. Other requirements are stated in terms of an exercise of reasonable judgment, an objective standard that is assessed on the standard of the judgment that would be brought to the decision by a lawyer of ordinary skill and competence.

e. *Attempts to commit disciplinary violations.* As stated in Subsection (2), a lawyer's attempt to violate a specific rule of a lawyer code constitutes a sanctionable offense. A charge of attempt is independently significant only when some essential element of a completed offense is not present. As with the charge of attempt in criminal law, disciplinary bodies must determine that the proof presented sufficiently demonstrates that the lawyer had the requisite intent (see Comment *d*), that the lawyer took a substantial step in a course of conduct planned to culminate in the lawyer's commission of the offense, and that evidence concerning that step is as a whole strongly corroborative of the lawyer's purpose. Compare Model Penal Code § 5.01 (1985) (defining offense of criminal attempt).

f. *Committing disciplinary violations through acts of another.* As stated in Subsection (2), a lawyer commits a sanctionable offense in either of the following ways: (1) knowingly assisting or inducing another lawyer to commit what the lawyer knows to be a violation; or (2) in the case of a nonlawyer such as a secretary, paralegal, investigator, or similar employee or other agent of the lawyer, assisting or inducing the person to do the prohibited act. On a lawyer's duty to supervise others in the lawyer's firm, see § 11. Such a violation occurs whether or not the acting person is aware of the violation. On the general absence of disciplinary liability of law firms as such, see Comment *b* hereto.

For purposes of the prohibition against inducing a nonlawyer to act in the lawyer's stead, whether a client is such a nonlawyer depends on the nature of the purported violation, and many situations involve close questions. Thus, a lawyer may not offer an unlawful inducement to a witness (see § 117), and the lawyer may not assist or induce a client to do so. Similarly, a lawyer may not file a nonmeritorious motion (see § 110), and a lawyer may not assist or induce a client to file such a motion pro se. On the other hand, because of the superior legal interest in recognizing the right of a client to speak directly to an opposing party and not only through that party's lawyer, and because of the superior interest in providing clients a full range of legal services relevant to a matter, the client's lawyer may counsel the client about the content of a communication directly with an opposing party known to be represented by counsel under the limitations stated in § 99(2) and Comment *k* thereto.

g. *Lawyer criminal conduct as a basis for discipline.* Criminal law applies in most respects to acts of lawyers, either in representing clients or in other capacities and activities (see § 8). An act constituting a violation of criminal law is also a disciplinary offense when the act either violates a specific prohibition in an applicable lawyer code or reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Those formulations have replaced in most jurisdictions a formerly employed standard stated in terms of criminal acts constituting "moral turpitude," a phrase that, while meaningful to individuals, is vague and may lead to discriminatory or otherwise inappropriate applications. Whether a criminal act reflects adversely on a lawyer's fitness depends on the nature of the act and the circumstances of its commission. The standard is applicable to criminal acts wherever they may occur, so long as they are also treated as criminal at the place of occurrence.

A record of conviction is conclusive evidence that the lawyer committed the offense, but absence of a conviction does not preclude a disciplinary prosecution. Because of the different agencies (prosecutor and lawyer disciplinary counsel) involved in criminal and disciplinary enforcement and the higher standard of proof in criminal cases, an acquittal does not by itself preclude a charge for any disciplinary purpose. In general, nonconstitutional aspects of criminal procedure do not apply to a disciplinary proceeding involving acts that also may constitute a criminal offense. A lawyer may invoke the constitutional privilege against self-incrimination, to the extent it applies, when called upon to testify in a disciplinary proceeding if the lawyer remains at risk of criminal prosecution. Disciplinary charges are usually stayed until completion of a criminal prosecution for the same act, unless doing so threatens a significant objective of the disciplinary process. Interim suspension of a lawyer accused of crime may be warranted and is commonly provided for following conviction of a serious crime regardless of pendency of an appeal.

h. Jurisdiction to discipline and choice of law in lawyer-disciplinary proceeding. Choice-of-law questions may arise in lawyer-disciplinary matters because of the interstate nature or impact of a lawyer's activities and varying regulations found in the jurisdictions in which those impacts occurred. Addressing such questions is complicated due to the basis on which lawyer-disciplinary agencies have traditionally determined their subject-matter jurisdiction. In general and in most states, jurisdiction to impose discipline depends on whether the lawyer in question is admitted in the state, including through admission pro hac vice (see § 2, Comment *b*). The array of disciplinary remedies consists largely of actions affecting such a respondent lawyer's local license (see § 1, Comment *e,* & Introductory Note hereto). A charged offense involving such a locally licensed lawyer is within the jurisdiction of the disciplinary agency, and the tribunal may apply the state's lawyer code even with respect to acts that occur wholly outside the jurisdiction and that have no significant impact within the jurisdiction. In contrast, under this theory of disciplinary competence, the only local sanction similar to discipline that may be available against a lawyer practicing in the jurisdiction without an in-state license and committing a disciplinary offense within it is a proceeding for injunctive or similar relief for unauthorized practice. That will be true even with respect to in-state activity that violates the lawyer codes of both the state and the lawyer's jurisdiction of admission. California, the District of Columbia, Maryland, and perhaps other jurisdictions extend the competence of their lawyer-disciplinary bodies to any lawyer who commits an offense within the jurisdiction. That is the scope of jurisdiction recommended by the ABA Model Rules for Lawyer Disciplinary Enforcement (as amended 1996). But in the large majority of jurisdictions, the only disciplinary forum is that of a jurisdiction in which the lawyer has actually been admitted. That jurisdiction will typically have a lawyer-code provision prohibiting unauthorized practice by reason of practicing law where not admitted as well as general provisions that have extraterritorial effect, but the motivation for enforcement against wholly out-of-jurisdiction activity is often not great.

With respect to choice-of-law considerations, an issue of true conflict may arise because a lawyer is admitted in two or more jurisdictions with conflicting lawyer-code provisions with respect to questioned action. Such a conflict may also arise in a jurisdiction exercising disciplinary jurisdiction over a lawyer not admitted in that state, when the lawyer's activities affect more than one jurisdiction. No single general rule or set of rules purporting to govern all situations inflexibly is desirable. In general, analysis of the question should correspond to two types of conduct.

First, some lawyer acts may appropriately lead to a finding that the lawyer demonstrates thereby an inability or unwillingness to comply with professional responsibilities. That demonstration involves conduct that will typically be in violation of the lawyer code of all interested jurisdictions, and its blameworthiness does not depend on where the conduct occurred. For example, such acts include serious criminal activity (see Comment *g*).

Second, however, some lawyer acts may be prohibited under the lawyer code of one jurisdiction but permitted or required elsewhere, and the lawyer's activity may have had impacts in both such jurisdictions. Some provisions of the lawyer codes do differ markedly among jurisdictions (see § 1, Comment *b*). It is therefore necessary to have a choice-of-law rule to determine which specific provision of two or more arguably applicable and inconsistent lawyer-code provisions should apply. Such a rule should take appropriate account of such elements as the following: the nature of the charged offense; the nature of the lawyer's work; the impact of the questioned conduct on the interests of third persons and on public institutions such as tribunals, administrative agencies, or legislative bodies; the residence and place of business of any client or third person whose interests are materially affected by the lawyer's actions; the place where the affected conduct occurred; and the nature of the regulatory

interest reflected in the different provisions in question. That rule should be selected for application which, among rules having a plausible basis for application, is the rule of the jurisdiction with the most significant relationship to the charged offensive conduct. See Restatement Second, Conflict of Laws § 6. Somewhat contrary to that approach, the 1983 ABA Model Rules of Professional Conduct were amended in 1993 (Rule 8.5), adding a rule that attempted to provide more rigid, per se rules-an approach that has not recommended itself to most jurisdictions (see Reporter's Note).

No more specific formula than that stated here can adequately deal with all relevant conflict considerations, and each issue of conflict must be addressed on its specific facts. However, as a presumptive preference, a lawyer in nonlitigation work is subject to the lawyer code of the single state in which the lawyer is admitted or, if admitted in more than one state, in the state in which the lawyer maintains his or her principal place of law practice. If the lawyer's act occurs in the course of representing a client in a litigated matter, the presumptive preference is for the lawyer-code rules enforced by the tribunal in which the proceeding is pending. Either presumptive preference can be displaced by a sufficient demonstration that the interests of another jurisdiction are, on the particular facts, more involved than those of the presumptive jurisdiction.

i. Reporting misconduct of a lawyer or judge. Subsection (3) states the rule found in the lawyer code of most jurisdictions. The rule is applicable to violations by lawyers whether or not in the same firm. In the case of a junior lawyer in a firm who knows of misconduct by a senior lawyer, including a supervisory lawyer (see § 11), reporting the violation to the firm's managing body or another senior lawyer does not satisfy the requirement (unless the junior lawyer reasonably assumes in the circumstances that those informed will report the offense), but may impose a similar requirement on other lawyers thus informed. By its terms, the rule is inapplicable to a lawyer's own violation.

The duty to disclose wrongdoing by another lawyer typically does not require disclosure of confidential client information protected as stated in § 60. If disclosure of such information is subject to an exception, for example because a client has consented to its disclosure for that purpose (see § 62), the duty to disclose applies. With respect to timing of a report of wrongdoing, the requirement is commonly interpreted not to require a lawyer involved in litigation or negotiations to make a report until the conclusion of the matter in order to minimize harm to the reporting lawyer's client. Lawyer codes also commonly provide an exception for information learned in counseling another lawyer in a substance-abuse or similar program.

Some lawyers have objected to the duty to disclose another lawyer's wrongdoing. Failure to comply subjects a lawyer to professional discipline, and the objection has been made that threats to report an opposing lawyer are used unfairly by unprincipled lawyers on the pretense that the disclosure rule requires it. Compare § 98, Comment *g* (extortionate threat to report alleged crime). On a reporting lawyer's immunity from libel and similar retaliatory actions by a lawyer who is reported to a disciplinary agency, see § 57, Comment *c*. The rule is also criticized on the ground that it may require a lawyer to take action contrary to the best interests of the lawyer's client, unless the confidentiality exception is interpreted so broadly as to make the requirement quite narrow in scope. The rule is defended as important for effective disciplinary enforcement because lawyers are much more likely than others to be aware of such violations and as an aspect of lawyer self-regulation.

The requirement applies when a lawyer has knowledge, which may be inferred from the circumstances (see Comment *d*). Knowledge is assessed on an objective standard. It includes more than a suspicion that misconduct has occurred, and mere suspicion does not impose a duty of inquiry. Compare § 11 (duties of supervision). Knowledge exists in an instance in which a reasonable lawyer in the circumstances would have a firm opinion that the conduct in question more likely than not occurred.

As an officer of the court, a lawyer must report to appropriate disciplinary authorities a known violation by a judge of an applicable rule of judicial conduct that raises a substantial question of the judge's fitness for judicial office. In jurisdictions where judges remain subject to discipline as lawyers, a report to an appropriate lawyer disciplinary agency may also be independently required by terms of the rule applicable to reporting lawyer violations.

Reporter's Note

*Comment a. Scope and cross-references.*Subsection (1) combines the several elements of ABA Model Rules of Professional Conduct, Rule 8.4(b)-(d) (1983). Subsection (2) is a close paraphrase of id., Rule 8.4(a).

*Comment b. Grounds for lawyer discipline—in general.*On the rule that a lawyer may be found guilty only of a specific provision of a lawyer code, see, e.g., In re Powell, 533 N.E.2d 831 (Ill.1988), cert. denied, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989) (canon on avoiding even appearance of impropriety is not independent basis for imposing discipline on lawyer). However, the California Rules of Professional Conduct contain broad wording disclaiming that the specific offenses spelled out exhaust the possible bases for discipline. See Cal. R. Prof. Conduct, Rule 1-100 (1988) ("The prohibition of certain conduct in these rules is not exclusive….").

Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, a federal mandate required states to have in effect laws providing for the suspension of, among other things, professional licenses for failure to pay child support or comply with other child-support or paternity orders, 42 U.S.C. § 666(a)(16) (1997). Several disciplinary orders have already appeared under such state legislation. E.g., In re Wolfrom, 681 N.E.2d 1336 (Ohio 1997) (suspension); In re Moras, 683 A.2d 833 (N.J.1996) (same); In re Rosoff, 650 N.Y.S.2d 149 (N.Y.App.Div.1996) (suspension until certification by family-court judge that all arrears in child-support obligations have been paid).

Thus far, most jurisdictions have resisted suggestions that more effective disciplinary enforcement over lawyers in firms could be achieved if law firms themselves were directly subject to vicarious disciplinary liability for violations of firm lawyers. See Schneyer, Discipline for Law Firms, 77 Corn. L. Rev. 1 (1992). Recent and notable exceptions are New Jersey and New York. See N.J. Rules of General Application, Rule 1:20-1(a); N.J. Rules of Prof. Conduct, Rules 5.1(a), 5.3(a), & 5.4(a); N. Y. Code of Professional Responsibility DR 1-102(A) ("[a] lawyer or law firm shall not" engage in described list of disciplinary offenses); id., DR 1-104 (supervisory responsibilities of "law firm"); id., DR 5-105(E) ("law firm" required to maintain conflict-checking system).

*Comment c. General provisions of lawyer codes.*See generally 2 G. Hazard & W. Hodes, Law of Lawyering § 8.4:101, at 952 (supp. 1992); C. Wolfram, Modern Legal Ethics §§ 3.3.1, at 87-88, 3.3.3, at 95 & 13.5.8, at 724-25 (1986). The lawyer codes and decisions interpreting them have continued to take comfort from the statement of Chief Justice Taney in Ex parte Secombe, 60 U.S. (19 How.) 9, 14, 15 L.Ed. 565 (1856), that "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed." For decisions rejecting attacks on catch-all provisions for their indefiniteness, see, e.g., In re West, 805 P.2d 351, 355 (Alaska 1991) (rejecting void-for-vagueness attack on prohibition against other conduct adversely reflecting on fitness to practice law); In re Anderson, 795 P.2d 64, 67 (Kan.1990), cert. denied, 498 U.S. 1095, 111 S.Ct. 985, 112 L.Ed.2d 1069 (1991) (conduct prejudicial to administration of justice); In re Stuhff, 837 P.2d 853, 857 (Nev.1992) (same), 577 N.E.2d 30, 33-34 (N.Y.), cert. denied, 502 U.S. 1009, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991) (conduct prejudicial to administration of justice and other conduct adversely reflecting on fitness to practice), and authority cited.

The rule that a catch-all provision should not be applied to conduct permissible under a more explicit rule seems not to have been discussed in a decided case. It would seem to follow from elementary principles of construction. E.g., In re West, 805 P.2d 351, 354 (Alaska 1991) ("other conduct" adversely reflecting on fitness to practice includes only conduct not already listed under other provisions); but compare, e.g., In re Cohen, 530 N.Y.S.2d 830, 832 (N.Y.App.Div.1988) (rejecting argument that findings of violations of both provision on prejudicial conduct and "other conduct" adversely reflecting were duplicitous); State ex rel. Okla. Bar Ass'n v. Hine, 937 P.2d 996 (Okla.1997) (Rule 3.3(b), prohibiting "lawyer" in "adversary proceeding" from communicating on merits ex parte with judge, covers only lawyers for participants in proceeding; nonetheless, lawyer who sent judge letter ex parte on merits of pending proceeding in capacity of private citizen violated Rule 8.4(d) prohibition against engaging in conduct prejudicial to administration of justice). Catch-all provisions are sometimes applied cumulatively,

covering conduct that is already and more explicitly covered by another provision. E.g., Davis v. Alabama St. Bar, 676 So.2d 306 (Ala.1996) (despite hearing board's finding that lawyers' advertising did not violate rule on false advertising, court affirms finding that advertising was conduct adversely reflecting on fitness to practice because lawyers failed to provide services of quality advertised).

Some decisions have employed the catch-all prohibition against conduct "prejudicial to the administration of justice" for a wide variety of acts, including those having little to do with interference with ongoing proceedings, e.g., Louisiana St. Bar Ass'n v. Harrington, 571 So.2d 151, 157 n.4 (La.1990) (list of covered activities include commingling client funds, failure to return client file after discharge, abandoning client, and failure to account to client for fees); Attorney Grievance Comm'n v. Casalino, 644 A.2d 43 (Md.1994) (willful tax evasion), or those in which the illegitimacy of the lawyer's conduct is far from apparent, e.g., In re Stuhff, supra (conduct prejudicial to administration of justice in serving judge presiding at client's criminal trial with copy of complaint against judge filed with judicial disciplinary commission); In re Holtzman, supra (release to media of false statement of specific wrongdoing aimed at named judge). Some decisions have attempted to elaborate narrower, more explicit standards, such as interpreting "prejudice" to require either repeated conduct causing some harm to the administration of justice or to a single act causing substantial harm of that nature and interpreting "administration of justice" as limited to "judicial proceedings and matters directly related thereto." See In re Hopkins, 677 A.2d 55 (D.C.1996) (failure to report to probate court client-personal representative's looting of estate after lawyer made unfulfilled promise to chief beneficiary to place funds under joint control); In re Haws, 801 P.2d 818, 823 (Or.1990); e.g., In re Jeffery, 898 P.2d 752, 759 (Or.1995) (threat of refusal to cooperate in trial, instead of making record for appeal). Such courts are not willing to extend the prohibition to all wrongful acts. E.g., Florida Bar v. Pettie, 424 So.2d 734, 737-38 (Fla.1982) (engaging in criminal conspiracy to import marijuana not prejudicial to administration of justice in sense intended). Some decisions, apparently a minority, require that the charged offense relate to specific practice norms or involve physical or otherwise direct interference with the administration of justice. E.g., In re Curran, 801 P.2d 962 (Wash.1990). A stricter (clear and present danger) test is applicable in a case in which First Amendment issues are raised by a charge involving lawyer speech. The leading case is In re Hinds, 449 A.2d 483, 498 (N.J.1982); see also, e.g., Attorney Grievance Comm'n v. Ficker, 572 A.2d 501, 505 (Md.1990); State ex rel. Oklahoma Bar Ass'n v. Porter, 766 P.2d 958, 969 (Okla.1988); Committee on Legal Ethics v. Douglas, 370 S.E.2d 325, 332 (W.Va.1988). On statements criticizing a judicial officer, see § 114. It is generally agreed that a lawyer's acts as litigant as well as those as advocate are covered. E.g., In re Anderson, 795 P.2d 64 (Kan.1990), cert. denied, 498 U.S. 1095, 111 S.Ct. 985, 112 L.Ed.2d 1069 (1991) (willful violation of child-support order entered by court in another state).

The prohibition against engaging in "other" conduct reflecting adversely on fitness to practice has also been applied to a wide variety of conduct. E.g., Norris v. Alabama St. Bar, 582 So.2d 1034, 1037 (Ala.), cert. denied, 502 U.S. 957, 112 S.Ct. 417, 116 L.Ed.2d 438 (1991) (sending flowers to funeral home with note to decedent's family offering legal assistance); People v. Good, 893 P.2d 101, 104 (Colo.1995) (sexual relationship between lawyer and client); Florida Bar v. Levin, 570 So.2d 917 (Fla.1990), cert. denied, 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1053 (1991) (5-year practice of engaging in illegal gambling through bookmakers, permitting betting activities in law office advocating illegal betting on television program as recreation); In re Wojihoski-Shaler, 603 N.E.2d 1347 (Ind.1992) (performing legal and clerical work for corporation in business of selling satellite equipment enabling users illegally to receive television signals); In re Warren, 669 A.2d 558 (Vt.1995) (appearing in court intoxicated). On an attempt, not widely followed in other jurisdictions, to give the concept an interpretation limited to seven specific acts or kinds of conduct, see In re Rochat, 668 P.2d 376 (Or.1983).

On conduct involving "dishonesty, fraud, deceit or misrepresentation," see, e.g., In re West, 805 P.2d 351, 354 (Alaska 1991) (counseling wife of deceased client in making false signature of client's name and verifying signature as notary); Maryland St. Bar Ass'n v. Agnew, 318 A.2d 811 (Md.1974) (willful tax evasion); Welts' Case, 620 A.2d 1017 (N.H.1993) (misrepresentation alone suffices as offense); In re Benson, 854 P.2d 466 (Or.1993) (drafting false lien documents on client's property in favor of brother to provide advance warning, through expected inquiry by police directed to brother, of possible state intent to obtain forfeiture of property owned outright). The decisions conflict on whether a dishonesty violation can be shown without demonstrating the lawyer's intent. Compare, e.g., Colorado v. Franco, 698 P.2d 230 (Colo.1985) (intent not required; reckless conduct suffices); In

re Griffith, 748 P.2d 86, 103 (Or.1987) (same), with, e.g., In re West, 805 P.2d 351, 353 (Alaska 1991) (limited to "intentional acts of misconduct"); In re Pelsinger, 598 N.Y.S.2d 218, 220 (N.Y.App.Div.1993) (requires evidence of "venal intent"); Bar Ass'n v. Todd, 833 P.2d 260, 263-64 (Okla.1992) (requires showing of "bad or evil intent or its legal equivalent"). Consistent with its approach on other catch-all provisions, the Oregon Supreme Court has attempted to define the specified types of dishonesty separately. See In re Hiller, 694 P.2d 540 (Or.1985).

Comment d. State of mind. See generally 1 G. Hazard & W. Hodes, Law of Lawyering §§ 400-404 (2d ed. 1990); C. Wolfram, Modern Legal Ethics § 3.3.1, at 88-90 (1986); see, e.g., ABA Model Rules of Professional Conduct, Terminology ¶¶ [1], [5], and [9] (1983) (definitions of "belief," "knowingly," and "reasonably should know"); Dahlman v. State Bar, 790 P.2d 1322, 1324 (Cal.1990) ("wilful" violation consists of purpose or willingness to commit the act; does not require bad faith, actual knowledge of provision of law violated, or intent to violate law, to injure another, or to obtain advantage); In re Wilkins, 649 A.2d 557 (D.C.1994) (finding of recklessness satisfies intent required for finding of dishonesty, but not for finding of moral turpitude); Attorney Q v. Mississippi St. Bar, 587 So.2d 228, 231 (Miss.1991), cert. denied, 502 U.S. 1098, 112 S.Ct. 1179, 117 L.Ed.2d 423 (1992) (citing Restatement, rules on incompetence and neglect impose objective standard; rules to be interpreted from perspective of reasonable layperson whom lawyer is charged with misleading). Certain offenses permit a finding of willfulness from broad inferences. E.g., Edwards v. State Bar, 801 P.2d 396, 401-02 (Cal. 1990) (although specific mental state relevant to degree of sanction, evidence that balance in trust account fell below amount credited to client alone suffices to support finding of willful misappropriation). The ABA Standards for Imposing Lawyer Sanctions, Definitions (as amended 1992), in ABA/BNA Law. Manual Prof. Conduct § 01:807 (supp. 1992), provides that "intent" encompasses "conscious objective or purpose to accomplish a particular result," while "knowledge" is defined as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." The definitions are relevant to a hierarchy of mental states underlying a lawyer's actions and corresponding levels of culpability. See Burrell v. Disciplinary Bd., 777 P.2d 1140, 1143 (Alaska 1989); In re Heamon, 622 N.E.2d 484, 488 (Ind.1993).

On the rule that claimed ignorance of a lawyer-code rule is no defense, see, e.g., Ainsworth v. State Bar, 762 P.2d 431, 439 (Cal.1988), cert. denied, 489 U.S. 1081, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989); In re Lewis, 562 N.E.2d 198, 213 (Ill.1990); In re Anonymous, 637 N.E.2d 131, 132 (Ind.1994); In re Whelan, 619 A.2d 571, 573 (N.H.1992); Louisiana St. Bar Ass'n v. Thalheim, 504 So.2d 822, 826 (La.1987); Office of Disciplinary Counsel v. Davis, 614 A.2d 1116, 1121 (Pa.1992); see also In re Wines, 660 P.2d 454, 457 (Ariz.1983) (lawyer is charged with knowledge of law and has affirmative duty to accomplish what law requires); compare In re Heamon, supra, 777 P.2d at 1144 (lack of evidence that lawyer knew that his acts constituted offense relevant to finding that offense was merely negligent, thus warranting lesser sanction).

Comment e. Attempts to commit disciplinary violations. See ABA Model Rules of Professional Conduct, Rule 8.4(a) (1983) (professional misconduct for lawyer to "attempt to violate the Rules of Professional Conduct"). See, e.g., In re Benson, 854 P.2d 466, 469 (Or.1993) (sufficient that lawyer attempted to mislead; success of scheme is not element of disciplinary offense). On the evidence of reported decisions, it appears that charges of attempt are rarely brought. The elements stated in the Comment as necessary to prove an attempt as a disciplinary offense follow the Institute's stated elements of attempt as a criminal offense. See Model Penal Code § 5.01 (1985); see generally 2 W. LaFave & A. Scott, Substantive Criminal Law § 6.2 (1986); Enker, Mens Rea and Criminal Attempt, 1977 Am. B. Found. Res. J. 845.

Comment f. Committing disciplinary violations through acts of another. See ABA Model Rules of Professional Conduct, Rule 8.4(a) (1983) (lawyer may not "knowingly assist or induce another to [violate or attempt to violate the rules of professional conduct], or do so through the acts of another"). As suggested in the Comment, the first portion of Rule 8.4(a) prohibits assisting or inducing another lawyer to violate a rule (only lawyers can violate such a rule), while the second portion applies to lawyers committing disciplinary violations through acts of employees or similar agents. With respect to supervisory responsibilities, see § 11 and Reporter's Note thereto. E.g., Holdren v. General Motors Corp., 13 F.Supp.2d 1192 (D.Kan.1998) (violation where lawyer violated anti-contact rule (see § 99) through client); In re Whelan, 619 A.2d 571 (N.H.1992) (lawyer committed disciplinary violation by

assisting or inducing his partner to draft codicil to client's will leaving property to lawyer); In re Shaw, 443 A.2d 670 (N.J.1982) (purchasing client's cause of action through office manager as "front man").

*Comment g. Lawyer criminal conduct as a basis for discipline.*See generally ABA Model Rules of Professional Conduct Rule 8.4(a) (1983) (lawyer may not "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"); ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 19 (as amended 1992), in ABA/BNA Law. Manual Prof. Conduct § 01:617-18 (supp. 1992). On interim suspension following conviction of a "serious crime" pending appeal, see ABA Model Rules for Lawyer Disciplinary Enforcement, supra, Rule 19(D). See generally 2 G. Hazard & W. Hodes, Law of Lawyering § 8.4:301 (1993 & supp. 1996); C. Wolfram, Modern Legal Ethics § 3.3.2 (1986). On the rule that a conviction need not relate to conduct that would independently constitute a lawyer-code violation, see, e.g., In re Hurley, 639 N.E.2d 705, 709 (Mass.1994), cert. denied, 514 U.S. 1036, 115 S.Ct. 1401, 131 L.Ed.2d 288 (1995); Office of Disciplinary Counsel v. Zdrok, 645 A.2d 830, 836 (Pa.1994) (conviction of serious crime is basis for discipline, whether or not underlying conduct itself violates any disciplinary rule and even if offense occurred prior to admission to practice). On particular offenses, see, e.g., In re Kelley, 801 P.2d 1126, 1130-31 (Cal. 1990) (conviction for drunk driving as "other misconduct warranting discipline" even though it does not constitute moral turpitude per se); In re Walker, 597 N.E.2d 1271, modified, 601 N.E.2d 327 (Ind.1992) (offense of physical assault on female companion and her daughter during lawyer's term as part-time prosecutor, in view of nexus between lawyer's penal-code violation and duties to clients, courts, or legal system); In re Whelan, 571 N.Y.S.2d 774, 775 (N.Y.App.Div.1991) (two misdemeanor convictions for driving under the influence, even though charges did not constitute serious crime).

On the conclusive effect of a criminal conviction, see, e.g., Selling v. Radford, 243 U.S. 46, 50-51, 37 S.Ct. 377, 378-379, 61 L.Ed. 585 (1917); In re Schuler, 818 P.2d 138, 141 (Alaska 1991); Chadwick v. State Bar, 776 P.2d 240, 245 (Cal.1989); Florida Bar v. Heller, 473 So.2d 1250, 1251 (Fla.1985); In re Huddleston, 595 So.2d 1141, 1145 (La.1992); In re Humphreys, 880 S.W.2d 402, 405 (Tex.), cert. denied, 513 U.S. 964, 115 S.Ct. 427, 130 L.Ed.2d 340 (1994); ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 19(E) (as amended 1993), in ABA/BNA Law. Manual Prof. Conduct § 01:618 (supp. 1994); but cf. Florida Bar v. Tepps, 601 So.2d 1174 (Fla.1992) (finding of Securities Exchange Commission that lawyer violated federal securities law not conclusive). A convicted lawyer is, however, entitled to a hearing on facts that might bear on mitigation of the disciplinary sanction. E.g., In re Thies, 662 F.2d 771 (D.C.Cir.1980); In re Jones, 506 F.2d 527, 529 (8th Cir.1974); Florida Bar v. Cruz, 490 So.2d 48 (Fla.1986); Committee on Legal Ethics v. Boettner, 394 S.E.2d 735, 738-39 (W.Va.1990), cert. denied, 506 U.S. 873, 113 S.Ct. 209, 121 L.Ed.2d 149 (1992). On the rule that an acquittal in a criminal proceeding does not preclude a disciplinary proceeding, see, e.g., Florida Bar v. Swickle, 589 So.2d 901, 905 (Fla.1991); In re Ettinger, 538 N.E.2d 1152, 1160-61 (Ill.1989); In re Segal, 719 N.E.2d 480 (Mass.1999); In re Strier, 598 N.Y.S.2d 200 (N.Y.App.Div.1993) (lawyer disbarred, notwithstanding acquittal after jury trial of offense of bribery); In re Rowe, 590 N.Y.S.2d 179, 181, 604 N.E.2d 728, 729 (N.Y.App.Div.1992), cert. denied, 508 U.S. 928, 113 S.Ct. 2390, 124 L.Ed.2d 293 (1993) (4 murders, despite lack of criminal responsibility due to mental disease or defect); In re Kraemer, 411 N.W.2d 71, 74 (N.D.1987); see generally, e.g., Brickman & Bibona, Collateral Estoppel as a Basis for Attorney Discipline: The Next Step, 5 Geo. J. Legal Ethics 1 (1991). Although a lawyer may invoke the right against self-incrimination in a disciplinary proceeding, under certain circumstances the factfinder may draw an adverse inference from the lawyer's assertion. Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967).

*Comment h. Jurisdiction to discipline and choice of law in lawyer-disciplinary proceeding.*See generally 2 G. Hazard & W. Hodes, The Law of Lawyering § 8.5:102 (2d ed. 1990 & supp. 1996); C. Wolfram, Modern Legal Ethics § 2.6.1, at 50-51 (1986); Zacharias, Federalizing Legal Ethics, 73 Tex. L. Rev. 335 (1994); ABA Model Rules of Professional Conduct, Rule 8.5 (as amended 1993).

On the general pattern of basing jurisdiction to discipline on whether the lawyer in question is locally admitted, see Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 So. Tex. L. Rev. 657, 686-87 (1995). Compare, e.g., ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 6A (as amended 1996) (alternatively recommending rule of jurisdiction extending to locally admitted lawyers, lawyers admitted pro hac vice, and "any lawyer not admitted in this state who practices law or

renders or offers to render any legal services in this state"); Daly, Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?, 36 So. Tex. L. Rev. 715, 749-51 (1995) (citing law in 6 states under which the courts claim the power to discipline not only locally admitted lawyers, but out-of-state lawyers who practice law within the jurisdiction); Md. R. Prof. Conduct, Rule 8.5(b) (as amended 1996) ("A lawyer not admitted … to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that: (1) involves the practice of law in this State by that lawyer, or (2) involves that lawyer holding himself or herself out as practicing law in this State, or (3) involves the practice of law in this State by another lawyer over whom that lawyer has the obligation of supervision or control.").

Few decisions deal explicitly with choice-of-law issues in lawyer discipline. E.g., In re Gil, 656 A.2d 303, 305 (D.C.1995) (for purpose of rule providing for disbarment for "extremely serious acts of dishonesty," gravity of criminal offense may be measured by law of any jurisdiction that could have prosecuted); cf. In re Dresser Indus., Inc., 972 F.2d 540 (5th Cir.1992) (federal common-law standard, rather than unique Texas lawyer-code rule permitting some suits against current clients, will be applied in federal disqualification proceeding); see also § 1, Comment *e,* and Reporter's Note thereto. With respect to the general approach of the Restatement Second of Conflict of Laws, see generally L. Brilmayer, An Introduction to Jurisdiction in the American Federal System 7, 14 (1986); R. Leflar et al., American Conflicts Law 243-47 (4th ed. 1986); E. Scoles & P. Hay, Conflict of Laws § 2.13 (2d ed. 1992).

Compare ABA Model Rule 8.5 (as amended August 1993), providing: (1) for litigation conduct (Rule 8.5(b)(1)), for application of the rules of professional conduct of the court if the lawyer has been admitted to practice there (either generally or pro hac vice), unless the rules of the court provide otherwise; (2) for nonlitigation conduct of a lawyer admitted only in one jurisdiction (Rule 8.5(b)(2)(i)), for application of the rules of the admitting jurisdiction; and (3) for nonlitigation conduct of a lawyer admitted in more than one jurisdiction (Rule 8.5(b)(2)(ii)), for application of the rules of the admitting jurisdiction in which the lawyer principally practices, except that where conduct "clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice," that jurisdiction's rules apply. The amended ABA Model Rule 8.5(b) attempts to set out choice-of-law rules conforming in some respects to those in the Comment, but as per se and unexcepted rules rather than presumptions. See Roach, The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics, 36 So. Tex. L. Rev. 907 (1995). For criticisms of the rule, see, e.g., Daly, supra; Rensberger, Jurisdiction, Choice of Law, and the Multistate Lawyer, 36 So. Tex. L. Rev. 799 (1995).

*Comment i. Reporting misconduct of a lawyer or judge.*On the reporting obligation generally, see, e.g., 2 G. Hazard & W. Hodes, Law of Lawyering § 8.3:101 et seq. (2d ed. 1990 & supp. 1996); C. Wolfram, Modern Legal Ethics § 12.10 (1986); Symposium, 67 N.D. L. Rev. 359 (1991); Lynch, The Lawyer as Informer, 1986 Duke L.J. 491; Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of *Himmel,* 1988 U. Ill. L. Rev. 977; Comm. Prof. Resp. Ass'n B. City N.Y., Report, 47 Record 905 (1992). On the self-regulatory rationale, see ABA Model Rules of Professional Conduct, Rule 8.3, Comment ¶ [1].

Subsection (3) and the Comment are based on ABA Model Rules 8.3(a) (reporting lawyers' misconduct) and 8.3(b) (reporting judges' misconduct) (1983). The reporting requirement has been widely adopted in the states. See Lawy. Man. Prof. Conduct 101:201 (supp. 1994). Nonetheless, few reported lawyer-discipline decisions involve claimed violations of such a rule, see Attorney U v. Mississippi Bar, 678 So.2d 963 (Miss.1996); In re Curran, 509 N.W.2d 429 (Wis.1994); In re Himmel, 533 N.E.2d 790 (Ill.1988); In re Dowd, 559 N.Y.S.2d 365 (N.Y.App.Div.1990); In re Lefkowitz, 483 N.Y.S.2d 281 (N.Y.App.Div.1984); see also In re Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I.1993). On the applicability of the requirement to intra-firm wrongdoing, see In re Lefkowitz, 483 N.Y.S.2d 281 (N.Y.App.Div.1984); In re Curran, 509 N.W.2d 429 (Wis.1994). On the requirement that a lawyer report misconduct of judicial officers, see ABA Model Rule 8.3(b). E.g., In re Borders, 665 A.2d 1381 (D.C.1995) (because inconsistent with judicial-wrongdoing reporting requirement, refusal of suspended lawyer, although extended sufficient offer of immunity, to testify against judge reflects unfavorably on lawyer's rehabilitation, thus barring readmission). On immunity from libel of a lawyer who reports another lawyer to a disciplinary agency,

see, e.g., Weber v. Cueto, 568 N.E.2d 513 (Ill.App.Ct.1991), cert. denied, 575 N.E.2d 925 (Ill.1991). On the use of threats to report to gain advantage, see generally ABA Formal Opin. 94-383 (1994).

The reporting obligation of judges with respect to knowledge of a disciplinary violation of a lawyer is similar to that imposed on other lawyers, except for the absence of any confidentiality exception. See ABA Model Code of Judicial Conduct, Canon 3D(2) (1990); e.g., Igo v. Coachmen Indus., Inc., 938 F.2d 650, 654-55 (6th Cir.1991) (pursuant to judges' duty to report, clerk directed to send copy of opinion with discussion of pervasive misconduct by lawyer to appropriate state disciplinary authorities).

With respect to confidentiality as a limitation on the disclosure duty, see ABA Model Rule 8.3(c) ("[t]his rule does not require disclosure of information otherwise protected by Rule 1.6"); id., Comment [2]; see generally 2 G. Hazard & W. Hodes, Law of Lawyering § 8.3:401 (supp. 1996); C. Wolfram, Modern Legal Ethics § 12.10.1, at 685 (1986); In re Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317 (R.I.1993). Following ABA Model Rule 8.3(c), as amended by the ABA House of Delegates in 1991, several jurisdictions also except information about another lawyer learned in the course of an approved lawyers assistance program, such as those dealing with substance abuse. See generally Lawy. Man. Prof. Conduct 101:204-05 (supp. 1994); e.g., N.Y. Code of Professional Responsibility, DR 1-103(A).

On the confidentiality exception, the Comment rejects the position of the well-known case of In re Himmel, 533 N.E.2d 790 (Ill.1988). While disclosure was required by the court, even if it involved disclosure of confidential client information, it would not have been required under the confidentiality exception stated in Subsection (3) and the Comment. The court limited the confidentiality exception to only such information as was protected against disclosure under the attorney-client privilege. However, the exception stated in the lawyer codes of the great majority of states is much broader. In those states, most information known within a law firm will be subject to the general confidentiality obligation. Thus, the disclosure requirement operates for one lawyer with respect to the wrongdoing of another only with respect to wrongdoing of such a nature when its revelation would either (1) not be materially adverse to the interests of the client whose information would be involved in the disclosure or (2) involve only information that is not confidential. See § 60.

With respect to requirement that a lawyer subject to the reporting obligation "know" of the other lawyer's misconduct, see, e.g., Doe v. Federal Grievance Committee, 847 F.2d 57 (2d Cir.1988) (lawyer must clearly know, rather than merely suspect, misconduct of other lawyer); Attorney U v. Mississippi Bar, 678 So.2d 963 (Miss.1996) ("knowledge" triggering reporting obligation includes more than personal knowledge; it states an objective standard of supporting evidence such that reasonable lawyer under the circumstances would form firm opinion that conduct in question more likely than not occurred); see generally 1 G. Hazard & W. Hodes, Law of Lawyering §§ 402-404 (2d ed. 1990).

Case Citations - by Jurisdiction

E.D.Pa.
Ariz.
Del.
Kan.
La.
Md.
Md.Spec.App.
Okl.
Vt.

Wash.

E.D.Pa.

E.D.Pa.2001. Cit. generally in disc., com. (c) quot. in disc. A United States Attorney's Office informed a man that he had been a victim of insurance fraud, but one month later the same office had a grand jury indict him for insurance fraud. The man moved to disqualify the office in view of the prosecutors' apparent breaches of the state rules of professional conduct. Granting the motion in part, this court disqualified the office, holding, inter alia, that the office transgressed Rule of Professional Conduct § 8.4(d). In its repeated unprofessional conduct, the office prejudiced the administration of justice and undermined public confidence in the country's legal institutions. The court noted that, while the Restatement's caution concerning overbroad readings of attorney standards was well taken in the civil law arena, in the criminal context presented here it did not go as far. U.S. v. Whittaker, 201 F.R.D. 363, 370, 371, reversed 268 F.3d 185 (3d Cir.2001).

Ariz.

Ariz.2002. Com. (c) quot. in disc. Disciplinary commission of state supreme court recommended imposition of 30-day suspensions on two attorneys for ethical infractions. On sua sponte review, this court held that six-month suspensions were the appropriate sanctions for the attorneys, who had failed to disclose to the trial judge in their medical-malpractice case, in violation of the ethical rule prohibiting false statements of fact or law to a tribunal, a secret agreement under which plaintiff would dismiss with prejudice the case against attorneys' judgment-proof client at the close of plaintiff's evidence, resulting in a “sham” trial meant to build a trial record to “educate” the trial judge as to hospital's culpability so that plaintiff might obtain reconsideration of a summary judgment previously granted to the hospital. In re Alcorn, 202 Ariz. 62, 41 P.3d 600, 611.

Del.

Del.2018. Com. (d) quot. in ftn. State bar disciplinary body filed a petition to discipline lawyer, alleging, inter alia, that lawyer failed to properly maintain his firm's books and records as required by state's ethical rules for lawyers. The disciplinary board found that lawyer had negligently violated the rules. This court affirmed, holding that rules that regulated attorney conduct had no state-of-mind requirement and therefore an attorney who violated them could be disciplined under strict-liability standards. The court quoted Restatement Third of the Law Governing Lawyers § 5, Comment *d*, in explaining that model rules did not specify which of the ethical rules governing lawyers used the strict-liability standard. Matter of Beauregard, 189 A.3d 1236, 1245.

Kan.

Kan.2013. Cit. in disc. and com. (c) quot. in disc. Disciplinary administrator filed a complaint against attorney, alleging that attorney committed multiple violations of the state rules of professional conduct while serving as state attorney general and later as county district attorney. Adopting the recommendation of the disciplinary hearing panel, this court ordered that attorney be indefinitely suspended from the practice of law in the state, holding, among other things, that the panel did not err in applying a general catch-all rule of professional conduct to attorney's violations despite the existence of a more specific rule that potentially could have applied. The court reasoned that it would be illogical to forgive dishonest conduct that violated the general rule simply because that conduct was also governed by another rule prohibiting misconduct in a specific setting, and that "fair notice" did not require the court to apply general rules only as a last resort, because every licensed attorney was responsible for observing the rules of professional conduct, regardless of whether the rules recited general or specific obligations. In re Kline, 311 P.3d 321, 337.

La.

La.2005. Com. (i) cit. in disc. Five years after dying attorney confessed to another attorney that he had suppressed exculpatory evidence, attorney to whom he had confessed reported the misconduct and underwent disciplinary proceedings for his own failure to report the unprivileged knowledge in a more timely manner. Hearing committee recommended public reprimand, and disciplinary board recommended a six-month suspension from the practice of law. Ordering a public reprimand, this court held, inter alia, that while attorney's failure to promptly report what he was told constituted professional misconduct because he believed that what he was told had more likely than not occurred, attorney's actions were merely negligent. In re Riehlmann, 2004-0680 (La. 1/19/05), 891 So.2d 1239, 1244.

Md.

Md.2015. Com. (b) quot. in case quot. in sup. State attorney-grievance commission brought a disciplinary action for professional misconduct against attorney, alleging that defendant violated Maryland law by working as a home-improvement contractor without a valid license and engaged in dishonest, fraudulent, and deceitful conduct during investigations by the Maryland home improvement commission and bar counsel. The trial court entered judgment against defendant. This court affirmed and ordered disbarment, holding that defendant violated numerous rules of professional conduct. Citing Restatement Third of the Law Governing Lawyers § 5, the court explained that, even though defendant's misconduct did not involve the practice of law, the outcome was warranted because his actions drew into question his ability or willingness to abide by his professional responsibilities. Attorney Grievance Com'n of Maryland v. Young, 445 Md. 93, 108, 124 A.3d 210, 219.

Md.Spec.App.

Md.Spec.App.2014. Com. (b) quot. in sup. (erron. cit. as com. 6). Bar counsel brought disciplinary proceedings against attorney in connection with allegations that attorney removed funds from a client's personal bank account and from her trust account after her death. The trial court found that attorney violated the rules of professional conduct as well as a state statute. This court agreed and ordered attorney to be disbarred. The court rejected attorney's argument that the rules and statute at issue did not apply because he was not acting in the role of client's attorney, but rather, as client's attorney-in-fact or as trustee of her trust. The court reasoned that, even if attorney was operating in a personal or a non-legal capacity when he removed the funds from client's accounts, the trial court found that he acted dishonestly and fraudulently and that his conduct constituted embezzlement. The court noted that, under Restatement Third of the Law Governing Lawyers § 5, a lawyer's professional duties extended to include some acts by a lawyer that, even if not directly involving the practice of law, drew into question the ability or willingness of the lawyer to abide by professional responsibilities. Attorney Grievance Com'n of Maryland v. Hodes, 105 A.3d 533, 556.

Okl.

Okl.2009. Com. (b) quot. in ftn. State bar association brought disciplinary proceedings against attorney who, in his capacity as trustee, made unauthorized withdrawals of funds from a spendthrift trust for his personal use and paid trustee fees to himself in advance of earning those fees. A trial panel of the professional responsibility tribunal found that attorney violated the rules of professional conduct and recommended a six-month suspension from the practice of law. Suspending attorney for one year, this court held, inter alia, that attorney took advantage of his position by dipping into trust funds for his own personal use in violation of his strict duty of loyalty to the trust beneficiaries. The court noted that a lawyer who commingled the role of a lawyer with that of a fiduciary was held both to the ethical standards for lawyers as well as to those governing fiduciaries. State ex rel. Oklahoma Bar Ass'n v. Clausing, 2009 OK 74, 224 P.3d 1268, 1274.

Vt.

Vt.2001. Com. (c) quot. in sup. Attorney appealed Professional Conduct Board's decision that he violated Code of Professional Responsibility. Reversing, this court held, inter alia, that attorney did not violate Code of Professional Responsibility by representation of present client against former client where rule then in effect did not expressly prohibit such action. In re Gadbois, 173 Vt. 59, 786 A.2d 393, 400.

Wash.

Wash.2006. Coms. (b) and (c) quot. in conc. op. State bar disciplinary board recommended, in part, that attorney serve a six-month suspension for knowingly violating the state's rule of professional conduct that a lawyer could not communicate directly with a party represented by another lawyer. Dismissing this count, this court held, inter alia, that, because the state rule was impermissibly vague as to whether an attorney representing his own interests pro se would be permitted to contact another party known to be represented by counsel, the court's interpretation that such contact would be prohibited was to be applied prospectively only. A concurring opinion argued that the court should have applied the rule of lenity in interpreting any ambiguity, and adopted a stricter, narrower construction of the rule that excluded self-represented lawyers. In re Disciplinary Proceeding Against Haley, 156 Wash.2d 324, 126 P.3d.1262, 1275.

Restatement (Third) of the Law Governing Lawyers 1 3 Intro. Note (2000)

Introductory Note

Introductory Note: This Topic addresses generally the range of civil remedies available for acts or omissions committed in a lawyer's professional capacity, including remedies available to a client or nonclient against the lawyer (§ 6) and remedies available to the lawyer against a client (§ 7). A lawyer's liability to a client in legal malpractice and similar remedies is considered in Chapter 4. With respect to liability of a lawyer to a nonclient, see §§ 51 and 56; with respect to liability of a client to a nonclient for acts of the client's lawyer, see §§ 26- 27 and 29.

Section 6 sets out the most significant and commonly available remedies, rather than exhaustively listing all possible remedies. Each remedy is subject to procedural and remedial requirements beyond those stated. Every jurisdiction imposes requirements with respect to the kinds of claims for which a particular remedy is suitable as well as the number and kinds of remedies available to a claimant with respect to a single claim for relief. A claimant to a remedy would be required to establish those elements in the manner provided by substantive, remedial procedural law. In doing so, the claimant may attempt to rely on provisions of the lawyer codes, which may provide appropriate standards of conduct for lawyers (see § 1, Comment *b*).

Restatement (Third) of the Law Governing Lawyers § 6 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 1. Regulation of the Legal Profession

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:

a. *Scope and cross-references.* This Section describes judicial relief available to a client or nonclient whose legal rights have been violated by actions of a lawyer. This Restatement does not purport to describe in detail such remedies and rules regarding their implementation (see Introductory Note). Instead, the Section and the following Comments note in general terms the most familiar, applicable remedies and certain circumstances involved in their application to lawyers. This list is not exhaustive, and the availability of one remedy does not necessarily foreclose others. For example, a court awarding a sum of money to prevent unjust enrichment (Subsection (3)) may also impose a constructive trust and order an accounting (see Restatement of Restitution § 160 and Restatement Second, Restitution § 30 (Tentative Draft No. 2, 1984)).

Availability of a particular remedy is subject to customary rules applicable to the remedy, including the general principle that duplicative remedies not be awarded. With respect to limitation of remedies, see Comment *n*.

Generally applicable law defines the elements that must be proved by a party seeking a remedy or seeking to defend against a claim for such a remedy. When the conduct of a lawyer is drawn into question, the provisions of lawyer codes regulating the lawyer with respect to such conduct may be relevant in determining the propriety of the conduct (see § 1, Comment *b,* & § 52, Comment *f*).

b. *Damages.* The most common kind of case in which damages are allowed is a claim of malpractice by a client against a lawyer. See generally Chapter 4. On the extent of damage remedies available to a nonclient against a lawyer, see generally §§ 51 and 56.

c. *Specific performance and other injunctive relief.* A lawyer's general undertaking to provide legal services to a client is not specifically enforceable. On the doctrine that a personal-services contract, including a contract to provide legal services, will not be specifically enforced, see Restatement Second, Contracts § 367(1). On the other hand, in litigation matters a court generally has discretion to refuse to permit a lawyer to withdraw to the extent stated in § 32(4) and Comment *d* thereto. The general rule providing limited injunctive relief against a lawyer's breach of a contract to provide personal services exclusively to one client (see id. § 367(2)) would not normally be relevant due to the unenforceability on grounds of public policy of a purported promise by a lawyer not to provide legal services to another client (see § 13). A lawyer employed in a full-time position as employee, such as inside legal counsel to a corporation, government agency, or similar entity, will often function under an agreement or rule requiring the lawyer not to practice law in outside employment. The typical remedy for breach of such an agreement is internal discipline or termination, rather than injunctive relief.

A lawyer may contract with a client to provide nonlegal services, such as when a lawyer and client enter into a business contract that the client seeks to enforce (see § 126). Such a contract is enforceable in accordance with the customary rules governing contracts, including remedies available for breach of such a contract.

Injunctive relief may also be appropriate for a lawyer's violation of noncontractual duties to a client. Thus, a lawyer who fails or refuses to turn over to a client or the client's successor files or other property to which the client is entitled (see § 33(1) & Comment *b* thereto) may be required to do so by injunctive order.

With respect to a nonclient, the instances in which injunctive relief against an opposing lawyer would be appropriate are limited. Nonetheless, when no other suitable remedy is available, it may be appropriate, for example, to enter an injunction against an opposing lawyer's violation of the prohibition against contact with employees of a nonclient (see §§ 99- 102).

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.

The costs imposed on a client deprived of a lawyer's services by disqualification can be substantial. At a minimum, the client is forced to incur the cost of finding a new lawyer not burdened by conflict in whom the client has confidence and educating that lawyer about the facts and issues. The costs of delay in the proceeding are borne by that client in part, but also by the tribunal and society. Disqualification is often the most effective sanction for a conflict of interest and will likely continue to be vigorously applied where necessary to protect the integrity of a proceeding or an important interest of the moving party. In applying it, however, tribunals should be vigilant to prevent its use as a tactic by which one party may impose unwarranted delay, costs, and other burdens on another. In an appropriate case, additional or other remedies may be appropriate, such as professional discipline (see § 5), legal-malpractice recovery (see Chapter 4), fee forfeiture (see § 37 & Comment *d* hereto), rescission or reformation of an instrument (see Comment *d* hereto), various procedural remedies (see Comments *j*-*m* hereto), or possible criminal sanctions (see § 8). Injunctive relief (see Comment *c* hereto) may be appropriate in a matter not before a tribunal, so that disqualification in a proceeding already underway cannot be sought.

The costs associated with disqualification require that standing to seek disqualification ordinarily be limited to present or former clients who would be adversely affected by the continuing representation, whether or not they are parties to the present litigation. Tribunals should not ordinarily permit parties who are not directly affected to

invoke the putative interests of an absent client with whom they are not in privity. However, concerns about the fairness of the processes of tribunals may require that tribunals in some cases raise conflicts issues on their own motion or permit a party who otherwise lacks standing to raise the issue. Particularly in criminal prosecutions (see § 129, Comment *c*), a court may intervene where necessary to protect a defendant against the ineffective assistance of counsel that may result from a conflict of interest.

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.

Illustration:

1. Lawyer was retained by Defendant to defend a claim for breach of warranty. Lawyer prepared a memorandum of legal research on the question of proper venue and made notes of interviews with three of Defendant's employees who had substantial knowledge of the processes used in manufacture of the product. Shortly thereafter, Lawyer's firm hired New Lawyer, who had been actively working on the case on behalf of Plaintiff at a former firm. Even if Lawyer would be disqualified from continuing to represent Defendant in the case (compare §§ 123- 124), the interview notes and memorandum of law could be made available to successor counsel for Defendant because Defendant can show that they were not enhanced or otherwise based on confidential information of Plaintiff revealed by New Lawyer to Lawyer.

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.

n. Limitation of remedies. Applicable rules of the law of remedies may limit relief that otherwise would be available, such as the limitation on recovery of damages for failure to avoid preventable loss. See Restatement Second, Contracts § 350; see also id. §§ 351 (unforeseeability and related limitations), 352 (uncertainty), 353 (losses due to emotional disturbance), and 356 (limitation on liquidated damages and penalties). Similarly, certain remedies may be withheld because precluded by election or affirmance (see id., Ch. 16, Topic 5; see also § 54).

Reporter's Note

*Comment a. Scope and cross-references.*The Section employs the approach of Restatement Second, Contracts § 345, in listing the most generally applicable judicial remedies, with the Comment indicating particular points of application in suits between client and lawyer.

*Comment b. Damages.*See generally Chapter 4; 1 R. Mallen & J. Smith, Legal Malpractice, ch. 15 (4th ed. 1996). On recovery in a malpractice action, see, e.g., Woodruff v. Tomlin, 616 F.2d 924 (6th Cir.1980), cert. denied, 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980) (malpractice charge permitted to go to trial where lawyer —who represented insurer, driver, owner, and passenger—did not tell passenger that she might have suit against driver and owner on which insurer would be liable); Ishmael v. Millington, 50 Cal.Rptr. 592 (Cal.Ct.App.1966) (malpractice would lie against lawyer who represented husband and wife in uncontested divorce, allegedly failing to inquire about husband's community assets so that wife wound up waiving substantial rights).

*Comment c. Specific performance and other injunctive relief.*E.g., American Motors Corp. v. Huffstutler, 575 N.E.2d 116, 121 (Ohio 1991) (injunctive relief appropriate to protect against lawyer's use of confidential information threatened by announcement of intent to serve as expert witness against former client in matters on

which lawyer had advised); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1283-84 (Pa.1992) (power of court to enjoin lawyer's threatened violation of duty not to engage in conflicting representation).

*Comment d. Preventing unjust enrichment.*On restitutionary relief to a client against a lawyer, see, e.g., Booher v. Frue, 358 S.E.2d 127 (N.C.Ct.App.1987), aff'd, 364 S.E.2d 141 (N.C.1988) (claim of undisclosed fee-sharing between lawyers states causes of action for constructive fraud, unjust enrichment, and constructive trust against forwardee lawyer); Eriks v. Denver, 824 P.2d 1207, 1213 (Wash.1992) (fee forfeiture for violation of concurrent-representation conflict prohibition despite absence of damages to client). On imposition of a constructive trust, see, e.g., *Booher v. Frue*, supra; Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal.Rptr. 330 (Cal.App.1989) (use of client confidential information to deprive client of opportunity to purchase property); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.App.1988) (use of client confidential information to set up competing collection agency).

On forfeiture of fees otherwise payable for valuable services delivered to the client, see, e.g., Moses v. McGarvey, 614 P.2d 1363 (Alaska 1980) (former corporate lawyers who represented shareholders until disqualified for conflict of interest denied all attorney fees); Jeffry v. Pounds, 136 Cal.Rptr. 373 (Cal.Ct.App.1977) (law firm competently represented personal-injury plaintiff, then wife of plaintiff in suit for divorce; firm not entitled to fees for period after it took wife's case, but not required to forfeit them for period before doing so); see generally § 37, Reporter's Note.

*Comment e. Rescission or reformation of a transaction.*See generally §§ 126- 127, Reporter's Notes.

Cases setting aside such a contract or gift to a lawyer-recipient include Hicks v. Clayton, 136 Cal.Rptr. 512 (Cal.App.1977) (lawyer's purchase of client's property with $14,000 in equity for $33 worth of stock was inequitable and subject to imposition of constructive trust, rescission, restitution, and incidental damages); Succession of Cloud, 530 So.2d 1146 (La.1988) (lawyer's violation of lawyer-code prohibition against acquisition of interest in client's mineral holdings as basis for nullifying transfer); Cuthbert v. Heidsieck, 364 S.W.2d 583 (Mo.1963) (setting aside client gift of $20,000 in stock to lawyer); Bartlett v. Bartlett, 444 N.Y.S.2d 157 (N.Y.App.Div.1981) (separation agreement prepared by lawyer for husband, but acting for both spouses); compare, e.g., Levine v. Levine, 436 N.E.2d 476 (N.Y.1982) (separation agreement prepared by lawyer for both spouses not per se subject to rescission, where lawyer made full disclosure of conflict and desirability of separate representation, and there was no inequitable conduct or other infirmity). See also, e.g., C.B. & T. Co., v. Hefner, 651 P.2d 1029, 1036-37 (N.M.Ct.App.1982) (where lawyer represented both buyer and seller, lawyer's uncommunicated knowledge of buyer's adversarial interest to seller not imputed to buyer for purposes of defeating rescission on ground of prudent-person standard).

*Comment f. Declaratory relief.*E.g., Griva v. Davison, 637 A.2d 830, 846-48 (D.C.1994) (entertains possibility of use of declaratory and other relief to remedy lawyer breach of fiduciary duty through violations of lawyer code). On the similar use of a motion in already-pending litigation to obtain clarification of a lawyer's responsibilities, see, e.g., § 99, Comment *m,* and Reporter's Note thereto (on application of anti-contact rule).

*Comment g. Contempt.*See generally 1 D. Dobbs, Remedies § 2 (2d ed. 1993); 11A C. Wright & A. Miller, Federal Practice & Procedure § 2960 (2d ed. 1995). On the inherent powers of courts to exercise the power of contempt, see generally ABA/BNA Law. Manual Prof. Conduct § 61:1201 (1984); ABA Standards Relating to the Function of the Trial Judge 92-96 (1972); R. Underwood & W. Fortune, Trial Ethics § 6.6.3 (1986); C. Wolfram, Modern Legal Ethics § 12.1.3 (1986); see also § 1, Comment *c,* and Reporter's Note thereto. On contempt in the case of an advocate, see § 105, Comment *e*.

*Comment h. Enforcing an arbitration award.*E.g., Anderson v. Elliott, 555 A.2d 1042 (Me.), cert. denied, 493 U.S. 978, 110 S.Ct. 504, 107 L.Ed.2d 507 (1989) (court had inherent power to issue rule requiring lawyer to submit to binding fee arbitration on petition of client); cf., e.g., Arizona Elec. Power Coop., Inc. v. Berkeley, 59 F.3d 988 (9th Cir.1995) (Arizona policy against compensation of unethical lawyers too indeterminate to constitute proper "public

policy" ground to vacate arbitrator's award to lawyer against client in fee dispute); Zackiva Communications Corp. v. Milberg Weiss Bershad Specthrie & Lerach, 636 N.Y.S.2d 768 (N.Y.App.Div.1996) (no ground for vacating award for lawyers, when award did not enforce nonrefundable retainer in violation of public policy); Robinson & Wells, P.C. v. Warren, 669 P.2d 844 (Utah 1983) (enforcing award to law firm against client after arbitration pursuant to clause in fee agreement; general standards followed for confirming arbitrator's award).

Comment i. Disqualification from a representation. See generally C. Wolfram, Modern Legal Ethics § 7.1.7 (1986); 1 R. Mallen & J. Smith, Legal Malpractice § 16.9-.21 (4th ed. 1996); Penegar, The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts, 8 Geo. J. Legal Ethics 831 (1995); Kline, Motions to Disqualify Based on Conflicts of Interest—Identifying the Rules of the Game, 25 St. Mary's L.J. 739 (1994); Lindgren, Toward a New Standard of Attorney Disqualification, 1982 A.B.F. Res. J. 419; Note, The Ethics of Moving to Disqualify Counsel for Conflict of Interest, 1979 Duke L.J. 1310. See also § 121, Comment *f*, and Reporter's Note thereto.

On alternative remedies, with respect to the remedy of professional discipline, see, e.g., In re Cohen, 853 P.2d 286 (Or.1993) (lawyer represented both parents in custody proceeding where husband's conduct created risk that wife would lose custody as well unless she was separately represented). The remedy of an injunction against further representation is illustrated by Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa.1992).

The federal criminal statute prohibiting a former government employee, including a former government lawyer, from working on matters for private clients that the employee worked on "personally and substantially" while in government service is 18 U.S.C. § 207(a). The federal criminal prohibition of current conflicts of interest is 18 U.S.C. § 208. See § 133, Reporter's Note. For an instance of conviction for a conflict of interest not involving a former government lawyer, see United States v. Bronston, 658 F.2d 920, 927 (2d Cir.1981) (lawyer use of mail to defraud innocent client through conflicting representation).

Courts in recent years have often expressed concern about the costs associated with disqualification motions as such. See, e.g., Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir.1982):

> [D]isqualification … is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.

See also, e.g., Panduit v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577 (Fed.Cir.1984) ("Judges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely—encouragement of vexatious tactics and increased cynicism by the public."); United States v. Kitchin, 592 F.2d 900, 903 (5th Cir.1979) ("An attorney may be disqualified only when there is a 'reasonable possibility that some specifically identifiable impropriety' actually occurred and, in light of the interests underlying the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of his choice."); Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir.1979) (employing test of "taint the trial" to determine whether to disqualify); Premium Products Sales Corp. v. Chipwich, Inc., 539 F.Supp. 427, 435 (S.D.N.Y.1982) ("[U]nless the integrity of the action currently before the court is threatened …, the courts must refrain from imposing the burdens of an attorney disqualification on a client and leave the matter to state or federal disciplinary proceedings"); In re Infotechnology, 582 A.2d 215, 216 (Del.1990) (for disqualification to be warranted, challenged conduct of lawyer must "adversely affect … the fair and efficient administration of justice"). See generally Lindgren, Toward a New Standard of Attorney Disqualification, 1982 Am. B. Found. Res. J. 419.

On expressions of concern over misuse of disqualification motions for tactical advantage, see, e.g., United States Football League v. National Football League, 605 F.Supp. 1448, 1452 (S.D.N.Y.1985) (citing authorities on

proposition that disqualification motions are "often interposed for tactical reasons" and produce unnecessary delay); Gregori v. Bank of America, 254 Cal.Rptr. 853, 859 (Cal.Ct.App.1989) ("Motions to disqualify often pose the very threat to the integrity of the judicial process that they purport to prevent. Such motions can be misused to harass opposing counsel, or to intimidate an adversary into accepting settlement…."); Borman v. Borman, 393 N.E.2d 847, 855 and n.18 (Mass.1979) (concern that disqualification motion can be employed as tactical weapons); Adam v. Macdonald Page & Co., 644 A.2d 461, 464 (Me.1994) (similar); ABA Model Rules of Professional Conduct, Scope ¶ [6] (1983) ("[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule …"); id., Rule 1.7, Comment ¶ [15] ("… where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment …"); cf. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 436, 105 S.Ct. 2757, 2763, 86 L.Ed.2d 340 (1985) (concern over use as litigation tactic does not justify permitting interlocutory review of order of disqualification). On refusing to disqualify for lack of sufficient threat of harm, but referral of the matter to a lawyer disciplinary agency, see, e.g., Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F.Supp. 1121 (N.D.Ohio 1990).

On standing, see generally C. Wolfram, supra § 7.1.7, at 333-35; see, e.g., In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir.1976) (unless conflict is open and obvious, only affected client, not a third party, may move for disqualification); Dawson v. City of Bartlesville, 901 F.Supp. 314 (N.D.Okla.1995) (denying standing; citing authorities); Waterbury Garment Corp. v. Strata Productions, Inc., 554 F.Supp. 63 (S.D.N.Y.1982) (plaintiff had standing to move to disqualify defendant's lawyer on ground lawyer had previously represented plaintiff in same matter); In re Infotechnology, Inc., 582 A.2d 215 (Del.1990) (nonclient party asserting conflict as basis for disqualification bears burden of demonstrating how conflict would prejudice moving party). But not all courts have limited those entitled to move to disqualify as set forth in the Comment. E.g., Kevlik v. Goldstein, 724 F.2d 844, 847-48 (1st Cir.1984) (opposing counsel may seek disqualification as aspect of enforcing lawyer code, whether or not representing affected client) (citing authority); Planning & Control, Inc. v. MTS Group, Inc., 1992 WL 51569 (s.D.N.Y.1992) (after refusing to follow "general rule which restricts standing to raise a [former-client] disqualification motion to one who is a client or former client of the challenged law firm," court finds disqualification motion wholly untenable on merits); Beck v. Board of Regents of State of Kansas, 568 F.Supp. 1107, 1111 (D.Kan.1983) (defendant has standing to allege conflict involving co-defendant who did not complain of it; but no conflict found). Courts have sometimes relaxed standing requirements where the case or its procedural posture poses particularly compelling public interests. E.g., Black v. Missouri, 492 F.Supp. 848, 861-62 (W.D.Mo.1980) (defendant could raise possible conflict in representation of class in class-action desegregation case because interests of the public were so greatly implicated). Courts have also relaxed standing requirements in challenges to defense representation in criminal cases, either on broad grounds of public policy, e.g., Pirillo v. Takiff, 341 A.2d 896 (Pa.1975) (judge on own motion may deny lawyer right to represent all 12 co-defendants appearing before grand jury), cert. denied, 423 U.S. 1083, 96 S.Ct. 873, 47 L.Ed.2d 94 (1976), or on the more satisfactory ground that public resources would be at risk should a convicted person set aside a conviction for lack of effective assistance of counsel due to the conflict; see generally C. Wolfram, Modern Legal Ethics § 7.1.7, at 334-35 (1986). On differing views over disqualification of a lawyer representing multiple witnesses before a grand jury, compare, e.g., Moore, Disqualification of an Attorney Representing Multiple Witnesses before a Grand Jury: Legal Ethics and the Stonewall Defense, 27 UCLA L. Rev. 1 (1979) (arguing for narrow grounds for disqualification), with, e.g., Vaira & Huyett, Time for a Rule Certain: A Proposal to End Representation of Multiple Grand Jury Witnesses, 85 Dick. L. Rev. 381 (1981).

On the timeliness of a motion to disqualify, see generally C. Wolfram, Modern Legal Ethics § 7.1.7, at 335 (1986); Hacker & Rotunda, Standing, Waiver, Laches, and Appealability in Attorney Disqualification Cases, 3 Corp. L. Rev. 82 (1980). The terms waiver, laches, and estoppel are often used interchangeably. See, e.g., Pastor v. Trans World Airlines, 951 F.Supp. 27 (E.D.N.Y.1996) (former client's failure to object to former counsel's adverse representation in one suit is not implied waiver of objection to adverse representation in second suit); Chemical Waste Management, Inc. v. Sims, 875 F.Supp. 501, 506 (N.D.Ill.1995) (disqualification denied on ground of

"implied waiver" in view of circumstances, including length of time, when movant learned of conflict, that movant was represented by counsel throughout, that no reason justified delay, and that disqualification would result in prejudice to responding party); Alexander v. Primerica Holdings, Inc., 822 F.Supp. 1099, 1115 n.34 (D.N.J.1993) (whether on ground of waiver, estoppel, or laches, disqualification denied in view of long, unjustified delay of over 3 years and prejudice threatened by late grant of motion; where facts known to sophisticated clients, fact that lawyers for clients filed motion promptly on learning facts irrelevant); Jackson v. J.C. Penney Co., Inc., 521 F.Supp. 1032 (N.D.Ga.1981) (on grounds of "waiver," no disqualification where litigant allowed 15 months to pass before complaining); River West, Inc. v. Nickel, 234 Cal.Rptr. 33, 44 (Cal.Ct.App.1987) ("waiver" precluded disqualification where over 39-month delay during which defendant knew of issue but did not even give notice of intent to move to disqualify and significant prejudice would result to plaintiff); Hudson v. State, 299 S.E.2d 531 (Ga.1983) (client must "without delay" make objection and could not wait until conviction to raise misgivings about possible conflict between lawyer's role as part-time state court prosecutor and probate judge and lawyer's representation of client); Roth v. Roth, 405 N.E.2d 851 (Ill.App.Ct.1980) ("waiver" precluded disqualification, where harm to defendant whose lawyer prepared for 2 years exceeded harm to plaintiffs from possible conflict); Empire Life & Hosp. Ins. Co. v. Harris, 595 S.W.2d 904 (Tex.Civ.App.1980) ("waiver" where former client waited until close of plaintiff's case in chief to move to disqualify). Compare, e.g., Government of India v. Cook Industries, Inc., 422 F.Supp. 1057 (S.D.N.Y.1976), aff'd, 569 F.2d 737 (2d Cir.1978) (two-and-one-half-month delay not laches); Lee v. Todd, 555 F.Supp. 628 (W.D.Tenn.1982) (motion to disqualify filed year after suit filed, but granted because delay justified by good-faith efforts to settle case on merits in interim, not effort to prejudice plaintiff); Casco Northern Bank v. JBI Assocs., Ltd., 667 A.2d 856, 861 (Me.1995) (former client did not "implicitly waive" right to object through long delay where former client was not aware of adverse representation until shortly before filing motion). Occasionally, a court will refer to a failure to object over a long period of time as "de facto consent" or the like. E.g., Trust Corp. v. Piper Aircraft Corp., 701 F.2d 85, 88 (9th Cir.1983) (objection month prior to trial date untimely, where defendant had provided file concerning now-challenged former representation to lawyer for plaintiff who retained file for over two-and-one-half years without objection, during which time all pretrial and discovery work was completed by counsel now sought to be disqualified).

On allowing use by a successor lawyer of a disqualified lawyer's work product not tainted with prohibited confidential information, see generally, Grishaw, Access to the Work Product of a Disqualified Attorney, 1980 Wis. L. Rev. 105; Note, The Availability of the Work Product of a Disqualified Attorney: What Standard?, 127 U. Pa. L. Rev. 1607 (1979); e.g., First Wisconsin Mortgage Trust v. First Wisconsin Corp., 584 F.2d 201 (7th Cir.1978) (en banc) (use of work product permitted); IBM v. Levin, 579 F.2d 271 (3d Cir.1978) (where disqualification not based on misuse of confidences, trial judge did not abuse discretion by allowing consultation for 60 days between disqualified firm and its successor); Realco Serv., Inc. v. Holt, 479 F.Supp. 867 (E.D.Pa.1979) (successor counsel given access to documents filed of record, material obtained in discovery, materials reflecting public information, and the like). Compare Fund of Funds v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir.1977) (where second firm was selected by first and given access to confidential material, it also was disqualified); State ex rel. Firs-Tier Bank, N.A. v. Mullen, 534 N.W.2d 575 (Neb.1995) (discovery warranted on question of exposure to confidential information where successor firm reviewed file of predecessor, disqualified firm and entered into fee-splitting arrangement with it).

*Comment j. Denying the admissibility of evidence.*E.g., In re Beiny, 517 N.Y.S.2d 474 (N.Y.App.Div.1987) (suppression of confidential documents obtained from opposing party); see also, e.g., § 99, Comment *n,* and Reporter's Note thereto (suppression of evidence obtained in violation of anti-contact rule); cf. § 103, Comment *f,* and Reporter's Note thereto (suppression of evidence unfairly obtained from unrepresented person).

*Comment k. Dismissing a claim or defense.*The Comment follows the approach employed in Ackerman v. National Property Analysts, Inc., 887 F.Supp. 510 (S.D.N.Y.1993); see also, e.g., Doe v. A Corp., 330 F.Supp. 1352, 1355 (S.D.N.Y.1971), aff'd sub nom. Hall v. A Corp., 453 F.2d 1375 (2d Cir.1972) (per curiam) (where lawyer representing class of stockholders suing corporation relied in complaint entirely on facts he learned while employed by the corporation, dismissal of complaint was warranted); Slater v. Rimar, Inc., 338 A.2d 584 (Pa.1975) (case dismissed without prejudice where lawyer for plaintiff had been lawyer for defendant).

*Comment l. New trial.*E.g., Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd., 15 Cal.Rptr.2d 585, 598 (Cal.Ct.App.1993) (setting aside judgment of sister state on ground of extrinsic fraud where lawyer purported to represent both plaintiff and defendant partnership after dissolution of partnership and without notice to absent partners); People v. Lackey, 405 N.E.2d 748 (Ill.1980) (reversible error where parents in suit to terminate parental rights were represented by same public defender who represented child as guardian ad litem); cf., e.g., Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (defendant attacking state conviction on ground of defense lawyer's conflict of interest must show that conflict actually affected quality of representation); Junger Utility & Paving Co. v. Myers, 578 So.2d 1117, 1119 (Fla.Dist.Ct.App.1989) (final judgment in civil case can be reversed only on showing of actual prejudice).

The principle underlying reversing the result in a case because of a conflict of interest was asserted in United States v. Throckmorton, 98 U.S. (8 Otto.) 61, 66, 25 L.Ed. 93 (1878) ("[W]here an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side-these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained …"). The principle is most often applied in criminal cases, e.g., Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

*Comment m. Procedural or other sanctions.*See § 110, Reporter's Note.

*Comment n. Limitation of remedies.*E.g., Wehringer v. Powers & Hall, P.C., 874 F.Supp. 425, 428-29 (D.Mass.), aff'd, 65 F.3d 160 (1st Cir.1995) (under Massachusetts law, damages for emotional distress not available to client in case involving only property rights); Schonberger v. Serchuk, 742 F.Supp. 108, 119-20 (S.D.N.Y.1990) (same, under New York law); McClung v. Smith, 870 F.Supp. 1384, 1391 (E.D.Va.1994) (speculative damages not recoverable in legal malpractice); Blain v. Doctor's Co., 272 Cal.Rptr. 250 (Cal.App.1990) (proper to dismiss claim of client for legal malpractice based on claim that lying at deposition as advised by lawyer caused damages because client could not recover for own misconduct); Wartzman v. Hightower Productions, Ltd., 456 A.2d 82 (Md.App.1983) (reliance interest recoverable by client from negligent lawyer included economic loss caused by failure of enterprise due to inability to sell stock caused by lawyer's negligence); Smith v. Childs, 437 S.E.2d 500, 507-09 (N.C.Ct.App.1993) (on facts, no failure to mitigate damages).

Case Citations - by Jurisdiction

—

Fla.App.
Mass.
Tex.App.

Fla.App.

Fla.App.2018. Com. (*i*) quot. in sup. Cigarette smoker, who was a member of a class action against cigarette manufacturer, sued manufacturer on an individual basis after the class was decertified, alleging that manufacturer misled her about the dangers of smoking. The trial court granted manufacturer's motion to disqualify smoker's law firm on the ground that an attorney who formerly worked for law firm previously represented manufacturer in the class action and related cases. This court granted smoker's petition for a writ of certiorari, quashed the order granting disqualification, and remanded for an evidentiary hearing to determine whether attorney had significant involvement in the class action and related litigation while working for law firm, such that disqualification of attorney was appropriate. The court relied in part on Restatement Third of the Law Governing Lawyers § 6 in explaining that, if the trial court found that law firm continued to employ attorney after it knew or should have known of the potential for disqualification, Florida rules of professional conduct indicated that law firm, as well as attorney, had to be disqualified from representing smoker. Balaban v. Philip Morris USA, 240 So.3d 896, 899.

Mass.

Mass.2013. Cit. in sup., quot. in ftn., com. (j) quot. in ftn. Former client sued law firm and two of firm's attorneys, alleging, inter alia, legal malpractice, negligent misrepresentation, and intentional misrepresentation. The trial court granted defendants' motion for a protective order to preserve the confidentiality of internal communications between attorneys and law firm's in-house counsel concerning how to respond to a "notice of claim" threatening a legal-malpractice suit that client had sent to law firm before firm withdrew from its representation of client. On interlocutory appeal, this court affirmed the trial court's grant of the protective order, holding that these internal communications were protected from disclosure to plaintiff by the attorney-client privilege. The court declined to adopt either the "fiduciary" or the "current client" exception to the attorney-client privilege, and noted that none of the 13 possible sanctions identified by the Restatement Third of the Law Governing Lawyers § 6 for a law firm's ethical breach of representing clients with adverse interests without their consent included disclosure of otherwise privileged communications. RFF Family Partnership, LP v. Burns & Levinson, LLP, 465 Mass. 702, 721, 991 N.E.2d 1066, 1079, 1080.

Tex.App.

Tex.App.2020. Cit. in sup. Attorney sued husband and wife who had hired him to review a personal-injury settlement that they had reached with husband's employer, seeking a declaratory judgment that he owned a 35% interest in an annuity and annuity payments they received under the settlement; husband and wife counterclaimed for breach of fiduciary duty. At the close of attorney's case, the trial court granted husband and wife's motion for a directed verdict, finding that the parties' attorney-fee agreement was unconscionable, and that, while husband and wife's counterclaim was untimely, they were entitled to disgorgement of attorney's fees. This court reversed in part, holding that husband and wife did not have an affirmative claim supporting the remedy of fee forfeiture, as required to recover disgorgement of fees. The court cited Restatement Third of the Law Governing Lawyers § 6 in noting that claims seeking equitable remedies were subject to legal bars such as statutes of limitations. Izen v. Laine, 614 S.W.3d 775, 792.

Restatement (Third) of the Law Governing Lawyers § 7 (2000)

§ 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.

Comment:

a. *Scope and cross-references.* This Section states the general availability of remedies to a lawyer (Subsection (1)), subject to Subsection (2), which recognizes that special limitations on such remedies may be appropriate in view of what the tribunal may properly determine to be overriding considerations arising from appropriate enforcement of a lawyer-code provision applicable to the lawyer. While the discussion herein is limited to remedies, similar considerations may apply to defenses that a lawyer asserts against claims of a client or former client.

b. *Rationale.* A lawyer seeking relief from a present or former client is not in the same position as are most other claimants with respect to responding parties. The relationship between lawyer and client is one in which the lawyer generally owes the client rigorously enforced fiduciary duties, including duties of the utmost good faith and fair dealing (see § 16). Those duties are diminished, but not entirely extinguished, at the end of the representation. While those duties inform many of the substantive rights that a lawyer might assert against a client, it may also be appropriate to take account of the lawyer's fiduciary duties when assessing the suitability of an otherwise-available remedy (e.g., § 41) (fee-collection methods). In view of the predominant role of courts in regulating lawyers (see

§ 2, Comment *c*), such concepts will be particularly relevant when the remedy in question is discretionary with the court or when a tribunal deals with a novel common-law question of remedy.

Illustrations:

1. In a written contract by which Client retained Lawyer to provide legal services in a personal-injury case, Client agreed to give Lawyer at least 30 days' notice of discharge. Client was a person not experienced in dealings with lawyers, and the representation was a routine personal-injury action. Client later discharged Lawyer without giving prior notice. Lawyer filed suit against Client, seeking damages for Client's violation of the 30-day-notice agreement. Due to Client's right to discharge Lawyer at any time (see § 32), the tribunal should refuse to enforce the 30-day limitation restricting that right.

2. Same facts as in Illustration 1, except that Client is a large organization represented in the negotiations with Lawyer by inside legal counsel. The matter involves an unusual time and capital commitment by Lawyer, necessitating that Lawyer hire additional professional and clerical assistance, terminate representation of other clients, and train office staff to deal with a complex set of technical issues entailed in representing Client. In the circumstances, the 30-day-notice requirement is not unreasonable, as it protects clear and legitimate interests of Lawyer and does not in the circumstances unduly burden Client's right of discharge.

On the right of a discharged inside legal counsel to maintain a suit against a client organization for wrongful dismissal, see § 32, Comment *b*; cf. § 37, Comment *e*.

c. *Public-policy limitations on remedies to lawyer.* As with other considerations of public policy, a tribunal will accord respect to the special rules regulating lawyers, including applicable provisions of a lawyer code, in adjudicating a dispute between a lawyer and a client or former client. Such attention is appropriate both in determining applicable remedial and substantive rules and when dealing with particular defenses, such as defenses of public policy in contract law (see, e.g., Restatement Second, Contracts § 197 et seq.) (unavailability of restitution on public-policy grounds). See § 1, Comment *b*; see, e.g., § 37 (fee forfeiture).

Reporter's Note

*Comment b. Rationale.*Illustration 2 is based on the facts and holding in Cohen v. Radio-Electronics Officers Union, 679 A.2d 1188 (N.J.1996) (term in fee agreement requiring client experienced in employing lawyers to give 6 months' notice void, but damages for 1 month's negotiated per-month fee reasonable and not inconsistent with policy of lawyer-code provision giving client right to discharge lawyer at any time in light of extent of lawyer's commitment to provide extensive services). Illustration 1 is a hypothetical variation on the decision, indicating an outcome consistent with the court's approach in situations involving clients who are not experienced in dealing with lawyers.

*Comment c. Public-policy limitations on remedies to lawyer.*See, e.g., Spilker v. Hankin, 188 F.2d 35 (D.C.Cir.1951) (on public-policy grounds, refusing to uphold lawyer's otherwise appropriate assertion of collateral estoppel against client's defense of misrepresentation to lawyer's claim on notes made in postinception fee

arrangement (see § 18, Comment *e*)); Jeffry v. Pounds, 136 Cal.Rptr. 373 (Cal.Ct.App.1977) (lawyer who breached conflict-of-interest rules entitled to no fee); Marino v. Tagaris, 480 N.E.2d 286 (Mass.1985) (court, as ultimate authority over conduct of lawyers, will inquire more closely than in typical arbitration case to ensure fairness to client of fee-arbitration proceeding); Stern v. Wonzer, 846 S.W.2d 939, 947-48 (Tex.Ct.App.1993) (permissible to admit evidence of lawyer code as limitation on lawyer's fee claim).

Case Citations - by Jurisdiction

—

N.D.Ill.

N.D.Ill.2021. Com. (a) cit. in sup. In a trademark action initiated by trademark owner against alleged infringer and its owner, plaintiff filed a motion for sanctions against, among others, defendants, alleging that defendants violated their duty of honesty and good-faith discovery by knowingly failing to disclose the existence of and to preserve certain electronic documents. This court granted in part plaintiff's motion for sanctions, holding that defendants' self-collection of documents was insufficient to satisfy its duties of candor, honesty, and good-faith discovery conduct and prejudiced plaintiffs. Citing Restatement Third of Agency § 8.15 and Restatement of the Law Governing Lawyers § 7, the court explained that defendants violated a fundamental assumption of electronic discovery, because they breached their duty of candor as the principals of their former attorneys to furnish information to the attorneys, deal with them fairly and in good faith, and to not misrepresent facts. DR Distributors, LLC v. 21 Century Smoking, Inc., 513 F.Supp.3d 839, 944.

N.J.

N.J.2011. Sec. and coms. (a) and (b) quot. in sup. In disciplinary proceedings brought against attorney for suing a current client to collect legal fees, the Disciplinary Review Board concluded that attorney's conduct created a conflict of interest and that a reprimand was warranted. This court ordered the imposition of a reprimand, holding that attorneys were not to sue a present or existing client during active representation, nor was an attorney to seek any remedy against a client that resulted in a conflict under the rules of professional conduct; in this case, by filing suit against client, attorney knowingly created an irreconcilable conflict of interest for the purpose of forcing his withdrawal from representation of client in the face of mounting unpaid fees, and such conduct could not be tolerated. The court noted that the Restatement Third of the Law Governing Lawyers made clear that a lawyer's remedies against a client were limited by both the law governing the remedy in question and the lawyer's obligations under any applicable ethical code. In re Simon, 206 N.J. 306, 317-318, 20 A.3d 421, 429.

Restatement (Third) of the Law Governing Lawyers 1 4 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Introductory Note

Introductory Note: A lawyer representing a client remains subject to numerous legal constraints external to, although often reflected in, applicable lawyer-code provisions (see § 1, Comment b). Among those legal constraints may be requirements of criminal law. For most lawyers in most representations, criminality of the lawyer's own conduct is not in issue. But a lawyer may commit offenses such as obstruction of justice, subornation of perjury, or criminal fraud, either alone, in complicity with a client, or in aid of another. In areas of significant doubt, no simply stated rule can reliably separate services of a lawyer that are legally permissible under the criminal law from those that constitute crimes. Determination of the propriety of a lawyer's challenged conduct depends on the specific circumstances and such considerations as the lawyer's proven purpose and state of knowledge.

Restatement (Third) of the Law Governing Lawyers § 8 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 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.

Comment:

a. *Scope and cross-references.* This Section describes in general terms the ways in which a lawyer may be guilty of a criminal offense and the interrelationship between the law of crimes and duties of a lawyer under an applicable lawyer code. The criminal law applicable to the claimed offense determines the legal consequences of the lawyer's actions. The Section refers to offenses in the course of representing a client; a lawyer may act as principal or accomplice outside such a representation. The scope of the latter crimes raises no issue relevant to this Restatement and is not considered here. On professional discipline of a lawyer for crimes committed either in the course of representing a client or otherwise, see § 5, Comment *g*.

On counseling a client about activity of doubtful legality, see § 94(2) and Comment *c* thereof. On limits on a lawyer's civil liability to others based on the lawyer's advising and assisting acts of clients, see § 56, Comments *b* and *c*.

b. *Rationale.* Lawyers play an important public role by informing clients about law and the operation of the legal system and providing other assistance to clients. In counseling clients a lawyer may appropriately advise them about the legality of contemplated activities (see § 94, Comment *c*). A lawyer is, of course, not generally liable under the law of crimes for a client's criminal acts solely because the lawyer advised or otherwise assisted the

client in the underlying activities that constituted the offense, such as when a lawyer did not know of the client's intended use of the advice or where the lawyer attempted to dissuade the client from committing the offense. A lawyer may, however, cross the divide between appropriate counseling and criminal activity. As with persons in other occupations and professions, lawyers functioning on behalf of a client remain subject to the requirements of criminal law. The Section and Comments indicate in general how criminal law may apply to a lawyer's activities.

c. *Source of the law defining a criminal offense of a lawyer.* For the most part, the substantive law of crimes applicable to lawyers is that applicable to others. With respect to certain crimes, provisions of a lawyer code (see § 1, Comment *b*) may be relevant in applying general criminal law to a lawyer, as with civil remedies (see Topic 3, Introductory Note). In general, provisions of such codes do not purport to displace duties imposed on lawyers and others by criminal law, but are drafted assuming the applicability of such law. For example, a lawyer charged with the offense of fraud against a client will be held to the standards of disclosure to the client required by an applicable lawyer code. A criminal statute that, consistent with precedent and with accepted norms governing construction of a criminal statute, could be construed so as to make it consistent with an applicable lawyer-code provision should be so construed.

d. *Responsibility as a principal.* In general, a lawyer may be responsible as a principal either when the lawyer personally commits a criminal offense or when a criminal offense is committed by a person for whose conduct the lawyer is legally accountable (see Model Penal Code § 2.06(1)). As an example of the latter, a lawyer would be guilty as a principal if the lawyer, acting with culpability sufficient to constitute the violation, causes an innocent or irresponsible client or other person to engage in conduct that would constitute an offense if engaged in by the lawyer (see id. § 2.06(2)(a)).

Illustration:

1. Knowing that Client would submit a document to a government agency in compliance with a reporting requirement, Lawyer knowingly prepares the document with materially false statements. Client, relying on Lawyer's representations, believes the statements to be true and submits the false document. Client, lacking knowledge, is guilty of no offense. Lawyer, who acted with knowledge and with intent that Client submit a false document, is guilty as a principal for the offense of submitting a false document to a government agency.

e. *Responsibility as an accomplice.* Two elements are generally necessary (see Model Penal Code § 2.06(3)) for accomplice culpability on the part of a lawyer (in addition to unusual situations in which criminal law expressly declares a lawyer's conduct to be complicity (see id. § 2.06(3)(b))). First, the lawyer must act with the purpose of promoting or facilitating the commission of the other's offense (see id. § 2.06(3)(a)). Second, one of the three following conditions must describe the lawyer's conduct: soliciting the client or other person to commit the offense; aiding or agreeing or attempting to aid the person in planning or committing the offense; or, having a legal duty to prevent the commission of the offense, failing to make a proper effort to do so (see id. § 2.06(3)(a)(i)-(iii)).

Unless law otherwise provides, a lawyer is not an accomplice in an offense committed by the lawyer's client or another person if the lawyer is a victim of the client's offense (see id. § 2.06(6)(a)) or if the offense is so defined that the lawyer's conduct is inevitably incident to its commission (see id. § 2.06(6)(b)). Moreover, a lawyer is not an accomplice if the lawyer terminates complicity prior to the commission of the offense and acts so as to negate

the effectiveness of the lawyer's former participation in the commission of the offense, gives timely warning to law-enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense (see id. § 2.06(6)(c)). On circumstances in which a lawyer may reveal confidential client information in so doing, see § 64 and §§ 66- 67.

Reporter's Note

*Comment c. Source of the law defining a criminal offense of a lawyer.*On the relevance of a lawyer-code rule in defining the criminal liability of a lawyer, see, e.g., United States v. Machi, 811 F.2d 991, 999-1002 (7th Cir.1987) (proper to place lawyer-code provisions in evidence to show that lawyer's conduct was serious violation to rebut lawyer's defense that he was merely acting as friend rather than for profit); United States v. Bronston, 658 F.2d 920, 927 (2d Cir.1981), cert. denied, 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982) (definition of impermissible conflict of interest for purposes of defining lawyer use of mail to defraud innocent client).

On employing a lawyer-code provision to limit an interpretation of a criminal statute, see, e.g., Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975) (criminal contempt incurred for purpose, reasonable in the circumstances, of obtaining immediate appellate review of trial court order to disclose confidential client information); People v. Belge, 372 N.Y.S.2d 798 (N.Y.Co.Ct.), aff'd mem., 376 N.Y.S.2d 771 (N.Y.App.Div.1975), aff'd per curiam, 359 N.E.2d 377 (N.Y.1976) (relevance of confidentiality obligation of lawyer code in limiting construction of criminal statute requiring report of unattended death).

*Comment d. Responsibility as a principal.*See generally ALI Model Penal Code § 2.06 (1962):

> Section 2.06. Liability for Conduct of Another; Complicity
>
> (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
>
> (2) A person is legally accountable for the conduct of another person when:
>
> (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or
>
> (b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or
>
> (c) he is an accomplice of such other person in the commission of the offense.

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

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

*e. Responsibility as an accomplice.*See Model Penal Code § 2.06(2)(c)-(3); e.g., In re McBride, 642 A.2d 1270 (D.C.1994) (discipline of lawyer following conviction of aiding and abetting client in possession and use of

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

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

End of Document

Restatement (Third) of the Law Governing Lawyers 1 5 Intro. Note (2000)

Introductory Note

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

Restatement (Third) of the Law Governing Lawyers 1 5 A Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Introductory Note

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

Restatement (Third) of the Law Governing Lawyers § 9 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 9 Law-Practice Organizations—In General

(1) A lawyer may practice as a solo practitioner, as an employee of another lawyer or law firm, or as a member of a law firm constituted as a partnership, professional corporation, or similar entity.
(2) A lawyer employed by an entity described in Subsection (1) is subject to applicable law governing the creation, operation, management, and dissolution of the entity.
(3) Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients:
(a) prior to leaving the firm:
(i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and
(ii) only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose; and
(b) after ceasing employment in the firm, to the same extent as any other nonfirm lawyer.

Comment:

a. *Scope and cross-references.* This Section considers generally the various forms in which lawyers practice law, as well as particular issues relating to soliciting firm clients by a departing lawyer and to agreements restricting future law practice. Most questions of organizational structure and operation are determined by reference to law that applies generally to lawyers and others who practice in the particular form, such as a partnership or professional corporation. The Section assumes compatibility between the rights and obligations that are defined by general law and the rights and obligations of lawyers and clients under applicable lawyer-code provisions. The Section and

Comments also consider instances in which lawyer-code provisions require different rules governing the structure or operation of a law firm. See, e.g., Comments *b* and *i*.

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

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

Among the questions determined by law generally applicable to the particular legal form in which the firm is constituted or attempted to be constituted are those specifying such matters as the following: the means by which the firm is to be constituted; who within the organization is authorized to govern the firm and to enter into contracts or otherwise incur liability on its behalf; the consequences of acts of any owner or nonowner employee of the firm causing injury to persons outside the organization (see § 58); the responsibility of the firm under laws governing employee rights; who within the firm is authorized to participate in managing the firm; what powers and rights exist in owners of the firm in the absence of controlling provisions in the firm agreement; the means by which an interest in the firm may be transferred and similar questions of succession to an interest in the firm; what events cause dissolution and what consequences follow from dissolution; and by what means the affairs of the firm are to be wound up on dissolution. With respect to any such issue, a provision of an applicable lawyer code bearing on the issue should control absent clear indication that valid different regulations governing structures of the kind involved are to control.

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

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

by a client such as in the office of prosecutor (see § 97, Comment *g*). The powers and duties of such a lawyer, as both employee and as lawyer representing clients, are defined by otherwise applicable law in ways appropriate to the lawyer's particular role.

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

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

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

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

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

A contract or temporary lawyer who performs legal services for or on behalf of clients of the firm is subject to duties to the firm's clients similar to those of lawyers generally, such as those of competence and diligence (see

§ 16(2)) and confidentiality (see § 60 and following). On the extent to which imputation of conflicts of interest occurs, see § 123, Comment *c(i)*.

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

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

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

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

However, as a matter of the departing lawyer's duties to the law firm, the client is considered to be a client of the firm (see § 14, Comment *h*). The departing lawyer generally may not employ firm resources to solicit the client, may not employ nonpublic confidential information of the firm against the interests of the firm in seeking to be retained by a firm client (when not privileged to do so, for example to protect the interests of the client), must provide accurate and reasonably complete information to the client, and must provide the client with a choice of counsel. As stated in Subsection (3), a departing lawyer accordingly may not solicit clients with whom the lawyer actually worked until the lawyer has either left the firm (Subsection (3)(b)) or adequately informed the firm of the lawyer's intent to contact firm clients for that purpose (Subsection (3)(a)). Such notice must give the firm a reasonable opportunity to make its own fair and accurate presentation to relevant clients. In either event, the lawyer and the firm are in positions to communicate their interest in providing representation to the client on fair and equal terms. If a lawyer and firm agree that the lawyer is free to solicit existing firm clients more extensively than as provided in Subsection (3), their relationship is controlled by such agreement. For example, it might be agreed that a departing lawyer may seek to represent some clients as an individual practitioner or as a member of another firm. On limitations on agreements that have the effect of restricting a departing lawyer's law practice, and hence the ability of clients to obtain counsel, see § 13.

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

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

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

Reporter's Note

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

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

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

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

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

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

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

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

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

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

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

On decisions, see, e.g., Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d 358 (Ill. 1998) (law firm pleaded recoverable claim for tortious interference with prospective economic advantage in alleging that departing members took various predeparture steps to induce existing clients to follow them to new firm); Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass.1989) (adopting approach of ABA Informal Opinion 1457, supra, departing lawyers violated fiduciary duty to remaining partners by rushing one-sided notice of departure to clients without providing partners effective opportunity to present their services as alternative); Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179 (N.Y.1995) (predeparture solicitation of firm clients to commit to be represented by departing lawyer at new firm constituted breach of lawyer's fiduciary duty to firm); Bray v. Squires, 702 S.W.2d 266 (Tex.Ct.App.1985) (permissible for former associates of firm to make postdeparture solicitation of financial-institution client, on whose matters they had actively worked, in competition with former firm); contra, e.g., Pratt, P.C. v. Blunt, 488 N.E.2d 1062 (Ill.App.Ct.1986) (semble) (postdeparture solicitation, only some of which was disparaging of former firm, enjoined as tortious interference with former firm's relationship with existing clients); Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853 (Ohio 1999) (fact issues precluded summary judgment on claim of misappropriation of trade secrets for firm to which departing lawyer had, postdeparture,

used telephone numbers of clients formerly represented at old firm, where lawyer made phone list at old firm); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa.1978), cert. denied, 442 U.S. 907, 99 S.Ct. 2817, 61 L.Ed.2d 272 (1979) (postdeparture solicitation of firm clients on whose matters departing associates had worked constituted tortious interference with existing contractual relationship between old firm and existing clients). Distinguishable are instances in which the departing lawyer deals unfairly, as by disparaging the old firm, misleading clients, or engaging in other wrongdoing, see Shein v. Myers, 576 A.2d 985 (Pa.Super.Ct.1990), appeal denied, 617 A.2d 1274 (Pa.1991), or, as apparently all decisions agree, by predeparture solicitation of clients without notice to the firm, see In re Silverberg, 438 N.Y.S.2d 143 (N.Y.App.Div.1981).

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

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

*Comment j. Dissolution and winding up of a law firm.*Under general partnership law, withdrawal or death of a partner causes dissolution of the partnership. See Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 413 (N.Y.1989), but a partnership agreement providing for nondissolution on withdrawal controls and, to the extent it so provides, prevents dissolution. E.g., Bonner v. Showa Denko, K.K., 518 N.W.2d 616, 620 (Minn.Ct.App.1994); Cowan v. Maddin, 786 S.W.2d 647 (Tenn.Ct.App.1989). In general, postdissolution fees received for matters that were work in progress of the partnership at the time of dissolution are also distributed pursuant to the partnership agreement, regardless of which partner performs the work postdissolution, see, e.g., Young v. Delaney, 647 A.2d 784 (D.C.1994); Grossman v. Davis, 34 Cal.Rptr.2d 355 (Cal.Ct.App.1994); Rothman v. Dolin, 24 Cal.Rptr.2d 571 (Cal.Ct.App.1993); see also Fox v. Abrams, 210 Cal.Rptr. 260 (Cal.Ct.App.1985) (same rule applied to dissolution of law corporation); Hurwitz v. Padden, 581 N.W.2d 359 (Minn.Ct.App.1998) (same); see generally R. Hillman, Lawyer Mobility § 2.3.1.3 (1994).

Case Citations - by Jurisdiction

—

D.Mass.
Cal.App.
Colo.App.
Ga.App.
N.J.Super.

D.Mass.

D.Mass.2001. Quot. in disc., com. (b) quot. in disc. Associate attorney whose employment was terminated after her request to become a partner was denied sued limited-liability partnership and its individual partners for sex discrimination. Denying partnership's motion for summary judgment, the court held that the case would proceed to a first-phase trial for adjudication on the merits against the partnership entity alone, and that separate counsel for each individual partner would not be necessary at this phase to avoid conflicts of interest. The court invited submissions of the parties regarding potential application to issues in this case of Restatement Third of the Law Governing Lawyers §§ 9, 121, 122, and 128. Dow v. Donovan, 150 F.Supp.2d 249, 272-274.

Cal.App.

Cal.App.2007. Com. (e) quot. in ftn. Investment corporation, by and through its receiver, sued attorney and his law firm, alleging that attorney, who had represented an individual convicted of engaging in fraudulent activities with the corporation, improperly obtained monies belonging to the receivership. The trial court granted law firm's motion for summary judgment on the ground that law firm could not be held vicariously liable for attorney's alleged acts. Reversing in part, this court held that plaintiff raised triable issues of fact as to whether attorney committed his alleged acts within the scope of his authority as a partner of the firm. The court noted that it referred to attorney as a partner, whatever the nature of attorney's relationship with law firm, observing that, in some cases, although not in this one, the particular label placed on an attorney might have legal ramifications. PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal.App.4th 384, 389, 58 Cal.Rptr.3d 516, 520.

Colo.App.

Colo.App.2004. Cit. in disc. Law firm brought suit for breach of contract against attorney who had left firm, after attorney refused to pay firm the agreed-upon portion of attorney's fees generated in several cases he took with him. The trial court ruled on a pretrial motion that the contract to apportion attorney's fees on attorney's departure from the firm was enforceable in accordance with its terms and was not contrary to public policy. Affirming, this court held, inter alia, that state rule of professional conduct barring division of a fee between lawyers not in the same firm did not apply to an agreement to apportion fees on departure of an attorney from a law firm. Moreover, the rule did not apply to division of fees within a firm, and the apportionment agreement here was accomplished while attorney was still employed by firm. Norton Frickey, P.C. v. Turner, 94 P.3d 1266, 1269.

Ga.App.

Ga.App.2016. Subsec. (3) quot. in sup. Partners at a law firm brought an action for, inter alia, breach of the duty of loyalty and breach of fiduciary duty against law firm's former associate attorney and her new firm, alleging that associate breached her duties to plaintiffs by taking eight cases with her when she terminated her employment with plaintiffs' firm. The trial court denied in part defendants' motion for summary judgment. This court affirmed in part, holding that there was a genuine issue of material fact as to whether associate was a fiduciary owing a duty of loyalty based on her status as law firm's agent. The court looked to Restatement Third of the Law Governing Lawyers § 9(3) for guidance on when a lawyer leaving a firm could solicit the firm's clients, and explained that there was a factual dispute regarding when associate's employment terminated, which affected whether she breached her duty by soliciting firm's clients before the end of her employment. Tolson Firm, LLC v. Sistrunk, 789 S.E.2d 265, 269.

N.J.Super.

N.J.Super.2003. Com. (i) cit. in sup. Law firm sued its former partner and his new firm to recover contingent fees in cases taken by former partner on his withdrawal from plaintiff firm, and for 50% of any future attorney's fees in those cases. The trial court granted summary judgment for plaintiff, and awarded damages. Affirming in part, this court held, inter alia, that the contingent-fee-division provision of plaintiff's partnership agreement executed by former partner was enforceable against former partner, since there was no showing in the record that the provision prevented, as a matter of fact or economic reality, former partner's ability to continue his practice or to handle cases that clients wanted him to take from plaintiff firm. Groen, Laveson, Goldberg & Rubenstone v. Kancher, 362 N.J.Super. 350, 362, 827 A.2d 1163, 1170.

End of Document

Restatement (Third) of the Law Governing Lawyers 1 5 B Intro. Note (2000)

Introductory Note

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

Restatement (Third) of the Law Governing Lawyers § 10 (2000)

§ 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.

Comment:

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

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

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

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

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

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

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

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

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

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

f. Nontraditional forms of law practice. The rule against splitting fees with nonlawyers has been one ground for the prohibition of partnerships between lawyers and nonlawyers when the practice of law is an activity of the partnership and for the prohibition of profit-making professional law corporations with stock owned by nonlawyers. This Section does not prohibit a law firm from cooperating with a legally separate partnership or other organization of nonlawyers in providing multi-disciplinary services to clients. The Section allows a lawyer employed and compensated by a nonprofit public-interest organization or a union to remit court-awarded fees to the employing organization, provided that the organization uses the funds only for legal services.

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

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

lawyer must disclose to the client that the client's communications with personnel of the ancillary enterprise—unlike communications with personnel in the lawyer's law office (see § 70, Comment *g*)—are not protected under the attorney-client privilege. If relevant, the lawyer should also disclose to the client that the ancillary business is not subject to conflict-of-interest rules (see generally Chapter 8) similar to those applicable to law practice.

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

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

Reporter's Note

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

The rule, uniformly followed until recently, was that a lawyer or the lawyer's estate could not sell the lawyer's interest in a law practice. See 1 G. Hazard & W. Hodes, Law of Lawyering § 1.17:102 (2d ed. 1990); C. Wolfram, Modern Legal Ethics § 16.2.1, at 879-80 (1986); Schoenwald, Model Rule 1.17 and the Ethical Sale of Law Practices: A Critical Analysis, 7 Geo. J. Legal Ethics 395, 399-401 (1993). The ABA amended its ABA Model Rules in 1990, adding Rule 1.17, to permit the sale of a law practice on the selling lawyer's cessation of practice in the jurisdiction. The rule was based on California Rules of Prof. Conduct, Rule 2-300. In the absence of such a rule, the fact that a law firm may pay the estate of a deceased lawyer an amount measured by earnings from the deceased lawyer's former clients has been held not to permit the estate of a sole practitioner to make the same arrangement with another lawyer or firm. E.g., Geffen v. Moss, 125 Cal.Rptr. 687, 693 (Cal.Ct.App.1975); O'Hara v. Ahlgren, Blumenfeld & Kempster, 537 N.E.2d 730 (Ill.1989).

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

asset in appropriate case, but here, in action by former partner's accounting action against law firm, partnership agreement and course of dealings precluded such treatment).

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

*Comment e. Compensation of nonlawyer employees.*The Section and Comment follow the standard treatment in the lawyer codes. See ABA Model Rules of Professional Conduct, Rule 5.4(a)(3) (1983) (same as § 10(c)(3)); ABA Model Code of Professional Responsibility, DR 3-102(A)(3) (1969); ABA Informal Opin. 1140 (1979); C. Wolfram, Modern Legal Ethics 510 (1986). On the very different proposal of the ABA's Kutak Commission, whose version of Rule 5.4 would have permitted nonlawyer ownership and exercise of managerial power in a law firm (subject to certain minimal limitations), see generally ABA Center for Professional Responsibility, Legislative History of the Model Rules of Professional Conduct 159 (1987).

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

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

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

*Comment g. Lawyer involvement in ancillary business activities.*See generally Schneyer, Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study, 35 Ariz. L. Rev. 363 (1993); Munneke, Dances with Nonlawyers: A New Perspective on Law Firm Diversification, 61 Fordham L. Rev. 559 (1992). On possible advantages of combining legal and nonlegal services in projects in which multiple disciplines

are relevant, see, e.g., In re Harold & Williams Dev. Co., 977 F.2d 906 (4th Cir.1992) (trial court erred in dismissing application of lawyer-accountant to perform both services for bankrupt estate without assessing possible savings and other individual merits and disadvantages).

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

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

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

Under lawyer-code provisions and other legal rules, a lawyer who does not keep an ancillary business sufficiently distinct from the lawyer's law practice may suffer various legal consequences. E.g., Avila v. Rubin, 84 F.3d 222 (7th Cir.1996) (lawyer who operated debt-collection service out of law office and mass-mailed collection notices on firm letterhead with facsimile of lawyer's signature violated federal Fair Debt Collection Act); In re Unnamed Attorney, 645 A.2d 69 (N.H.1994) (given strong nexus between lawyer's title-insurance company and law practice, lawyer-code requirement of audit by disciplinary authorities extended to both).

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

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

Case Citations - by Jurisdiction

—

D.Mass.
Mass.
Mo.App.
Wis.

D.Mass.

D.Mass.2001. Cit. in ftn. Massachusetts law professor, licensed to practice in New York, sought to enforce oral fee-splitting agreement allegedly formed in Illinois with law firms from South Carolina and Mississippi that profited from tobacco industry's settlement of numerous lawsuits. This court denied in part South Carolina defendants' motion for summary judgment, but it took motion under advisement as to enforceability of fee-splitting agreement, inviting parties to brief issues raised by the laws of the various jurisdictions as to fee-splitting agreements. It noted that if plaintiff was considered a nonlawyer, then no state would allow him to share fees with a lawyer. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 178 F.Supp.2d 9, 26.

Mass.

Mass.2017. Com. (b) cit. in disc. In disciplinary proceedings, attorney was charged with violating multiple rules of professional conduct in connection with his solicitation and handling of a substantial number of mortgage-loan modification cases over more than a four-year period. After a hearing, the trial court ordered that attorney be disbarred. This court affirmed, holding, among other things, that the trial court did not err in finding that attorney violated the limitations on fee sharing by paying nonlawyers for referring clients to him and encouraging them to solicit clients for a fee. The court noted that, under Restatement Third of the Law Governing Lawyers § 10, the limitations on fee sharing were intended to protect a lawyer's professional independence of judgment, in

recognition that a person who was entitled to a portion of a lawyer's fee could attempt to influence the lawyer's services to maximize fees. Matter of Zak, 73 N.E.3d 262, 267.

Mo.App.

Mo.App.2015. Com. (b) cit. and quot. in ftn. Non-lawyer business manager at a law firm brought, inter alia, a breach-of-contract action against firm and firm's owner, alleging that defendants' failed to compensate him for his 50% ownership interest in the firm. The trial court granted defendants' motion to dismiss. This court affirmed, holding that the parties' alleged profit-sharing agreement was unenforceable, because it violated Missouri's rules of professional conduct. The court rejected plaintiff's reliance on Restatement Third of the Law Governing Lawyers § 10, Comment *b*, to support his argument that an exception applied to the rule prohibiting a lawyer from dividing fees or compensation with a non-lawyer, noting that plaintiff failed to explain that the agreement to share profits and losses equally with a lawyer presented no significant risk of harm to clients or third persons, or that the firm's profits were indirectly related to the legal services it rendered. Grillo v. Global Patent Group LLC, 471 S.W.3d 351, 356.

Wis.

Wis.2012. Com. (b) cit. in diss. op., com. (e) quot. in diss. op. State office of lawyer regulation brought disciplinary proceedings against attorney, alleging, among other things, that attorney violated a state supreme court rule prohibiting attorneys from sharing legal fees with nonlawyers by paying a paralegal bonuses based on a percentage of the gross recoveries from the personal injury cases that she worked on. Dismissing in part, this court held that the rule did not preclude attorney from paying the bonuses at issue. The dissent argued that a formula, as used here, which compensated a nonlawyer employee based on a percentage of the legal fees generated in the particular matters on which the nonlawyer worked, constituted unlawful fee splitting in violation of both the purpose and the plain prohibition set forth in the rule. In re Disciplinary Proceedings Against Weigel, 342 Wis.2d 129, 2012 WI 71, 817 N.W.2d 835, 847.

Restatement (Third) of the Law Governing Lawyers 1 5 C Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 1. Regulation of the Legal Profession

Topic 5. Law-Firm Structure and Operation

Title C. Supervision of Lawyers and Nonlawyers Within an Organization

Introductory Note

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

Restatement (Third) of the Law Governing Lawyers § 11 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 1. Regulation of the Legal Profession

Topic 5. Law-Firm Structure and Operation

Title C. Supervision of Lawyers and Nonlawyers Within an Organization

§ 11 A Lawyer's Duty of Supervision

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

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

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

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

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

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

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

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

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

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

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

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

Comment:

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

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

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

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

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

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

e. Responsibility for directly supervised lawyers; for other lawyers. A lawyer has at least one and, in the case of partners, two general areas of supervisory responsibility with respect to other firm lawyers. Under Subsection (2), a supervising lawyer must actively ensure that a directly supervised lawyer conforms to rules of an applicable lawyer code. That responsibility is borne by all lawyers, whatever their rank otherwise in the firm hierarchy, but only applies with respect to other lawyers over whom they have direct supervisory authority. More broadly, a lawyer who is a partner in a law firm (including an owner of an interest in a professional corporation or similar organization) has a further responsibility under Subsection (3)(b). The partner must take reasonable remedial measures if the partner knows of another firm lawyer's violation of rules of the lawyer code. Such an obligation attaches even if the partner has no direct supervisory authority over the other lawyer. The obligation is not only to prevent such violations (although it includes that), but extends to taking reasonable steps to remedy or mitigate the consequences of the violation. While such a response might include a report of wrongdoing under § 5(3), the requirement of taking reasonable remedial action extends to all known violations and not only those covered by an applicable reporting obligation and in any event may not be sufficiently satisfied through reporting if other reasonably available measures (such as informing a client that a supervised lawyer has wrongfully taken the client's funds) exist.

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

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

In several important senses, all lawyers within a law firm bear direct responsibility for nonlawyer personnel. First, as stated in Subsections (4)(a)(i) and (4)(a)(ii), every lawyer in the firm must take reasonable steps to ensure that the firm has in effect measures giving reasonable assurance that the conduct of all nonlawyers in the firm is compatible with the professional obligations of the lawyer. This obligation is broader than the corresponding obligation for general measures ensuring appropriate lawyer conduct, which only applies to partners in the firm (see Subsection (1)). Second, each lawyer must make reasonable supervisory efforts with respect to the particular nonlawyers over whom the lawyer has direct supervisory authority. Again, those measures must ensure that the nonlawyer's conduct conforms to the professional obligations of the lawyer. Because the lawyer is the direct supervisor, the lawyer's obligations for the conduct of such directly supervised nonlawyers are greater than for the conduct of other nonlawyer firm personnel. The fact that a lawyer is busy or distracted in other critically important work, such as the work of providing legal services to clients or generating a high percentage of the firm's fee revenue, does not excuse neglecting supervisory responsibilities or ignoring inappropriate conduct on the part of a supervised nonlawyer. Because the obligation is to make reasonable efforts, lack of knowledge on the part of the lawyer will not constitute a defense if under the circumstances the lawyer either failed to ensure the presence of measures to prevent misconduct or failed to make reasonable efforts to see that a supervised nonlawyer complied with those measures and otherwise conformed the person's conduct to the professional obligations of the lawyer.

Even if a lawyer has no general or specific supervisory responsibility as described above, a lawyer may nonetheless be responsible under Subsection (4)(b)(i) for certain acts of nonlawyers in the firm if the lawyer orders the conduct or ratifies it with the described knowledge. The nonlawyer's acts come within that Subsection if, had they been committed by a lawyer, they would have violated the lawyer's duties under the applicable lawyer code. Thus, asking a secretary in the law firm to make a phone call that violates the confidentiality obligations owed to a firm client would be as impermissible as if the lawyer made the call personally. Also, under Subsection (4)(b)(ii) every

partner in a law firm and every nonpartner who has direct supervisory authority over the nonlawyer who so acts is personally responsible for such an act if the lawyer knows of the conduct at a time when the lawyer could prevent it or mitigate its consequences but fails to take reasonable remedial measures. The nature of such measures must be determined on the basis of facts that could reasonably be known by the lawyer after an appropriate investigation, the seriousness of the conduct, the extent of harm, the identity of a victim (if any) of the conduct, the nature of the lawyer's level of responsibility within the firm, the response of other responsible persons within the firm, the firm's reasonable policies on such matters, and possible involvement of law-enforcement or regulatory agencies.

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

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

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

Reporter's Note

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

Comment b. Rationale. See generally 2 G. Hazard & W. Hodes, Law of Lawyering § 5.1:101 et seq. and § 5.3:101 et seq. (2d ed.1990); C. Wolfram, Modern Legal Ethics § 16.3.1 (1986). On the rationale drawn from agency law, see, e.g., Florida Bar v. Rogowski, 399 So.2d 1390, 1391 (Fla.1981); State v. Barrett, 483 P.2d 1106, 1111 (Kan.1971); State ex rel. Oklahoma Bar Ass'n v. Braswell, 663 P.2d 1228, 1231-32 (Okla.1983). On the requirement of

exercising additional insight gained from experience and skill, see, e.g., Gadda v. State Bar, 787 P.2d 95, 100 (Cal.1990) (rejecting contention that supervising lawyer only as blameworthy as associate being supervised).

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

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

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

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

*Comment f. Responsibility for nonlawyers in a law firm.*With respect to discipline, see, e.g., In re Miller, 872 P.2d 661 (Ariz.1994) (failure to supervise adequately nonlawyer assistant); Mays v. Neal, 938 S.W.2d 830 (Ark.1997) (discipline of lawyer whose unsupervised nonlawyer employees impermissibly solicited clients and communicated with them without supervision by lawyer); In re Kaplan, 2 Cal.St.Bar Ct.Rptr. 504 (Cal. St. B. Ct., Review Dep't, 1993) (failure of solo practitioner to supervise office manager); Florida Bar v. Lawless, 640 So.2d 1098 (Fla.1994) (failure to supervise out-of-office paralegal who was given plenary responsibility for visa problems of clients); In re Schreiber, 632 N.E.2d 362 (Ind.1994) (general mismanagement and failure to supervise employees in multi-office firm); Office of Disciplinary Counsel v. Ball, 618 N.E.2d 159 (Ohio 1993) (failure of solo practitioner to supervise secretary who misappropriated substantial client funds over 10-year period); compare, e.g, In re Harrington, 608 So.2d 631, 634 (La.1992) (insufficient evidence of either ratification or failure to supervise where employee drafted offending letter without consulting lawyer, which was first and only time employee took such action); In re Jenkins, 816 P.2d 335, 341-42 (Idaho 1991) (conduct of nonlawyer employees constituted blatant solicitation, but insufficient evidence that lawyer ordered or ratified such). With respect to liability to a client for acts of a nonemployee agent, see, e.g., Kleeman v. Rheingold, 614 N.E.2d 712 (N.Y.1993) (lawyer can be liable to client for negligence in service of process even though task was farmed out to nonemployee independent contractor); see generally § 58, Comments *c* and *e,* and Reporter's Note thereto.

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

Case Citations - by Jurisdiction

—

Colo.
Iowa
Me.
Ohio
Okl.

Colo.

Colo.2011. Quot. in ftn. State filed a complaint against attorney for allegedly violating the rules of professional conduct by, among other things, entrusting a client's bankruptcy case to a law clerk/paralegal employed by his firm. This court ordered that attorney be disbarred, based in part on his failure to review and correct the law clerk/paralegal's deficient filings for the client, his failure to monitor her use of his federal electronic case management log-in and password, and his failure to keep the client reasonably notified about the status of the matter. The court rejected attorney's argument that he was unaware of the law clerk/paralegal's activities, holding that he should have known that she was working on the bankruptcy matters, and that, even if he had no inkling of her involvement, he nonetheless would have violated the rules of professional conduct by inadequately supervising her work. People v. Calvert, 280 P.3d 1269, 1283, 1284.

Colo.2003. Quot. in sup. In attorney disciplinary proceeding, attorney was charged, in part, with failing to adequately supervise his paralegal assistant in the handling of a marital-dissolution matter, resulting in assistant's engaging in unauthorized practice of law. This court suspended attorney from practice of law for a nine-month period, concluding that attorney's acting as paralegal's assistant's direct supervisor but failing to fulfill his professional obligations with regard to that supervision was in violation of Colorado Rules of Professional Conduct. People v. Smith, 74 P.3d 566, 572.

Iowa

Iowa, 2010. Subsec. (4)(b) cit. in sup. Incarcerated sex offender appealed his designation in a civil commitment action as a sexually violent predator (SVP). This court ruled that the trial court erred in vacating its initial finding of probable cause that offender was an SVP, and remanded, holding that sufficient evidence existed to support that initial determination so as to justify offender's continued detention. The court, however, concluded that offender's statutory right to counsel was violated when a psychologist hired by state interviewed offender without first informing him of his right to counsel. The court rejected state's argument that the controlling statute's mandates did not apply to psychologist, reasoning that, because psychologist was a member of the prosecutor's review committee, he was investigative personnel working at the direction of the attorney general, and what attorney general could not do under the statute, his representative could not do. In re Detention of Mead, 790 N.W.2d 104, 109.

Me.

Me.2011. Com. (g) cit. in sup. State board of overseers of the bar filed an information alleging that six attorneys who were acting as law firm's executive committee had violated certain state bar rules in connection with their discovery and handling of a former partner's misconduct. A single justice of this court entered, inter alia, a judgment determining that none of the six attorneys had violated the rules. Vacating that judgment and remanding, this court held that attorneys violated a state bar rule addressing the responsibilities of partners and lawyers for compliance with the code, because, at the time of former partner's misconduct, defendants and firm did not have procedures in place to ensure compliance with ethics rules, and because they failed to take remedial measures to avoid or mitigate the consequences of his behavior. Board of Overseers of Bar v. Warren, 2011 ME 124, 34 A.3d 1103, 1112.

Ohio

Ohio, 2005. Subsec. (4) cit. and quot. in sup., coms. (c) and (f) quot. in sup. In attorney disciplinary proceeding, disciplinary board found, in part, no clear and convincing evidence of professional misconduct, after examining attorney's alleged misconduct in connection with a domestic-relations matter in which persons employed in attorney's law office altered documents or falsely notarized them. Disagreeing with the board's finding, this court held that, by failing to adequately supervise nonlawyer assistants with care, attorney violated disciplinary rules barring conduct prejudicial to the administration of justice and prohibiting conduct that adversely reflected on a lawyer's fitness to practice law, and concluded that an 18-month suspension, with 12 months conditionally suspended, was warranted for attorney's misconduct. Mahoning Cty. Bar Ass'n v. Lavelle, 107 Ohio St.3d 92, 2005-Ohio-5976, 836 N.E.2d 1214, 1217, 1218.

Ohio, 2004. Subsec. (4) and coms. (c) and (f) quot. in sup. In attorney-disciplinary proceeding, Board of Commissioners on Grievances and Discipline found that attorney had neglected legal matters entrusted to him by clients injured in automobile accidents and had failed to properly supervise his legal assistant, recommending a one-year suspension with six months stayed. On review, this court found that attorney had committed the misconduct found by the board. His failure to adequately supervise his legal assistant, with whom he had been involved in a romantic relationship, adversely reflected on his fitness to practice law and thus violated disciplinary rules. Attorney's pattern of misconduct and refusal or inability to address problems in his office warranted a

two-year suspension, with 18 months stayed. Lorain County Bar Association v. Noll, 105 Ohio St.3d 6, 2004-Ohio-7013, 821 N.E.2d 988, 991.

Okl.

Okl.2010. Com. (f) cit. and quot. in ftn. State bar association commenced disciplinary proceedings against attorney, alleging that he failed to supervise a nonlawyer employee, who, without attorney's knowledge, induced a client to sign a contract and pay for legal services to be provided by employee's separate business. A trial panel of the professional responsibility tribunal recommended that attorney be suspended from the practice of law for six months and be directed to pay for the costs of the proceeding. This court ordered attorney disciplined by a public reprimand and by imposition of the costs of the proceeding, holding, among other things, that attorney was vicariously liable for employee's misdeeds, which went unnoticed until the client complained; attorney's failure to supervise any of employee's work activities not only enabled employee to misrepresent attorney's individual involvement in the case but also to engage in the unauthorized practice of law. State ex rel. Oklahoma Bar Ass'n v. Martin, 2010 OK 66, 240 P.3d 690, 697-698.

Restatement (Third) of the Law Governing Lawyers § 12 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 1. Regulation of the Legal Profession

Topic 5. Law-Firm Structure and Operation

Title C. Supervision of Lawyers and Nonlawyers Within an Organization

§ 12 Duty of a Lawyer Subject to Supervision

(1) For purposes of professional discipline, a lawyer must conform to the requirements of an applicable lawyer code even if the lawyer acted at the direction of another lawyer or other person. (2) For purposes of professional discipline, a lawyer under the direct supervisory authority of another lawyer does not violate an applicable lawyer code by acting in accordance with the supervisory lawyer's direction based on a reasonable resolution of an arguable question of professional duty.

Comment:

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

b. *Responsibility of a supervised lawyer.* As indicated in Subsection (1), a lawyer under the direct supervisory authority of another lawyer does not by the fact of supervision become absolved from violations of an applicable lawyer code. Thus, a junior law-firm associate working under the supervision of a senior partner is nonetheless personally responsible to know and apply relevant lawyer-code and other legal requirements in the course of the associate's work. Even a direct instruction from the senior lawyer does not protect the supervised lawyer except to the limited extent provided in Subsection (2) (see Comment *c*). Similarly, attempted instructions or announcements

of binding firm policy by a nonlawyer manager, such as the firm's business manager, for example on the manner in which clients are to be charged fees, do not bind even the most junior lawyer in the firm if following such an instruction would violate the lawyer's duty under an applicable lawyer code.

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

In some instances, however, professional requirements may be unclear because a reasonable view of the facts or the lawyer code is subject to conflicting interpretations, or the matter may involve an exercise of professional discretion. When supervisory and supervised lawyers disagree over such a matter, the supervisory lawyer may make either of two decisions. First, consistently with § 12(2), the supervisory lawyer may reasonably decide that, given the strength of support for the supervised lawyer's position in light of the probable risk and magnitude of harm to a client or third person, the view of the supervised lawyer may be followed. Alternatively, the supervising lawyer may decide to direct, and is empowered to direct (see § 11, Comment *e*), that the course of action preferred by the supervisory lawyer be followed.

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

Reporter's Note

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

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

*Comment c. Acting pursuant to a supervisory lawyer's direction.*E.g., ABA Model Rules of Professional Conduct, Rule 5.2(b) (1983); In re Ockrassa, 799 P.2d 1350 (Ariz.1990) (fact that superiors to prosecutor saw no problem in his prosecution of same person whom he had earlier defended in substantially related matter no defense when even minimal research would have disclosed clear authority to contrary); cf., e.g., Harris v. Marsh, 123 F.R.D. 204, 216 (E.D.N.C.1988) (for purposes of liability for Rule 11 violation in filing groundless suit, associate in law firm may not blindly follow commands of partners known to be wrong); People v. Casey, 948 P.2d 1014 (Colo.1997) (direction of supervising lawyer no defense when ethical dilemma not even arguable); In re Howes, 940 P.2d 159, 164-65 (N.M.1997) (assistant United States attorney disciplined for unconsented conversations with represented criminal defendants; argument that lawyer followed reasonable interpretation of arguable question of professional duty rejected on view that superior had no reasonable basis for position that anti-contact rule (cf. § 99, Comment *h*) was inapplicable to Justice Department lawyers). In resolving a dispute between supervisory and

supervised lawyers, the supervisory lawyer may be required to act so as to minimize intrusion into the supervised lawyer's privacy. E.g., McCurdy v. Department of Transp., 898 P.2d 650 (Kan.Ct.App.1995) (subordinate lawyer who claimed inability to accept case of public-agency employer against person represented by law firm on ground that lawyer had existing client-lawyer relationship with same law firm not required to reveal exact nature of conflict; employer could verify relationship by inquiry to law firm). For criticism of the lawyer-code rule restated in Subsection (2), see Rice, The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers, 32 Wake Forest L. Rev. 887 (1997).

Case Citations - by Jurisdiction

—

C.A.7
W.D.Ky.
D.Nev.Bkrtcy.Ct.

C.A.7

C.A.7, 1998. Cit. in disc. (citing § 13, Proposed Final Draft No. 2, 1998, which is now § 12). A defendant gang member who was charged with drug and conspiracy crimes moved for recusal of the judge, whose son had, as a supervised third-year law student, assisted in the earlier prosecution of the gang's leader. Illinois federal district court denied the defendant's motion. This court granted the defendant's petition for a writ of mandamus and ordered that the district court judge recuse himself pursuant to 28 U.S.C. § 455(a), because the prior case was so closely related to this defendant's case. The court determined that the judge was not required to recuse himself under § 455(b)(5), because the prior case in which the judge's son participated was not the same proceeding as defendant's case. It stated that the judge's son was “acting as a lawyer” in the prior proceeding, and that he bore the same ethical responsibilities to his client and to the court that a full-fledged member of the bar would have. Matter of Hatcher, 150 F.3d 631, 636.

W.D.Ky.

W.D.Ky.2006. Subsec. (1) quot. in sup. Former client brought a legal-malpractice action against attorneys who represented him in underlying lawsuit to recover total-disability benefits from insurance company. Denying attorneys' motion for summary judgment, this court declined to dismiss nonsupervisory attorney as a defendant from the litigation, and held, inter alia, that the malpractice claim against him was to go forward at this time. The court stated that the fact that the supervising attorney had admittedly made all of the decisions about the case did not relieve nonsupervisory attorney of his duty to plaintiff to conform to the Code of Professional Conduct, even if he acted at the direction of supervisory attorney. McMurtry v. Wiseman, 445 F.Supp.2d 756, 779.

D.Nev.Bkrtcy.Ct.

D.Nev.Bkrtcy.Ct.2008. Com. (b) quot. in sup. As part of a Chapter 13 proceeding, lawyers for debtor and creditor entered a stipulation containing an erroneous property description, and despite both parties' agreement that a mistake was made, creditor's attorney refused to sign a stipulation vacating an order that had been entered on the mistaken stipulation. After vacating the order, and holding a hearing on its order to show cause why attorney, attorney's law firm, and creditor itself should not have been sanctioned for their refusal to help debtors correct an admitted mistake, this court ordered sanctions because attorney and firm failed to maintain their professional independence from creditor. Although the court noted that attorney was not a partner, but instead a junior associate who presumably had to answer to “higher ups,” it nonetheless sanctioned him with a private reprimand because he was a lawyer admitted to practice and, as such, he had the duty to know and apply the legal requirements governing his own work. In re Martinez, 393 B.R. 27, 40.

End of Document

Restatement (Third) of the Law Governing Lawyers 1 5 D Intro. Note (2000)

Introductory Note

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

Restatement (Third) of the Law Governing Lawyers § 13 (2000)

§ 13 Restrictions on the Right to Practice Law

(1) A lawyer may not offer or enter into a law-firm agreement that restricts the right of the lawyer to practice law after terminating the relationship, except for a restriction incident to the lawyer's retirement from the practice of law.
(2) In settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients.

Comment:

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

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

b. *Law-firm restrictive covenants and a client's choice of counsel.* As stated in Subsection (1), a lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the

covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to prevent undue restrictions on the ability of present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers in a firm and prohibits both making and accepting such a restriction.

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

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

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

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

Reporter's Note

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

In the clear majority of jurisdictions a covenant in a partnership agreement that restricts the right of a former law-firm lawyer to practice by reason of a substantial financial penalty for competing with the former firm will be

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

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

*Comment c. Restrictive agreements in settling claims.*On the prohibition against law-practice restrictions in settlement or similar agreements, see, e.g., ABA Model Rules of Professional Conduct, Rule 5.6(b) (1983); Jarvis v. Jarvis, 758 P.2d 244 (Kan.Ct.App.1988) (agreement settling marriage-dissolution litigation containing clause restricting wife's right to employ particular lawyer in any future action against husband to enforce decree void and unenforceable); see also, e.g., ABA Formal Opin. 95-394 (1995) (despite limitation in ABA Model Rule 5.6(b) to prohibiting restrictive agreements in settlements “between private parties,” same rationale should extend to settlement of client's claim against governmental agency); cf., e.g., Shebay v. Davis, 717 S.W.2d 678 (Tex.Ct.App.1986) (restrictive clause in settlement agreement, even if invalid, does not affect remainder of agreement). Contra, e.g., Lee v. Florida Dept. Of Ins. & Treasurer, 586 So.2d 1185 (Fla.Dist.Ct.App.1991) (restrictive covenant in private settlement agreement cannot be avoided by disciplinary rule).

Case Citations - by Jurisdiction

—

Ariz.
Ariz.App.
Fla.App.
Mass.
N.J.Super.

Ariz.

Ariz.2006. Cit. generally in conc. and diss. op., subsec. (1), com. (a), and Reporter's Note cit. in ftn., subsec. (1) and com. (b) quot. in conc. and diss. op. After voluntarily leaving law firm, former partner sued firm, alleging that firm was required, pursuant to a shareholder agreement, to buy back his stock, despite firm's claim that he forfeited his stock under a voluntary-withdrawal provision in the shareholder agreement. The trial court entered summary judgment for plaintiff, and the court of appeals affirmed in part and reversed in part. Vacating and remanding for further factual inquiry as to the provision's reasonableness, this court held that it could not determine as a matter of law that the provision violated ethical rules of the profession, since it did not restrict plaintiff's right to practice in competition with firm within the region, but rather imposed only financial disincentives for doing so. The concurring and dissenting opinion argued that such financial disincentives constituted a penalty that restricted plaintiff's right to practice in violation of ethical rules. Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 213 Ariz. 24, 138 P.3d 723, 729, 731, 732, 733.

Ariz.App.

Ariz.App.2005. Com. (b) cit. in disc. Law firm's former partner who withdrew from the firm and took several of firm's clients with him sued the firm, seeking to invalidate the shareholder agreement's voluntary-withdrawal provision, which required him to tender his share of stock in the firm for no compensation. Trial court entered judgment for plaintiff, holding that the shareholder agreement was invalid. This court affirmed in part, holding that the voluntary-withdrawal provision constituted an unlawful restriction on plaintiff's right to practice law, and that the agreement was unenforceable because it required plaintiff to forfeit all of his capital contribution regardless of whether he actually took with him any of defendant's clients. Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 210 Ariz. 256, 110 P.3d 357, 360, vacated 213 Ariz. 24, 138 P.3d 723 (2006).

Fla.App.

Fla.App.2011. Com. (b) quot. in sup. Criminal defendant was convicted of murder and sentenced to death. After defendant's attorney, who had been appointed to represent defendant at state expense, filed, in a prior noncapital case against defendant a motion alleging newly discovered evidence of innocence (with a view toward eliminating one of the aggravating factors relied on as justification for the death sentence), the state moved to prohibit attorney from representing defendant in the capital case. The trial court granted the motion on the ground that state-appointed capital counsel could not represent a capital defendant in any proceeding except the capital proceeding for which the counsel had been appointed to represent the defendant. Reversing and remanding, this court, stressing that restrictions on a lawyer's right to practice could intrude on a client's right to choose counsel, held that, while a Florida statute prohibited state-appointed capital counsel from representing a capital defendant in a noncapital proceeding at state expense, the same lawyer, acting pro bono publico, could represent a capital defendant in proceedings other than capital collateral proceedings without charge. Melton v. State, 56 So.3d 868, 873.

Mass.

Mass.2008. Com. (b) quot. in disc. Partners who withdrew from law firm sued firm, seeking certain distributions that they allegedly were owed from the firm's cash surplus. The trial court entered judgment for plaintiffs. Reversing in part and remanding, this court held that the firm's amended partnership agreement, which imposed identical financial consequences on all partners who voluntarily withdrew from the firm, regardless of whether they competed with the firm after withdrawing, did not violate the Massachusetts rule of professional conduct barring agreements that restricted lawyers' rights to practice after termination of the partnership relationship. Pierce v. Morrison Mahoney LLP, 452 Mass. 718, 724, 897 N.E.2d 562, 568.

N.J.Super.

N.J.Super.2003. Cit. in sup. Law firm sued its former partner and his new firm to recover contingent fees in cases taken by former partner on his withdrawal from plaintiff firm, and for 50% of any future attorney's fees in those cases. The trial court granted summary judgment for plaintiff, and awarded damages. Affirming in part, this court held, inter alia, that the contingent-fee-division provision of plaintiff's partnership agreement executed by former partner was enforceable against former partner, since there was no showing in the record that the provision prevented, as a matter of fact or economic reality, former partner's ability to continue his practice or to handle cases that clients wanted him to take from plaintiff firm. Groen, Laveson, Goldberg & Rubenstone v. Kancher, 362 N.J.Super. 350, 362, 827 A.2d 1163, 1170.

Restatement (Third) of the Law Governing Lawyers 2 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Introductory Note

Case Citations - by Jurisdiction

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

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

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

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

Case Citations - by Jurisdiction

—

C.A.2
E.D.N.Y.

W.D.N.Y.
Del.Ch.
Mich.App.
Nev.
N.J.Super.
Or.

C.A.2

C.A.2, 1994. Intro. Note cit. in case cit. in sup. (citing Ch. 2, Intro. Note to T.D. No. 5, 1992. The Intro. Note has since been revised; see Official Text). Convicted defendant granted new trial sued officer conducting lineup in which witness identified him under 42 U.S.C. § 1983, alleging that defendant arranged to have witness wait in precinct parking lot for arrival of defendant and plaintiff from another precinct, providing opportunity for witness to see plaintiff in custody before lineup. This court affirmed the district court's finding that suit was barred by three-year limitation statute, and held that plaintiff's claim may have accrued as early as date of hearing at which defendant's conduct was disclosed to plaintiff's counsel, prompting counsel to move to suppress lineup identification, but that it certainly accrued no later than date plaintiff was sentenced for crimes of which he was convicted with aid of identification, both dates occurring more than three years before plaintiff brought suit. Veal v. Geraci, 23 F.3d 722, 725.

C.A.2, 1993. Intro. Note cit. in sup. (citing Ch. 2, Intro. Note to T.D. No. 5, 1992. The Intro. Note has since been revised; see Official Text). After government brought contempt proceeding against union officers, officers' attorney entered into settlement agreement with government. Later, officers' attorney informed government that his clients would rather resign their posts than carry out settlement terms. Government replied by outlining terms under which it would accept resignations as substitute for settlement. Three officers resigned, but remaining officers did not resign or carry out settlement. Government moved for entry of judgment enforcing settlement terms, and New York federal district court granted motion for enforcement. Affirming, this court held, in part, that attorney had actual and apparent authority to enter into settlement. Attorney stated in court that he had authority to settle, attorney proposed clients' resignations at their instance, their resignations underscored clients' belief of his authority, and officers waited over one year before claiming that attorney lacked authority to settle. U.S. v. International Broth. of Teamsters, 986 F.2d 15, 20.

C.A.2, 1993. Intro. Note cit. in case cit. in sup. (citing Ch. 2, Intro. Note to T.D. No. 5, 1992. The Intro. Note has since been revised; see Official Text). Attorneys/brokers for investors in a cooperative apartment were convicted of mail fraud after they secretly purchased apartments for themselves and resold them at a substantial profit. This court, reversing their convictions, held, inter alia, that the apartments and the profits generated by their resale were not “property” or “money” serving as the required object of an alleged scheme to defraud, as the investors lacked any contractual right to retain the apartments or resale profits for themselves or to bar the defendants from selling the apartments and retaining the profits. The court stated that a constructive trust theory, standing alone, could not support criminal liability on these facts. U.S. v. Miller, 997 F.2d 1010, 1018.

E.D.N.Y.

E.D.N.Y.2008. Intro. Note cit. in case quot. in disc. (citing Ch. 2, Intro. Note to T.D. No. 5, 1992. The Intro. Note has since been revised; see Official Text). Non-profit corporation brought ERISA class action against three non-profit organizations that were formerly participants, along with plaintiffs, in an employee welfare benefit plan, alleging that defendants failed to return reserves attributable to plaintiffs, and instead breached their fiduciary duties to plaintiffs by paying the claims of their own employees with the funds. This court ruled, inter alia, that the six-year ERISA statute of limitations applied to plaintiffs' fiduciary-duty claims, rather than the three-year limitations period, because plaintiffs did not have actual knowledge of the material facts giving rise to the causes of action; while plaintiffs' attorney conceded that he had actual knowledge of defendants' alleged diversions more than three years prior to the filing of the suit, the court applied the rule that, in a class action case, knowledge of

the plaintiffs' counsel was not imputed to the plaintiffs in the class. L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Com'n of Nassau County, Inc., 558 F.Supp.2d 378, 394, 396.

W.D.N.Y.

W.D.N.Y.2015. Intro. Note quot. in case quot. in sup. Patients, on behalf of themselves and others similarly situated, sued hospitals, alleging that defendants engaged in deceptive trade practices in violation of a state statute by charging them excessively for copies of their medical records. This court denied defendants' motions to dismiss, holding that plaintiffs sufficiently pleaded a consumer transaction or consumer-oriented conduct for purposes of their deceptive-trade-practices claims, even though some or all of the requests for medical records were made on their behalf by attorneys who represented them in personal-injury cases. The court reasoned that, under Restatement Third of the Law Governing Lawyers § 2, the nature of plaintiffs' relationship with their attorneys was one of agency, and that plaintiffs did not bring their personal-injury lawsuits as part of any commercial disputes, but rather, to restore themselves, personally, to their respective pre-injury statuses. McCracken v. Verisma Systems, Inc., 131 F.Supp.3d 38, 47.

Del.Ch.

Del.Ch.2003. Intro. Note quot. in ftn. Following his federal indictment, attorney sued corporate client for advancement of litigation expenses pursuant to corporation's bylaws and Delaware General Corporation Law that allowed corporation to advance litigation expenses to its "agents." This court granted in part and denied in part parties' motions for summary judgment, holding, inter alia, that pursuant to common-law definition of "agent," most claims against plaintiff did not arise from his actions as an agent for corporation. The Legislature intended that the term "agent" be used in its traditional sense as involving action by a person (an agent) acting on behalf of another (the principal) as to third parties. Fasciana v. Electronic Data Systems Corp., 829 A.2d 160, 168.

Mich.App.

Mich.App.2019. Intro. Note quot. in sup. Former employee sued former employer, alleging that employer violated the Whistleblowers' Protection Act by terminating her in retaliation for reporting to employer's attorney that co-worker made threatening statements during a disciplinary meeting. The trial court denied employer's motion for summary disposition. This court reversed and remanded for entry of an order granting summary disposition for employer, holding that the trial court erred by concluding that employee engaged in protected activity by communicating with employer's attorney. The court reasoned that, although employer's attorney might, in general terms, have been a member of a "public body" by virtue of his profession, he was also acting as employer's agent within the meaning of the Restatement Third of the Law Governing Lawyers when employee communicated with him, such that she was, in essence, communicating with employer. Rivera v. SVRC Industries, Inc., 934 N.W.2d 286, 297.

Nev.

Nev.2018. Intro. Note quot. in diss. op. Buyers of a condominium unit sued, among others, condominium association and lawyer who represented association, alleging that defendants retaliated against them in violation of a state statute for requesting that association retain a new lawyer in connection with a dispute regarding a deck on buyers' unit that was built by a previous owner of the unit. The trial court granted lawyer's motion to dismiss, and the court of appeals affirmed. Affirming that portion of the decision, this court held that a lawyer who provided legal services to and acted on behalf of a common-interest community homeowners association client was not an "agent" of the client for purposes of liability under the statute. The dissent argued that attorney was association's agent under principles of agency law set forth in both the Restatement Third of the Law Governing Lawyers and Restatement Second of Agency § 14. Dezzani v. Kern & Associates, Ltd., 412 P.3d 56, 65.

N.J.Super.

N.J.Super.2004. Intro. Note quot. in disc. After independent outside attorney for corporation successfully defended derivative lawsuit brought against him for malpractice, the trial court granted attorney's motion for statutory indemnification from corporation for expenses of the suit on the basis that attorney was a corporate agent. Reversing, this court held that attorney was not entitled to indemnification as a corporate agent because his services did not involve the exercise of managerial authority or discretion on behalf of the corporation or the representation of the corporation in dealings with third parties; instead, he was sued by the corporation for providing it with allegedly faulty legal advice. Cohen v. Southbridge Park, Inc., 369 N.J.Super. 156, 161, 848 A.2d 781, 784.

Or.

Or.2006. Intro. Note quot. in sup. Investor in parcels of land sued joint venturer and her attorney in connection with implementation of a settlement agreement, alleging, in part, that attorney was jointly liable with venturer because he had aided and abetted venturer's breach of fiduciary duties and conversion of plaintiff's property. After plaintiff and venturer settled, the trial court granted summary judgment for attorney. The court of appeals reversed as to plaintiff's breach-of-fiduciary-duty claim. This court reversed, holding, as a matter of first impression, that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship was protected by privilege and was not liable for assisting the client in conduct that breached the client's fiduciary duty to a third party; here, there was nothing to suggest that attorney's advice and assistance fell outside the scope of this relationship. Reynolds v. Schrock, 341 Or. 338, 349, 142 P.3d 1062, 1068.

Restatement (Third) of the Law Governing Lawyers 2 1 Case Notes

General Case Citations

D.Mass.

D.Mass.2007. Cit. in sup. (general cite). Alleged client of law firm sued firm for legal malpractice, claiming that, while firm represented both him and developer in connection with a stadium project, it never discussed any conflicts of interest with him and advanced the interests of developer at his expense. This court denied defendant's motion to strike the opinion of plaintiff's expert as to, among other things, whether a client-lawyer relationship existed between the parties, rejecting defendant's argument that expert's reference to the Rules of Professional Conduct from New Hampshire and Massachusetts was improper because those Rules stated that legal rules or principles of substantive law external to the Rules determined the existence of that relationship; expert used the Rules as a threshold affirmation that dual representation was permissible, but he relied on the ABA Formal Opinion and the Restatement Third to explain when such dual representation existed. Weber v. Sanborn, 526 F.Supp.2d 135, 147.

Restatement (Third) of the Law Governing Lawyers 2 1 Intro. Note (2000)

Introductory Note

Case Citations - by Jurisdiction

Introductory Note: This Topic addresses creation of a relationship of lawyer and client (§ 14) and the duties a lawyer owes to a prospective client (see § 15). A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not. Prospective and former clients receive certain protections, but not all those due to clients.

Case Citations - by Jurisdiction

Mich.

Mich.2018. Intro. Note quot. in diss. op. and cit. in ftn. to diss. op. Former employee of medical center filed a claim against former employer under the Michigan Whistleblowers' Protection Act, alleging that employer improperly terminated her on the ground that she violated the Health Insurance Portability and Accountability Act by reporting to her private attorney that, while she was at work, she unexpectedly encountered an individual against whom she had previously obtained a personal-protection order. After the trial court granted summary judgment for employer, the court of appeals reversed and remanded for further proceedings, finding that employee's phone call to her attorney, who was a mandatory member of the state bar, was a report to a public body that was protected under the Act. This court denied employer's application for leave to appeal. The dissent argued that, under the Restatement Third of the Law Governing Lawyers, a lawyer was an agent, and a whistleblower employee's communication with his or her own agent did not constitute a report to a public body that was a protected activity under the Act. McNeill-Marks v. MidMichigan Medical Center-Gratiot, 912 N.W.2d 181, 191.

Restatement (Third) of the Law Governing Lawyers § 14 (2000)

§ 14 Formation of a Client–Lawyer Relationship

A relationship of client and lawyer arises when:
(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
(a) the lawyer manifests to the person consent to do so; or
(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
(2) a tribunal with power to do so appoints the lawyer to provide the services.

Comment:

a. *Scope and cross-references*. This Section sets forth a standard for determining when a client-lawyer relationship begins. Nonetheless, the various duties of lawyers and clients do not always arise simultaneously. Even if no relationship ensues, a lawyer may owe a prospective client certain duties (see § 15; § 60 & Comment *d* thereto). A lawyer representing a client may perform services also benefiting another person, for example arguing a motion for two litigants, without owing the nonclient litigant all the duties ordinarily owed to a client (see § 19(1)). Even if a relationship ensues, the client may not owe the lawyer a fee (see § 17 & Comment *b* thereto; § 38 & Comment *c* thereto; Restatement Second, Agency § 16). When a fee is due, the person owing it is not necessarily a client (see § 134). Moreover, a client-lawyer relationship may be more readily found in some situations (for example, when a person has a reasonable belief that a lawyer was protecting that person's interests; see Comment *d* hereto) than in others (for example, when a person seeks to compel a lawyer to provide onerous services). In some situations—

for example, when a lawyer agrees to represent a defendant without knowing that the lawyer's partner represents the plaintiff—a lawyer is forbidden to perform some duties for the client (continuing the representation) while nevertheless remaining subject to other duties (keeping the client's confidential information secret from others, including from the lawyer's own partner).

When a client-lawyer relationship arises, its scope is subject to the principles set forth in § 19(1), and its termination is governed by §§ 31 and 32. Agency and contract law are also applicable, except when inconsistent with special rules applicable to lawyers. The scope of responsibilities may change during the representation.

b. *Rationale.* The client-lawyer relationship ordinarily is a consensual one (see Restatement Second, Agency § 15). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services. The consent requirement, however, is not symmetrical. The client may at any time end the relationship by withdrawing consent (see §§ 31, 32, & 40), while the lawyer may properly withdraw only under specified conditions (see §§ 31 & 32). A lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship (see Comment *e*), and a court may direct the lawyer to represent the client by appointment (see Comment *g*). Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant. Agreement between client and lawyer likewise defines the scope of the representation, for example, determining whether it encompasses a single matter or is continuing (see § 19(1); § 31(2)(e) & Comment *h*). Even when a representation is continuing, the lawyer is ordinarily free to reject new matters.

c. *The client's intent.* A client's manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer to write a will. The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. The client may hire the lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer's acts, for example when a friend asks a lawyer to represent an imprisoned person who later manifests acceptance of the lawyer's services. The client's intent may be communicated by someone acting for the client, such as a relative or secretary. (The power of such a representative to act on behalf of the client is determined by the law of agency.) No written contract is required in order to establish the relationship, although a writing may be required by disciplinary or procedural standards (see § 38, Comment *b*). The client need not necessarily pay or agree to pay the lawyer; and paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 134).

The client-lawyer relationship contemplates legal services from the lawyer, not, for example, real-estate-brokerage services or expert-witness services. A client-lawyer relationship results when legal services are provided even if the client also intends to receive other services. A client-lawyer relationship is not created, however, by the fact of receiving some benefit of the lawyer's service, for example when the lawyer represents a co-party. Finally, a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.

A client-lawyer relationship can arise even if the client's consent to enter into the relationship is not fully informed. The lawyer should, however, consult with the client about such matters as the benefits and disadvantages of the proposed representation and conflicts of interest. On consultation in general, see § 20. A lawyer who fails to disclose such matters may be subject to fee forfeiture, professional discipline, malpractice liability, and other sanctions (see §§ 15, 20, 37, 48, 121, & 122).

d. *Clients with diminished capacity.* Individuals who are legally incompetent, for example some minors or persons with diminished mental capacity, often require representation to which they are personally incapable of giving consent (see Restatement Second, Agency § 20). A guardian for such an individual may retain counsel for the incapacitated person, subject in some instances to court approval. A court also may appoint counsel to represent an

incompetent party without the party's consent. A person of diminished capacity nevertheless may be able to consent to representation, and to become liable to pay counsel, under the doctrine of "necessaries" (see § 31, Comment *e*; § 39; Restatement Second, Contracts § 12, Comment *f*). Representing a client of diminished capacity is considered in § 24 (see also § 31, Comment *e* (client's incompetence does not automatically end lawyer's authority)).

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

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

Illustrations:

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

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

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

Illustrations:

3. Claimant writes to Lawyer, describing a medical-malpractice suit that Claimant wishes to bring and asking Lawyer to represent Claimant. Lawyer does not answer the letter. A year later, the statute of limitations applicable to the suit expires. Claimant then sues Lawyer for legal malpractice for not having filed the suit on time. Under this Section no client-lawyer relationship was created (see § 50, Comment *c*). Lawyer did not communicate willingness to represent Claimant, and Claimant could not reasonably have relied on Lawyer to do so. On a lawyer's duty to a prospective client, see § 15.

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

The principles of promissory estoppel do not bind prospective clients as readily as lawyers. Clients who are not sophisticated about how client-lawyer relationships arise should not be forced to accept unwanted representation or to pay lawyers for unwanted services. Nevertheless, promissory estoppel may bind a person who has not requested a lawyer's services. That may occur, for example, when a person has regularly retained a lawyer to prepare and file certain reports, knows that the lawyer is preparing and filing the next report, and accepts the benefit of the lawyer's services without warning the lawyer that they are unwanted. Also, a person's knowing acceptance of the benefits of a lawyer's representation, when the person could have chosen not to accept them, may constitute consent by ratification. If an employer, for example, notifies an employee that it has arranged for a lawyer to represent the employee in a prosecution arising out of the employment, and the employee confers with the lawyer and takes no action when the lawyer purports to speak for the employee in court, the employee has ratified the relationship. The client may end the relationship by discharging the lawyer (see §§ 32 & 40).

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

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

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

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

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

A class-action lawyer may therefore be privileged or obliged to oppose the views of the class representatives after having consulted with them. The lawyer may also propose that opposing positions within the class be separately represented, that sub-classes be created, or that other measures be taken to ensure broader class participation. Withdrawal may be an option (see § 32), but one that is often undesirable because it may leave the class without effective representation. The lawyer should act for the benefit of the class as its members would reasonably define that benefit.

g. Nonconsensual relationship: appointed counsel. A lawyer may be required to represent a client when appointed by a court or other tribunal with power to do so. A lawyer may discuss the proposed representation with the prospective client and may give the court reasons why appointment is inappropriate or should be terminated.

The appointment may be rejected by the prospective client, except for persons, such as young children, lacking capacity to make that decision. In the case of some parties, for example corporations and other entities, the party may appear in court only through a lawyer. A court may require a criminal defendant to choose between an unwelcome lawyer and self-representation, and in criminal cases standby or advisory counsel may be appointed

when the defendant elects self-representation. When a court appoints a lawyer to represent a person, that person's consent may ordinarily be assumed absent the person's rejection of the lawyer's services.

h. Client-lawyer relationships with law firms. Many lawyers practice as partners, members, or associates of law firms (see § 9(1)). When a client retains a lawyer with such an affiliation, the lawyer's firm assumes the authority and responsibility of representing that client, unless the circumstances indicate otherwise. For example, the lawyer ordinarily may share the client's work and confidences with other lawyers in the firm (see § 61, Comment *d),* and the firm is liable to the client for the lawyer's negligence (see § 58). Should the lawyer leave the firm, the client may choose to be represented by the departing lawyer, the lawyer's former firm, neither, or both (see §§ 31 & 32; see also § 9(3)). On the other hand, a client's retention of a lawyer or firm ordinarily does not permit the lawyer or firm, without further authorization from the client, to retain a lawyer outside the firm at the client's expense to represent the client (see Restatement Second, Agency § 18). On imputation of conflicts of interest within a law office, see § 123.

i. Others to whom lawyers owe duties. In some situations, lawyers owe duties to nonclients resembling those owed to clients. Thus, a lawyer owes certain duties to members of a class in a class action in which the lawyer appears as lawyer for the class (see Comment *f*) and to prospective clients who never become clients (see § 15). Duties may be owed to a liability-insurance company that designates a lawyer to represent the insured even if the insurer is not a client of the lawyer, to trust beneficiaries by a lawyer representing the trustee, and to certain nonclients in other situations (see § 134, Comment *f*; see also Comment *f* hereto). What duties are owed can be determined only by close analysis of the circumstances and the relevant law and policies. A lawyer may also become subject to duties to a nonclient by becoming, for example, a trustee, or corporate director. On conflicts between such duties and duties the lawyer owes clients, see § 135; see also § 96. On civil liability to nonclients, see §§ 51 and 56.

Reporter's Note

*Comment b. Rationale.*On continuing relationships, see, e.g., IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978); § 31, Comment *h,* and Reporter's Note thereto.

*Comment c. The client's intent.*See, e.g., Davis v. State Bar, 655 P.2d 1276 (Cal.1983) (client told lawyer client wanted to bring suit; lawyer asked for documents and wrote letters); Dawson v. Duncan, 494 N.E.2d 900 (Ill.App.Ct.1986) (retainer by agent); Zych v. Jones, 406 N.E.2d 70 (Ill.App.Ct.1980) (no relationship when lawyer filed appearance for party at third person's request and party said he would notify lawyer if party wanted lawyer's services but never so notified lawyer). On ratification by a client, see E. Wood, Fee Contracts of Lawyers 65-66 (1936); Annot., 78 A.L.R. 3d 318 (1961). On retention by an agent, see Randolph v. Resolution Trust Corp., 995 F.2d 611 (5th Cir.1993). On nonlegal services, see Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir.1991) (lawyer provided investment advice, not legal services, to sophisticated client); In re Petrie, 742 P.2d 796 (Ariz.1987) (lawyer's unsuccessful assertion that lawyer was not to perform legal services); Otaka, Inc. v. Klein, 791 P.2d 713 (Hawaii 1990) (lawyer-broker who performed some legal services had client-lawyer relationship).

*Comment d. Clients with diminished capacity.*See Cook v. Connolly, 366 N.W.2d 287 (Minn.1985) (parent authorized by statute to retain lawyer for child); In re Sippy, 97 A.2d 455 (D.C.1953) (in mother's proceeding to commit disobedient minor daughter, lawyer retained by daughter, not lawyer retained by mother, represents daughter); Fed. R. Civ. P. 17(c) (representative, next friend, or guardian ad litem may sue or defend on behalf of infant or incompetent person); E. Wood, Fee Contracts of Lawyers 32-33, 61-65 (1936).

*Comment e. The lawyer's consent or failure to object.*E.g., Davis v. State Bar, 655 P.2d 1276 (Cal.1983); Morris v. Margulis, 718 N.E.2d 709 (Ill.App.Ct.1999) (firm declined to represent client, but later gave advice); De Vaux v. American Home Assurance Co., 444 N.E.2d 355 (Mass.1983) (lawyer's secretary told would-be client to send letter, arranged medical examination, and told client to write opposing party; jury could find real or apparent authority); George v. Caton, 600 P.2d 822 (N.M.Ct.App.), cert. quashed, 598 P.2d 215 (N.M.1979) (lawyer said he would handle case); In re McGlothlen, 663 P.2d 1330 (Wash.1983) (lawyer offered to answer questions and

later gave advice). On promissory estoppel, see, e.g., Hacker v. Holland, 570 N.E.2d 951, 956 (Ind.Ct.App.1991) (lawyer promised only to protect interests, but without promising to represent client); Kurtenbach v. Te-Kippe, 260 N.W.2d 53, 56 (Iowa 1977). A number of promissory-estoppel cases involve lawyers for one party to a transaction who offered to provide services for other parties, who reasonably relied on the lawyers and were allowed to recover for their negligence. Nelson v. Nationwide Mortgage Corp., 659 F.Supp. 611 (D.D.C.1987) (lawyer volunteered to explain documents and answered questions); Simmerson v. Blanks, 254 S.E.2d 716 (Ga.Ct.App.1979) (lawyer offered to file financing statement); Stinson v. Brand, 738 S.W.2d 186 (Tenn.1987) (buyer's lawyer was also trustee under deed of trust). See also Rice v. Forestier, 415 S.W.2d 711 (Tex.Civ.App.1967) (client delivered papers in suit to lawyer representing client in other matters; lawyer did nothing). For estoppel of a client, see Freedman v. Horton, Schwartz & Perse, 383 So.2d 659 (Fla.Dist.Ct.App.1980) (client who knew but did not object when client's lawyer retained another lawyer is liable for second lawyer's fees); Citicorp Real Estate, Inc. v. Buchbinder & Elegant, P.A., 503 So.2d 385 (Fla.Dist.Ct.App.1987) (mortgagee liable for fee because was functional equivalent of owner, accepted lawyer's services, and asked for bill).

*Comment f. Organizational, fiduciary, and class-action clients.*See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978) (considering whether trade association or its members were clients); United States v. Walters, 913 F.2d 388 (7th Cir.1990) (in circumstances presented, corporate officers retained counsel in their individual capacities); Arctic Slope Native Assoc. v. Paul, 609 P.2d 32 (Alaska 1980) (retaining counsel for corporation before its incorporation); ABA Model Rules of Professional Conduct, Rule 1.13 (1983); 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); Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Corn. L. Rev. 825 (1992); Pope, Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics, 68 Ore. L. Rev. 1 (1989).

On whether a person associated with an organization is a co-client along with the organization, see generally, e.g., Wick v. Eismann, 838 P.2d 301 (Idaho 1992) (whether lawyer for corporation owning motor speedway also represented minority shareholder for purposes of legal-malpractice liability); Doe v. Poe, 595 N.Y.S.2d 503 (N.Y.App.Div.1993) (trial court's denial of action to enjoin lawyers from disclosing to intra-corporate committee CEO's communications to it potentially harmful to him was supported by facts); ABA Formal Opin. 92-365, at 2-5 (1992) (whether lawyer for trade association also represents individual member is question of fact); ABA Formal Opin. 91-361, at 4 n.4 (1991) (whether lawyer for partnership represents any individual partner in addition to partnership as entity is question of fact concerning intent of parties, which may be implied from circumstances); compare, e.g., Hopper v. Frank, 16 F.3d 92 (5th Cir.1994) (on facts, no evidence that business partners who hired lawyer to represent limited partnership in sale of limited-partnership interests also represented individual partners); Rose v. Summers, Compton, Wells & Hamburg, 887 S.W.2d 683 (Mo.Ct.App.1994) (on facts, lawyer for limited partnership did not also represent limited partners, thus precluding their legal-malpractice suit); Bowen v. Smith, 838 P.2d 186 (Wyo.1992) (no evidence that lawyer for corporation, employed in the interest of majority shareholder, also represented minority shareholders, thus barring their legal-malpractice suit).

On the relevance of common ownership and management, compare, e.g., Meyer v. Mulligan, 889 P.2d 509 (Wyo.1995) (question of fact whether husband and wife, incorporators of corporation to own motel, were co-clients with standing to sue lawyer for corporation for legal malpractice), with, e.g., Rice v. Strunk, 670 N.E.2d 1280 (Ind.1996) (on facts, no evidence that lawyer for partnership owning and operating apartments had client-lawyer relationship with general partner-operating manager sufficient to warrant malpractice suit by that person; court refuses to follow decisions holding that lawyer for general partnership always represents each general partner).

The general rule is that confidential communications between a lawyer for an organization and an employee or agent of the organization about a matter of interest to the organization does not thereby make the lawyer counsel for the associated person with respect to that person's own interests in the same matter. Thus, the organization may continue to employ the lawyer to oppose the person in the same or a substantially related matter. See, e.g., Kubin v. Miller, 801 F.Supp. 1101, 1116 (S.D.N.Y.1992); Ferranti Intern. plc v. Clark, 767 F.Supp. 670 (E.D.Pa.1991); Professional Serv. Indus., Inc. v. Kimbrell, 758 F.Supp. 676 (D.Kan.1991); Talvy v. American Red

Cross, 618 N.Y.S.2d 25 (N.Y.App.Div.1994); see also § 103, Comment *e*, and Reporter's Note thereto. If, however, an officer or agent and the organization are co-clients, the normal rules of conflicts of interest (see § 121, Comment *e(i)*) would preclude subsequent representation of the company against the officer or agent in a substantially related matter by the same firm. E.g., Cooke v. Laidlaw, Adams & Peck, 510 N.Y.S.2d 597 (N.Y.App.Div.1987) (even if no communications between officer and lawyer representing both company and officer, lawyer and firm disqualified from representing company adversely to office in substantially related matter). On the right of a lawyer for an organization to share confidential communications of an organization's agents with other agents of the organization, see § 131, Comment *e,* and Reporter's Note thereto.

On decisions recognizing that even a long-standing personal relationship between the lawyer for an organization and a constituent does not by itself entail the relationship of client and lawyer, see, e.g., Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332 (Fed.Cir.1988) (lawyers who represented original patentee had no client-lawyer relationship with inventor, employee of patentee, and thus were not precluded from seeking to invalidate patent now held by inventor's new employer); Ferranti Intern. plc v. Clark, 767 F.Supp. 670 (E.D.Pa.1991) (former in-house lawyer who originally hired outside law firm to conduct investigation could not object to outside law firm's representing corporation in suit against same former in-house lawyer for activities uncovered in investigation, where firm made clear that they did not represent any individual in investigation); Robertson v. Gaston Snow & Ely Bartlett, 536 N.E.2d 344 (Mass.), cert. denied, 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989) (despite fact that law firm provided estate-planning services for corporate officer and retained his will in office safe, insufficient proof that firm representing corporation in corporate reorganization also represented officer in that matter sufficient to create duty on part of law firm to protect his future employment with new corporation); Doe v. Poe, 595 N.Y.S.2d 503 (N.Y.App.Div.1993) (fact that chief executive officer and board chairman of bank hired law firm and directed their activities did not make officer personal client of law firm). On relationships with shareholders, see, e.g., Egan v. McNamara, 467 A.2d 733 (D.C.1983) (on facts, long-term lawyer for corporation had no client-lawyer relationship with majority shareholder); Felty v. Hartweg, 523 N.E.2d 555 (Ill.App.Ct.1988) (lawyer for corporation had no client-lawyer relationship with minority shareholder and thus no duty to disclose to shareholder misconduct of corporate officer). See also, e.g., ABA Formal Op. 91-361 (1991) (when scope of representation so provides, lawyer for partnership represents entity rather than the individual partners).

On the other hand, in particular circumstances and in the absence of warning from the lawyer, a constituent of an organizational client may reasonably rely on the lawyer's apparent willingness to provide legal services for the constituent in addition to the entity, thus creating an implied client-lawyer relationship. See, e.g., Rosman v. Shapiro, 653 F.Supp. 1441 (S.D.N.Y.1987) (50% shareholder in closely held corporation); E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D.Tex.1969) (officer of corporation, where officer was party to proceeding and lawyer appeared on officer's behalf); Cooke v. Laidlaw, Adams & Peck, Inc., 510 N.Y.S.2d 597 (N.Y.App.Div.1987) (corporate officer, where lawyer for corporation appeared in SEC proceeding on behalf of officer); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (driver of corporate employer, who allegedly gave incriminating statement to corporation's lawyer after lawyer's promise of confidentiality); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (general partners in limited partnership, where they reasonably believed lawyer for partnership was acting on their behalf).

Some decisions dealing with whether a person associated with an organization that is represented by counsel is a co-client of the same lawyer involve the question whether an officer of a corporation may invoke the attorney-client privilege concerning the officer's communications to the lawyer. Decision turns on whether the officer reasonably understood that the lawyer was representing the officer's personal interests as opposed to those of the organization. See, e.g., United States v. Keplinger, 776 F.2d 678 (7th Cir.1985) (subjective but unreasonable belief of corporate officer that company's lawyers represented him insufficient to establish client-lawyer relationship for purposes of attorney-client privilege); E.F. Hutton & Co. v. Brown, 305 F.Supp. 371 (S.D.Tex.1969) (vice president of brokerage firm called to testify before SEC extensively discussed proposed testimony with company lawyers and was accompanied by lawyers to 2 hearings; lawyers and vice president gave conflicting testimony on whether he was told they represented only company; held: communications were privileged because at both hearings lawyers entered appearance for vice president and were referred to as personal counsel of vice president, which they did

not refute, but lawyer could not assert privilege against corporation in subsequent adverse proceeding due to co-client exception to privilege).

A position contrary to that of the Section and Comment is that per se rules determine whether a lawyer for an organization also represents its members. E.g., Pucci v. Santi, 711 F.Supp. 916, 927 n.4 (N.D.Ill.1989), and authorities cited (lawyer for partnership always represents each general partner); Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31 (S.D.N.Y.1954) (each member of unincorporated association is client of association's lawyer).

On the principle that whether a lawyer for an organization represents an affiliated organization is a question of fact to be determined under the principles stated in § 14, see, e.g., Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 265-66 (Minn.1992) (whether lawyer for pension trust also represented particular corporate member of trust is question of fact precluding summary judgment in legal-malpractice suit); ABA Formal Opin. 95-390 (1995) (whether conflict exists is question of fact whether affiliate is also client, whether understanding exists between lawyer and client-organization that lawyer will not represent adverse to affiliate or whether such representation would materially and adversely affect lawyer's ability to represent client-organization).

On trusts and estates practice, see Whitfield v. Lindemann, 853 F.2d 1298 (5th Cir.1988), cert. denied, sub nom., Klepak v. Dole, 490 U.S. 1089, 109 S.Ct. 2428, 104 L.Ed.2d 986 (1989) (lawyer liable to pension plan for aiding trustee in breach of duties); Elam v. Hyatt Legal Services, 541 N.E.2d 616 (Ohio 1989) (lawyer representing executor liable for negligence to remainderpersons to whom executor owed fiduciary duty); Hazard, Triangular Lawyer Relationships: An Exploratory Analysis, 1 Geo. J. Leg. Ethics 15 (1987).

On class-action lawyers, see In re Agent Orange Products Liability Litigation, 800 F.2d 14 (2d Cir.1986) (lawyer who has approved settlement may later represent dissenting class members on appeal); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir.1978) (decision to appeal taken in first instance by nominal plaintiffs, but lawyer may oppose their position); Greenfield v. Villager Indus., Inc., 483 F.2d 824 (3d Cir.1973) (lawyer's duty to ensure that class members receive proper notice of proposed settlement); see Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1447-57 (1981).

*Comment g. Nonconsensual relationship: appointed counsel.*ABA Model Rules of Professional Conduct, Rule 6.2 (1983) (lawyer may not seek to avoid appointment except for good cause); ABA Model Code of Professional Responsibility, EC 2-29 (1969) (similar). Compare Mallard v. U.S. District Court, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) (28 U.S.C. § 1915(d) does not authorize appointment of unwilling counsel for indigent in civil case).

For the right of a litigant to reject appointed counsel and proceed pro se, see Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (criminal prosecution); Knox Leasing v. Turner, 562 A.2d 168 (N.H.1989) (civil action); 28 U.S.C. § 1654. But compare McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (considering extent to which standby appointed counsel may participate in criminal trial over defendant's objection); Jones v. Niagara Frontier Transp. Author., 722 F.2d 20 (2d Cir.1983) (corporation may appear only through lawyer); Merco Constr. Engineers v. Municipal Court, 581 P.2d 636 (Cal.1978) (same); Tracy-Burke Assocs. v. Dept. of Employment Security, 699 P.2d 687 (Utah 1985) (same).

*Comment h. Client-lawyer relationships with law firms.*On the presumption that retaining one lawyer makes that lawyer's firm and its other lawyers subject to the responsibilities of a lawyer representing that client, see, e.g., Bossert Corp. v. City of Norwalk, 253 A.2d 39 (Conn.1968) (imputation of conflict of interest to retained lawyer); Saltzberg v. Fishman, 462 N.E.2d 901 (Ill.App.Ct.1984) (right of firm to collect fees); Staron v. Weinstein, 701 A.2d 1325 (N.J.Super.Ct.App.Civ.1997) (lawyer with of-counsel relationship to firm had apparent authority to bind firm to represent client); George v. Caton, 600 P.2d 822 (N.M.Ct.App.), cert. quashed, 598 P.2d 215 (N.M.1979) (malpractice liability); Harman v. La Crosse Tribune, 344 N.W.2d 536 (Wis.Ct.App.), cert. denied, 469 U.S. 803, 105 S.Ct. 58, 83 L.Ed.2d 9 (1984) (all lawyers in firm have duty of loyalty to client); E. Wood, Fee

Contracts of Lawyers 178-81 (1936). On the division of fees when a lawyer leaves a firm or the firm dissolves, see generally R. Hillman, Lawyer Mobility (1994); Marks, Barefoot Shoemakers: An Uncompromising Approach to Policing the Morals of the Marketplace When Law Firms Split Up, 19 Ariz. St. L.J. 509 (1987). On a lawyer's usual lack of authority to retain another lawyer outside the firm without the client's consent, see Kiser v. Bailey, 400 N.Y.S.2d 312 (N.Y.Civ. Ct.1977); E. Wood, Fee Contracts of Lawyers 286-89 (1936).

Case Citations - by Jurisdiction

—

C.A.1
C.A.3
C.A.4
C.A.5
C.A.7
C.A.8,
C.A.D.C.
M.D.Ala.
D.Ariz.
C.D.Cal.Bkrtcy.Ct.
D.Conn.
D.Del.Bkrtcy.Ct.
D.D.C.
E.D.La.
W.D.La.
D.Me.
D.Md.
D.Minn.Bkrtcy.Ct.
N.D.Miss.
D.Mont.
E.D.N.Y.
E.D.N.Y.Bkrtcy.Ct.
D.N.Mar.I.
E.D.Va.
Ariz.App.
Cal.App.
Del.Ch.
D.C.App.
Fla.App.
Ill.App.
Iowa,
Iowa
Iowa,
Iowa
La.
La.App.
Me.

Md.
Md.Spec.App.
Mass.
Mich.
Minn.
Miss.
Miss.App.
Mo.App.
Nev.
N.H.
N.J.Super.App.Div.
N.J.Super.
N.Y.
N.D.
Ohio.
Ohio App.
Tenn.
Tex.App.
Utah
Va.
N.M.C.C.A.

C.A.1

C.A.1, 2002. Subsec. (1)(b) cit. in ftn. Federal district court jury in Maine found that a lawyer and her law firm had simultaneously represented a client and client's son, who had interests adverse to client, and then compounded problem by suing client on son's behalf. Jury awarded client damages. Answering a certified question, Maine Law Court held that issue of existence of an attorney-client relationship was one of fact. On appeal of federal case, defendants argued that district court's earlier jury instruction, given without benefit of Law Court's later opinion, was potentially misleading to jury. This court affirmed the verdict, holding that district court was within its discretion in finding that facts of this case did not warrant that specific jury instruction, where it had already instructed that jury should consider all facts and circumstances, and that the lawyers must have expressly or impliedly agreed to the representation. Estate of Keatinge v. Biddle, 316 F.3d 7, 13.

C.A.3

C.A.3, 2007. Cit. in disc. and sup. Chapter 11 debtor subsidiaries brought an adversary proceeding against controlling corporation for breach of contract, breach of fiduciary duties, estoppel, and misrepresentation arising from the manner in which it ceased funding debtors' corporate parent. The district court ordered defendant to turn over documents that were withheld based on the attorney-client privilege. This court vacated and remanded for a determination of whether defendant and debtors were parties to a joint representation, since the district court could only compel defendant to produce the disputed documents because of the adverse-litigation exception to the co-client privilege if it found that defendant and debtors were jointly represented by the same attorneys on a matter of common interest that was the subject matter of those documents. In re Teleglobe Communications Corp., 493 F.3d 345, 362, 380.

C.A.3, 2001. Quot. in sup., subsec. (1)(a) cit. but dist., subsec. (1)(b) cit. in sup. (citing § 26, Proposed Final Draft No. 1, 1996, which is now § 14 of the Official Draft). Corporation brought legal-malpractice claims against attorney, alleging that defendant breached his professional duties to it by allowing its malpractice claim against lawyer who previously represented it in sale of industrial property to become time-barred. Reversing the district

court's grant of summary judgment for defendant and remanding, this court held, inter alia, that a genuine issue of material fact existed as to whether an attorney-client relationship arose between the parties concerning a potential malpractice claim against lawyer who previously represented plaintiff. Dixon Ticonderoga Co. v. Estate of O'Connor, 248 F.3d 151, 169.

C.A.4

C.A.4, 2014. Com. (h) quot. in ftn. In a tort case based on alleged asbestos exposure, this court reversed and remanded the court of appeals' decision denying defendant's motion for vacatur of an underlying remand order. In the course of its discussion, this court pointed out that it used the phrase "plaintiffs' counsel" to refer to both of plaintiffs' attorneys, because those attorneys came from the same firm. The court explained that, according to Restatement Third of The Law Governing Lawyers § 14, Comment *h*, when a client retained a lawyer, the lawyer's firm assumed the authority and responsibility of representing that client, unless the circumstances indicated otherwise. Barlow v. Colgate Palmolive Co, 772 F.3d 1001, 1005.

C.A.5

C.A.5, 1994. Quot. in case quot. in sup. (citing § 26, P.D. No. 6, 1990, which is now § 14). Corporation's two majority stockholders, along with corporation, formed a limited partnership, which purchased all of corporation's assets. Limited partnership engaged Ohio law firm to prepare public offering documents, but attempted public offering of limited partnership interests was unsuccessful and corporation went bankrupt. Stockholders filed legal malpractice suit against law firm in Mississippi state court, alleging that firm's delay in providing final public offering documents did not give plaintiffs sufficient time to sell partnership interests, resulting in offering's failure and plaintiffs' financial losses. Upon removal, Mississippi federal district court entered judgment for law firm, determining that stockholders lacked standing to sue. Affirming, this court held that plaintiffs lacked standing to sue because they failed to establish an attorney-client relationship in their individual capacities separate from their partnership. Even if attorney-client relationship existed with stockholders prior to partnership's formation, partnership's acceptance of benefits of the attorney-client relationship—the final offering documents—and both parties' agreement that stockholders would not pay or be personally liable for legal fees, made clear that attorney-client relationship with limited partnership preempted any prior arguable relationship with stockholders. Hopper v. Frank, 16 F.3d 92, 95.

C.A.7

C.A.7, 2021. Cit. in sup. Start-up company and its founder filed a claim for legal malpractice against company's former attorney after attorney obtained an arbitration award against them for years of unpaid wages, alleging that they would not have been liable for the award if he had not advised them to enter into an illegal agreement with him to defer his compensation. The district court granted attorney's motion to dismiss. Affirming, this court held that, even if founder was attorney's client on certain matters where he advised her personally or he otherwise owed her a duty as an intended beneficiary of his attorney–client relationship with company, founder failed to plead any plausible malpractice claims arising from those matters. The court cited Restatement Third of the Law Governing Lawyers § 14 in explaining that an attorney's duty normally extended only to the client. UFT Commercial Finance, LLC v. Fisher, 991 F.3d 854, 858.

C.A.8,

C.A.8, 2013. Com. (c) quot. in sup. Defendant was indicted for conspiring to distribute drugs and conspiring to possess drugs with the intent to distribute based, in part, on statements that made he made to an attorney who represented one of his coconspirators. The district court denied defendant's motion to dismiss the indictment or, alternatively, suppress his statements to the attorney, and sentenced defendant to imprisonment after a jury

convicted him on both counts. Affirming, this court held, among other things, that defendant did not have an attorney-client relationship with the attorney, and the government therefore could not have unconstitutionally intruded into any such relationship by refusing to suppress the statements. The court reasoned, in part, that defendant conceded that his conversations with the attorney regarding the sentencing disparities for different types of cocaine were among "a mix of social exchanges and discussions regarding legal issues of importance to" defendant, and that conversations of that nature did not suffice to form an attorney-client relationship. U.S. v. Williams, 720 F.3d 674, 688.

C.A.D.C.

C.A.D.C.2009. Com. (f) cit. in disc. United States sought civil forfeiture of almost $7 million on the ground that the money was involved in a scheme to launder money earned through an unlawful offshore Internet gambling enterprise. The district court invoked the fugitive-disentitlement statute to grant summary judgment to government against a claim to the money filed by a British Virgin Islands corporation. Reversing, this court held that a genuine issue of fact existed as to whether the statute applied to corporation's majority shareholder, and thus whether corporation's claim could be dismissed under the statute, since government failed to satisfy its burden to show that shareholder remained outside the United States to avoid pending criminal charges. The court concluded that, while shareholder's knowledge of one of the criminal warrants against him satisfied the statute's requirement of notice, the mere fact that he was a majority shareholder was not sufficient to impute corporation's knowledge of outstanding warrants to him; shareholders were not ordinarily deemed to be “clients” of a corporation's lawyers, who, in this case, had such notice. U.S. v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scotland Intern. Account No. 2029-56141070, Held in Name of Soulbury Ltd., 554 F.3d 123, 129.

C.A.D.C.2006. Cit. in disc., com. (c) quot. in disc. Investment adviser and hedge fund petitioned for review of an SEC rule regulating hedge funds under the Investment Advisers Act of 1940, challenging the rule's requirement that an investor in a hedge fund, rather than just the fund itself, be counted as a client of the fund's adviser for purposes of the Act's exemption from registration for advisers with fewer than 15 clients. Vacating the rule and remanding, this court held that the SEC's interpretation of the word “client,” which had the effect of requiring hedge-fund advisers to register with the SEC if the funds they advised had 15 or more “shareholders, limited partners, members, or beneficiaries,” was unreasonable and came close to violating the Act's plain language. The court observed that construction of a statutory term required that the words of the statute be read in context. Goldstein v. S.E.C., 451 F.3d 873, 878.

M.D.Ala.

M.D.Ala.2011. Cit. in case quot. in sup. Government, on behalf of alleged victims of sexual harassment by rental agent who managed certain rental housing properties, sued rental agent and others for housing discrimination under the Fair Housing Act (FHA). This court granted third-party housing advocate's motion to quash defendants' subpoena, holding that notes made by a paralegal of telephone conversations with persons who called in response to a form letter distributed by housing advocate were protected by the attorney-client privilege. The court reasoned that the callers contacted advocate to explore the possibility of raising potential FHA claims, whether or not they were fully knowledgeable about such claims or the particulars of the Act, and whether or not they ultimately agreed to be represented; preliminary consultations of this kind were protected by the attorney-client privilege. U.S. v. Gumbaytay, 276 F.R.D. 671, 679.

D.Ariz.

D.Ariz.2014. Subsec. (1)(a) quot. in case quot. in sup. Insured who originally lived in Michigan but later moved to Arizona brought claims sounding in breach of contract and bad faith against insurer, alleging that insurer breached a personal-injury-protection policy it had issued to insured's father in Michigan by failing to pay insured benefits due and to inform him of the extent of his benefits after an automobile accident in Michigan rendered him a

quadriplegic. This court denied in part insurer's motion for summary judgment, holding that a genuine issue of fact existed as to whether insured knew or reasonably should have known of insurer's alleged bad-faith actions prior to the deadline for the statute of limitations. Citing Restatement Third of the Law Governing Lawyers § 14 on formation of an attorney—client relationship, the court noted that there was conflicting evidence as to whether insured's former attorney continued to represent him during the relevant period such that attorney's knowledge of the extent of insured's entitlement to attendant-care benefits could be imputed to insured. Barten v. State Farm Mut. Auto. Ins. Co., 28 F.Supp.3d 978, 988.

C.D.Cal.Bkrtcy.Ct.

C.D.Cal.Bkrtcy.Ct.2021. Com. (c) cit. in ftn. In a reopened bankruptcy case, purported purchaser of real property filed a motion for administrative expenses, alleging that it was entitled to reimbursement for payments it made on the mortgage securing the property, because its contributions substantially benefited the bankruptcy estate. This court denied purchaser's motion for administrative expenses, holding, inter alia, that there were no tangible benefits to the estate from purchaser's expenditures. Citing Restatement of the Law Governing Lawyers § 14, Comment *c*, the court noted that purchaser's assertion that it was entitled to administrative expenses because the bankruptcy estate retained an attorney as counsel in violation of the implied attorney–client relationship between the attorney and purchaser, despite the fact that purchaser provided the attorney its confidential information related to the real-property purchase, and observed that determining the veracity of purchaser's assertions was unnecessary for its holding. In re Machevsky, 637 B.R. 510, 518.

D.Conn.

D.Conn.2011. Quot. in sup. Former employees of bankrupt cookie companies brought a putative class action against companies' corporate shareholders and management firm hired by shareholders to run companies, alleging that defendants were liable under state and federal law for failing to provide companies' employees with 60 days' advance notice of the termination of their jobs. This court granted in part and denied in part defendants' motion for an order permitting their counsel to contact putative class members, holding that there was a basis for imposing limited restrictions on the parties' abilities to communicate with putative class members prior to class certification. The court noted that, while defendants' attorney's attempts to contact a particular company officer probably would have been unethical if officer had been represented by plaintiffs' counsel, there was no evidence that officer manifested an intent to receive legal services from plaintiffs' counsel before defendants' attorney contacted her, or that plaintiffs' counsel manifested consent to represent her. Austen v. Catterton Partners V, LP, 831 F.Supp.2d 559, 569.

D.Del.Bkrtcy.Ct.

D.Del.Bkrtcy.Ct.2008. Quot. in disc., com. (f) quot. in disc. Chapter 11 debtor-subsidiaries brought adversary proceeding asserting contract and tort claims against their corporate parents and officers and directors of parents. Denying plaintiffs' motion to compel discovery, this court held, inter alia, that defendants were not required to turn over certain documents that were protected by attorney-client privilege under the "adverse litigation exception," because plaintiffs and defendants were not jointly represented by the same counsel on a matter of common interest relating to the specific issue that was addressed in the withheld documents. The court reasoned, in part, that there was no explicit or implied joint representation of plaintiffs and defendants by defendants' counsel in connection with plaintiffs' claims against defendants. In re Teleglobe Communications Corp., 392 B.R. 561, 588.

D.D.C.

D.D.C.2020. Com. (f) quot. in sup. Buyers of a government-contracting firm under a verbal contract sued seller, alleging, among other things, breach of contract and fraud in the inducement. This court denied buyers' motion

to disqualify seller's counsel, holding that buyers failed to show that seller's counsel also represented buyers in their individual capacity in the early stages of the parties' dispute. The court cited Restatement Third of the Law Governing Lawyers § 14 in noting that, while sometimes in the absence of warning from a lawyer, a constituent of an organizational client could reasonably rely on the lawyer's apparent willingness to provide legal services for the constituent in addition to the organization, thus creating an implied client–lawyer relationship, the overwhelming evidence in the record showed that seller's counsel repeatedly gave such warnings to buyers, and that there was no indication that seller's counsel learned any private information that remained private for more than a few days and was useful to seller in this action. Butler v. Enterprise Integration Corporation, 459 F.Supp.3d 78, 113.

D.D.C.2018. Subsec. (1)(b) quot. in sup. In criminal proceedings against owner of two companies and registered agent for the companies, who were charged as co-defendants with participating in an alleged scheme to defraud public schools, the government moved to disqualify owner's attorney based on allegations that attorney also represented the companies and registered agent under conflicts of interest to which the clients had not consented. This court denied the government's motion, holding that attorney never enjoyed an attorney–client relationship with registered agent that would form the basis for a disqualifying conflict. The court reasoned, in part, that the factors set forth in Restatement Third of the Law Governing Lawyers § 14 weighed against finding that an attorney–client relationship was formed, given that attorney never had a one-on-one conversation with registered agent, registered agent never paid attorney, and there was no indication that registered agent ever intended for attorney to provide her with legal services. United States v. Crowder, 313 F.Supp.3d 135, 144.

D.D.C.2013. Quot. in sup., com. (c) cit. in sup. Provider of summer camp programs, together with its founder, brought claims for conversion, inter alia, against purported business partner, alleging that defendant misappropriated a large sum of money from plaintiffs. Defendant moved to disqualify law firm representing plaintiffs, asserting that two law-firm partners had provided him with legal and personal advice. Denying defendant's motion without prejudice, this court held that defendant failed to present sufficient facts that an attorney-client relationship ever existed. Citing Restatement Third of the Law Governing Lawyers § 14, the court pointed out that neither party presented emails or other documentation affirmatively establishing the existence of an attorney-client relationship, and there were no allegations of a formal agreement, payment of attorney's fees, or explicit statements about the nature of the alleged relationship. Headfirst Baseball LLC v. Elwood, 999 F.Supp.2d 199, 209.

E.D.La.

E.D.La.2018. Quot. in case quot. in disc. After bringing a lawsuit against, among others, health-insurance company for conspiring with others to restrict competition in relevant markets, medical support company and others filed a motion to disqualify defendant's counsel, alleging that counsel had previously represented plaintiff in negotiations with the state insurance board regarding allegations of medical malpractice asserted by a hospital. This court granted plaintiff's motion to disqualify, holding, inter alia, that counsel's present and former representations were substantially related. The court explained that, under Restatement Third of the Law Governing Lawyers § 14, counsel had manifested consent to represent plaintiff during negotiations with government officials when it communicated with plaintiff through an engagement letter explicitly describing its services as "legal services" and describing its relationship to plaintiff as being plaintiff's "legal counsel." Academy of Allergy & Asthma in Primary Care v. Louisiana Health Service and Indemnity Company, 384 F.Supp.3d 644, 654.

W.D.La.

W.D.La.2020. Quot. in case quot. in sup. After former employee sued former employer for gender-based discrimination claims, defendant filed a motion to disqualify plaintiff's attorney, alleging that defendant previously retained attorney to teach workplace gender-discrimination seminars to its personnel. This court denied defendant's motion to disqualify, holding, inter alia, that disqualification of plaintiff's attorney was unwarranted, because attorney and defendant never had an attorney–client relationship with one another such that attorney's representation of plaintiff created a conflict of interest. Citing Restatement Third of the Law Governing Lawyers

§ 14, the court explained that defendant never requested services from attorney beyond training seminars, attorney did not make recommendations for substantive changes to defendant's policies, and attorney was not given any of defendant's confidential information. Flowers v. Heard, McElroy & Vestal, L.L.C., 551 F.Supp.3d 688, 700.

D.Me.

D.Me.2002. Coms. (c), (e), and (f) cit. in disc. Grantor of power of attorney brought suit for legal malpractice against lawyer engaged by holder. After the jury returned a verdict for plaintiff, defendant filed motions for judgment n.o.v and/or for a new trial. Denying the motions, the court held that whether an attorney-client relationship existed between the parties was a question of fact for the jury. Keatinge v. Biddle, 188 F.Supp.2d 3, 4.

D.Md.

D.Md.2017. Cit. and quot. in sup. Consumer Financial Protection Bureau sued buyer of structured settlements and attorney who purported to act as an independent professional advisor to consumers who were considering selling their structured settlements to buyer, when in fact he had both personal and professional ties to buyer, alleging that defendants violated the Consumer Financial Protection Act by participating in a scheme to buy structured settlements on unfair terms. While originally granting defendants' motion to dismiss attorney under the Act's "practice of law" exclusion, this court granted plaintiff's subsequent motion to amend the complaint to clarify that consumers were unaware of the fact that attorney was a lawyer, such that the exclusion could not apply. The court reasoned that, under Restatement Third of the Law Governing Lawyers § 14, it was impossible for a "client" to form an attorney—client relationship with a person if the client did not know the person was an attorney. Consumer Financial Protection Bureau v. Access Funding, LLC, 281 F.Supp.3d 601, 605.

D.Md.2017. Subsec. (1)(a) quot. in case quot. in sup. (general cite). Federal agency that was charged with regulating the offering and provision of consumer-financial products and services sued company that purchased structured settlements from consumers, as well as attorney with personal and professional ties to company, who purportedly provided independent professional advice to consumers in connection with the sale of their structured settlements to company, alleging violations of the Consumer Financial Protection Act. This court granted attorney's motion to dismiss agency's claims against him, holding that attorney's conduct fell within the "practice of law" exclusion to the Act. The court reasoned, in part, that, when consumers utilized attorney as their independent professional advisor and attorney performed that function for them, both attorney and consumers manifested the intent necessary to form an attorney—client relationship under the Restatement Third of the Law Governing Lawyers. Consumer Financial Protection Bureau v. Access Funding, LLC, 270 F.Supp.3d 831, 849.

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Coms. (c) and (f) cit. in disc. In one of two consolidated adversary proceedings, Chapter 7 trustee of estate of loan-placement agent brought claim for breach of fiduciary duty against law firm that agent hired to prepare loan documents for a multimillion-dollar casino loan that agent arranged. This court held, inter alia, that law firm violated its duty to disclose and its duty of loyalty to agent, because, although participant lenders for the casino loan were the actual clients represented by firm in an action against a third party in which agent was the named plaintiff, firm agreed to represent agent in a closely related action by one loan participant against agent without seeking informed consent from either agent or that participant. The court reasoned that law firm had an attorney-client relationship with the casino loan participants, because both law firm and agent fully understood that agent was retaining law firm to represent the loan participants as the true lenders, and not agent, which was merely the nominal lender. In re SRC Holding Corp., 352 B.R. 103, 183, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

N.D.Miss.

N.D.Miss.2001. Quot. in case quot. in ftn. (quoting § 26 of Prelim. Draft No. 6, 1990, which is now § 14 of the Official Text). Mississippi resident who was evicted from her home sued foreclosing bank and bank's attorney, alleging, among other claims, breach of fiduciary duty and negligence. This court denied plaintiff's motion to remand case to state court, holding, inter alia, that attorney was fraudulently joined. Attorney was not liable for breach of fiduciary duty or negligence, because an attorney did not owe a duty, fiduciary or otherwise, to the adverse party in a case he was litigating. Any duty that extended to the adversary, whether one of a fiduciary nature or one of ordinary reasonable care, created a conflict of interest. James v. Chase Manhattan Bank, 173 F.Supp.2d 544, 550.

D.Mont.

D.Mont.2004. Quot. and cit. in sup., subsec. (1) cit. in sup., com. (f) cit. and quot. in sup. Students and their parents sued school district and district employees, alleging that students were surreptitiously videotaped while in the high-school locker room. Granting in part plaintiffs' motion for protective order, this court held, inter alia, that plaintiffs' counsel could conduct ex parte interviews with former and current employees, and agents of the school district, so long as these employees had not manifested an intent to be represented by counsel. Harry v. Duncan, 330 F.Supp.2d 1133, 1141, 1142.

E.D.N.Y.

E.D.N.Y.2018. Com. (f) quot. in sup. Consumer filed a putative class action against company, alleging violations of the Telephone Consumer Protection Act. This court granted defendant's motion to strike plaintiff's class allegations, holding that plaintiff could not adequately represent the interests of absent class members, because her husband, who formerly acted as counsel for plaintiff and the class before being replaced by substitute counsel, intended to seek fees for his work under a theory of quantum meruit, which would come out of the class's recovery because he was no longer in a position to negotiate with defendant. The court explained that, under Restatement Third of the Law Governing Lawyers § 14, a plaintiff's lawyer in a class action owed duties both to the named plaintiff and to the class, and that, if the interests of plaintiff and the class were to diverge over husband's fee request, then so would substitute counsel's loyalties. Wexler v. AT & T Corp., 323 F.R.D. 128, 131.

E.D.N.Y.2014. Subsec. (1) cit. in disc. and cit. in case quot. in disc., com. (e) quot. in case quot. in disc. In Chapter 11 bankruptcy proceedings, president of debtor company filed a pro se motion to disqualify debtor's law firm from representing debtor's liquidating trust in connection with certain litigation against him, on the basis that a conflict of interest existed due to the fact that, pre-petition, law firm, rather than acting exclusively for the benefit of debtor, had really been acting for the benefit of president and other insiders to help them to obtain debtor's assets in bankruptcy. Following an evidentiary hearing, bankruptcy court disqualified law firm. Reversing in part and remanding, this court held that president's delay in bringing the disqualification motion amounted to a waiver of his right to contest this alleged conflict of interest. The court pointed out that, among other things, president waited almost three years in bringing the disqualification motion, even though he knew of the conflict of interest; he conceded that he delayed for tactical purposes; and disqualification prejudiced the liquidating trust. KLG Gates LLP v. Brown, 506 B.R. 177, 186, 191.

E.D.N.Y.2006. Quot. in sup. In an action against criminal defendant accused of participating in a racketeering conspiracy with an organized crime family, government moved to disqualify defendant's attorney, in part on grounds that that his alleged prior representation of a government witness created a conflict of interest. Denying the motion, this court concluded, among other things, that attorney had acted as an unpaid investigator for witness, not an attorney, and thus no ethical standard would be breached by his representation of defendant. The court pointed out that witness did not believe that attorney had represented him and had testified that the “job” attorney had performed for him was “being a courier of messages.” U.S. v. Pizzonia, 415 F.Supp.2d 168, 179.

E.D.N.Y.Bkrtcy.Ct.

E.D.N.Y.Bkrtcy.Ct.2012. Quot. in case quot. in sup., com. (c) quot. in sup. Chapter 7 trustee applied to retain law firm as his general and bankruptcy counsel. Creditor objected in part, arguing that law firm suffered from a disabling conflict of interest and was not disinterested, because it represented him and an entity that he owned and controlled in connection with a possible investment in a real estate venture in China. This court overruled creditor's objection, holding that the China real estate venture was not substantially related to claims that trustee might assert against creditor or entity. The court determined, as part of its inquiry, that entity was an actual client of law firm, and creditor was a prospective client, with respect to the China real estate venture; in the course of the preliminary discussions about the China venture among creditor, his brother, and law firm, creditor could be viewed as a person who discussed with a lawyer the possibility of forming a client-lawyer relationship with respect to that matter. In re Persaud, 467 B.R. 26, 38.

D.N.Mar.I.

D.N.Mar.I.2011. Quot. in sup. Lessee who prepaid the rent for the entirety of a 55-year lease of real property sued lessors, alleging that defendants wrongfully attempted to terminate the lease after only two years. Denying the parties' cross motions for summary judgment on plaintiff's claim for breach of fiduciary duty against one defendant who was also an attorney, this court held, among other things, that genuine issues of material fact remained as to whether plaintiff had an attorney-client relationship with that defendant with regard to the lease; a reasonable jury could find that defendant should have known that plaintiff was relying on him to provide legal services, in light of the fact that plaintiff was a foreign national who did not speak English and was not familiar with Commonwealth law, and had sought or at least received an explanation of the terms of the lease drafted by defendant. Sin Ho Nam v. Quichocho, 841 F.Supp.2d 1152, 1177.

E.D.Va.

E.D.Va.2008. Quot. in sup. Patent owner sued competitors for infringement of its patents on x-ray inspection systems. Granting plaintiff's motion for sanctions concerning alleged misrepresentations made by defendants to the court to avoid a default judgment, this court held that defendants' representations that they did not retain defense counsel for this litigation until after becoming aware of the entry of a default were entirely devoid of substance; defendants had a longstanding attorney-client relationship with an attorney retained as patent-prosecution counsel who, prior to the entry of default, was directed to explore defenses to the complaint and consider settlement possibilities, and defendants, immediately following the entry of default, officially retained him as litigation defense counsel. The court noted that attorney-client relationships arose out of substance and intent, even in the absence of a written contract. American Science and Engineering, Inc. v. Autoclear, LLC, 606 F.Supp.2d 617, 623.

Ariz.App.

Ariz.App.2014. Com. (h) quot. in sup. Law firm brought an action for breach of contract and unjust enrichment against former client. The trial court entered judgment on a jury verdict in favor of law firm, and awarded law firm attorney's fees. This court vacated the grant of attorney's fees in favor of law firm and remanded, holding that the rule forbidding an award of attorney's fees when a party represented itself applied to law firms, and that law firm was therefore ineligible for an award of its fees. The court rejected law firm's argument that it was not authorized to represent itself because a corporation or other legal entity had to be represented by a natural person, noting that the rules governing attorney conduct contemplated law firms representing clients, and that, because law firm was authorized to practice law, it was capable of self-representation. Munger Chadwick, P.L.C. v. Farwest Development and Const. of the Southwest, LLC, 329 P.3d 229, 231.

Ariz.App.2014. Quot. in case cit. in sup. After limited partnership sued minority partner, partner moved for a determination of no conflict with regard to the law firm that was defending him in partnership's suit against him and representing him in pursuing direct claims against partnership, seeking a ruling that law firm could also represent him on certain derivative claims that he planned to bring on behalf of partnership against majority partner. The trial court denied minority partner's motion, and granted partnership's motion to disqualify law firm. Reversing the trial court's disqualification order, this court held that no conflict of interest existed on the part of law firm, because it had no attorney—client relationship with partnership. The court reasoned that there was no evidence that partnership manifested to law firm its intent that law firm provide legal services to it or that law firm manifested any consent to do so; law firm's only attorney—client relationship was with minority partner. Simms v. Rayes, 316 P.3d 1235, 1238.

Cal.App.

Cal.App.2007. Com. (h) quot. in disc. Investment corporation, by and through its receiver, sued attorney and his law firm, alleging that attorney, who had represented an individual convicted of engaging in fraudulent activities with the corporation, improperly obtained monies belonging to the receivership. The trial court granted law firm's motion for summary judgment on the ground that law firm could not be held vicariously liable for attorney's alleged acts. Reversing in part, this court held that plaintiff raised triable issues of fact as to whether attorney committed his alleged acts within the scope of his authority as a partner of the firm. The court noted that, unless there was an agreement to the contrary, the retention of an attorney in a law firm constituted the retention of the entire firm. PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal.App.4th 384, 392, 58 Cal.Rptr.3d 516, 522.

Cal.App.2007. Subsec. (2) quot. in ftn. City's department of children and family services filed a petition to commence dependency proceedings, alleging, in part, that two brothers and two sisters, who lived with their mother and the father of sisters, were at risk of severe harm. The juvenile court disqualified nonprofit law center from representing all four siblings, relieved a panel attorney of his representation of the father of brothers, and appointed that attorney to represent brothers. This court affirmed as to the disqualification of law center, but noted that attorney should have been disqualified from representing brothers, because their interests were adverse to their father's. The court noted that the fact that attorney's representation of father was brief was irrelevant, because communication of confidential information was presumed when counsel was appointed for a parent in dependency proceedings. In re Zamer G., 153 Cal.App.4th 1253, 1262, 63 Cal.Rptr.3d 769, 776.

Del.Ch.

Del.Ch.2002. Com. (f) quot. in ftn. Shareholders of a corporation filed derivative suits to challenge a proposed stock purchase from a corporation wholly owned by controlling shareholder. When a proposed settlement was reached by participating plaintiffs, several objector plaintiffs opposed it and filed a motion to disqualify law firms participating in the stipulation of settlement on grounds of conflict of interest, alleging that firms could not ethically support settlement of the action when settlement was opposed by objectors. This court denied objectors' motion to disqualify, holding, inter alia, that participating firms' support for a settlement opposed by objectors did not warrant their disqualification in absence of unfair prejudice to objectors. Counsel owed a duty to act in good faith on behalf of all intended beneficiaries of the representative action, and not simply at direction of named plaintiffs. In re M & F Worldwide Corp., 799 A.2d 1164, 1175.

D.C.App.

D.C.App.2018. Cit. in ftn. In disciplinary proceedings, attorney was charged with violating the rules of professional conduct in connection with his representation of a friend whom he had invited to serve as an indemnitor for another client's surety bonds. After a hearing committee found that attorney and friend entered into an attorney–client relationship with regard to the indemnity agreement and that attorney violated the professional

rules during that representation, the board on professional responsibility adopted the committee's conclusions and recommended sanctions. This court accepted the board's recommendation, holding, among other things, that substantial evidence supported the finding of an attorney–client relationship. The court rejected attorney's argument that no relationship was formed under Restatement Third of the Law Governing Lawyers § 14, noting that a client's request that an attorney render legal services and the attorney's acceptance did not have to be explicitly made, and could be inferred from context if substantial evidence supported a finding of such a relationship. In re Robbins, 192 A.3d 558, 564.

D.C.App.2014. Cit. in sup., cit. in case quot. in sup., subsecs. (1)(a)-(1)(b) quot. in sup. After attorney was suspended from the practice of law in West Virginia for 120 days, the District of Columbia Office of Bar Counsel recommended that reciprocal discipline be imposed on attorney in the District of Columbia. Adopting that recommendation, this court agreed with the West Virginia Supreme Court's finding that attorney committed numerous disciplinary violations when he distributed the proceeds of a medical-malpractice judgment to a client without informing client's bankruptcy trustee, who had applied to have attorney appointed as special counsel in the bankruptcy proceedings. Applying the approach of Restatement Third of the Law Governing Lawyers § 14, the court rejected attorney's argument that he never received notice of the bankruptcy court's order granting his appointment as special counsel and therefore did not commit any disciplinary infractions with regard to trustee. The court reasoned that an attorney-client relationship between attorney and trustee arose before the bankruptcy court issued the order granting attorney's appointment, because trustee had asked attorney to provide legal services, attorney had consented to provide those services, and attorney knew or should have known that trustee would rely on him to provide those services. In re Nace, 98 A.3d 967, 975, 976.

Fla.App.

Fla.App.2008. Quot. in sup. Client and three of his brothers brought a legal-malpractice action against law firm and its partners, after defendants failed to collect for plaintiffs any proceeds from the sale of a family-controlled piece of real property. The trial court granted summary judgment for defendants. Reversing and remanding, this court held that genuine issues of material fact existed as to whether client's brothers were clients of the law firm; the firm's own correspondence supported a conclusion that the test for the attorney-client relationship was satisfied, and that the firm undertook the representation of client both on his own behalf and on behalf of the brothers he had the authority to represent. Mansur v. Podhurst Orseck, P.A., 994 So.2d 435, 438.

Ill.App.

Ill.App.2015. Cit. in sup. Private-equity company and investors brought a legal-malpractice action against attorney and law firm that specialized in intellectual-property law, alleging that plaintiffs invested in a company that relied on a number of processes that were the subject of patents based on defendants' misrepresentation that the company owned and controlled the patents. The trial court entered judgment for plaintiffs. This court affirmed, holding that defendants owed a duty to all investors involved in the transaction. Citing Restatement Third of the Law Governing Lawyers § 14, the court explained that, even though the retention agreement was only between private-equity company and defendants, defendants knew that there were other investors involved in the transaction that were dependent on their work, and the evidence showed that defendants consented to perform services for the transaction as a whole. Meriturn Partners, LLC v. Banner and Witcoff, Ltd., 391 Ill.Dec. 775, 780, 31 N.E.3d 451, 456.

Iowa,

Iowa, 2016. Subsec. (1)(b) cit. in case cit. in sup. State disciplinary board charged lawyer with violating the rules of professional conduct in connection with allegations that, following her removal as the attorney for an estate in probate proceedings, she sought and received a loan from the executor without obtaining the executor's informed consent. After the grievance commission found that lawyer violated the rules, this court suspended her license for

60 days, holding that she was still in an attorney-client relationship with the executor at the time of the loan. The court noted that, under Restatement Third of the Law Governing Lawyers § 14, an attorney-client relationship normally existed between the executor of an estate and the attorney designated by the executor to probate the estate, and explained that, under the circumstances here, lawyer's attorney-client relationship with the executor had not yet ended when attorney and executor discussed the loan. Iowa Supreme Court Attorney Disciplinary Bd. v. Pederson, 887 N.W.2d 387, 392.

Iowa

Iowa, 2015. Cit. in sup. Attorney disciplinary board filed a complaint against attorney, alleging that attorney violated the rules of professional conduct by, among other things, entering into an intimate relationship with a divorce client who hired him to prepare and file a qualified domestic relations order (QDRO), and then assaulting her after the relationship deteriorated. After a grievance commission panel found that the alleged violations had occurred, this court suspended attorney's license to practice law indefinitely with no possibility of reinstatement for 18 months, holding that, while it was unclear whether attorney's representation of client in connection with the QDRO was ongoing, attorney and client established a separate attorney—client relationship in connection with a will matter before they entered into their sexual relationship. The court cited Restatement Third of the Law Governing Lawyers § 14 in concluding that an attorney—client relationship was created when client sought assistance from attorney in drafting her will and attorney expressly agreed to draft a will for her. Iowa Supreme Court Attorney Disciplinary Bd. v. Blessum, 861 N.W.2d 575, 588.

Iowa,

Iowa, 2015. Cit. in sup., cit. in case cit. in sup. The Iowa Supreme Court Disciplinary Board brought disciplinary proceedings against attorney who had been appointed to represent a defendant who had been charged with domestic abuse, alleging that attorney violated the rules of professional conduct by engaging in sexual relations with the victim in the domestic-abuse case. The Iowa Supreme Court Grievance Commission concluded that attorney committed the alleged violations and recommended a 30-month suspension. This court suspended attorney indefinitely with no possibility of reinstatement for 30 months, holding, among other things, that the Board established by a preponderance of the evidence that there was an attorney—client relationship between attorney and victim under Restatement Third of the Law Governing Lawyers § 14. The court pointed out that victim testified that she believed that attorney was assisting her in a matter related to suspension of her driver's license, and that victim, at attorney's request, had obtained a notarized document that expressly stated that attorney was her lawyer in connection with the driver's license matter. Iowa Supreme Court Attorney Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 605, 611.

Iowa, 2014. Subsec. (1)(b) quot. in sup. Executor/beneficiary of estate brought a legal-malpractice action against estate counsel, alleging that counsel failed to advise her about potential legal challenges to another beneficiary's option to purchase, at a below-market-value price, farmland that was property of the estate. The trial court granted summary judgment for counsel. The court of appeals reversed. Vacating the decision of the court of appeals and affirming the judgment of the trial court, this court held that the creation of an attorney—fiduciary relationship between counsel and executor did not impose on counsel an independent duty to represent executor's personal interests. The court observed no compelling reason to create a broader duty for estate attorneys, or to create a duty for an attorney to affirmatively advise a personal representative that the representation did not extend to representative's personal interests, referring to Restatement Third of the Law Governing Lawyers § 14(1)(b) in noting that personal representatives were protected by Iowa law when they reasonably expected that an attorney was representing their personal interests. Sabin v. Ackerman, 846 N.W.2d 835, 842, 843.

Iowa

Iowa, 2011. Cit. in sup. Attorney disciplinary board brought a complaint against attorney relating to his representation of four separate clients, alleging, as to one client, that attorney violated the rules of professional conduct by failing to satisfy a hospital's lien on the proceeds of a settlement of the client's personal-injury action. Suspending attorney's license to practice law, this court held, inter alia, that, while an attorney-client relationship existed during attorney's prosecution and settlement of client's personal-injury action, such a relationship did not exist when attorney filed an appearance on behalf of client in hospital's lien action, because the undisputed evidence established that attorney filed an answer on behalf of client in that action without client's authority to do so. Iowa Supreme Court Attorney Disciplinary Bd. v. Netti, 797 N.W.2d 591, 599.

Iowa, 2009. Com. (f) quot. in sup. Patient and his wife brought medical malpractice action against doctor and clinic that employed doctor. After counsel for defendants violated a state statute by meeting with clinic's surgeon, who had also examined patient, without notice to plaintiff, the trial court granted plaintiffs' motion to compel production of a memorandum that counsel for defendants authored to memorialize his recollection of the meeting. On interlocutory appeal, this court affirmed in part, rejecting counsel for defendants' argument that he also represented surgeon and that the memorandum was therefore protected by surgeon's personal attorney-client privilege. The court explained that the memorandum did not reflect legal advice sought by surgeon but, rather, demonstrated counsel for defendants' investigation into clinic's liability for doctor's actions. Keefe v. Bernard, 774 N.W.2d 663, 670.

Iowa, 2008. Quot. in sup., com. (c) cit. and quot. in sup., com. (e) quot. in sup. Defendant was convicted by a jury of second-degree robbery and sentenced by the trial court as an habitual offender. The court of appeals reversed. Vacating the decision of the court of appeals and affirming the judgment and sentence of the trial court, this court held that incriminating statements defendant made to an attorney during a night of socializing prior to defendant's arrest were not privileged attorney-client communications, and thus were properly admitted into evidence at trial, because no attorney-client relationship existed when the statements were made; defendant never asked attorney to represent him, attorney never felt that the circumstances established an attorney-client relationship, and defendant could not have reasonably relied on attorney to provide legal services based merely on attorney's willingness to check into the status of the criminal investigation. State v. Parker, 747 N.W.2d 196, 204, 205.

La.

La.2006. Quot. in sup. In an attorney disciplinary proceeding, the Office of Disciplinary Counsel (ODC) filed formal charges against attorney who was also a stockbroker for allegedly mishandling the funds of a client of a lawyer who shared attorney's office, in violation of the Rules of Professional Conduct. The hearing committee recommended that the charges be dismissed, and the disciplinary board recommended a one year suspension from the practice of law. This court dismissed the charges, holding, inter alia, that the ODC failed to prove the existence of an attorney-client relationship between attorney and owner of the funds, a necessary element of proof for certain of the charges, because the undisputed facts established that owner did not manifest an intent that attorney provide legal services for her, but rather investment services only. In re Austin, 943 So.2d 341, 347.

La.App.

La.App.2021. Quot. in sup. Ex-wife brought a legal-malpractice action against attorney, alleging that defendant failed to properly reinstate a community-property regime for plaintiff and ex-husband, resulting in plaintiff not receiving certain properties when she and ex-husband divorced. The trial court granted defendant's exception raising objection of no right of action. This court affirmed in part, holding that plaintiff lacked reasonable belief that an attorney–client relationship existed between the parties. The court pointed out that plaintiff failed to satisfy the elements of determining the existence of an attorney–client relationship under Restatement Third of the Law Governing Lawyers § 14, because she presented no evidence that the parties agreed upon a fee arrangement for the provision of legal services, and, even if there was an attorney–client relationship between the parties at the time the community-property regime was initially terminated, plaintiff did not reasonably contemplate that defendant's duty would continue. Pearce v. Lagarde, 330 So.3d 1160, 1168.

La.App.2010. Cit. and quot. in case quot. in sup. Clerical employee of a two-member limited-liability law firm asserted claims for both vicarious liability and independent negligence against firm, after a lawyer-member of the firm allegedly assaulted and raped her on the firm's premises after business hours. The trial court granted summary judgment for firm. Reversing and remanding, this court held that firm owed a duty to plaintiff that was independent of its vicarious liability for the accused lawyer-member's actions as an employee of the firm, because plaintiff was also an invitee or social guest of the firm after work and a pro bono client of the firm. The court noted that the accused lawyer-member had advised plaintiff on a child-custody issue, that firm's other lawyer-member had corresponded with the court and appeared in open court on plaintiff's behalf, and that the custody issue had apparently not been resolved, as plaintiff alleged that she and the accused lawyer-member had discussed the matter on the night of the alleged attack. Doe v. Hawkins, 42 So.3d 1000, 1008.

Me.

Me.2002. Subsec. (1)(b) cit. in disc. Grantor of durable power of attorney to his son as attorney-in-fact brought suit for breach of fiduciary duty against lawyer retained by son to assist him in handling father's business affairs, after lawyer sued father on behalf of son for failure to fund a trust for son's benefit. The trial court entered judgment on a jury verdict for plaintiff's estate following plaintiff's death, and certified questions of law. This court held that the mere fact that the holder of a power of attorney retained counsel did not create an attorney-client relationship between attorney and grantor, but facts might develop in particular cases that could support a finding that such an attorney-client relationship between attorney and grantor had been created. Estate of Keatinge v. Biddle, 789 A.2d 1271, 1273.

Md.

Md.2014. Subsec. (1)(b) quot. in sup. In disciplinary proceedings, attorney was charged with violating the rules of professional conduct by entering into a real-estate-investment partnership with a current client. After a hearing judge determined that attorney had violated the rules regarding conflicts of interest and misconduct, this court concluded that disbarment was the appropriate sanction. The court rejected attorney's argument that his attorney —client relationship with client had terminated after he successfully obtained an H1B visa for her, noting that, during or shortly before the month attorney and client formed their partnership, client paid attorney $1,000 to represent her in connection with an application for permanent residency, and attorney never expressed, in writing or otherwise, his lack of consent to assist client. Attorney Grievance Com'n of Maryland v. Agbaje, 438 Md. 695, 93 A.3d 262, 280-281.

Md.2013. Adopted and quot. in case quot. in conc. op., coms. (c) and (e) quot. in conc. op. Attorney grievance commission filed a petition for disciplinary action against attorney who was hired by a client to form a limited-liability company in exchange for a flat fee, alleging, among other things, that attorney violated the Maryland Rules of Professional Conduct when he deposited a check from the client in his personal checking account rather than in an attorney trust account. After a hearing, the trial court found that the payment was made in anticipation of future services, rather than for past legal services rendered, and thus had to be deposited in an attorney trust account, because, under the terms of the parties' legal-services agreement, an attorney-client relationship was not formed until the parties executed the agreement and client gave the check to attorney. The concurring opinion stressed that an attorney-client relationship could be formed before the signing of a retainer agreement, when a client manifested an intent to receive legal services and the attorney manifested consent to provide those services, and that an attorney therefore could in some cases be justified in immediately applying a portion of an after-acquired retainer to pay for work already done. Attorney Grievance Com'n of Maryland v. Stillwell, 434 Md. 248, 74 A.3d 728, 745.

Md.2009. Quot. in sup. (general cite). Attorney grievance commission filed a petition for disciplinary or remedial action against attorney, alleging that attorney violated rules of professional conduct in connection with his

relationship with his ex-girlfriend. The trial court found, among other things, that there was no attorney-client relationship between attorney and ex-girlfriend. This court overruled commission's exception to that finding, noting that, in her deposition testimony, ex-girlfriend made it clear that she never intended for attorney to provide her with legal services, and that the trial court specifically found that neither attorney nor ex-girlfriend, at any point in time, acted as if, or operated under the impression that an attorney-client relationship existed. Attorney Grievance Com'n of Maryland v. Shoup, 410 Md. 462, 979 A.2d 120, 136.

Md.2009. Com. (h) cit. but dist. and cit. in case cit. in disc. After a private attorney hired by defendant failed to appear on the day of trial and defendant decided to proceed pro se rather than being represented by attorney's law partner, a jury found defendant guilty of first-degree burglary. The court of appeals affirmed. Reversing, this court held, inter alia, that the trial court erred in concluding that defendant waived his right to an attorney and voluntarily elected to represent himself; while members of a law firm were sometimes treated as the same attorney for conflict-of-interests purposes, where, as here, the defendant exercised his right to select the private counsel of his choice, the defendant could not be forced to either accept an attorney that was not retained or to proceed pro se in the event that the chosen attorney did not appear on the date of the defendant's trial. Gonzales v. State, 408 Md. 515, 970 A.2d 908, 914, 920.

Md.2008. Subsec. (1)(b) quot. in sup. After state attorney grievance commission filed in this court a petition for discipline or remedial action against attorney, and a trial court hearing the case at this court's direction issued findings and conclusions, commission recommended a reprimand as the appropriate sanction. Agreeing that reprimand was the appropriate sanction, this court held that there was no inconsistency between the trial court's finding that attorney failed to communicate the scope of his representation of client at removal proceedings in Immigration Court in violation of state rules of professional conduct with its finding that no attorney-client relationship existed in respect to those proceedings; no attorney-client relationship existed with respect to the removal proceedings by clear and convincing evidence, because there was scant evidence that client manifested to attorney his intent that attorney provide him with legal services in connection with those proceedings. Attorney Grievance Com'n v. Akpan, 405 Md. 277, 950 A.2d 820, 822-823.

Md.2008. Subsec. (1)(b) quot. in case quot. in sup. Attorney grievance commission filed a petition for disciplinary action against attorney in connection with her representation of six former clients. After referral, the trial court made findings of fact and conclusions of law, culminating in a determination of numerous rules violations. Ordering disbarment, this court rejected attorney's claim that her attorney-client relationship with one of her clients did not begin until client signed the retainer agreement. The court concluded that client clearly manifested her intent to have attorney provide her with legal representation several months earlier when she handed over to attorney the documents and papers necessary to the representation and remitted a retainer fee, and that attorney's acceptance of the papers and fees manifested her intent to provide legal representation to client. Attorney Grievance Com'n of Maryland v. Kreamer, 404 Md. 282, 946 A.2d 500, 521.

Md.2007. Quot. in case quot. in disc. Attorney Grievance Commission filed a petition for disciplinary action against attorney, alleging violations of the rules of professional conduct in connection with his transactions involving a business associate. The trial court found that attorney falsely stated during a deposition in his personal-bankruptcy case that he was associate's attorney, and later invoked the attorney-client privilege in that same deposition to refuse to answer questions as to whether associate loaned him money. Ordering attorney disbarred, this court concluded that attorney knowingly testified falsely under oath that an attorney-client relationship existed when none was ever formed. The court found nothing to substantiate attorney's affirmative defense that business associate reasonably believed him to be his attorney; attorney had never previously represented associate, and attorney formed his limited-liability corporation as part of a self-interested business transaction, rather than as a mere agent for associate. Attorney Grievance Com'n of Maryland v. Siskind, 401 Md. 41, 930 A.2d 328, 346.

Md.2006. Adopted in case quot. in sup. After witness in a criminal trial invoked his Fifth Amendment right against self-incrimination and refused to testify, the trial court imposed on witness a five-month sentence for direct criminal contempt. The court of special appeals determined that the trial court made an adequate independent determination of the validity of witness's Fifth Amendment invocation. This court reversed and remanded with

directions to dismiss the contempt action, holding that witness was deprived of his Sixth Amendment right to effective assistance of counsel when he was held in contempt based on his counsel's unauthorized disclosure of privileged information regarding the nature of his advice to witness and his opinion as to the applicability of the Fifth Amendment privilege. The court stated that an attorney-client privilege existed when witness and counsel conferred about the validity of witness's assertion of his Fifth Amendment right. Smith v. State, 394 Md. 184, 905 A.2d 315, 325.

Md.2003. Quot. in sup., com. (e) quot. in sup. Attorney Grievance Commission filed petition for disciplinary action against attorney who was named personal representative and sole legatee in will prepared by attorney for client, alleging violations of Maryland Rules of Professional Conduct. Hearing judge held that attorney violated Rule 1.8(c). This court overruled attorney's exceptions, concluding that hearing judge's finding that attorney-client relationship existed when client's will was created was supported by clear and convincing evidence. Attorney-client relationship could arise by implication from client's reasonable expectation of legal representation and attorney's failure to dispel expectation. Here, attorney had done legal work for client before, client sought attorney's advice and assistance for matter within attorney's professional competence, and attorney told police following discovery of client's remains that he was client's attorney. Attorney Grievance Com'n of Maryland v. Brooke, 374 Md. 155, 821 A.2d 414, 425.

Md.Spec.App.

Md.Spec.App.2014. Subsec. (1)(b) quot. in case quot. in sup. Assignee of the fee interests of an attorney in several settlements that had not yet been disbursed sought judicial review of the decision of the Trustees of the Client Protection Fund of the Bar of Maryland (Fund) to deny its claims for reimbursement of the amounts allegedly owed to it under the assignment agreements, after attorney failed to pay assignee its assigned interests and was later disbarred. The trial court affirmed Fund's determination. Affirming, this court held, inter alia, that assignee lacked standing to make claims for compensation arising out of its assignment agreements with attorney, because there was no attorney—client relationship between them. Pointing to the test set out in Restatement Third of the Law Governing Lawyers § 14, the court reasoned that assignee made no manifestations in the assignment agreements that it intended for attorney to provide legal services to it. American Asset Finance, LLC v. Trustees of Client Protection Fund of Bar of Maryland, 216 Md.App. 306, 86 A.3d 73, 80.

Md.Spec.App.2013. Cit. in ftn., adopted in case cit. in sup. and quot. in ftn. Former husband moved to set aside separation agreements that he had entered into with former wife without the advice of independent legal counsel, alleging, among other things, that the agreements were invalid because there was a confidential relationship between husband and the attorney who represented wife in preparing the agreements. The trial court denied husband's motion. Affirming, this court held that, while the trial court erred in concluding that no attorney-client relationship existed between husband and attorney in connection with attorney's prior preparation of an immigration petition for husband, there was no confidential relationship between husband and attorney in connection with her preparation of the separation agreements. Attorney was not representing husband when she prepared the agreements; among other things, husband had no contact with attorney regarding the agreements, wife told husband that she would ask attorney to prepare the agreements for her, husband acknowledged both in an email to wife and in his motion to set aside that attorney did not represent him in preparing the agreements, and the agreements specifically advised husband to seek independent counsel. Shih Ping Li v. Tzu Lee, 210 Md.App. 73, 62 A.3d 212, 232.

Mass.

Mass.2011. Com. (h) quot. in sup. Named partner of a law firm petitioned for interlocutory relief from a trial court order denying firm's request to withdraw as counsel for a client who had entered into a contingent-fee agreement with firm and ordering named partner to enter an appearance on client's behalf. This court remanded for entry of a judgment vacating the order to the extent that it required named partner himself to appear on behalf of client, holding, among other things, that the language of the agreement was clear that the agreement was between client

and firm, and not between client and named partner individually; the fact that named partner did not specify on the agreement that he was signing on behalf of firm did not render the agreement ambiguous. In re Kiley, 459 Mass. 645, 652, 947 N.E.2d 1, 7.

Mich.

Mich.2021. Com. (b) quot. in ftn.; coms. (c) and (e) cit. in ftn. Law office sued law firm and clients of law firm, alleging that defendants breached the terms of a referral agreement entered into between the parties, under which defendants would pay a portion of an underlying personal-injury judgment to plaintiff as compensation for plaintiff referring law firm to clients. The trial court entered judgment in part for plaintiff. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. This court affirmed in part, reversed in part, vacated in part, and remanded, holding, inter alia, that defendants bore the burden of persuasion in establishing their affirmative defense that the referral agreement was unenforceable because plaintiff did not have an attorney–client relationship with clients. Citing Restatement Third of the Law Governing Lawyers § 14, the court observed that whether clients and plaintiff intended to enter into such a relationship could be inferred from their actions and the circumstances. Law Offices of Jeffrey Sherbow, PC v. Fieger & Fieger, PC, 968 N.W.2d 367, 383, 384.

Minn.

Minn.2015. Cit. in treatise cit. in sup. In disciplinary proceedings, attorney was charged with violating the rules of professional conduct by, among other things, entering into an investment agreement with a client who was a member of his household. After a hearing, the referee found that attorney engaged in the majority of the alleged misconduct and recommended that attorney be suspended from the practice of law for 90 days. This court suspended attorney indefinitely with no right to petition for reinstatement for one year, holding, among other things, that the referee did not clearly err when he found that an attorney—client relationship existed between attorney and the client when they executed the investment agreement, because the client sought legal advice from attorney to help her close a conservatorship and invest her money, attorney provided her with legal advice and a power of attorney, and it was reasonable for her to have relied on attorney's legal advice. The court noted that, under Restatement Third of the Law Governing Lawyers § 14, it was incumbent on the lawyer to clarify any ambiguity as to whether an attorney—client relationship had been created. In re Disciplinary Action against Severson, 860 N.W.2d 658, 666.

Miss.

Miss.2016. Cit. in case quot. in sup. and cit. in ftn. (citing § 26 of T.D. No. 5, 1992, which is now § 14 of the Official Text) (erron. cit. as P.D. No. 6, 1990). Husband filed a legal-malpractice claim against lawyer and law firm, alleging wrongful conduct in connection with the administration of his late wife's estate. The trial court granted summary judgment for defendants. Reversing and remanding, this court held that there was a genuine issue of material fact concerning the existence of an attorney–client relationship between the parties. The court referred to the test set forth in the Restatement of the Law Governing Lawyers for determining when a relationship between a lawyer and client arose in pointing to evidence that defendants not only represented to plaintiff that they were his attorneys, but that they also made the same representation to the court in wife's probate proceedings. Gibson v. Williams, Williams & Montgomery, P.A., 186 So.3d 836, 848.

Miss.2008. Subsecs. (1)(a) and (1)(b) and com. (e) quot. in sup. Inmate filed a complaint against attorney with the state bar, after attorney's paralegal, without attorney's knowledge or consent, corresponded with inmate on attorney's letterhead and worked on inmate's case. The complaint tribunal found, among other things, that attorney did not violate professional rules of conduct regarding representation of clients, because no attorney-client relationship existed between attorney and inmate. Affirming that portion of the decision, this court held, inter alia, that there was insufficient evidence to find that attorney, by her words, actions, or conduct, indicated that paralegal had authority to communicate her consent to undertake the representation of a client, and that no attorney-

client relationship was established by attorney's failure to communicate her lack of consent to represent inmate. The court noted that attorney had no knowledge of inmate's case or paralegal's correspondence with inmate and, therefore, could not reasonably have known about inmate's reliance on her services. Mississippi Bar v. Thompson, 5 So.3d 330, 335, 336.

Miss.1991. Quot. in ftn. in sup. (quoting § 26, P.D. No. 6, 1990, which is now § 14). An inmate sued his attorney, alleging fraud, breach of trust, breach of contract, misrepresentation, and negligence and seeking compensatory and punitive damages. The inmate, who hired and paid the attorney to pursue an application for postconviction relief, claimed the attorney substantially failed to perform the duties incumbent upon him. The trial court dismissed the complaint on its face. This court reversed and remanded for further proceedings, holding that the inmate's payment of the attorney's fee formed an attorney-client relationship creating certain duties by the attorney toward the inmate, the nonperformance of which might entitle the inmate to relief. Singleton v. Stegall, 580 So.2d 1242, 1244.

Miss.App.

Miss.App.2009. Quot. in sup. Purchaser of real property sued seller's attorney, who prepared the deed and other documents for the transaction, alleging that defendant committed malpractice in failing to advise her of a mortgage lien on the property. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that the evidence was insufficient to establish an attorney-client relationship between the parties. The court reasoned that plaintiff did not select attorney or direct him to prepare the documents, did not request or receive any legal advice from attorney or his staff, and paid the cost of the document preparation—which was undertaken by the seller—as part of the deal for the purchase of the property. Grandquest v. Estate of McFarland, 18 So.3d 324, 327.

Miss.App.2008. Quot. in case quot. in sup. (citing § 26 of Preliminary Draft No. 6, 1990, which is now § 14 of the Official Text). Lender sued borrower, seeking, among other things, payment under a settlement that had been entered as an agreed judgment in a prior action between the parties. The trial court ruled in favor of lender. Affirming, this court held, inter alia, that borrower was bound by the settlement even though he had not signed it, because the settlement had been signed by an attorney with whom borrower had an attorney-client relationship. The court noted that, while borrower, proceeding pro se, had answered the complaint and filed a counterclaim in the prior action, he subsequently authorized attorney to negotiate and enter into a settlement of the action with lender on his behalf, and attorney consented. Franklin v. BSL, Inc., 987 So.2d 1050, 1053.

Mo.App.

Mo.App.2011. Cit. in sup., cit. in ftn. Former wife petitioned for a writ of prohibition preventing the trial court from enforcing its order requiring law firm to withdraw from its representation of her in connection with former husband's motion to modify a dissolution decree. This court entered an order in prohibition, holding that husband did not have an attorney-client relationship with law firm. While husband had consulted with law firm prior to filing the dissolution action, he did not hire law firm to represent him, and thus was a former prospective client rather than a former client; in addition, husband did not testify that during his consultation with law firm he sought or received any legal advice or assistance from law firm, and there was no evidence that law firm intended to give legal advice and assistance to husband. State ex rel. Thompson v. Dueker, 346 S.W.3d 390, 394.

Nev.

Nev.2020. Com. (f) quot. in sup. In an action brought by state senators, among others, against senate majority leader and senate secretary for allegedly illegal legislative conduct, plaintiffs filed a motion to disqualify defense counsel on the ground that counsel, as the legislative counsel bureau legal division, had a concurrent conflict of interest with plaintiffs, because counsel represented all members of the state senate. The trial court denied defendants'

petition for writ of mandamus. This court granted defendants' petition, finding that plaintiffs lacked standing to disqualify defense counsel, because counsel represented the legislature and not its members, counsel's defense of defendants as to their actions regarding the bills was ancillary to counsel's defense of the bills themselves, and plaintiffs were not acting on behalf of the legislature when challenging the bills. The dissent argued that the majority should have denied defendants' requested relief, because, under Restatement Third of the Law Governing Lawyers § 14, Comment *f*, whether defense counsel represented members of the legislature or only the legislature itself was a finding of fact, and the record did not indicate that the trial court abused its broad discretion in making its factual finding that defense counsel represented plaintiffs as well as defendants. State ex rel. Cannizzaro v. First Judicial District Court in and for County of Carson City, 466 P.3d 529, 535.

Nev.2005. Com. (f) cit. in ftn. in sup. Lender's assignees sued guarantors of bankrupt borrower, seeking to collect on personal guarantees. The trial court granted plaintiffs' motion to disqualify defendants' counsel. This court denied defendants' petition for a writ of mandamus, holding, inter alia, that the trial court did not abuse its discretion by concluding that attorney had previously represented assignees' affiliates in a substantially related matter, and, given that lender and assignees were affiliates' successors in interest, that assignees were attorney's former clients. The court noted that, although a lawyer representing a corporate entity generally represented only the entity itself, the inquiry into an attorney-client relationship was very fact-specific, and, in certain situations, courts had found a sufficient connection to other persons or entities to warrant the lawyer's disqualification. Waid v. Eighth Judicial District Court, 121 Nev. 605, 119 P.3d 1219, 1223.

N.H.

N.H.2009. Com. (c) cit. in sup. Professional Conduct Committee filed a petition recommending that attorney be disbarred. Ordering that attorney be suspended for two years, this court held that attorney who represented ward in connection with conservatorship of ward's estate violated conduct rule barring representations that were directly adverse to another client when he also represented ward's wife and conservator of ward's estate in their pursuit of a limited guardianship of ward for medical purposes. The court concluded that sufficient evidence existed that attorney formed attorney-client relationships with ward's conservator and wife, who consulted with attorney regarding the guardianship proceeding; consultation with the intent of seeking legal advice was the fundamental basis of the attorney-client relationship. In re Wyatt's Case, 159 N.H. 285, 982 A.2d 396, 409.

N.J.Super.App.Div.

N.J.Super.App.Div.2007. Cit. in ftn., com. (f) quot. in sup. Daughter who was executor/cobeneficiary of her mother's estate brought, along with her cobeneficiary sisters and estate, action for legal malpractice against attorney and law firm for allegedly giving daughter tax advice that resulted in large tax liability for each of the individual plaintiffs. Reversing as to daughter, this court held, inter alia, that defendants failed to clearly define the scope of their representation of daughter, and that daughter reasonably could have expected to be represented both as an individual and as executor. The court pointed to the wording of the retainer agreement and the fact that defendants did not expressly advise daughter that their representation was limited to her duties and responsibilities as an executor. Estate of Albanese v. Lolio, 393 N.J.Super. 355, 375, 923 A.2d 325, 337, 338.

N.J.Super.

N.J.Super.1999. Quot. in disc. (citing § 26, Prop. Final Draft No. 1, 1996, which is now § 14). State moved to disqualify murder defendant's law firm on the ground that firm had an ongoing professional relationship with the lead detective in the case, for whom it had provided representation in an unrelated workers' compensation matter. The trial court denied the motion. Affirming, this court held that detective became firm's former client once a final judgment was entered in the compensation proceedings, following which neither party undertook to reestablish the attorney-client relationship, and that firm's representation of defendant in the criminal case would not create an appearance of impropriety. State v. Bruno, 323 N.J.Super. 322, 732 A.2d 1136, 1142.

N.J.Super.1997. Coms. (a) and (e) cit. in sup., com. (h) quot. in sup. (citing § 26, Proposed Final Draft No. 1, 1996, which is now § 14). When an attorney let a statute of limitations run after he was retained to represent a husband and wife in a personal injury action, the clients sued the attorney and the attorney's former law firm for legal malpractice. The trial court granted the law firm summary judgment; this court reversed and remanded, holding that fact issues existed as to whether the law firm was liable for the attorney's malpractice. Plaintiffs made a sufficient showing that the firm became their counsel by virtue of both the retainer agreement and the fact that the attorney had at least apparent authority to enter into such agreements on the firm's behalf. Although the firm did not know of the clients' case and for that reason failed to notify plaintiffs that its relationship with the attorney was terminated, the retainer agreement referred to the firm as the firm retained. Furthermore, evidence of the firm's role in the attorney's cases and its entitlement to a share of the proceeds of any recovery obtained by the attorney was not developed, nor did the court know what the firm did to assure knowledge of, and proper control over, cases retained by the attorney as “of counsel” to the firm. Staron v. Weinstein, 305 N.J.Super. 236, 701 A.2d 1325, 1327, 1328.

N.J.Super.1996. Quot. in sup., illus. 1 to com. (e) quot. in sup. (citing § 26, Proposed Final Draft, 1996, which is now § 14). A female state employee, represented by a New Jersey law firm, sued the Speaker of the New Jersey Assembly for sexual harassment during the period from July 1994 to October 1995. In March 1993, an attorney in the same law firm, at the Speaker's request, agreed to undertake an investigation of alleged sexual harassment of State employees in the Office of Legislative Services. Trial court found that the attorney's undertaking created an appearance of impropriety and entered an order disqualifying the attorney and his law firm from representing the state employee in her lawsuit. This court affirmed the order of disqualification, holding that under the Rules of Professional Conduct both an actual conflict of interest and an appearance of a conflict of interest were present. The court determined that an attorney-client relationship was present between the attorney and the State, because even though the attorney was not ultimately retained by the State, he was consulted to conduct an investigation of sexual harassment of employees in a State office, he agreed to undertake that investigation, and he received confidential information and the Speaker's views on the subject of sexual harassment of State employees and how the State government was responding to the problem. Herbert v. Haytaian, 292 N.J.Super. 426, 678 A.2d 1183, 1188.

N.Y.

N.Y.2009. Com. (f) quot. in disc. Absent class member—i.e., class member who was not a named party—in a federal securities class action brought a special proceeding seeking a judgment directing law firms to turn over their files related to their representation of plaintiff and other class members in their prosecution of the class actions. The trial court granted plaintiff's petition; the appellate division reversed. Affirming, this court held that plaintiff, unlike a represented party in traditional individual litigation, did not enjoy a presumptive right of access to law firms' case files upon the representation's termination; moreover, plaintiff, who long ago had been unable to convince a federal district court that anything in 23 boxes of documents he already had been granted suggested fraud, did not make an adequate showing to compel law firms to produce their files, in particular, the firms' work product and analysis relating to the class actions. Wyly v. Milberg Weiss Bershad & Schulman, LLP, 12 N.Y.3d 400, 410-411, 880 N.Y.S.2d 898, 908 N.E.2d 888, 895.

N.D.

N.D.2003. Com. (a) cit. in sup. Hearing panel recommended that attorney be suspended from practice of law for one year and pay costs. Attorney had threatened the father of his fiancée's child that, if father did not sign document seeking his consent to discuss child-visitation rights outside of his lawyer's presence, father would not receive visitation with his child that night. Father refused to sign and was denied visitation. This court adopted panel's recommendations, concluding that there was clear and convincing evidence that attorney violated state rules of professional conduct. The court determined that attorney had attorney-client relationship with his fiancée when he spoke to father, because attorney implied an attorney-client relationship when he inserted himself into the dispute

between father and fiancée and acted with apparent authority. In re Application for Disciplinary Action Against Hoffman, 2003 ND 161, 670 N.W.2d 500, 504.

Ohio.

Ohio.2011. Cit. in sup. Nonprofit corporation brought a legal-malpractice action against attorney and law firm that were retained by a dissident member of corporation's board of trustees in his attempt to regain control of corporation, alleging that defendants had breached their obligations as attorneys and had negligently represented that a quorum was present at a board meeting during which dissident member removed opposing members from the board. The trial court granted summary judgment for defendants; the court of appeals reversed. Reversing, this court held that the malpractice claim asserted by plaintiff failed because there was no evidence that an attorney-client relationship existed between it and defendants. New Destiny Treatment Ctr., Inc. v. Wheeler, 129 Ohio St.3d 39, 44, 2011-Ohio-2266, 950 N.E.2d 157, 162.

Ohio App.

Ohio App.2022. Cit. in sup., cit. in case cit. in sup. Cotrustee, who was the manager of a family limited-liability company and a purported beneficiary of the family trust, brought a malpractice claim against attorneys who prepared settlor's estate documents. The trial court granted defendants' motion for summary judgment. This court affirmed, holding that plaintiff lacked standing to bring a legal-malpractice claim against defendants, because there was no attorney–client relationship between the parties. Citing Restatement Third of the Law Governing Lawyers § 14, the court explained that there was no express relationship between the parties, because plaintiff did not sign an engagement letter with defendants, and defendants' represention of the limited-liability company did not place the parties in a relationship based solely on plaintiff's position as the company's manager; furthermore, the fact that defendants wrote legal memoranda to plaintiff, her siblings, and settlor, in which defendants discussed settlor's estate plans, did not create an implied relationship between the parties. Meehan v. Smith, 192 N.E.3d 1214, 1221, 1222.

Tenn.

Tenn.2014. Quot. in sup. Defendant who was convicted of second-degree murder appealed, claiming in part that the trial court erred in ruling that the attorney—client privilege did not apply to communications between defendant and an attorney she spoke to at the crime scene. The court of appeals found that that defendant had no reasonable belief or expectation that attorney had assented to the formation of an attorney—client relationship. This court vacated the conviction on other grounds, but nevertheless held that the attorney—client privilege was inapplicable in this instance. The court pointed out that, as described in Restatement Third of The Law Governing Lawyers § 14, an attorney—client relationship arose when a person sought and received legal advice from an attorney in circumstances in which a reasonable person would have relied on such advice. In this case, attorney told defendant numerous times that she was not acting as her attorney and was present at the scene only because of her friendship with the victim. State v. Jackson, 444 S.W.3d 554, 599-600.

Tex.App.

Tex.App.2008. Cit. and quot. in disc. Investors in start-up venture sued venture's lawyer for breach of fiduciary duty, among other claims, alleging that defendant failed to incorporate the terms of investors' preliminary agreement, without changing them, into the final, signed partnership agreement with venture. The trial court entered summary judgment against plaintiffs. Affirming, this court held, inter alia, that the evidence did not raise a fact question concerning the existence of an attorney-client relationship between the parties. The court concluded that, while attorney-client relationships could arise by implication, determination of whether a contract could be implied required use of an objective standard—what the parties said and did—not their unstated subjective beliefs;

here, there was no showing that plaintiffs ever manifested their intent that defendant provide legal services to them or that defendant reasonably should have known that plaintiffs relied on him to provide them with legal services. Span Enterprises v. Wood, 274 S.W.3d 854, 857, 858.

Tex.App.2003. Com. (e) cit. in disc. Law firms and lawyers who had entered into contingency-fee agreement with client and represented client in its trade-secrets claim moved to confirm arbitration award in dispute over attorneys' fees. Trial court confirmed arbitration award in favor of law firms, and entered summary judgment for lawyers. Appellate court affirmed in part, reversed in part, and remanded. On rehearing, this court affirmed trial court's judgment, holding, inter alia, that because evidence did not conclusively establish existence of an attorney-client relationship between lawyers and client before fee agreement was signed, whether such a relationship existed was a question of fact for arbitrators. The arbitrators' finding that lawyers did not represent client during negotiation of fee agreement, and thus did not owe client any fiduciary duties prior to execution of fee agreement, was not in manifest disregard of the law. Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 255.

Utah

Utah, 2005. Cit. and quot. in disc., com. (g) cit. and quot. in disc. and cit. in ftn. After physician's medical-malpractice insurer sought a declaration that it had no duty to defend absent physician in a malpractice suit against him, patient moved for appointment of counsel to represent physician's interests. The trial court appointed an attorney, who petitioned this court for extraordinary relief. Affirming, this court held that the trial court did not abuse its discretion when it appointed counsel for an absent, nonindigent civil litigant, and that, despite ethical concerns raised by physician's absence, such as the lack of consent by physician to the lawyer-client relationship, good-faith compliance with the appointment order provided attorney with a safe harbor in which to be free from exposure to disciplinary action. The court concluded that physician's consent to the representation could be fairly implied. Burke v. Lewis, 2005 UT 44, 122 P.3d 533, 541, 542.

Va.

Va.2011. Quot. in sup. County citizens petitioned for the removal of four members of the county board of supervisors. The trial court entered an order of nonsuit and imposed sanctions against petitioners. This court reversed the trial court's judgment imposing sanctions, holding that the trial court erred in sanctioning petitioners, because they were not the true parties to the removal action; the only parties to the action were the commonwealth, as the moving party, and supervisors, as the responding parties. The court noted that a petitioner in a removal action was analogous to a victim in a criminal proceeding, since, in both cases, the commonwealth's attorney did not owe the petitioner or victim a professional duty. Johnson v. Woodard, 281 Va. 403, 707 S.E.2d 325, 329.

N.M.C.C.A.

N.M.C.C.A.2020. Com. (g) quot. in ftn. Servicemember pleaded to and was found guilty of using cocaine. The trial court sentenced him to a term of confinement and a bad-conduct discharge, which was suspended and later remitted. After the adjournment of the court-martial, servicemember was administratively separated from the military while his mandatory appeal was pending. In response to a novel pleading filed by appointed appellate counsel for servicemember, this court held that servicemember was entitled to continued appellate representation by counsel, notwithstanding counsel's inability, despite the exercise of due diligence, to locate or communicate with servicemember. The court cited Restatement Third of the Law Governing Lawyers § 14 in support of its conclusion that counsel was ethically required to go forward with the representation absent affirmative indication that servicemember wished to waive or withdraw his appeal. United States v. Harper, 80 M.J. 540, 546.

End of Document

Restatement (Third) of the Law Governing Lawyers § 15 (2000)

§ 15 A Lawyer's Duties to a Prospective Client

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

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

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

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

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

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

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

Comment:

a. *Scope and cross-references.* This Section summarizes the duties of a lawyer to a person seeking legal services. Duties attach even when no client-lawyer relationship ensues. On application of the attorney-client privilege to communications with a prospective client, see § 72. Application of rules parallel to those of § 132(2) on former-client conflicts of interest and those of §§ 123- 124 on imputation of conflicts is considered in Comment *c* hereto. Whether a person who consults a lawyer forms a client-lawyer relationship is determined under § 14. On duties owed by a lawyer to nonclients, see §§ 51 and 56.

b. *Rationale.* Prospective clients are like clients in that they often disclose confidential information to a lawyer, place documents or other property in the lawyer's custody, and rely on the lawyer's advice. But a lawyer's discussions with a prospective client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client's problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients, as indicated in the Section and following Comments.

c. *Confidential information of a prospective client.* It is often necessary for a prospective client to reveal and for the lawyer to learn confidential information (see § 59) during an initial consultation prior to their decision about formation of a client-lawyer relationship. For that reason, the attorney-client privilege attaches to communications of a prospective client (see § 70, Comment *c*). The lawyer must often learn such information to determine whether a conflict of interest exists with an existing client of the lawyer or the lawyer's firm and whether the matter is one that the lawyer is willing to undertake. In all instances, the lawyer must treat that information as confidential in the interest of the prospective client, even if the client or lawyer decides not to proceed with the representation (see Subsection (1)(a); see also § 60(2)). The duty exists regardless of how brief the initial conference may be and regardless of whether screening is instituted under Subsection (2)(a)(ii). The exceptions to the principles of confidentiality and privilege apply to such communications (see §§ 61- 67).

Subsection (2) states rules parallel to those governing former-client conflicts under § 132, but it relaxes two analogous former-client rules. First, personal disqualification of a lawyer who deals with a prospective client occurs only when the subsequent matter presents the opportunity to use information obtained from the former prospective client that would be "significantly harmful." In contrast, § 132 applies whenever there is a "substantial risk" of adverse use of the former client's confidential information, regardless of the degree of threatened harm. Second, screening is permitted under Subsection (2)(a) so long as the lawyer takes reasonable steps to limit his or her exposure to confidential information during the initial consultation. In contrast, screening under § 124(2)(a) is permissible only when information obtained in the earlier representation would not likely be of significance in the subsequent representation.

In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information as reasonably appears necessary for that purpose. Where that information indicates that a conflict of interest or other reasons for nonrepresentation exists, the lawyer should so inform the prospective client or simply decline the representation. If the prospective client still wishes to retain the lawyer, and if consent is possible under § 122(1), consent from any other affected present or former client should be obtained before further confidential information is elicited. The lawyer may also condition conversations with the prospective client on the person's consent to the lawyer's representation of other clients (see § 122, Comment *d*) or on the prospective client's agreement that any information disclosed during the consultation is not to be treated as confidential (see § 62). The prospective client's informed consent to such an agreement frees the lawyer to represent a client in a matter and to use in that matter, but only if the agreement so provides, confidential information received from the prospective client. A prospective client may also consent to a representation in other ways applicable to a client under § 122.

Even in the absence of such an agreement, when a consultation with a prospective client does not lead to a lawyer's retention the lawyer is not always prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter. A prospective client's assurance of confidentiality through prophylactic prohibition as broad as that required in the case of a former client under § 132 must yield to a reasonable degree to the need of the legal system and to the interests of the lawyer and of other clients,

including the need of a lawyer to obtain information needed to determine whether the lawyer may properly accept the representation without undue risk of prohibitions if no representation ensues. Thus, under Subsection (2), prohibition exists only when the lawyer has received from the prospective client information that could be significantly harmful to the prospective client in the matter. In such an instance and absent the prospective client's consent, the lawyer must withdraw from a substantially related representation commenced before the prospective client communicated with the lawyer and must not represent a client in such a matter in the future, including a client the lawyer ordinarily represents on a continuing basis.

When a tribunal is asked to disqualify a lawyer based on prior dealings with a former prospective client, that person bears the burden of persuading the tribunal that the lawyer received such information. The prohibition is imputed to other lawyers as provided in § 123, but may be avoided if all personally prohibited lawyers are screened as stated in § 124(2)(b) and (2)(c) (see Subsection (2)(a)). In that situation, screening avoids imputation even when the requirements of § 124(2)(a) have not been met. In deciding whether to exercise discretion to require disqualification, a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purpose of preventing the lawyer or the lawyer's firm from representing an adverse party rather than in a good-faith endeavor to determine whether to retain the lawyer. The tribunal may also consider whether the disclosure of significantly harmful confidential information resulted from the failure of the lawyer or the prospective client to take precautions reasonable in the circumstances. In addition to screening, Subsection (2)(b) permits representation if both the former prospective client and any affected present client consent.

Illustrations:

1. Person makes an appointment with Lawyer to discuss obtaining a divorce from Person's Spouse. During the initial consultation, Lawyer makes no effort to limit the conversation or obtain any agreement on Person's part to nonconfidentiality. During the course of the one-hour discussion, Person discusses his reasons for seeking a divorce and the nature and extent of his and Spouse's property interests. Because Person considers Lawyer's suggested fee too high, Person retains other counsel. Thereafter, Spouse seeks Lawyer's assistance in defending against Person's divorce action. Lawyer may not accept the representation of Spouse. If Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).

2. The President of Company A makes an appointment with Lawyer, who had not formerly had dealings with Company A. At the outset of the meeting, Lawyer informs President that it will first be necessary to obtain information about Company A and its affiliates and about the general nature of the legal matter to perform a conflicts check pursuant to procedures followed in Lawyer's firm. President supplies that information in a 15-minute meeting, including the information that the matter involves a contract dispute with Company B. The ensuing conflicts check reveals a conflict of interest with another Client of the firm (other than Company B), and Lawyer accordingly declines the representation. Lawyer and the other firm lawyers may continue representing Client (see Subsection (2)(a)).

3. Same facts as Illustration 2, except that Lawyer is later approached by Company B to represent it in its contract dispute with Company A. Both Lawyer and other firm lawyers may accept the representation unless Company A had disclosed to Lawyer confidential information that could be significantly harmful to Company A in the contract dispute. Even if such a disclosure had been made, if Lawyer is screened as provided in § 124(2)(b) and (c), Lawyer's disqualification is not imputed to other members of Lawyer's firm (see Subsection (2)(a)).

4. Same facts as Illustration 2, except that President wishes their first meeting both to discuss conflicts facts and to review Lawyer's preliminary thoughts on the merits of the contract

dispute. Lawyer states willingness to do so only if Company A agrees that Lawyer would not be required to keep confidential information revealed during the preliminary discussion. President agrees, and the preliminary discussion ranges over several aspects of the dispute. Lawyer later declines the representation because of a conflict involving another firm client. Thereafter, Lawyer is approached by Company B to represent it in its contract dispute with Company A. Lawyer may accept the representation. Because of President's agreement, Lawyer is not required to keep confidential from Company B information learned during the initial consultation.

d. Protecting a prospective client's property. When prospective clients confide valuables or papers to a lawyer's care, the lawyer is under a duty to safeguard them in the same way as valuables or papers of any person that are in the lawyer's possession as the result of a professional relationship (see §§ 44- 46). Ordinarily, if no client-lawyer relationship ensues, the lawyer must promptly return all material received from the prospective client.

e. A lawyer's duty of reasonable care to a prospective client. When a prospective client and a lawyer discuss the possibility of representation, the lawyer might comment on such matters as whether the person has a promising claim or defense, whether the lawyer is appropriate for the matter in question, whether conflicts of interest exist and if so how they might be dealt with, the time within which action must be taken and, if the representation does not proceed, what other lawyer might represent the prospective client. Prospective clients might rely on such advice, and lawyers therefore must use reasonable care in rendering it. The lawyer must also not harm a prospective client through unreasonable delay after indicating that the lawyer might undertake the representation. What care is reasonable depends on the circumstances, including the lawyer's expertise and the time available for consideration (see § 52).

If a lawyer provides advice that is intended to be only tentative or preliminary, the lawyer should so inform the prospective client. Depending on the circumstances, the burden of removing ambiguities rests with the lawyer, particularly as to disclaiming conclusions that the client reasonably assumed from their discussion, for example whether the client has a good claim.

f. Other duties to a prospective client. In addition to duties of confidentiality and care, the lawyer is subject to general law in dealing with a prospective client. The lawyer, for example, may not give the prospective client harmful advice calculated to benefit another client (see §§ 51(2) & 56).

g. Compensation of a lawyer for consultation with a prospective client. In the absence of circumstances indicating otherwise, prospective clients would ordinarily not expect to pay for preliminary discussions with a lawyer. When a client-lawyer relationship does not result, a lawyer is not entitled to be compensated unless that has been expressly agreed or it is otherwise clear from the circumstances that payment will be required.

Reporter's Note

*Comment c. Confidential information of a prospective client.*See § 72, Comment *d,* and Reporter's Note thereto. The position in the Comment is in most respects consistent with the position in ABA Formal Opin. 90-358 (1990). Few cases address explicitly the question of the later disqualifying effect of having learned the minimum information necessary to decide whether or not the lawyer would have a conflict of interest taking a case. The position taken in the Comment follows from the principles of this section and § 132 on former-client conflicts of interest. See also, e.g., Poly Software Int'l, Inc. v. Su, 880 F.Supp. 1487 (D.Utah.1995) (no disqualification when lawyer avoided learning details of case in half-hour consultation with opposing party); Bennett Silvershein

Assoc. v. Furman, 776 F.Supp. 800 (S.D.N.Y.1991) (no disqualification warranted by brief consultation 10 years earlier about tenuously related matter); B.F. Goodrich Co. v. Formosa Plastics Corp., 638 F.Supp. 1050 (S.D.Tex.1986) (no disqualification where prospective client held one-day discussion of case with lawyer as part of "beauty contest" but client's inside legal counsel regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client); INA Underwriters Insurance Co. v. Rubin, 635 F.Supp. 1 (E.D.Pa.1983) (no disqualification where lawyer held only preliminary discussion with prospective client, and lawyer was screened); Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F.Supp. 663 (N.D.Ill.1983) (similar); Derrickson v. Derrickson, 541 A.2d 149 (D.C.1988) (husband had sought unsuccessfully to retain lawyer in divorce case 8 years earlier; lawyer permitted to take wife's later case arising out of same facts); Cummin v. Cummin, 695 N.Y.S.2d 346 (N.Y.App.Div.1999) (no disqualification when firm lawyer spoke briefly to opposing party 6 years earlier and was screened from present representation); State ex rel. DeFrances v. Bedell, 446 S.E.2d 906 (W.Va.1994). But see Bridge Prods. Inc. v. Quantum Chemical Corp., 1990 WL 70857 (N.D.Ill.1990) (disqualification required when lawyer did not seek waiver and potential client, in one-hour discussion as part of "beauty contest," disclosed its settlement terms and strategic advice of its other lawyers, despite screening instituted by lawyer's firm); Bays v. Theran, 639 N.E.2d 720 (Mass.1994) (telephone conversation about possibility of representation, including discussion of merits, created lawyer-client relationship barring representation of adverse party); Desbiens v. Ford Motor Co., 439 N.Y.S.2d 452 (N.Y.App.Div.1981) (firm reviewed plaintiff's file in auto accident and decided not to represent him; access to plaintiff's information now bars firm from handling defense of products-liability claim arising out of same facts); Lovell v. Winchester, 941 S.W.2d 466 (Ky.1997) (consultation with parties who expected lawyer to represent them bars later representation of opposing party). On the relevance of a prospective client's disclosures allegedly intended to produce disqualification, see In re American Airlines, Inc., 972 F.2d 605, 613 (5th Cir.1992).

*Comment d. Protecting a prospective client's property.*See § 44, Comment *b,* and Reporter's Note thereto; ABA Model Rules of Professional Conduct, Rule 1.15 (1983) (referring to "property of clients or third persons").

*Comment e. A lawyer's duty of reasonable care to a prospective client.*Meighan v. Shore, 40 Cal.Rptr.2d 744 (Cal.Ct.App.1995) (lawyer who speaks to wife and injured husband but represents only husband should advise wife of existence of loss-of-consortium claim); Miller v. Metzinger, 154 Cal.Rptr. 22 (Cal.Ct.App.1979) (lawyer who advises potential client must mention statute-of-limitations expiration); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn.1980) (lawyer who tells prospective client that client has no claim is liable for negligence in that opinion); Procanik v. Cillo, 543 A.2d 985 (N.J.Super.Ct.App.Div.1988) (lawyer who states reasons for declining case must be professionally reasonable in those reasons, but need not disclose lawyer's opinion on how likely it is that courts will overrule adverse precedent); compare Flatt v. Superior Court, 885 P.2d 950 (Cal.1994) (after initially interviewing prospective client, lawyer determined from conflict check within firm that intended defendant in suit was present firm client; no duty to inform prospective client to file suit within limitations period).

*Comment g. Compensation of a lawyer for consultation with a prospective client.*No authority on point has been found.

Case Citations - by Jurisdiction

—

M.D.Ala.
Colo.
Ill.App.
Ind.
Mo.App.
N.J.
N.Y.

N.D.
Tex.App.
Wis.

M.D.Ala.

M.D.Ala.2011. Cit. in case quot. in sup. Government, on behalf of alleged victims of sexual harassment by rental agent who managed certain rental housing properties, sued rental agent and others for housing discrimination under the Fair Housing Act (FHA). This court granted third-party housing advocate's motion to quash defendants' subpoena, holding that notes made by a paralegal of telephone conversations with persons who called in response to a form letter distributed by housing advocate were protected by the attorney-client privilege. The court reasoned that the callers contacted advocate to explore the possibility of raising potential FHA claims, whether or not they were fully knowledgeable about such claims or the particulars of the Act, and whether or not they ultimately agreed to be represented; preliminary consultations of this kind were protected by the attorney-client privilege. U.S. v. Gumbaytay, 276 F.R.D. 671, 679.

Colo.

Colo.2011. Subsec. (1)(c) cit. and quot. but not fol., quot. in case quot. in disc., and cit. in conc. op.; com. (d) cit. in case cit. in disc. Prospective clients brought an action for legal malpractice and negligent misrepresentation against attorney and her law firm, alleging that attorney provided them with incorrect information regarding a statute of limitations, causing them to miss a filing deadline. The trial court granted defendants' motion to dismiss. The court of appeals reversed as to plaintiffs' negligent-misrepresentation claim. Reversing and remanding, this court held, among other things, that the court of appeals erred in relying on Restatement Third of the Law Governing Lawyers § 15(1)(c) as a basis for establishing a duty of care owed by an attorney to a nonclient; under Colorado law, attorneys did not owe a duty of reasonable care to nonclients, and to hold that the tort of negligent misrepresentation might be based on an attorney's duty of reasonable care to prospective clients would diminish the requirement that a plaintiff establish an attorney-client relationship in order to state a claim of malpractice. The concurring opinion maintained that the scope of § 15(1)(c) and its applicability to legal-malpractice actions in Colorado was not before the court. Allen v. Steele, 252 P.3d 476, 479-481, 484-486.

Ill.App.

Ill.App.2015. Cit. in sup. Criminal defendant, who was in custody on charges of aggravated criminal sexual assault, was charged with solicitation of murder for hire, after he allegedly hired a fellow inmate to kill some or all of the witnesses in his sexual-assault case. The trial court granted defendant's motions to suppress certain wire-recorded evidence that the state had allegedly obtained using information from an attorney that defendant had consulted with about his sexual-assault case, but had not yet retained, who also happened to represent the inmate solicited by defendant. Reversing and remanding, this court held, among other things, that the evidence could not be suppressed on the basis that the attorney had violated any duty owed to defendant, as a prospective client, under Restatement Third of the Law Governing Lawyers § 15. The court reasoned, in part, that defendant failed to establish that the attorney received in his consultations with defendant information that could have been significantly harmful to defendant in either the sexual-assault case or the solicitation case. People v. Shepherd, 26 N.E.3d 964, 974.

Ind.

Ind.2009. Com. (c) quot. in sup. Criminal defendant appealed his convictions for the murders of his father, stepmother, and two stepsisters. Affirming, this court held, inter alia, that the trial court did not err in denying defendant's motion for a special prosecutor. Although the court recognized that the county prosecutor had, while in private practice, met with defendant while defendant was interviewing attorneys to act as his defense counsel

regarding the murder of his family, prosecutor was not retained by defendant. The court concluded that, for a prosecutor's previous involvement with a defendant to merit disqualification, there had to be some showing that the prosecutor received confidential information that could assist the prosecution, and here there was none. Pelley v. State, 901 N.E.2d 494, 507.

Mo.App.

Mo.App.2011. Cit. in sup., cit. in ftn., cit. in cases cit. and quot. in sup., com. (c) quot. in sup. Former wife petitioned for a writ of prohibition preventing the trial court from enforcing its order requiring law firm to withdraw from its representation of her in connection with former husband's motion to modify a dissolution decree. This court entered an order in prohibition, holding that husband did not have an attorney-client relationship with law firm. While husband had consulted with law firm prior to filing the dissolution action, he did not hire law firm to represent him, and thus was a former prospective client rather than a former client; in addition, husband did not show that the matter of the consultation and this matter were the same or substantially related and that the information received during the consultation would be significantly harmful if used in this matter. State ex rel. Thompson v. Dueker, 346 S.W.3d 390, 395, 396.

N.J.

N.J.2011. Subsec. (2) and com. (b) quot. in sup., com. (c) quot. in sup. and in ftn. Contractor sued corporate restaurant owner, seeking payment for construction renovation and remodeling work it performed for the restaurant. The trial court denied defendant's motion to disqualify plaintiff's counsel based on defendant's assertion that defendant's principal, 18 months earlier, had consulted with plaintiff's counsel as a prospective client. On interlocutory appeal, the court of appeals affirmed. Affirming, this court held that defendant failed to demonstrate that the matters disclosed during the consultation were either the same or substantially related to the subject matter of this action, or that the information disclosed during that consultation was significantly harmful to defendant in this action. O Builders & Associates, Inc. v. Yuna Corp. of NJ, 206 N.J. 109, 123-125, 127, 19 A.3d 966, 974, 975, 977.

N.Y.

N.Y.2015. Rptr's Note to com. (c) quot. in sup. In a divorce proceeding, husband filed a motion to disqualify wife's attorney on grounds of conflict of interest based on the prospective-client rule, alleging that he spoke with attorney's staff for an intake interview and exchanged information that could be harmful to his position. This court denied plaintiff's motion, holding that attorney did not receive confidential information or information that could be harmful to plaintiff in this matter, and the prospective-client rule did not apply, because plaintiff did not act in good faith. Citing Restatement Third of Law Governing Lawyers § 15, the court explained that the prospective-client rule contained an element of good faith, and concluded that plaintiff contacted attorney only out of motivation to ensure that attorney could not represent defendant. Bernacki v. Bernacki, 47 Misc.3d 316, 320, 1 N.Y.S.3d 761, 764.

N.D.

N.D.2015. Cit. in sup.; com. (g) quot. in sup. Father filed a disciplinary complaint against attorney, alleging that attorney agreed to represent him in a proceeding to modify his parenting schedule against his child's mother, even though attorney had previously consulted with the child's maternal grandfather about appealing the initial primary-residential-responsibility determination. The inquiry committee issued an admonition against attorney; the disciplinary board affirmed. This court dismissed the complaint, holding that there was not clear and convincing evidence that the consultation with the grandfather established an attorney-client relationship. Citing Restatement Third of the Law Governing Lawyers § 15, the court explained that usually prospective clients would not expect to

pay for a consultation, but, here, the grandfather's payment of an initial consultation fee did not, by itself, establish an attorney-client relationship. Kuntz v. Disciplinary Bd. of Supreme Court of North Dakota, 869 N.W.2d 117, 124.

Tex.App.

Tex.App.2010. Com. (b) cit. in ftn. (erron. cit. as Restatement Third of Agency). After former client brought legal-malpractice claims against lawyer, lawyer moved to compel arbitration pursuant to an arbitration clause in the parties' legal services contract. The trial court ruled that the clause was invalid or unenforceable. Conditionally granting lawyer's petition for a writ of mandamus, this court held, among other things, that the trial court erred if it refused to compel arbitration based on the unconscionability of the clause. The court rejected client's argument that mere consultation between an attorney and a prospective client created a fiduciary relationship, noting that neither Restatement Third, The Law Governing Lawyers § 15, nor Comment *b* of that section, either stated or directly supported that proposition. In re Pham, 314 S.W.3d 520, 527.

Wis.

Wis.2003. Cit. in disc. The Office of Lawyer Regulation appealed referee's finding that attorney did not violate disciplinary rule prohibiting disclosure of information related to representation of a client without client consent. Adopting the referee's findings and dismissing the action, the court held that, even though attorney had not been formally retained to represent potential client in a divorce action, his disclosures were impliedly authorized in order for him to carry out his then pending representation of potential client. In re Disciplinary Proceedings Against Duchemin, 260 Wis.2d 12, 21, 658 N.W.2d 81, 85.

End of Document

Restatement (Third) of the Law Governing Lawyers 2 2 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Introductory Note

Introductory Note: This Topic outlines the duties of lawyers to clients (§ 16) and of clients to lawyers (§ 17), the rules for the validity and construction of client-lawyer contracts (§ 18), and the extent to which lawyers and clients can agree to limit their duties (§ 19). The Topic also summarizes more detailed expositions stated elsewhere in this Restatement; those more detailed expositions control to the extent that they differ from statements in this Topic.

Restatement (Third) of the Law Governing Lawyers § 16 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 2. Summary of the Duties under a Client–Lawyer Relationship

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

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

(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;
(2) act with reasonable competence and diligence;
(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and
(4) fulfill valid contractual obligations to the client.

Comment:

a. *Scope and cross-references.* This Section presupposes that a client-lawyer relationship has come into existence (see §§ 14 & 15) and has not been terminated (see §§ 31- 33). The duties summarized here may be enforced by appropriate remedies, including disciplinary proceedings (see § 5) and suits by the client for damages, restitution, or injunctive relief (see § 6 & Chapter 4). Lawyers also owe clients duties prescribed by general law. A lawyer, for example, may not defame a client (see § 56). Other, more specific duties are specified elsewhere, for example, the duty to communicate with a client (see § 20).

b. *Rationale.* A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital. Lawyers often deal with matters most confidential and vital to the client. A lawyer's work is sometimes complex and technical, often is performed in the client's absence, and often cannot properly be evaluated simply by observing the results. Special safeguards are therefore necessary.

Correlatively, adequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help. The law encourages clients to consult lawyers and limits the liability to third persons of lawyers who act vigorously for their clients (see §§ 51 & 56). Requiring lawyers to protect their clients' interests with competence, diligence, and loyalty furthers those goals.

A lawyer is not required to accept a client, to undertake representation without pay (except when a court has appointed the lawyer), or to remain in a representation when withdrawal is permissible (see §§ 14, 32, 34, & 35). By undertaking a representation, a lawyer does not guarantee success in it, unless the lawyer makes extraordinary representations or warranties or unless the matter is routine and any reasonably competent lawyer could achieve the client's objectives (for example, drafting a deed or setting up a corporation). Lawyers may have duties to others that limit those owed to a client (see Comment *c* hereto).

c. *Goals of a representation.* The lawyer's efforts in a representation must be for the benefit of the client (see Restatement Second, Agency § 387). A client-lawyer relationship is thus different from a partnership entered into for mutual profit; the lawyer may hope to further the lawyer's professional reputation and income through a representation, but may do so only as a by-product of promoting the client's success.

Individual clients define their objectives differently. One litigant might seek the greatest possible personal recovery, another an amicable or speedy resolution of the case, and a third a precedent implementing the client's view of the public interest. The client, not the lawyer, determines the goals to be pursued, subject to the lawyer's duty not to do or assist an unlawful act (see § 94). The lawyer must keep the client informed and consult with the client as is reasonably appropriate to learn the client's decisions (see § 20) and must follow a client's instructions (see § 21(2)). On a lawyer's decisions in the representation, see §§ 22- 24.

The lawyer's duties are ordinarily limited to matters covered by the representation. A lawyer who has agreed to write a contract is not required to litigate its validity, even though the client's general objectives may ultimately be aided by resort to litigation (see §§ 14 & 19). Ordinarily the lawyer may not act beyond the scope of contemplated representation without additional authorization from the client (see § 27, Comment *e*). Nevertheless, some of the lawyer's duties survive termination of the representation (see § 33).

The lawyer's legal duties to other persons also limit duties to the client. On the rules governing conflicts of interest, see Chapter 8. A lawyer owes duties to the court or legal system and to an opposing party in litigation (see Chapters 6 & 7) and may owe duties to certain nonclients who might be injured by the lawyer's acts (see § 51). Sometimes a client's duties to other persons, for example as a trustee or class representative, may impose on the lawyer similar consequential duties (see § 14, Comment *f*). A lawyer may not do or assist an unlawful act on behalf of a client (see §§ 23, 32, & 94). Circumstances also exist in which a lawyer may refrain from pursuing the client's goals through means that the lawyer considers lawful but repugnant (see § 23, Comment *c*; § 32).

d. *Duties of competence and diligence.* In pursuing a client's objectives, a lawyer must use reasonable care (see § 52; see also Restatement Second, Agency § 379). The lawyer must be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications. The lawyer must use those capacities diligently, not letting the matter languish but proceeding to perform the services called for by the client's objectives, including appropriate factual research, legal analysis, and exercise of professional judgment. On delay in litigated matters, see § 110. The law seeks to elicit competent and diligent representation through civil liability (see Chapter 4), disciplinary sanctions (see § 5), and such other means as educational and examination requirements for

admission to the bar and programs of continued legal education and peer review. Other remedies may be available, such as a new trial in a criminal prosecution because of ineffective assistance of counsel (see § 6).

The Preamble to the ABA Model Rules of Professional Conduct (1983) (see id. ¶ [2]) and EC 7-1 of the ABA Model Code of Professional Responsibility (1969) refer to a lawyer's duty to act "zealously" for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.

e. Duties of loyalty. The responsibilities entailed in promoting the objectives of the client may be broadly classified as duties of loyalty, but their fulfillment also requires skill in gathering and analyzing information and acting appropriately. In general, they prohibit the lawyer from harming the client. Those duties are enforceable in appropriate circumstances by remedies, such as disqualification, to enforce rules governing conflicts of interest (see § 121, Comment *f*), civil liability (see §§ 50 & 55), and professional discipline (§ 5).

A lawyer may not use or disclose sensitive information about the client, except in appropriate circumstances (see Chapter 5). Likewise, the lawyer must take reasonable measures to safeguard the client's property and papers that come into the lawyer's possession (see §§ 44- 46). The rules forbidding conflicts of interest (see Chapter 8) likewise protect against the abuse of client information.

A lawyer must be honest with a client. A lawyer may not obtain unfair contracts or gifts (see §§ 126 & 127) or enter a sexual relationship with a client when that would undermine the client's case, abuse the client's dependence on the lawyer, or create risk to the lawyer's independent judgment, for example when the lawyer represents the client in divorce proceedings (see also, e.g., § 41 (abusive fee-collection methods); see generally Restatement Second, Agency §§ 387-398). A lawyer may not knowingly make false statements to a client and must make disclosures to a client necessary to avoid misleading the client. However, a lawyer's duty of confidentiality to another client may prohibit some disclosures. On the general duty voluntarily to disclose facts to a client, see § 20.

The duties of loyalty are subject to exceptions described elsewhere in this Restatement. Those exceptions typically protect the concerns of third persons and the public or satisfy the practical necessities of the legal system.

f. Duties defined by contract. Contracts generally create or define the duties the lawyer owes the client (see Restatement Second, Agency § 376). One or more contracts between client and lawyer may specify the services the lawyer is being retained to provide, the services the lawyer is not obliged to provide, and the goals of the representation. They may address such matters as which lawyers in a law firm will provide the services; what reports are to be provided to the client; whether the lawyer will present a detailed budget for the representation; what arrangements will be made for billing statements for legal services and disbursements; what decisions will be made by the lawyer and what matters decided by the client; and what alternative-dispute-resolution methods the lawyer will explore. Such matters may also be handled by client instructions during the representation (see Topic 3). Various requirements govern client-lawyer contracts (e.g., §§ 18, 19, 22- 23, 34- 46, 121, & 126- 127). A lawyer's intentional failure to fulfill a valid contract may in appropriate circumstances subject the lawyer to professional discipline as well as to contractual remedies.

With respect to contracts between lawyer and client involving business other than fees and disbursements for professional services, see § 126.

Reporter's Note

*Comment b. Rationale.*See Frankel, Fiduciary Law, 71 Calif. L. Rev. 795 (1983); Clark, Agency Costs Versus Fiduciary Duties, in Principals and Agents: The Structure of Business 55 (J. Pratt & R. Zeckhouser ed. 1985); C. Wolfram, Modern Legal Ethics 145-48 (1986); Cooter & Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U. L. Rev. 1045 (1991).

*Comment c. Goals of a representation.*See ABA Model Rules of Professional Conduct, Rule 1.2 (1983) (client to decide objectives of representation); ABA Model Code of Professional Responsibility, DR 7-101(A)(1) (1969) (lawyer must seek client's lawful objectives); Institute of Judicial Administration-ABA, Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 3.1(b)(ii) (1980) (counsel ordinarily bound by client's definition of client's interests); ABA Standards Relating to the Administration of Criminal Justice, Standards 4-1.6 (2d ed.1980) (lawyer should represent client's legitimate interests); Commission on Professional Responsibility, The Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct 2.1 (rev. draft 1982) (lawyer must be faithful to client's interests as perceived by client); see D. Rosenthal, Lawyer and Client: Who's in Charge? (1974).

*Comment d. Duties of competence and diligence.*See ABA Model Rules of Professional Conduct, Rules 1.1 & 1.3 (1983) (duties of competence); Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 Geo. L.J. 705 (1981); Reporter's Notes to Chapter 4.

*Comment e. Duties of loyalty.*See Reporter's Notes to §§ 32, 41, 44- 46, 50, 59, 60, and 121- 133. On honesty to clients, see ABA Model Rules of Professional Conduct, Rule 8.4(c) (1983) (forbidding "conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA Model Code of Professional Responsibility DR 1-102(A)(4) (1969) (similar); Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659 (1990); § 20, Reporter's Note. On sexual relationships between lawyer and client, see, e.g., McDaniel v. Gile, 281 Cal.Rptr. 242 (Cal.Ct.App.1991); Iowa State Bar Ass'n Comm. on Prof. Ethics v. Hill, 436 N.W.2d 57 (1989); In re Gibson, 369 N.W.2d 695 (Wis.1985); Office of Disciplinary Counsel v. Ressing, 559 N.E.2d 1359 (Ohio 1990); Cal. R. Prof. Conduct, Rule 3-120; Minn. R. Prof. Conduct, Rule 1.8(k). See also ABA Canons of Legal Ethics, Canon 11 (1908) (lawyer "should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client").

*Comment f. Duties defined by contract.*ABA Model Code of Professional Responsibility, DR 7-101(A)(2) (1969) (discipline for intentionally failing to carry out contract of employment); In re Burns, 679 P.2d 510 (Ariz.1984) (discipline for charging fee larger than agreed on); Attorney Grievance Comm'n v. Kerpelman, 438 A.2d 501 (Md.1981) (same); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup.Ct.1978) (liability for breach of contract to incorporate client's business).

Case Citations - by Jurisdiction

—

C.A.9,
C.A.9
E.D.Ky.
D.Minn.Bkrtcy.Ct.
D.Nev.Bkrtcy.Ct.
S.D.N.Y.Bkrtcy.Ct.
D.N.Mar.I.
M.D.Tenn.Bkrtcy.Ct.
Alaska,
Ga.
Iowa,
Iowa
Mass.App.
N.J.Super.

Okl.
Tex.
Tex.App.
Wis.

C.A.9,

C.A.9, 2017. Quot. in sup. Attorney who formerly worked for county attorney's office sued county and county officials, alleging that defendants terminated her in violation of her First Amendment rights after she publicly commented on county's settlement of a lawsuit in which the county sheriff's department was accused of brutality towards protesters. The district court entered judgment on a jury verdict for plaintiff on her First Amendment claim. Reversing, this court held that attorney's public comment was made in her official capacity and thus not protected by the First Amendment. The court reasoned, in part, that plaintiff's public comment fell under the broad set of official duties she owed county as its attorney under Arizona law and Restatement Third of the Law Governing Lawyers § 16. Brandon v. Maricopa County, 849 F.3d 837, 845.

C.A.9

C.A.9, 2012. Cit. in disc. Defendant, who was convicted of murder and sentenced to death, moved for relief from the denial of his federal habeas petition, arguing that his counsel had abandoned him. The district court denied the motion. Affirming, this court held that defendant was not abandoned by counsel in this case, since counsel did not refuse to represent defendant or renounce the attorney-client relationship; on the contrary, he diligently pursued habeas relief on defendant's behalf, although omitting a colorable constitutional claim from defendant's amended petition. Towery v. Ryan, 673 F.3d 933, 942.

E.D.Ky.

E.D.Ky.2014. Com. (b) quot. in sup. Trustee of unsecured-creditors' trust, which was created under the bankruptcy plan of Chapter 11 debtor/mining company to liquidate some of debtor's assets, brought an action against debtor's former officers, alleging that they mismanaged the company. This court granted trustee's renewed motion for turnover of records of debtor's law firm related to its representation of debtor during company's Chapter 11 restructuring, holding that the federal common law of privilege did not block trustee's right to turnover of law firm's internal documents under the Bankruptcy Code. The court noted that treating a client's needs as primary was consistent with the lawyer's role as fiduciary, citing Restatement Third of the Law Governing Lawyers § 16, Comment *b*, for the proposition that a lawyer was a fiduciary. In re Black Diamond Min. Co., LLC, 507 B.R. 209, 218.

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Subsec. (3) cit. in sup. In one of two consolidated adversary proceedings, Chapter 7 trustee of estate of loan-placement agent brought claim for breach of fiduciary duty against law firm that agent hired to prepare loan documents for a multimillion-dollar casino loan that agent arranged. This court held, inter alia, that law firm violated its duty to disclose and its duty of loyalty to agent, because, although participant lenders for the casino loan were the actual clients represented by firm in an action against a third party in which agent was the named plaintiff, firm agreed to represent agent in a closely related action by one loan participant against agent without seeking informed consent from either agent or that participant. The court further concluded that firm's actions constituted a blatant conflict of interest for which disgorgement of law firm's fees was the appropriate remedy. In re SRC Holding Corp., 352 B.R. 103, 189, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

D.Nev.Bkrtcy.Ct.

D.Nev.Bkrtcy.Ct.2013. Cit. in sup. Judgment creditor brought an adversary proceeding against debtors, claiming that debtors' prepetition judgment debt was nondischargeable as one incurred through fraud. After attorney who had filed debtors' bankruptcy petition refused to defend debtors against the adversary proceeding on the ground that the parties' retainer agreement excluded adversary proceedings from the flat fee, and debtors, acting pro se, reached a settlement with creditor, this court ordered sanctions against debtors' attorney. The court held that attorney had violated multiple state ethical rules and sections of the Bankruptcy Code by engaging in "unbundling," a business model that automatically divorced representation in a consumer's main Chapter 7 case from representation in any adversary proceeding that arose after filing. The court noted that lawyers were professionals who owed fiduciary duties to their individual clients, and were required to continue to represent them even if initially rosy predictions turned sour. In re Seare, 493 B.R. 158, 181.

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2008. Subsec. (2) and com. (b) quot. in sup. Chapter 11 trustee brought adversary complaint against former counsel for debtors in possession, alleging, in part, counsel's breach of fiduciary duty for failure to disclose the absence of a bidder-registration form for stalking-horse bidder's bid for debtors' assets at auction, which form was to have provided required certification that certain principals of debtors were not involved in the bid. Denying in part defendants' motion to dismiss, this court rejected as meritless defendants' argument that they owed no fiduciary duty to debtors in possession as their clients; every lawyer owed its client a fiduciary duty to act with reasonable competence and diligence. In re Food Management Group, LLC, 380 B.R. 677, 706.

D.N.Mar.I.

D.N.Mar.I.2011. Subsec. (3) quot. in sup. Lessee who prepaid the rent for the entirety of a 55-year lease of real property sued lessors, alleging that defendants wrongfully attempted to terminate the lease after only two years. Denying the parties' cross motions for summary judgment on plaintiff's claim for breach of fiduciary duty against one defendant who was also an attorney, this court held that genuine issues of material fact remained as to whether that defendant fully disclosed and transmitted the terms of the transaction in a manner that could be reasonably understood by plaintiff, whether plaintiff reasonably understood defendant's attempts to do so, and whether plaintiff gave informed consent not just to the terms of the transaction but also to defendant's role in the transaction, including whether defendant was representing plaintiff in the transaction. Sin Ho Nam v. Quichocho, 841 F.Supp.2d 1152, 1177.

M.D.Tenn.Bkrtcy.Ct.

M.D.Tenn.Bkrtcy.Ct.2004. Subsec. (3) cit. in case quot. in disc. United States Trustee (UST) sought disgorgement from debtors' attorney of attorney's fees earned in connection with the redemption of automobiles in Chapter 7 cases, on basis, in part, of conflict of interest. Denying UST's motion on this basis, this court held, inter alia, that there was no conflict of interest that would warrant disgorgement of attorney's fees where debtors were all aware of fee, all were completely satisfied with attorney's representation, all understood they were borrowing additional funds to pay attorney's fees, and all understood that lender from which they borrowed redemption funds was independent entity not associated with attorney. In re Ray, 314 B.R. 643, 654.

Alaska,

Alaska, 2020. Coms. (b) and (c) cit. in ftn. After attorney filed an ex parte motion in which he criticized client for refusing to settle a wrongful-death action arising from his son's death and for refusing to consult with his ex-wife, who was co-beneficiary of son's estate, client discharged attorney and hired new counsel, who proceeded to

settle the wrongful-death suit; attorney later disbursed his fees from the settlement proceeds without authorization, even though the amount of the fees was in dispute. The trial court found that attorney had violated the rules of professional conduct and ordered forfeiture of his entire fee for the wrongful-death suit. Affirming, this court held that the trial court did not err in finding that attorney violated his duty of loyalty. The court explained that, under Restatement Third of the Law Governing Lawyers § 16, lawyers owed both a fiduciary duty and a duty of loyalty to their clients, and a lawyer's efforts had to be for the benefit of the client. Kenneth P. Jacobus, P.C. v. Kalenka, 464 P.3d 1231, 1239.

Ga.

Ga.2004. Subsec. (2) cit. in ftn. Seller of company brought legal-malpractice action against his attorney following lapse of UCC filing statements perfecting seller's security interest in buyer's assets. The trial court granted defendant's motion to dismiss, and the court of appeals affirmed on limitations grounds. Reversing, this court held, inter alia, that, because defendant's duty was to safeguard plaintiff's security interest, which defendant could have satisfied by either informing plaintiff of the renewal requirement or renewing the financing statements in 2001, defendant breached his duty in 2001 when he failed to do both; thus, the four-year statute of limitations had not expired when plaintiff filed suit. Barnes v. Turner, 278 Ga. 788, 606 S.E.2d 849, 851.

Iowa,

Iowa, 2017. Cit. in sup. In disciplinary proceedings, attorney was charged with violating the state's ethical rules by simultaneously representing two clients on opposing sides of a loan transaction. The grievance commission recommended a 30-day suspension. This court imposed a 60-day suspension based on attorney's violation of rules providing that a lawyer could not represent a client if the representation of that client would involve a concurrent conflict of interest with another client, unless the lawyer obtained informed consent from both clients in writing. The court reasoned that attorney failed to fulfill his general obligations under Restatement Third of the Law Governing Lawyers § 16, because he was unable to adequately pursue the interests of the lending client by obtaining the return of either his original investment or any future payments promised to him under the promissory note that attorney prepared on behalf of the borrowing client. Iowa Supreme Court Attorney Disciplinary Board v. Willey, 889 N.W.2d 647, 654.

Iowa, 2017. Quot. in sup. Client brought an action for legal malpractice, assault, and battery against her former attorney with whom she had had a sexual relationship that ultimately turned violent. The trial court directed a verdict for defendant on two malpractice claims; a jury returned a verdict for defendant on plaintiff's remaining malpractice claims and found for plaintiff on her assault and battery claims. This court affirmed, holding that a sexual relationship alone could not give rise to claims for legal malpractice or breach of fiduciary duty without evidence that the provided legal services were also deficient. The court explained that Restatement Third of the Law Governing Lawyers § 16 limited the fiduciary duties owed by a lawyer to a client to within the scope of representation and that any breach had to be a legal cause of the injury for liability to attach, and determined that, in this case, plaintiff failed to establish a causal nexus between her sexual relationship with defendant and any breach of fiduciary duties. Stender v. Blessum, 897 N.W.2d 491, 508-509.

Iowa, 2015. Com. (b) cit. in conc. op. After defendant was convicted of first-degree arson, he filed a motion for a judgment of acquittal or a new trial, alleging that his court-appointed public defender had an impermissible conflict of interest for months before withdrawing, by representing the prosecution's witness in an unrelated case. The trial court denied defendant's motion for a new trial and the court of appeals reversed and remanded. Vacating the court of appeals decision, this court affirmed the trial court's decision, holding that defendant was not entitled to a new trial because there was sufficient evidence to support defendant's conviction and defendant failed to show there was an actual conflict that affected his trial. Citing Restatement Third of Law Governing Lawyers §§ 16 and 121, the concurring opinion argued that when defendant's attorney contacted the prosecution on behalf of his other client, he breached his duty of loyalty by facilitating the discovery of evidence by the prosecution that was adverse to defendant. State v. Vaughan, 859 N.W.2d 492, 504.

Iowa

Iowa, 2010. Com. (e) quot. in sup. State supreme court attorney disciplinary board filed charges against attorney, alleging that he violated the state rules of professional conduct by engaging in a sexual relationship spanning several weeks with a client who had retained him to represent her in a dissolution proceeding that included a child-custody issue, and continuing to represent her after the relationship commenced. The state supreme court grievance commission recommended a 30-day suspension of attorney's license to practice law. This court concurred in the commission's recommended sanction, noting that, while a sexual relationship between an attorney and a client could be harmful to the client's interest, particularly when the client was dealing with a divorce, the misconduct at issue appeared to be an isolated occurrence, attorney's conduct was not predatory, and client had seemingly suffered no emotional harm from the relationship. Iowa Supreme Court Attorney Disciplinary Bd. v. Monroe, 784 N.W.2d 784, 790.

Mass.App.

Mass.App.2017. Coms. (c) and (f) quot. in sup. Law firm filed an action for breach of contract and unjust enrichment against former clients, alleging that defendants failed to pay fees plaintiff earned representing defendants in an employment dispute. The trial court granted plaintiff's motion for summary judgment. This court reversed in part as to the portion of the award that was for professional courtesy credits that plaintiff had issued to defendants and had subsequently reversed, holding that the amount of the credits had been waived by plaintiff. Citing Restatement Third of the Law Governing Lawyers § 16, the court noted that a lawyer's duties to its client could exceed those contained in their contract, and determined that, here, plaintiff could not reverse the credits, because it had not indicated that the credits were conditioned on defendants' timely payment of their bills. BourgeoisWhite, LLP v. Sterling Lion, LLC, 71 N.E.3d 171, 175, 177.

Mass.App.2006. Com. (e) and Rptr's Note to com. (e) cit. in ftn. in sup. Attorney who was suspended by Board of Bar Overseers from the practice of law for engaging in unethical conduct in personal-injury action was required, as a result of suspension, to withdraw from representing the same client in wrongful-termination action. After replacement counsel settled the wrongful-termination action, attorney's firm moved to enforce a charging lien against the proceeds. The trial court, inter alia, denied firm's motion for summary judgment. Affirming, this court held, among other things, that firm was barred from recovering compensation because attorney's conduct constituted a serious breach of his fundamental duty of loyalty to client, particularly his obligation to refrain from conduct that harmed client. Kourouvacilis v. American Federation of State, County and Municipal Employees, 65 Mass.App.Ct. 521, 535, 841 N.E.2d 1273, 1285.

N.J.Super.

N.J.Super.2004. Com. (c) cit. in disc. Teenager, who had pled guilty to felony murder, petitioned for postconviction relief (PCR) based on trial counsel's affair with petitioner's mother, who allegedly helped to coerce petitioner not to withdraw guilty plea. PCR court denied petition. Reversing and remanding, this court held that although strength of state's case might have affected petitioner's decision to withdraw guilty plea, it did not affect the fact that conduct of defense counsel warranted relief. State v. Lasane, 371 N.J.Super. 151, 162, 852 A.2d 246, 255.

Okl.

Okl.2008. Cit. in ftn. In an action to recover damages for property loss caused by fire, plaintiff filed a voluntary dismissal with prejudice, without the knowledge of his counsel of record. On the motion of plaintiff's lawyer, the trial court vacated the dismissal. The court of appeals reversed. Vacating the opinion of the court of appeals, and

affirming the order of the trial court, this court remanded, holding, inter alia, that, because a party to an action who was represented by counsel of record could not act independently as his own attorney, a dismissal filed by the represented client that was not joined by the counsel of record, or that was filed without client's having earlier discharged his lawyer from employment, was facially ineffective. Watson v. Gibson Capital, L.L.C., 2008 OK 56, 187 P.3d 735, 738.

Tex.

Tex.2004. Com. (c) cit. in sup. Client brought malpractice action against law firm and law-firm shareholder, who also served as a legislator on city council and who voted in favor of an ordinance that adversely affected client. The trial court granted law firm's motion for summary judgment, but the court of appeals reversed and remanded. This court reversed and rendered judgment for firm and shareholder, holding, inter alia, that an attorney was not liable for failing to act beyond the scope of his representation; because representing client before city council was not included in the scope of firm's representation here, firm had no duty to inform client of the city council meeting, which was also a matter of public record. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159-160.

Tex.2000. Cit. in conc. and diss. op. (citing § 28, Prop. Final Draft No. 1, 1996, which is now § 16). Clients sued attorneys for, inter alia, breach of contract in connection with attorneys' collection of an additional 5% in fees following settlement in clients' wrongful-death suit against third party. The trial court entered summary judgment for attorneys, but the intermediate appellate court reversed. Reversing, this court held, in part, that attorneys were entitled to the additional fees provided for in the fee agreement when the wrongful-death judgment was "appealed to a higher court," or, in other words, when defendant in that action filed a cash deposit with the appellate court. Concurring and dissenting opinion believed that the contingent-fee agreement should be construed against attorneys/drafters, and that the term "appealed to a higher court," as used therein, was ambiguous and could reasonably be interpreted to mean something more than the initial step taken by defendant to preserve its appellate rights. Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 867.

Tex.App.

Tex.App.2001. Subsec. (3) quot. in sup. Client sued attorney and law firm for malpractice and breach of fiduciary duty in connection with failure to disclose conflict of interest based on attorney's status as city council member. The trial court granted defendants summary judgment. Reversing and remanding, this court held, inter alia, that fact issues existed as to whether client waived conflict of interest, thus precluding summary judgment for defendants on breach-of-fiduciary-duty claim. Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905, 906, judgment reversed 145 S.W.3d 150 (Tex.2004).

Wis.

Wis.2007. Com. (b) quot. in diss. op. and cit. in ftn. to diss. op. Employer sued former employees who established a competing roofing-applications consulting business, alleging, in part, breach of contract. The trial court dismissed the case with prejudice as a sanction for plaintiff's attorney's failure to respond to discovery and violation of court orders; the court of appeals affirmed. Affirming, this court held that the trial court did not erroneously exercise its discretion in imputing attorney's conduct, which it found to be egregious, to plaintiff, after concluding that plaintiff itself was at fault for failing to act in a reasonable and prudent manner. The dissent argued that viewing plaintiff's conduct as blameworthy distorted the traditional lawyer-client relationship, as it required plaintiff to have engaged in an unreasonably high level of supervision of attorney and to have responded rapidly to any question about attorney's conduct of discovery. Industrial Roofing Services, Inc. v. Marquardt, 299 Wis.2d 81, 726 N.W.2d 898, 926.

End of Document

Restatement (Third) of the Law Governing Lawyers § 17 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 2. Summary of the Duties under a Client–Lawyer Relationship

§ 17 A Client's Duties to a Lawyer

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

(1) compensate a lawyer for services and expenses as stated in Chapter 3;
(2) indemnify the lawyer for liability to which the client has exposed the lawyer without the lawyer's fault; and
(3) fulfill any valid contractual obligations to the lawyer.

Comment:

a. *Scope and cross-references.* This Section presupposes that a client-lawyer relationship exists (see § 14). Some duties arising from that relationship are defined in more detail elsewhere in this Restatement. This Section does not set forth all the duties of a client to a lawyer, for clients also generally owe lawyers the same duties they owe third persons, such as the duty to avoid actionable misrepresentation. A client who converts a lawyer's property, for example, is liable for that wrong (see Restatement Second, Agency § 470). Moreover, a client's deception of or failure to cooperate with a lawyer may provide a defense to the client's later claim of civil liability (see § 54) or inadequate assistance of counsel. On a lawyer's right to withdraw from a representation when the client fails substantially to fulfill an obligation to the lawyer, see § 32(3)(g). On remedies for the recovery of compensation by a lawyer, see § 41.

The duties of clients to lawyers are less extensive than those of lawyers to clients. Lawyers owe special duties because clients entrust them with important and sensitive matters, and because the legal system requires diligent and devoted performance of that trust (see § 16, Comment *b*).

b. *Compensation.* A lawyer normally has a legally enforceable right to compensation for the lawyer's services (see Restatement Second, Agency § 441). The lawyer may recover the fair value of the services from the client (see § 39), unless they have validly agreed to another measure of compensation (see §§ 18 & 38). The lawyer may agree to serve without compensation (see § 38, Comment *c*) and may also lose the right to compensation for misconduct (see §§ 37, 40, & 41). The lawyer also may be entitled to recover certain sums disbursed for the client's benefit. For other related subjects, see Chapter 3.

c. *Client indemnity of a lawyer.* Generally, a principal must indemnify an agent for liabilities and expenses incurred by the agent through acts authorized by the principal (see Restatement Second, Agency §§ 438 & 439). Lawyers are not typical agents, for their unusual knowledge and responsibility gives them a greater ability to avoid acts giving rise to liability, and a lawyer may have a duty to avoid acts having that effect. Sometimes, moreover, no liability falls on the lawyer to begin with. A lawyer, for example, cannot be held liable to an opposing party for otherwise defamatory statements in a pleading (see § 57). Sometimes, however, a lawyer is held liable through fault or in place of the client, and the lawyer can therefore claim indemnity. For example, when a lawyer has made proper expenditures for the benefit of the client such as the payment of a court reporter (see § 30(2)), the client must indemnify the lawyer unless the contract between them contemplates otherwise (see § 38, Comment *e*).

d. *Contractual obligations.* The client's duty to compensate a lawyer for services rendered is often controlled by a written or oral fee contract (see §§ 18 & 38). A contract may also create or expand a duty to indemnify the lawyer for expenses resulting from the representation. That allocation of responsibility is subject to limits set by public policy, such as the power of a court to specify that a sanction on the lawyer's misconduct shall not be passed on to the client (see §§ 29 & 30). On the inability of a lawyer to limit or avoid legal malpractice liability to a client by a contract in advance, see § 54. On limitations on client-lawyer business dealings, see § 126. A contract might require a client to provide valuable assistance to a lawyer—free transportation, for example—and, if the client did not perform, the lawyer would be entitled to the appropriate remedies for breach.

Contracts purporting to impose duties on clients must be read in light of the purposes of the client-lawyer relationship and public policies relating to it. Thus, if a client lies to a lawyer or fails to honor an expressed or implied provision of a client-lawyer contract requiring cooperation with the lawyer, withdrawal by the lawyer may be authorized (see § 32(3)(f) & (g)), and the client's misrepresentation may constitute a defense to the client's malpractice claim (see § 54, Comment *d*), modify the lawyer's duty of confidentiality (see §§ 64 & 67), or entitle the lawyer to indemnity if the client's conduct exposes the lawyer to liability to a third person without the lawyer's fault (see Comment *c* hereto). Such consequences can be predicated on client conduct such as misleading a lawyer concerning important facts, even where there is no explicit contract by the client to cooperate. Dealing with suspected client misrepresentation is a matter of delicacy. In determining whether a client misrepresentation constitutes an actionable wrong against a lawyer, it should be noted that the lawyer may be in a better position than nonprofessionals to assess the strength or weakness of a client's initial story and the client should be accorded wide discretion in determining how much of a possibly embarrassing or otherwise sensitive account to share with the lawyer. On a lawyer's right to withdraw, despite material harm to the client, when the client's failure to provide essential facts renders the representation unreasonably difficult, see § 32, Comment *l*.

Reporter's Note

Comment b. Compensation. See Reporter's Notes to §§ 30(2), 38, and 39.

Comment c. Client indemnity of a lawyer. E.g., Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir.1985) (indemnity for lawyer's expenses in successful defense of suit against lawyer for actions representing client); Crownover v. Schonfeld, 214 So.2d 499 (Fla.Dist.Ct.App.1968) (indemnity for expenses resulting from lawyer's signing bond enabling client to keep appliance); Roberts, Walsh & Co. v. Trugman, 264 A.2d 237 (N.J.Dist.Ct.1970) (lawyer liable to court reporter but could obtain indemnity from client); E. Wood, Fee Contracts

of Lawyers 281 (1936); § 30, Comment *b,* and Reporter's Note thereto; § 38, Comment *e,* and Reporter's Note thereto.

*Comment d. Contractual obligations.*See § 18, Reporter's Note; § 38, Reporter's Note; E. Wood, Fee Contracts of Lawyers, supra. For the power of a court to specify that sanctions will not be paid by a client, see, e.g., Associated Radio Serv. Co. v. Page Airways, 73 F.R.D. 633 (N.D.Tex.1977); Golleher v. Horton, 583 P.2d 260 (Ariz.Ct.App.1978). On the use of a client's failure to inform a lawyer of relevant facts as a defense to a malpractice suit, see Bank of Anacortes v. Cook, 517 P.2d 633 (Wash.Ct.App.1974); Rapuzzi v. Stetson, 145 N.Y.S. 455 (N.Y.App.Div.1914). On contributory negligence and related defenses, see § 54, Reporter's Note. On a possible client duty of good faith, see Hagans, Brown & Gibbs v. First Nat'l Bank, 783 P.2d 1164 (Alaska 1989). On obligations under general law, see Morganroth & Morganroth v. DeLorean, 123 F.3d 374 (6th Cir.1997), cert. denied, 523 U.S. 1094, 118 S.Ct. 1561, 140 L.Ed.2d 793 (1998) (liability for defrauding lawyer); Mass v. McClenahan, 893 F.Supp. 225 (S.D.N.Y. 1995) (liability for discriminatory discharge of lawyer).

Case Citations - by Jurisdiction

—

C.A.1
Okl.
Tex.

C.A.1

C.A.1, 1997. Cit. in disc. (citing § 29, Proposed Final Draft No. 1, 1996, which is now § 17). After an attorney formed a law firm to purchase the practice of a deceased collection attorney, the law firm billed a retail store in excess of $1 million for past work the deceased attorney allegedly had performed on the store's cases. The store at first paid the bills, but eventually sued the law firm, seeking an accounting and bringing claims for breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices under Massachusetts law. The law firm counterclaimed for the unpaid balance. The district court granted the store summary judgment, awarding the entire amount of the store's payments on the disputed bills and attorney's fees. This court affirmed, holding that the law firm had not met its burden of substantiating its bills under Massachusetts law, and that the store had met its burden of showing unfair and deceptive practices. The court noted that seeking to enforce a valid fee contract was an exception to the general requirement that fiduciaries subordinate their interests to those of their clients. Sears, Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10, 17.

Okl.

Okl.2008. Cit. in ftn. In an action to recover damages for property loss caused by fire, plaintiff filed a voluntary dismissal with prejudice, without the knowledge of his counsel of record. On the motion of plaintiff's lawyer, the trial court vacated the dismissal. The court of appeals reversed. Vacating the opinion of the court of appeals, and affirming the order of the trial court, this court remanded, holding, inter alia, that, because a party to an action who was represented by counsel of record could not act independently as his own attorney, a dismissal filed by the represented client that was not joined by the counsel of record, or that was filed without client's having earlier discharged his lawyer from employment, was facially ineffective. Watson v. Gibson Capital, L.L.C., 2008 OK 56, 187 P.3d 735, 738.

Tex.

Tex.2001. Com. (d) quot. in conc. op. Law firm, whose contingent-fee agreement with clients was for one-third of "any amount received by settlement or recovery" of clients' award against their mortgagor, sued clients for

attorneys' fee after clients' award was offset by mortgagors' counterclaim. The trial court granted law firm summary judgment, and appellate court affirmed. Reversing, this court held that contingent-fee agreement entitled firm to net amount of clients' recovery, which was computed after any offset. Concurrence asserted that whether a contingent fee should be based on net or gross recovery depended on the circumstances. Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 97.

End of Document

Restatement (Third) of the Law Governing Lawyers § 18 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 2. Summary of the Duties under a Client–Lawyer Relationship

§ 18 Client–Lawyer Contracts

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

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

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

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

Comment:

a. *Scope and cross-references.* This Section sets forth general rules concerning the validity and construction of client-lawyer contracts. The rules concern both fee arrangements (see § 38) and other matters. Other provisions of this Restatement state more particular requirements for the validity of such contracts, for example, provisions concerning limits on client rights (see § 19), attorney fees (see §§ 34- 36 & 43), malpractice-liability waivers (see § 54), the client's right to discharge the lawyer (see § 32(1)), and conflicts of interest (see §§ 121 & 125- 131). See especially § 38, on the validity and construction of fee contracts.

On business and financial transactions between a lawyer and a client, see § 126. Section 126, however, concerns only business and financial transactions. The Section does not apply to the payment for legal services in money by clients. Some forms of payment, such as those involving security interests on client property or payment in a corporate client's stock, are subject to § 126 (see § 43).

b. *Rationale.* The provisions of this Section protect clients against unfair contracts and interpretations of them, for reasons set forth below (see Comments *e* and *h* hereto; see also § 16, Comment *b*).

c. *Contracts meeting other applicable requirements.* Contracts between lawyer and client may concern not only fees but other terms as well, such as the extent of the lawyer's services or the identity of the lawyers in a firm who are to do the work. The contract may be in writing or oral or evidenced by the circumstances, as when a client proceeds with a lawyer after having been informed of the lawyer's fees.

Illustration:

1. Client reads Lawyer's newspaper advertisement stating that Lawyer writes simple wills for $200. Lawyer has not previously represented Client. Client telephones Lawyer and asks Lawyer to write a simple will. Lawyer agrees to do so. Neither party mentions the advertisement or discusses Lawyer's fees. The parties have entered an implicit contract under which Lawyer is to write the will and Client is to pay $200. However, no such contract concerning the fee would exist if Client had not read or learned of the advertisement, and Lawyer's right to a fee would then be based on § 39. In that event, Lawyer's advertisement could be introduced in evidence by Client to show Lawyer's opinion of the fair value of Lawyer's services.

This Section requires that, to be enforceable, a contract must meet applicable requirements imposed by other sources of law, including aspects of contract law such as the consideration requirement and the Statute of Frauds. The applicable requirements also include those imposed by professional regulations, such as the rule in many jurisdictions that contingent-fee contracts be in writing (see § 38, Comment *b*). Client-lawyer contracts are subject to many other rules (see Comment *a* hereto), for example, the rule requiring that legal fees be reasonable in the circumstances (see § 34). Similarly, the contract remedies available to the lawyer are modified by other applicable law, such as the rule allowing a client to discharge a lawyer without cause (see §§ 32 & 40).

d. *Contracts at the outset of a representation.* This Section does not independently limit the enforceability of client-lawyer contracts made at the outset of a representation, but other law protects clients who enter into such contracts (see Restatement Second, Agency § 390, Comment *e*). In entering a contract at the outset of a representation, the lawyer must explain the basis and rate of the fee (see § 38(1)) and advise the client of such matters as conflicts of interest, the scope of the representation, and the contract's implications for the client (see, e.g., §§ 15, 20, & 121- 122). The contract may not provide for unreasonable fees (see § 34) or unreasonable waivers of client rights (see § 19), and is subject to other prohibitions (see Comment *a* hereto). The contract is construed according to the principles set forth in this Section (see also § 38).

e. *Contracts entered into during a representation.* Client-lawyer fee contracts entered into after the matter in question is under way are subject to special scrutiny (cf. Restatement Second, Contracts § 89(a) (promise

modifying contractual duty is binding if fair and equitable in view of circumstances unanticipated when contract was made)). A client might accept such a contract because it is burdensome to change lawyers during a representation. A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good. A lawyer, on the other hand, usually has no justification for failing to reach a contract at the inception of the relationship or pressing need to modify an existing contract during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter. A lawyer is also required to give the client at least minimal information about the fee at the outset (see § 38(1)).

The client's option under this Section to avoid the contract may be exercised during or after the representation. In particular it may be exercised during litigation about the lawyer's fee, because that is when the former client is most likely to seek new counsel and learn the facts relating to the fairness of the contract. The client may exercise the option informally, for example, by protesting against the lawyer's request for payment under the contract. A client who avoids the contract as stated here cannot then enforce its favorable terms against the lawyer, and the client is liable to the lawyer for the fair value of the lawyer's services (see § 39). A client may lose the right to avoid a contract by knowingly reaffirming it when not subject to pressure, for example after the representation concludes. If the client does not choose to avoid the contract, it remains in effect for both parties.

The lawyer may enforce the contract by persuading the tribunal that the contract was fair and reasonable to the client under the circumstances in which it was entered. The showing of fairness and reasonableness must encompass two elements. First, the lawyer must show that the client was adequately aware of the effects and any material disadvantages of the proposed contract, including, if applicable, circumstances concerning the need for modification. The more experienced the client is in such dealings with lawyers, the less the lawyer need inform the client. Likewise, less disclosure is required when an independent lawyer is advising the client about the proposed contract. It will also be relevant to sustaining the contract if the client initiated the request for the modification, such as when a client who is facing unexpected financial difficulty requests that the lawyer change an hourly fee contract to one involving a contingent fee.

Second, the lawyer must show that the client was not pressured to accede in order to avoid the problems of changing counsel, alienating the lawyer, missing a deadline or losing a significant opportunity in the matter, or because a new lawyer would have to repeat significant work for which the client owed or had paid the first lawyer. A test sometimes used has been that an agreement is voidable only if reached after the lawyer has started to perform the services. However, a contract made after the lawyer has been retained but has performed no services could be unfair because of the difficulty of obtaining other counsel in the circumstances. In general, the lawyer must show that a reasonable client might have chosen to accept the late contract, typically because it benefited the client in some substantial way (other than by relieving the client from having to find a new lawyer). Although fairness and reasonableness to the client is the issue, the strength and legitimacy of the lawyer's need for the terms of the late contract are relevant to that issue.

If the client and lawyer made an initial contract and the postinception contract in question is a modification of that contract, the client may avoid the contract unless the lawyer makes the showings indicated in Subsection (1)(a). Postinception modification beneficial to a lawyer, although justifiable in some instances, raises questions why the original contract was not itself sufficiently fair and reasonable. Yet, the scope of the representation and the relationship between client and lawyer cannot always be foreseen at the time of an initial contract. Both client and lawyer might sometimes benefit from adjusting their terms of dealing. Sometimes, indeed, a new contract may be unavoidable, as when a client asks a lawyer to expand the scope of the representation.

Illustration:

2. Client retains Lawyer to conduct a business litigation, agreeing to pay a specified hourly fee, due when the suit is over. After the suit has been brought, the defendant unexpectedly impleads a third party, and the proceedings threaten to require much more of Lawyer's time than the parties had originally expected. Lawyer and Client agree to shift to a contingent-fee arrangement, after Lawyer explains to Client that Lawyer is willing to continue on an hourly fee and points out in reasonable detail the payments by the client and incentives for the lawyer that each arrangement would give rise to in different circumstances. Soon after the contract, the defendant unexpectedly makes and Client accepts a large settlement offer. Lawyer is entitled to recover a contingent fee under the contract, even though hindsight shows that Client would have paid much less under the original hourly fee arrangement.

f. Contracts after a representation ends. Once a lawyer has finished performing legal services, the lawyer's proposal of a fee due is less coercive, although the client may remain influenced by trust that the lawyer will be fair. Such a contract will be enforced if the requirements of Subsection (1)(b) are satisfied, subject to the limits on fees discussed in Comments *a* and *d* hereto and to restrictions on abusive fee collection (see § 41; see also § 54 (limitations on contracts concerning a lawyer's liability for malpractice)).

When a lawyer submits and a client pays a postrepresentation bill that simply implements a previous valid fee contract, the submission and payment do not constitute a new contract subject to Subsection (1)(b). However, there is a new contract and that Subsection applies when the submission and payment modify a previous contract or when the parties have not previously reached such a contract.

What disclosure is needed to permit a client to evaluate the appropriateness of a postrepresentation contract depends on the circumstances. The amount of information the lawyer should provide varies with the sophistication of the client, the size of the fee, and the client's means. If a lawyer bases a fee on a number of factors, those factors and the subjective nature of that assessment must be disclosed. In any event, the lawyer must respond to questions reasonably raised by the client and must disclose aspects of the calculation of the fee that are subject to reasonable dispute.

Assuming adequate disclosure has been made, the client may accept the validity of a final bill or other postrepresentation fee proposal by paying or agreeing to pay it. If the disclosure requirements of Subsection (1)(b) have been met, the client may not argue that the fee would not have been awarded under § 39 had there been no valid contract. If the requirements of this Section have not been met, the client is not precluded by payment of a final bill from contending that the fee was unreasonably large (see § 34) or otherwise unlawful, although the client's acceptance of the bill may be admissible as evidence to controvert such a challenge (see § 42). The lawyer in such a case may still recover whatever fee is due under a valid previous contract or on the basis of quantum meruit (see § 39).

Illustration:

3. Lawyer and Client validly agree that Client will pay Lawyer $100 per hour. When the matter is resolved, Lawyer sends a bill for $1,800 which Client pays. Later, Client learns that six of the 18 hours for which Lawyer charged were devoted to writing a memo that Lawyer wrote both for Client's matter and for another matter for another client (who was also charged for the six hours). Although the contract contains a provision that might be read to allow

such double charging, the contract might also reasonably be construed to provide that Client should pay for only half of the six hours (see also § 38, Comment *d*). Client's acceptance and payment of the bill does not bar Client from challenging the amount of Lawyer's bill.

g. *Contracts between a lawyer and a third person.* This Section concerns contracts between a client and lawyer. It also applies in situations where a lawyer renders services to two clients and one of them agrees to pay fees for both. Whether rules similar to those of this Section apply when a nonclient, such as a parent or spouse of a client, agrees with a lawyer to pay the fee of the lawyer's client depends on general principles of law. To the extent the nonclient is subject to the same pressures as a client, application of rules similar to those of this Section may be warranted.

h. *Construction of client-lawyer contracts.* Under this Section, contracts between clients and lawyers are to be construed from the standpoint of a reasonable person in the client's circumstances. The lawyer thus bears the burden of ensuring that the contract states any terms diverging from a reasonable client's expectations. The principle applies to fee terms (see § 38) as well as other terms. It requires, for example, that a lawyer's contract to represent a client in "your suit" be construed to include representation in appropriate appeals if the lawyer had not stated that appeals were excluded.

Three reasons support this rule. First, lawyers almost always write such contracts (or state them, in the case of oral contracts) and a contract traditionally is interpreted against its author (see Restatement Second, Contracts § 206). Second, lawyers are more able than most clients to detect and repair omissions in client-lawyer contracts. Third, many lawyers consider it important to inform clients about the risks to the client that might arise from the representation, including risks unresolved by a client-lawyer contract.

Many tribunals have expressed the principle as a rule that ambiguities in client-lawyer contracts should be resolved against lawyers. That formulation can be taken to mean that the principle comes into play only when other means of interpreting the contract have been unsuccessful. Under this Section, the principle that the contract is construed as a reasonable client would understand it governs the construction of the contract in the first instance. However, this Section does not preclude reliance on the usual resources of contractual interpretation such as the language of the contract, the circumstances in which it was made, and the client's sophistication and experience in retaining and compensating lawyers or lack thereof. The contract is to be construed in light of the circumstances in which it was made, the parties' past practice and contracts, and whether it was truly negotiated. When the reasons supporting the principle are inapplicable—for example, because the client had the help of its own inside legal counsel or another lawyer in drafting the contract—the principle should be correspondingly relaxed.

Illustration:

4. Corporation, a small business without inside legal counsel, retains Lawyer to provide services relating to its miscellaneous transactions, under a contract providing that Lawyer will charge a stated hourly fee, to be billed and paid monthly. State law does not entitle successful plaintiffs to recover prejudgment interest in a suit to recover such fees, absent an express or implied contractual provision for interest on late payments. Lawyer may not charge for interest even if there was a local custom that lawyers did charge interest on late payments unless Corporation knew of the custom. This Section requires Lawyer to explain the interest charge to Corporation.

Reporter's Note

*Comment c. Contracts meeting other applicable requirements.*See C. Wolfram, Modern Legal Ethics 501-504 (1986); E. Wood, Fee Contracts of Lawyers 23-33, 255 (1936) (discussing consent, mistake, consideration, and other issues).

*Comment d. Contracts at the outset of a representation.*For conflicting authority as to whether client-lawyer contracts reached before a representation should be treated as arms-length transactions not subject to special judicial scrutiny, see Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 U.C.L.A. L. Rev. 29, 54-70 (1989); § 42, Comment *c,* and Reporter's Note thereto.

*Comment e. Contracts entered into during a representation.*For the principle that contracts during a representation may be rejected by the client unless the lawyer proves them to be fair and reasonable, see, e.g., Vaughn v. King, 167 F.3d 347 (7th Cir.1999); Maksym v. Loesch, 937 F.2d 1237 (7th Cir.1991) (discussing when principle begins to operate); Jo B. Gardner, Inc. v. Beanland, 611 S.W.2d 317 (Mo.Ct.App.1980); Terzis v. Estate of Whalen, 489 A.2d 608 (N.H.1985); compare Brundage, The Profits of the Law: Legal Fees of University-Trained Advocates, 32 Am. J. Leg. Hist. 1, 5, 7 (1988) (similar principle in 13th century). For authority on what contracts may be upheld under that principle, compare Drake v. Becker, 303 N.E.2d 212 (Ill.App.Ct.1973) (contract procured by threat of withdrawal invalid); Griffin v. Rainer, 186 S.E.2d 10 (Va.1972) (similar); Ward v. Richards & Rossano, Inc., P.S., 754 P.2d 120 (Wash.Ct.App.1988) (client may retrieve 10% fee to handle appeal when lawyer did not disclose that existing contingent-fee contract would be construed to exclude representation on appeal) with Volsky v. Lone Star Airways, 618 F.Supp. 733 (D.D.C.1985) (new contract proper when business client gave lawyer new matters); Rock v. Ballou, 209 S.E.2d 476 (N.C.1974) (similar); Tidball v. Hetrick, 363 N.W.2d 414 (S.D.1985) (proper to switch to contingent-fee contract when client could not pay agreed-on hourly fee). See generally Annot., 13 A.L.R.3d 701 (1967).

*Comment f. Contracts after a representation ends.*Compare Gleason v. Klamer, 163 Cal.Rptr. 483 (Cal.Ct.App.1980) (valid contract formed when client had new lawyer, discussed bill with accountant, and explicitly accepted it); Santora, McKay & Ranieri v. Franklin, 339 S.E.2d 799 (N.C.Ct.App.1986) (jury could find valid contract when client did not object to bills and wrote letter indicating intent to pay), with Mar Oil, S.A. v. Morrissey, 982 F.2d 830 (2d Cir.1993) (no valid contract when client did not understand import of language); Roehrdanz v. Schlink, 368 N.W.2d 409 (Minn.Ct.App.1985) (no valid contract when client was not told of change in hourly rate and bill did not itemize charges for services); Epstein, Reiss & Goodman v. Greenfield, 476 N.Y.S.2d 885 (N.Y.App.Div.1984) (failure to object to bill did not create valid contract when there was no explanation of services performed and some services were arguably unauthorized); Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan, 988 P.2d 467 (Wash.Ct.App.1999) (accord and satisfaction unenforceable if client not informed of billing rates); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994) (client's payment guaranty unenforceable when signed in exchange for release of file); see Shea, Rogal & Assoc., Ltd. v. Leslie Volkswagen, Inc., 576 N.E.2d 209 (Ill.App.Ct.1991) (law firm bound when its manager endorsed and deposited check stated by client to be payment in full where sum due was disputed). Payment of or assent to bills sent during a representation could create a valid contract only if it met the standards for contracts during a representation. Nilsson, Robbins v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir.1988); Tucker v. Dudley, 164 A.2d 891 (Md.1960) (contract after client won case but before client received proceeds treated as contract during the representation); see Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff, 638 F.Supp. 714 (S.D.N.Y.1986) (sophisticated business client who made partial payment on bills bound when no claim of fraud, mistake, or overreaching).

Comment g. Contracts between a lawyer and a third person. See In re "Agent Orange" Product Liability Litigation, 818 F.2d 216 (2d Cir.), cert. denied, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987) (striking down, because of conflicts of interest, contract by which some class-action lawyers advanced funds, to be repaid threefold out of any attorney-fee award). The issue most often litigated in fee suits involving nonclients is whether the nonclient, the client, or both are liable for the lawyer's fees. E.g., In re A.H. Robins Co., 846 F.2d 267 (4th Cir.1988) (when insurer retains lawyer to represent insured, only insurer liable); Collins v. Martin, 276 S.E.2d 102 (Ga.Ct.App.1981) (husband who hired lawyer for wife without her authority liable); Becnel v. Arnouville, 425 So.2d 972 (La.Ct.App.1983) (when father hired lawyer for comatose son, later contract of lawyer and son discharged father).

Comment h. Construction of client-lawyer contracts. E.g., Dardovitch v. Haltzman, 190 F.3d 125 (3d Cir.1999) (contingent-fee contract did not entitle lawyer to extra payment for collecting settlement); Severson, Werson, Berke & Melchior v. Bolinger, 1 Cal.Rptr.2d 531 (Cal.Ct.App.1991) (contract to charge firm's "regular hourly rates" means rates in effect at start of representation); Lawrence v. Walzer & Gabrielson, 256 Cal.Rptr. 6 (Cal.Ct.App.1989) (client-lawyer arbitration clause construed not to require arbitration of malpractice claim); Beatty v. NP Corp., 581 N.E.2d 1311 (Mass.App.Ct.1991) (principles that doubtful contracts are construed against drafter "counts double when the drafter is a lawyer"); Luna v. Gillingham, 789 P.2d 801 (Wash.Ct.App.1990) (fee contract construed to permit client to use amount of court-awarded fee as credit against contingent-fee amount); § 38, Reporter's Note (applying rule of construction to fee issues). For the construction of contingent-fee contracts, in the absence of contrary language, to require the lawyer to handle any appeal, see, e.g., Carmichael v. Iowa State Highway Comm'n, 219 N.W.2d 658 (Iowa 1974); Attorney Grievance Comm'n v. Korotki, 569 A.2d 1224 (Md.1990); Ward v. Richards & Rossano, Inc., P.S., 754 P.2d 120 (Wash.Ct.App.1988); Annot., 13 A.L.R.3d 673 (1967); cf. Shaw v. Manufacturers Hanover Trust Co., 499 N.E.2d 864 (N.Y.1986) (contract read to exclude appeal when that construction helped client).

Case Citations - by Jurisdiction

—

C.A.1
M.D.Fla.
N.D.Ill.Bkrtcy.Ct.
E.D.N.Y.Bkrtcy.Ct.
E.D.Tex.
N.D.Tex.
Alaska
Cal.
Ill.App.
Kan.
Ky.App.
Mass.
Mass.App.
Miss.
N.J.
N.J.Super.App.Div.
N.J.Super.
N.D.
Okl.
Tex.

Tex.App.
Wis.

C.A.1

C.A.1, 1997. Cit. in disc. (citing § 29A, Proposed Final Draft No. 1, 1996, which is now § 18). After an attorney formed a law firm to purchase the practice of a deceased collection attorney, the law firm billed a retail store in excess of $1 million for past work the deceased attorney allegedly had performed on the store's cases. The store at first paid the bills, but eventually sued the law firm, seeking an accounting and bringing claims for breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices under Massachusetts law. The law firm counterclaimed for the unpaid balance. The district court granted the store summary judgment, awarding the entire amount of the store's payments on the disputed bills and attorney's fees. This court affirmed, holding that the law firm had not met its burden of substantiating its bills under Massachusetts law, and that the store had met its burden of showing unfair and deceptive practices. The court noted that seeking to enforce a valid fee contract was an exception to the general requirement that fiduciaries subordinate their interests to those of their clients. Sears, Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10, 17.

M.D.Fla.

M.D.Fla.2013. Com. (e) cit. in sup. and quot. in ftn. Attorneys who were representing client in a wrongful-death action petitioned for, inter alia, authorization to increase their total contingency fee, in accordance with their amended agreement with client, to an amount greater than that allowed by Florida's rules of professional conduct without prior court approval. This court denied attorneys' petition, holding that attorneys had not rebutted the presumption that the requested fees were excessive. The court reasoned that the fee waiver was ill-fitted for a situation, such as that here, in which counsel was asking the client to significantly (and unfavorably) modify their fee agreement after operating under a standard Florida contract for almost one and a half years. The court referred to Restatement Third of the Law Governing Lawyers § 18, Comment *e*, in noting that contracts entered into (or modified) during an existing representation could make a client feel pressured to accept the terms to avoid displeasing his or her lawyer, particularly when the fiduciary nature of the attorney—client relationship was considered. Wright v. Ford Motor Co., 982 F.Supp.2d 1292, 1296, 1297.

N.D.Ill.Bkrtcy.Ct.

N.D.Ill.Bkrtcy.Ct.2018. Com. (d) quot. in sup., cit. in sup. and in ftn. (general cite). In separate Chapter 13 proceedings for individual debtors, trustee objected to debtors' proposed plans, which provided that debtors would pay their respective law firms before their secured auto lenders. After a hearing, this court held that the plans were confirmable, but denied without prejudice firms' applications for compensation on the ground that they violated a local rule requiring firms to sign their fee agreements with debtors and file them with the court. The court declined to exercise its inherent power to deny compensation for an attorney's breach of fiduciary duty, but cited Restatement Third of the Law Governing Lawyers § 18 in noting that a fiduciary relationship arose before debtors entered into their retention agreements with firms, which imposed a heightened duty on firms to disclose to debtors the implications of their compensation. In re Carr, 584 B.R. 268, 281.

N.D.Ill.Bkrtcy.Ct.2018. Com. (d) quot. in sup. In two separate Chapter 13 proceedings, trustee filed objections to debtors' proposed plans that accelerated payment of the bankruptcy attorneys' fees set forth in court-approved retention agreements and satisfied secured debtors' auto lenders' claims only after payment of the attorneys' fees. This court confirmed the proposed plans but sustained the trustee's objections for breach of fiduciary duty, holding that a pre-agency fiduciary relationship existed between debtors and attorneys that necessitated a heightened duty to fully disclose the implications of any compensation structure prior to entering into a retention agreement. The court quoted Restatement Third of the Law Governing Lawyers § 18, Comment *d*, which set forth an attorney's informational disclosure obligations at the onset of a representation. In re Carr, 583 B.R. 458, 468.

E.D.N.Y.Bkrtcy.Ct.

E.D.N.Y.Bkrtcy.Ct.2000. Cit. generally in disc., com. (e) quot. but not fol. (citing § 29A of the Tentative Drafts; this is now § 18). Chapter 11 debtor sought denial of proof of claim filed by counsel for debtor's wife in a criminal matter in which firm represented her pursuant to a retainer agreement guarantied by debtor. Among other things, debtor argued that counsel acted unethically when it replaced the initial retainer agreement with a second agreement after representation had begun. Entering judgment for counsel, the court held, in part, that counsel's conduct would be deemed ethical so long as it showed that the terms of the second retainer were fair and reasonable and fully known and understood by debtor's wife. In re Stamell, 252 B.R. 8, 16, 17.

E.D.Tex.

E.D.Tex.2014. Com. (h) quot. in sup. Law firm brought an action against former client, alleging that defendant owed substantial sums under the parties' fee agreement for plaintiff's work enforcing defendant's patent, and that plaintiff had a lien over all amounts recovered by defendant as a result of enforcing the patent. This court denied defendant's motion for a preliminary injunction, which sought to prevent plaintiff from informing those entities from which defendant sought settlements that plaintiff had a lien on the amounts and to pay the amounts into an escrow account. Citing Restatement Third of the Law Governing Lawyers § 18, the court explained that ambiguities had to be interpreted in favor of defendant because plaintiff failed to draft the agreement to clearly state any terms that diverged from a reasonable client's expectations, but determined that the harm defendant suffered did not warrant a preliminary injunction. Mount Spelman & Fingerman, P.C. v. GeoTag, Inc., 70 F.Supp.3d 782, 787.

N.D.Tex.

N.D.Tex.2011. Com. (e) quot. in sup. Attorneys sued former clients, after clients challenged the validity of, and amount owed under, the parties' 30% contingency fee agreement. This court held that the agreement was valid and binding as to clients, even though it was executed approximately three weeks after attorneys began representing them, because attorneys had overcome the presumption of unfairness or invalidity that applied when a contingency fee agreement was entered into during the existence of an attorney-client relationship. While circumstances had evolved before the agreement was signed such that attorneys knew that it was likely that defendants would in short order obtain a large recovery in the underlying litigation, they performed substantial work on behalf of clients, and achieved not insignificant results; in addition, clients were aware of the terms of the agreement well before attorneys' representation of them began. Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue, 843 F.Supp.2d 673, 683.

Alaska

Alaska, 2009. Subsec. (2) and com. (h) cit. and quot. in ftn. After their underlying personal-injury case settled for policy limits, clients sued law firm, disputing the amount of attorney's fees due under the parties' modified contingent-fee agreement, which provided for a flat fee of $250,000 if law firm obtained a policy-limits settlement without requiring “further substantial litigation,” but otherwise reverted to the percentages in the prior fee agreement. The trial court granted summary judgment for law firm. Affirming, this court held that the trial court did not err in interpreting the phrase “further substantial litigation” to mean “additional considerable efforts in carrying on the legal contest.” The court concluded that reasonable persons in the clients' circumstances would not have expected “further substantial litigation” to mean purely in-court proceedings and filings to the exclusion of work done in preparation for mediation or trial, and noted that attorney-client contracts were to be construed as any other contract, using general rules of contract interpretation. Weiner v. Burr, Pease & Kurtz, P.C., 221 P.3d 1, 8.

Alaska, 2007. Com. (d) quot. in ftn. Bankruptcy trustee brought a legal-malpractice action against attorney who had represented debtors in a consumer-protection case pursuant to a "hybrid" fee agreement, after debtors, who had turned down a settlement offer in the underlying case because their attorney's fees under the agreement would have exceeded the $25,000 offered, lost at trial and were ordered to pay defendant car dealer $100,000 in costs and fees. The trial court dismissed. Reversing and remanding, this court held that Alaska law prohibited a fee agreement that used a client's decision to settle as a trigger to convert contingent-fee representation into an obligation to pay hourly fees, because a hybrid agreement of this kind impermissibly burdened the client's exclusive right to settle a case. The court noted as unlikely that the fee agreement's single sentence devoted to the conversion provision satisfied an attorney's duty to fully explain the agreement's terms. Compton v. Kittleson, 171 P.3d 172, 179.

Cal.

Cal.2018. Cit. in sup. Law firm that was disqualified from representing two clients who were adverse to one another brought a lawsuit against one of those clients, alleging that defendant owed plaintiff damages for services rendered. An arbitrator awarded damages to plaintiff. The court of appeals reversed, finding that the agreement between the parties, which included the arbitration term and a blanket waiver of any conflict of interests that might arise if plaintiff ever represented a party adverse to defendant, was unenforceable because plaintiff violated California ethical rules by failing to disclose plaintiff's conflict of interest. This court affirmed, inter alia, holding that the blanket waiver included in the agreement was a violation of ethical rules because it did not fully disclose existing conflicts. The court quoted Restatement Third of the Law Governing Lawyers § 18 in explaining that a contract between an attorney and a client had to be construed as a reasonable person in the circumstances of the client would have construed it. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., 425 P.3d 1, 15.

Ill.App.

Ill.App.2002. Com. (h) quot. in case quot. in sup. (citing § 29A, Proposed Final Draft No. 1, 1996, which is now § 18). Law firm sued clients to recover costs for computer-assisted legal research and other expenses. Trial court ordered that firm was entitled to recover only $2,940 out of $20,704 in claimed costs. This court affirmed, holding, inter alia, that the computer-assisted legal-research expenses were a form of attorney fees and were not separately recoverable as a cost or expense pursuant to the parties' contingent-fee agreement. Noting that an ambiguous agreement should be construed against the drafter, the court construed the contingent-fee agreement strictly against the firm in concert with the court's inherent power to supervise the reasonableness of a contingent-fee agreement. Guerrant v. Roth, 334 Ill.App.3d 259, 267 Ill.Dec. 696, 777 N.E.2d 499, 504-505.

Kan.

Kan.2020. Subsec. (2) quot. in sup. Purchaser of limousine business filed a complaint with the state attorney's disciplinary administration against attorney, alleging that respondent violated professional-conduct rules by representing both seller and petitioner during the sale of the business while they were adversarial parties. This court ordered suspension of respondent, holding that the record supported a finding by the disciplinary panel that respondent represented adversarial parties without informing them of the conflict of interest or obtaining their informed consent. The court rejected respondent's assertion that he was merely a scrivener who mediated the transaction, and explained that, under Restatement Third of the Law Governing Lawyers §§ 18 and 19, a reasonable person in petitioner's position at the time of the sale would have understood the retainer agreement to mean that respondent represented both parties to the sale as an attorney, because the plain language of the retainer agreement drafted by respondent and entered into by petitioner, respondent, and seller indicated that respondent was employed to provide legal and business advice. Matter of Murphy, 473 P.3d 886, 901.

Ky.App.

Ky.App.2017. Com. (c) cit. and quot. in disc. Law firm that represented trust beneficiaries in settling a dispute over the distribution of trust assets filed a motion for attorney's fees under a state statute; beneficiaries opposed law firm's motion, arguing that the requested fee was in breach of their hourly-rate fee agreement with law firm and unreasonable under the circumstances. The trial court granted partial summary judgment for beneficiaries, finding that the parties had not entered into a modification of the agreement. Affirming that portion of the decision, this court held that beneficiaries' failure to object after law firm informed them that it was dissatisfied with the agreement and that it intended to seek additional fees on another basis was not sufficient to constitute a modification of the agreement. While Restatement Third of the Law Governing Lawyers § 18 provided that an agreement to modify a contract did not necessarily need to be memorialized in writing, the evidence presented by law firm did not constitute clear and convincing evidence that the parties agreed to modify the agreement. Kincaid v. Johnson, True & Guarnieri, LLP, 538 S.W.3d 901, 911, 915.

Mass.

Mass.2005. Com. (e) quot. in sup. Referring attorney sought referral fees pursuant to oral fee-sharing agreement with attorneys retained by client. Affirming the trial court's entry of judgment for plaintiff, this court held, inter alia, that the parties entered into an enforceable fee-sharing agreement, and decided that, hereafter, in order to satisfy professional ethical requirements, lawyers who participated in a fee-sharing agreement were required to obtain the client's consent in writing before the referral was made. The court said that this rule relieved a client from feeling pressured to accede to a midrepresentation fee-sharing change to avoid the problems of changing counsel, alienating the lawyer, missing a deadline, or losing an opportunity. Saggese v. Kelley, 445 Mass. 434, 443, 837 N.E.2d 699, 706.

Mass.App.

Mass.App.2017. Subsec. (1)(a) and com. (e) cit. in ftn.; subsec. (2) quot. in sup. Law firm filed an action for breach of contract and unjust enrichment against former clients, alleging that defendants failed to pay fees plaintiff earned representing defendants in an employment dispute. The trial court granted plaintiff's motion for summary judgment. This court reversed in part as to the portion of the award that was for professional courtesy credits that plaintiff had issued to defendants and had subsequently reversed, holding that the amount of the credits had been waived by plaintiff. Citing Restatement Third of the Law Governing Lawyers § 18(2), the court explained that, here, there was no evidence of a genuine issue of material fact as to whether defendants had reason to believe that the credits were conditioned on their timely payment of bills. BourgeoisWhite, LLP v. Sterling Lion, LLC, 71 N.E.3d 171, 177.

Miss.

Miss.2021. Subsec. (2) quot. in case quot. in sup. (quoting § 29A(2) of T.D. No. 5, 1992, which is now § 18(2) of the Official Text). Attorney sued client, alleging that defendant failed to pay for legal services rendered pursuant to promissory notes entered into between the parties. The trial court granted plaintiff's motion for summary judgment. This court affirmed, holding that plaintiff's purported oral representations that he would recalculate attorney's fees owed did not change defendant's obligations under the promissory notes. Quoting Restatement Third of the Law Governing Lawyers, the court explained that it construed contracts between attorneys and clients as reasonable persons in the clients' position would, and reasoned that, here, defendant voluntarily signed the promissory notes that clearly and unambiguously stated the principal amount and interest rates that defendant promised to pay. Borries v. Murphy, 324 So.3d 261, 266.

Miss.1994. Subsec. (2) quot. in part in case quot. in sup. (citing § 29A, T.D. No. 5, 1992, which is now § 18). Attorneys who represented the estate of a deceased prisoner filed a petition for authorization of additional attorneys' fees. The chancery court awarded fees and interest over the objection of the estate's trustee. Reversing and rendering, this court held, inter alia, that the attorneys could not recover fees under a contingency contract for their successful compromise of a hospital's claim for medical expenses and for obtaining an order that the Department of Corrections pay that claim, since these transactions involved no "recovery," which was contractually required for an award of additional fees. In re Estate of Sparkman, 639 So.2d 1258, 1261.

Miss.1991. Subsec. (2) cit. in disc. (citing § 29A, P.D. No. 6, 1990, which is now § 18). State brought disciplinary proceedings against attorney whose communication with unrepresented adverse party "not to worry" about contacting their insurance company violated state rule of professional responsibility's prohibition against advising nonclient about any matter other than that they should obtain counsel. The court found by clear and convincing evidence that attorney violated this rule and entered order agreeing with the complaint tribunal that attorney be privately, rather than publicly, reprimanded. Attorney Q v. Mississippi State Bar, 587 So.2d 228, 231.

N.J.

N.J.2020. Com. (h) cit. and quot. in sup. Client sued attorney who formerly represented her son in a bullying lawsuit against school district, seeking to invalidate the parties' written retainer agreement on the ground that attorney procured it in violation of the professional rules. After a hearing, the trial court voided the agreement and limited attorney to the quantum meruit value of his services, finding that he orally promised client that she would not be responsible for his legal fees if the lawsuit did not succeed, despite terms of the agreement suggesting otherwise. The court of appeals affirmed. Affirming, this court held that the agreement was not valid under Restatement Third of the Law Governing Lawyers § 18, because the trial court accepted client's assertion that she would not have retained attorney had he informed her that she would be responsible for his hourly fees if the lawsuit failed, and concluded that a reasonable client would have viewed the agreement as a typical contingent-fee arrangement that obligated the client to pay a percentage of a monetary recovery only if the lawsuit succeeded. Balducci v. Cige, 223 A.3d 1229, 1240, 1241.

N.J.1996. Cit. in disc., com. (c) cit. in disc., coms. (d) and (h) cit. and quot. in disc. (citing § 29A, P.F.D. No. 1, 1996, which is now § 18). Discharged attorney sued client to recover fees allegedly owed under the parties' retainer agreement. Client argued that the agreement, which required client to provide attorney with six months' notice of termination, was unenforceable as an unreasonable restriction of its right to discharge counsel. The trial court entered judgment for attorney, but the intermediate appellate court reversed and remanded. Affirming as modified, this court held that fair and reasonable attorney-client agreements, though usually construed against the attorney, were enforceable where they satisfied both general contracts and professional ethics requirements; that, while attorneys and clients were free to negotiate such innovative arrangements as the engagement retainer, the notice provision here was excessive; and that attorney could recover the fair value of his pretermination services. Cohen v. ROU, 146 N.J. 140, 679 A.2d 1188, 1196, 1198, 1199.

N.J.Super.App.Div.

N.J.Super.App.Div.2009. Quot. in sup.; com. (c) cit. in case quot. in sup. (citing § 29A of Prop. Final Draft No. 1, 1996, which is now § 18 of the Official Text). Law firm sued former clients, seeking unpaid fees, expenses, and collection fees consistent with a master retainer that it allegedly incorporated by reference in the parties' retainer agreement. The trial court granted summary judgment for law firm. This court reversed the entry of judgment with respect to those sums purportedly authorized by law firm's master retainer and remanded, holding, inter alia, that law firm, by inviting the client to seek out its master retainer instead of explaining the full terms of its retention, impermissibly shifted its fiduciary duty to the client and undermined the intent and purpose of the rules of professional conduct. The court noted that an agreement between an attorney and a client was construed as a reasonable person in the circumstances of the client would have construed it and that an otherwise enforceable

agreement between an attorney and client was invalid if it ran afoul of ethical rules governing that relationship. Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J.Super. 510, 530, 983 A.2d 604, 615.

N.J.Super.

N.J.Super.2001. Com. (d) quot. in case quot. in disc. (citing § 29A, Proposed Final Draft No. 1, 1996, which is § 18 of the Official Draft). Attorney who failed to timely secure written contingent-fee agreement from clients sued clients' heirs for compensation for work done for clients, seeking to recover fees by enforcement of contingent-fee agreement or pursuant to doctrine of quantum meruit. Trial court awarded plaintiff fee based on quantum meruit. Affirming, this court held that recovery under contingent-fee agreement was not justified, because the agreement was not executed within a reasonable time after commencement of representation; however, plaintiff was entitled to quantum meruit recovery for reasonable value of legal services rendered. Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 340 N.J.Super. 104, 120, 773 A.2d 1176, 1187.

N.J.Super.1999. Cit. in sup., quot. in ftn. in sup. (citing § 29A, Prop. Final Draft No. 1, 1996, which is now § 18). Client sued attorney for legal malpractice in connection with defendant's decision to settle plaintiff's personal injury action without first securing plaintiff's approval. The trial court dismissed the complaint for failure to comply with the provisions of the Affidavit of Merit statute. Affirming in part, reversing in part, and remanding, this court held that dismissal was appropriate as to plaintiff's claims of professional negligence and fraud; however, to the extent plaintiff had alleged breach of the approval-of-settlement clause included in his retainer agreement, he had stated a claim upon which relief could be granted. Levinson v. D'Alfonso & Stein, 320 N.J.Super. 312, 727 A.2d 87, 89.

N.D.

N.D.2010. Subsec. (2) quot. in sup. Disciplinary board filed a petition against attorney for violating the rules of professional conduct, alleging that, after his longtime client had been judicially declared incapacitated, he represented client's sons at a hearing in which they sought to be appointed as client's guardians/conservators, and then drafted a new will for client, purportedly on client's behalf, which favored sons' interests. While suspending attorney from the practice of law for 90 days based on other grounds, this court rejected the panel's finding that attorney's actions violated the rules on conflict of interest, concluding that there was no clear and convincing evidence that longtime client was attorney's client at the time of the hearing; attorney's status as client's current or former attorney was unclear in the absence of evidence as to client's understanding of his professional relationship with attorney and whether client hired attorney on retainer or whether they entered into a new contract each time client requested that attorney perform a task. In re Disciplinary Action Against Kuhn, 2010 ND 127, 785 N.W.2d 195, 200.

Okl.

Okl.2008. Cit. in ftn. In an action to recover damages for property loss caused by fire, plaintiff filed a voluntary dismissal with prejudice, without the knowledge of his counsel of record. On the motion of plaintiff's lawyer, the trial court vacated the dismissal. The court of appeals reversed. Vacating the opinion of the court of appeals, and affirming the order of the trial court, this court remanded, holding, inter alia, that, because a party to an action who was represented by counsel of record could not act independently as his own attorney, a dismissal filed by the represented client that was not joined by the counsel of record, or that was filed without client's having earlier discharged his lawyer from employment, was facially ineffective. Watson v. Gibson Capital, L.L.C., 2008 OK 56, 187 P.3d 735, 738.

Tex.

Tex.2017. Com. (h) quot. in case quot. in sup. and cit. in ftn. Attorneys sued client who had hired them to represent him in a partnership dispute, alleging that, under the parties' contingent-fee agreement, they were entitled to a percentage of the ownership interest in the partnership that they recovered on his behalf. After a jury found that attorneys were not entitled to an interest in the partnership, the trial court granted attorneys' motion for a new trial, ruling that the agreement unambiguously provided for the recovery of an ownership interest as attorney's fees. The court of appeals denied client's petition for a writ of mandamus. This court conditionally granted client's petition for a writ of mandamus, holding that the agreement only permitted recovery for monetary awards. The court pointed out that, under Restatement Third of the Law Governing Lawyers § 18, a lawyer had a duty to appreciate the importance of words to detect and repair omissions in client-lawyer contracts. In re Davenport, 522 S.W.3d 452, 458, 461.

Tex.2011. Subsec. (2) quot. in sup. and cit. in ftn.; com. (e) quot. in ftn.; com. (h) quot. in sup., cit. in ftn., and cit. and quot. in diss. op. Former client sued attorney, seeking a declaration that its contingent fee agreement was with law firm where attorney was "of counsel," not with attorney personally. The trial court entered judgment on a jury verdict for defendant, and the court of appeals affirmed. Reversing and remanding, this court held that a client-lawyer agreement had to be construed from the perspective of a reasonable client in the circumstances, and that, under that standard, the agreement in this case was not ambiguous, and was between client and law firm. The dissent argued that an agreement on firm letterhead did not unambiguously create an agreement with the firm, and that consideration of the actual contract and the circumstances surrounding its formation led to the conclusion that the fee agreement was ambiguous as a matter of law. Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 450, 451, 453, 458, 459.

Tex.2006. Cit. in case quot. in disc. Discharged law firm sued former client, seeking payment under a fee agreement. The trial court entered judgment on a jury verdict for law firm. The court of appeals reversed. Affirming that portion of the decision, this court held, inter alia, that a provision of the agreement requiring client to pay law firm a percentage based on the value of client's underlying claim at the time of discharge, rather than on client's actual recovery, was unconscionable as a matter of law, in part because it did not fulfill firm's obligation to give client at the outset a clear and accurate explanation of how such a fee was to be calculated, specifically, how the present value of the claims was to be measured. Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 565.

Tex.2001. Com. (h) cit. in ftn., quot. in conc. op., cit. in ftn., in. conc. op., subsec. (2) and com. (c) quot. in conc. op. Law firm, whose contingent-fee agreement with clients was for one-third of "any amount received by settlement or recovery" of clients' award against their mortgagor, sued clients for attorneys' fee after clients' award was offset by mortgagors' counterclaim. The trial court granted law firm summary judgment, and appellate court affirmed. Reversing, this court held that contingent-fee agreement entitled firm to net amount of clients' recovery, which was computed after any offset. Concurrence asserted that whether a contingent fee should be based on net or gross recovery depended on the circumstances. Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95, 97.

Tex.2000. Com. (h) cit. in conc. and diss. op. (citing § 29A, Prop. Final Draft No. 1, 1996, which is now § 18). Clients sued attorneys for, inter alia, breach of contract in connection with attorneys' collection of an additional 5% in fees following settlement in clients' wrongful-death suit against third party. The trial court entered summary judgment for attorneys, but the intermediate appellate court reversed. Reversing, this court held, in part, that attorneys were entitled to the additional fees provided for in the fee agreement when the wrongful-death judgment was "appealed to a higher court," or, in other words, when defendant in that action filed a cash deposit with the appellate court. Concurring and dissenting opinion believed that the contingent-fee agreement should be construed against attorneys/drafters, and that the term "appealed to a higher court," as used therein, was ambiguous and could reasonably be interpreted to mean something more than the initial step taken by defendant to preserve its appellate rights. Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 866.

Tex.App.

Tex.App.2014. Subsec. (2) quot. in case quot. in disc. Law firm sued, among others, corporate client and its president, seeking to recover unpaid attorney's fees. The trial court granted partial summary judgment for firm on its motion to strike an affidavit by president, in which he purported to testify regarding the reasonableness and necessity of the fees in the underlying litigation. Affirming that portion of the decision, this court held that the testimony and opinions proffered by president were inadmissible and not competent summary-judgment evidence, because president was not an attorney and did not qualify as an expert on issues concerning attorney's fees. The court reasoned, in part, that, although the question of whether a fee agreement was reasonably clear had to be determined from the client's perspective, neither side had raised an issue of ambiguity that would require the fee agreements to be construed or interpreted by the court. Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 829-830.

Tex.App.2013. Com. (h) cit. in case quot. in sup. Client brought malpractice and other claims against law firm that he had retained to pursue claims against his alleged common-law wife after she won a lottery jackpot. The trial court denied defendant's motion to compel arbitration pursuant to an arbitration provision contained in the parties' fee agreement. This court affirmed, and denied defendant's petition for a writ of mandamus, holding that the arbitration clause, which required plaintiff to arbitrate all of his claims but allowed defendant to litigate its claims regarding costs and expenses, was so one-sided that it was unconscionable under the circumstances existing when the parties made the contract. The court noted that, according to Restatement Third of the Law Governing Lawyers § 18, Comment *h*, contracts between an attorney and client first had to be construed from the standpoint of a reasonable person in the client's circumstances. Royston, Rayzor, Vickery & Williams, L.L.P. v. Lopez, 443 S.W.3d 196, 208.

Tex.App.2010. Coms. (c) and (h) cit. and quot. in sup. Law firm brought breach-of-contract suit against North Carolina client for failure to pay the full amounts billed for legal services. The trial court dismissed law firm's claims for lack of personal jurisdiction over client. This court affirmed, holding that, because the forum-selection clause in the attorney-client agreement, under which client allegedly consented to the jurisdiction of the Dallas, Texas, courts, was not clear on its face and required interpretation to give meaning to its language, client did not consent to such jurisdiction. Noting that client's president was not sophisticated and signed, without negotiation, the already drafted agreement six months after representation had begun, the court concluded that, at the time client entered into the agreement, it did not contemplate litigating in Texas, since it hired firm's attorney, licensed in North Carolina, to represent it in litigation in North Carolina. Falk & Fish, L.L.P. v. Pinkston's Lawnmower and Equipment, Inc., 317 S.W.3d 523, 528, 529.

Tex.App.2008. Cit. in sup., com. (h) cit. and quot. in sup. Former client sued attorney and law firm in which attorney was "of counsel," seeking a declaratory judgment that attorney signed a contingency-fee agreement on behalf of law firm, which had disclaimed rights to or interest in the disputed fees, and thus could not recover fees individually. The trial court entered judgment on a jury verdict for attorney. Affirming, this court held that the agreement was ambiguous, but declined to apply the doctrine of contra proferentem to interpret the contract against attorney; instead, it construed the fee agreement from the standpoint of a reasonable client with sophistication and experience that had vigorously negotiated the agreement with an individual attorney, after being told that the law firm would not take the case, and the court concluded that such a client would understand that it had contracted with an individual lawyer rather than the law firm. Anglo-Dutch Petroleum Intern., Inc. v. Greenberg Peden, P.C., 267 S.W.3d 454, 471, 472.

Wis.

Wis.2004. Com. (h) quot. in ftn. to conc. and diss. op. Law firm brought action against former client and guarantor to enforce retainer letter and guaranty to collect legal fees and retroactive interest. Trial court entered judgment for law firm, and court of appeals affirmed in part and reversed in part. Affirming in part, this court held, inter alia, that award of retroactive interest was proper. The concurring and dissenting opinion disagreed regarding retroactive interest, arguing that retainer letter in which the interest terms were stated was ambiguous, and, as a general rule,

contractual ambiguities were to be construed against the drafter. DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Limited Partnership, 273 Wis.2d 577, 682 N.W.2d 839, 853.

Restatement (Third) of the Law Governing Lawyers § 19 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 2. Summary of the Duties under a Client–Lawyer Relationship

§ 19 Agreements Limiting Client or Lawyer Duties

(1) Subject to other requirements stated in this Restatement, a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if:
(a) the client is adequately informed and consents; and
(b) the terms of the limitation are reasonable in the circumstances.
(2) A lawyer may agree to waive a client's duty to pay or other duty owed to the lawyer.

Comment:

a. *Scope and cross-references.* This Section describes the extent to which lawyers and clients may limit the duties to each other summarized in §§ 16 and 17. It addresses not waivers and settlements of claims that have already arisen (see § 54), but specifications defining in advance the duties of a lawyer or client. For additional requirements applicable to contracts reached during a representation, see § 18. This Section does not deal with duties that lawyers and clients may owe to third persons, except as they may be affected by changes in the duties of lawyers and clients to each other. See, e.g., §§ 51 and 56 (right of certain nonclients to sue lawyer for negligence). The Section assumes that the client is legally competent (see § 24). Concerning the waiver by a client of duties owed by a lawyer to the client, see § 19(1).

This Section provides default rules that apply when no other, more specific rule of the Restatement applies. Thus, its rules are subject to other provisions, such as those that concern allowing, restricting, or forbidding client consent to the disclosure of confidential information (e.g., §§ 26(3) & 62), waiver of conflicts of interest (e.g., §§ 122 &

126), and arbitration of fee disputes (see § 42). The Section should be applied in view of the prohibition against advance waiver by the client of the lawyer's civil liability (see § 54). The separation between the Sections is indistinct at the margins. Any accepted limitation might serve to diminish the lawyer's legal-malpractice liability notwithstanding § 54 and therefore might be motivated in part by the objective of obtaining such diminution. The reasonableness requirement of § 19(1)(b) serves to limit such diminutions to those in which the client obtains reasonably valuable services in the circumstances (see Comment *c* hereto).

b. *Rationale.* Restrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others. On the one hand, for some clients the costs of more extensive services may outweigh their benefits. A client might reasonably choose to forgo some of the protection against conflicts of interest, for example, in order to get the help of an especially able or inexpensive lawyer or a lawyer already familiar to the client. The scope of a representation may properly change during a representation, and the lawyer may sometimes be obligated to bring changes of scope to a client's notice (see § 20). In some instances, such as an emergency, a restricted representation may be the only practical way to provide legal services (see Comments *c* and *d* hereto).

On the other hand, there are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers (see § 16, Comment *b*). Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly. Also, any attempt to assess the basis of a client's consent could force disclosure of the client's confidences. In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

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

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

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

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

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

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

Fifth, the terms of the limitation must in all events be reasonable in the circumstances (§ 19(1)(b)). When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver—typically, a reduced legal fee or the ability to retain a particularly able lawyer—could reasonably be considered to outweigh the potential risk posed by the limitation. It is also relevant whether there were special circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.

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

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

Illustrations:

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

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

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

d. Lawyer waiver of a client's duties. Lawyers generally are well positioned to appraise a waiver of a client's duties to them (see § 17). Waiver of the client's duty to pay for legal services had traditionally been encouraged when motivated by the client's inability to pay. The client's duty to indemnify the lawyer for certain losses attributable to the client (see § 17(2)) is based on an implied contract which is subject to waiver. Client waivers do not diminish the duties owed to third persons, such as the duty not to commit or assist crime or fraud.

e. Contracts to increase a lawyer's duties. The general principles set forth in this Section apply also to contracts calling for more onerous obligations on the lawyer's part. A lawyer or law firm might, for example, properly agree to provide the services of a tax expert, to make an unusually large number of lawyers available for a case, or to take unusual precautions to protect the confidentiality of papers. Such a contract may not infringe the rights of others, for example by binding a lawyer to aid an unlawful act (see § 23) or to use for one client another client's secrets in a manner forbidden by § 62. Nor could the contract contravene public policy, for example by forbidding a lawyer ever to represent a category of plaintiffs even were there no valid conflict-of-interest bar (see § 13) or by forbidding the lawyer to speak on matters of public concern whenever the client disapproves.

Clients too may sometimes agree to special obligations, for example to contribute work to a case, as by conducting witness interviews.

Reporter's Note

*Comment c. Limiting a representation.*See generally ABA Model Rules of Professional Conduct, Rule 1.2(c) (1983) ("A lawyer may limit the objectives of the representation if the client consents after consultation."); Zacharias, Limited Performance Agreements: Should Clients Get What They Pay For?, 11 Geo. J. Leg. Ethics 915 (1998); e.g., Kane, Kane & Kritzer, Inc. v. Altagen, 165 Cal.Rptr. 534 (Cal.Ct.App.1980) (lawyer retained by sophisticated client to send collection letters, but not to file or discuss suit unless requested); Johnson v. Jones, 652 P.2d 650 (Idaho 1982) (to draw up contract but not to advise on rights under it); Delta Equipment & Constr. Co. v. Royal Indem. Co., 186 So.2d 454 (La.Ct.App.1966) (to defend workers-compensation claim but not wage claim); Martini v. Leland, 455 N.Y.S.2d 354 (N.Y.Civ.Ct.1982) (to consult on pending suit but not conduct the litigation); Greenwich v. Markhoff, 650 N.Y.S.2d 704 (N.Y.App.Div.1996) (to bring worker-compensation claims; lawyer liable for not informing client of possible negligence claim). For regulations prohibiting certain limited tax-shelter opinions, see Treasury Dept. Circular No. 230, 31 C.F.R. § 10.33; C. Wolfram, Modern Legal Ethics 700-01 (1986).

On limited representation in an emergency, see, e.g., ABA Model Rules of Professional Conduct, Rule 1.1, Comment ¶ [3] (1983) ("In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest"); Tex. Discipl. R. Prof. Conduct, R. 1.01(a)(2) (lawyer may accept or continue representation in matter which lawyer knows is beyond lawyer's competence "in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances").

On limitation of lawyer duties, see, e.g., United States v. Roth, 860 F.2d 1382 (7th Cir.1988), cert. denied, 490 U.S. 1080, 109 S.Ct. 2099, 104 L.Ed.2d 661 (1989) (criminal defendant who was a lawyer agreed, inter alia, that expert defense counsel would not engage in plea bargaining, in order to avoid conflicts of interest); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F.Supp. 193 (N.D.Ohio 1976) (city agreed that firm would help it in issuing bonds without ceasing to represent corporation in adversarial dealings with city), aff'd, 573 F.2d 1310 (6th Cir.1977), cert. denied, 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978); Griffith v. Taylor, 937 P.2d 297 (Alaska 1997) (agreement that lawyer would perform only "scrivener" function of preparing quit-claim deed based entirely on statutory form); Maxwell v. Superior Court, 639 P.2d 248 (Cal.1982) (criminal defendant agreed that lawyer could write book about case); In re Harris, 514 N.E.2d 462 (Ill.1987) (client who could not find other counsel agreed that lawyer could take long time recovering escheated funds). On the procedural requirements for

such waivers, see, e.g., Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir.1981) (consent upheld when client discussed question with inside legal counsel); IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978) (consent inadequate when conflict cursorily mentioned to inside legal counsel, even though other inside legal counsel knew of conflicting case); Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir.1984) (cursory disclosure of conflict inadequate); Maxwell v. Superior Court, supra (consent of criminal defendant to publication-rights contract adequate when contract contained detailed waiver provisions and judge questioned defendant in court). Much of the case law concerns conflicts of interest. See § 122, Reporter's Note.

*Comment d. Lawyer waiver of a client's duties.*See § 38, Comment *c,* and Reporter's Note thereto.

*Comment e. Contracts to increase a lawyer's duties.*See Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc., 465 N.E.2d 500 (Ill.App.Ct.1984) (lawyer who "guarantees" result of litigation liable if negligent in reaching that conclusion); 1 R. Mallen & J. Smith, Legal Malpractice § 15.4 (3d ed. 1989) (higher standard of care for lawyers claiming to be specialists). On restrictions on accepting clients that are unenforceable because in conflict with public policy, see, e.g., ABA Formal Opin. 94-381 (1994) (in view of ABA Model Rules of Professional Conduct, Rule 5.6(a) (1983), inside corporate counsel may not seek and outside lawyer may not give promise conditioning representation of corporation on undertaking never to represent anyone against corporation in future).

Case Citations - by Jurisdiction

—

C.A.3
N.D.Ga.Bkrtcy.Ct.
E.D.Mich.Bkrtcy.Ct.
D.Nev.Bkrtcy.Ct.
Iowa,
Kan.
Mass.App.
N.J.
N.J.Super.App.Div.
N.M.App.
Okl.

C.A.3

C.A.3, 2007. Cit. in disc. Chapter 11 debtor subsidiaries brought an adversary proceeding against controlling corporation for breach of contract, breach of fiduciary duties, estoppel, and misrepresentation arising from the manner in which it ceased funding debtors' corporate parent. The district court ordered defendant to turn over documents that were withheld based on the attorney-client privilege. This court vacated and remanded for a determination of whether defendant and debtors were parties to a joint representation, since the district court could only compel defendant to produce the disputed documents because of the adverse-litigation exception to the co-client privilege if it found that defendant and debtors were jointly represented by the same attorneys on a matter of common interest that was the subject matter of those documents. In re Teleglobe Communications Corp., 493 F.3d 345, 363.

N.D.Ga.Bkrtcy.Ct.

N.D.Ga.Bkrtcy.Ct.2003. Subsec. (1) cit. and quot. in sup., com. (b) quot. in disc. and cit. in ftn. After debtors who were represented by counsel when they filed their Chapter 7 petition appeared pro se in opposition to a

nondischargeability complaint and to a mortgage lender's motion for relief from stay, this court ordered counsel to show cause why sanctions should not be imposed for failure to represent debtors. Despite its determination at a hearing that no sanctions or other discipline was appropriate or necessary in this case, the court held, inter alia, that the general rule was that, absent special circumstances, an attorney representing a Chapter 7 debtor could not limit the scope of the representation, and was required to represent the debtor in all aspects of the bankruptcy case, including contested matters or adversary proceedings that involved the debtor's interests. In re Egwim, 291 B.R. 559, 570, 571.

E.D.Mich.Bkrtcy.Ct.

E.D.Mich.Bkrtcy.Ct.2012. Cit. in disc. (general cite). In Chapter 7 proceedings, trustee filed a motion seeking an order requiring law firm to disgorge amounts paid by debtors under a prepetition agreement and a postpetition agreement with law firm for services rendered in connection with the filing and completion of debtors' bankruptcy case. This court held that, while law firm's unbundling of legal services to be provided to debtor into separate prepetition and postpetition agreements was not per se prohibited by the state's rules of professional conduct and did not necessarily warrant cancellation under § 329 of the Bankruptcy Code, the record was insufficient to enable the court to determine whether law firm provided adequate consultation to debtors concerning the limitations on its services prepetition and whether debtors' consent to such limitation was fully informed. In re Slabbinck, 482 B.R. 576, 585.

D.Nev.Bkrtcy.Ct.

D.Nev.Bkrtcy.Ct.2013. Cit. in sup., com. (b) quot. in sup., com. (c) cit. and quot. in sup. Judgment creditor brought an adversary proceeding against debtors, claiming that debtors' prepetition judgment debt was nondischargeable as one incurred through fraud. After attorney who had filed debtors' bankruptcy petition refused to defend debtors against the adversary proceeding on the ground that the parties' retainer agreement excluded adversary proceedings from the flat fee, and debtors, acting pro se, reached a settlement with creditor, this court ordered sanctions against debtors' attorney. The court held that attorney had violated multiple state ethical rules and sections of the Bankruptcy Code by engaging in "unbundling," a business model that automatically divorced representation in a consumer's main Chapter 7 case from representation in any adversary proceeding that arose after filing. The court reasoned, in part, that attorney's decision to unbundle representation was unreasonable in light of debtors' circumstances and objectives; among other things, prevailing in creditor's adversary proceeding was the only way debtors could have achieved their original objective in hiring attorney, which was to eliminate the garnishment connected to creditors' judgment against them. In re Seare, 493 B.R. 158, 184, 192-196, 220.

Iowa,

Iowa, 2014. Subsec. (1) quot. in disc. Executor/beneficiary of estate brought a legal-malpractice action against estate counsel, alleging that counsel failed to advise her about potential legal challenges to another beneficiary's option to purchase, at a below-market-value price, farmland that was property of the estate. The trial court granted summary judgment for counsel. The court of appeals reversed. Vacating the decision of the court of appeals and affirming the judgment of the trial court, this court held that the creation of an attorney—fiduciary relationship between counsel and executor did not impose on counsel an independent duty to represent executor's personal interests. The court noted that, while the rule of Restatement Third of the Law Governing Lawyers § 19(1) permitted a lawyer to limit the scope of representation by agreement with a client, it only allowed the lawyer and client to agree to limit a duty that the lawyer would otherwise owe to the client, and thus it did not support executor's claim that estate attorneys represented the personal interests of executors unless specifically limited. Sabin v. Ackerman, 846 N.W.2d 835, 841, 842.

Kan.

Kan.2020. Com. (c) quot. in sup. Purchaser of limousine business filed a complaint with the state attorney's disciplinary administration against attorney, alleging that respondent violated professional-conduct rules by representing both seller and petitioner during the sale of the business while they were adversarial parties. This court ordered suspension of respondent, holding that the record supported a finding by the disciplinary panel that respondent represented adversarial parties without informing them of the conflict of interest or obtaining their informed consent. The court rejected respondent's assertion that he was merely a scrivener who mediated the transaction, and explained that, under Restatement Third of the Law Governing Lawyers §§ 18 and 19, a reasonable person in petitioner's position at the time of the sale would have understood the retainer agreement to mean that respondent represented both parties to the sale as an attorney, because the plain language of the retainer agreement drafted by respondent and entered into by petitioner, respondent, and seller indicated that respondent was employed to provide legal and business advice. Matter of Murphy, 473 P.3d 886, 901.

Mass.App.

Mass.App.2017. Subsec. (2) cit. in sup.; com. (d) quot. in sup. Law firm filed an action for breach of contract and unjust enrichment against former clients, alleging that defendants failed to pay fees plaintiff earned representing defendants in an employment dispute. The trial court granted plaintiff's motion for summary judgment. This court reversed in part as to the portion of the award that was for professional courtesy credits that plaintiff had issued to defendants and had subsequently reversed, holding that the amount of the credits had been waived by plaintiff. Citing Restatement Third of the Law Governing Lawyers § 19, the court explained that a lawyer could waive a client's duty to pay a fee, and determined that, here, plaintiff could not reverse the credits it had issued, because it had not indicated that the credits were conditioned on defendants' timely payment of their bills. BourgeoisWhite, LLP v. Sterling Lion, LLC, 71 N.E.3d 171, 176.

N.J.

N.J.1996. Subsec. (1) cit. in disc. (citing § 30, P.F.D. No. 1, 1996, which is now § 19). Discharged attorney sued client to recover fees allegedly owed under the parties' retainer agreement. Client argued that the agreement, which required client to provide attorney with six months' notice of termination, was unenforceable as an unreasonable restriction of its right to discharge counsel. The trial court entered judgment for attorney, but the intermediate appellate court reversed and remanded. Affirming as modified, this court held that fair and reasonable attorney-client agreements, though usually construed against the attorney, were enforceable where they satisfied both general contracts and professional ethics requirements; that, while attorneys and clients were free to negotiate such innovative arrangements as the engagement retainer, the notice provision here was excessive; and that attorney could recover the fair value of his pretermination services. Cohen v. ROU, 146 N.J. 140, 679 A.2d 1188, 1199.

N.J.Super.App.Div.

N.J.Super.App.Div.2007. Cit. in sup., quot. in ftns., com. (c) cit. in sup. Daughter who was executor/cobeneficiary of her mother's estate brought, along with her cobeneficiary sisters and estate, action for legal malpractice against attorney and law firm for allegedly giving daughter tax advice that resulted in large tax liability for each of the individual plaintiffs. The trial court granted summary judgment for defendants, holding that defendants were retained as counsel for the estate and not the individual plaintiffs. Reversing as to daughter, this court held, inter alia, that defendants failed to clearly define the scope of their representation of daughter, and that daughter reasonably could have expected to be represented both as an individual and as executor. The court pointed to the wording of the retainer agreement and the fact that defendants did not expressly advise daughter that their representation was limited to her duties and responsibilities as an executor. Estate of Albanese v. Lolio, 393 N.J.Super. 355, 375, 923 A.2d 325, 337, 338.

N.M.App.

N.M.App.2020. Cit. in sup. Former chief investment officer of educational retirement board and spouse brought a qui tam action on behalf of New Mexico against, among others, investment advisor, alleging that discovery was necessary to investigate defendant's counsel's conflicts of interest, because defendant's counsel previously represented financial entities in a matter that undermined its ability to loyally represent defendant in litigation regarding the recovery of improperly invested funds on behalf of retirement board. The trial court denied plaintiffs' motion to compel discovery. This court affirmed, holding that plaintiffs failed to demonstrate that defendant's counsel had disqualifying conflicts of interest. Citing Restatement Third of the Law Governing Lawyers § 19, the court observed that concerns of improper dissemination of confidential information were ameliorated by limiting the scope of counsel's representation, so long as defendant gave informed consent and the limitation did not unduly interfere with defendant's desired work. State ex rel. Foy v. Vanderbilt Capital Advisors, LLC, 511 P.3d 329, 348.

Okl.

Okl.2008. Cit. in ftn. In an action to recover damages for property loss caused by fire, plaintiff filed a voluntary dismissal with prejudice, without the knowledge of his counsel of record. On the motion of plaintiff's lawyer, the trial court vacated the dismissal. The court of appeals reversed. Vacating the opinion of the court of appeals, and affirming the order of the trial court, this court remanded, holding, inter alia, that, because a party to an action who was represented by counsel of record could not act independently as his own attorney, a dismissal filed by the represented client that was not joined by the counsel of record, or that was filed without client's having earlier discharged his lawyer from employment, was facially ineffective. Watson v. Gibson Capital, L.L.C., 2008 OK 56, 187 P.3d 735, 738.

End of Document

Restatement (Third) of the Law Governing Lawyers 2 3 Intro. Note (2000)

Introductory Note

Case Citations - by Jurisdiction

Introductory Note: This Topic addresses the allocation between client and lawyer of the authority to make decisions concerning the representation. It deals with authority only as between client and lawyer, describing rights that can in appropriate circumstances be enforced against the other or that disciplinary authorities can enforce against the lawyer. It does not deal with the authority of the lawyer to bind the client in dealings with courts and third parties, a subject considered in Topic 4.

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

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

The Topic first describes the lawyer's duty to inform and consult with a client (see § 20). Section 21 describes the power of client and lawyer to allocate authority and the presumptive allocation that prevails in the absence of specification. The Topic then considers authority that may always be exercised by the client (see § 22) and by the lawyer (see § 23). The final Section states qualifications that apply when the client's ability to decide is impaired (see § 24).

Case Citations - by Jurisdiction

N.J.

N.J.2009. Intro. Note cit. in case cit. in sup. (citing Ch. 2, Topic 3, Intro. Note to T.D. No. 5, 1992. The Intro. Note has since been revised; see Official Text). (erron. cit. as § 141). After owners of a beach club brought defamation and other claims against neighbors who opposed their application to expand the club, neighbors filed a third-party complaint against owners' attorneys for, among other things, malicious use of process. The trial court granted summary judgment for attorneys. The court of appeals affirmed. Affirming as modified, this court held, inter alia,

that there was no support in the record on the required element of malice as it related to attorneys; all of the evidence on the subject of attorneys' motivations pointed to their good faith belief that owners and their business had been damaged, that neighbors' alleged conduct was wrongful, and that the claims were made for no improper purpose. LoBiondo v. Schwartz, 199 N.J. 62, 110-111, 970 A.2d 1007, 1034.

N.J.1993. Intro. Note quot. generally in disc. (citing Ch. 2, Topic 3, Intro. Note to T.D. No. 5, 1992. The Intro. Note has since been revised; see Official Text). Casino hotel employee who took leave of absence found that her position was filled when she returned for work. She sued employer for breach of contract and promissory estoppel. After plaintiff failed to respond to defendant's demand for service of documents and other requests, the trial court granted defendant summary judgment. It also granted defendant's motion for counsel fees, holding that plaintiff's complaint was frivolous because it was without any reasonable basis in law or equity. The intermediate appellate court affirmed. Reversing, this court held, inter alia, that to the extent that a New Jersey statute, which allowed award of attorneys' fees to prevailing party in a lawsuit if nonprevailing party asserted claim or defense in bad faith or knew or should have known that complaint was without any reasonable basis in law or equity, applied to the parties, the statute was valid; however, the court declined to extend the statute to apply to award of counsel fees and costs against attorneys, since such award would raise questions whether the statute impinged on the supreme court's exclusive power to discipline attorneys. It noted that parties rely on their attorneys to evaluate the basis in “law or equity” of a claim or defense. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 626 A.2d 425, 430.

Restatement (Third) of the Law Governing Lawyers § 20 (2000)

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

(1) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer under §§ 21- 23.
(2) A lawyer must promptly comply with a client's reasonable requests for information.
(3) A lawyer must notify a client of decisions to be made by the client under §§ 21- 23 and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment:

a. *Scope and cross-references.* This Section's general requirement that a lawyer inform and consult with a client is complemented by more particular requirements set forth elsewhere in this Restatement, for example the requirements that a lawyer make documents available to a client (see § 46) and disclose the basis or rate of the lawyer's fee (see § 38) and concerning the receipt of property of the client (see § 44). Other provisions require a client's informed consent to such matters as a client-lawyer contract (see §§ 18 & 19) and a lawyer's representation of a client despite a conflict of interest (see § 122). On a lawyer's counseling function, see § 94. For the requirement of lawyer honesty to clients, see § 16. For the application of this Section to a client with diminished capacity, see § 24. On communicating with co-clients, see § 60, Comment *l.* As to when the duty to inform a client ends, see § 33, Comment *h.* For imputation of a lawyer's knowledge to a client or to other lawyers of the same firm, see §§ 28 and 132. A lawyer's failure to consult properly with a client may constitute ground for professional discipline (see § 5) and liability for damages and similar relief (see Chapter 4).

b. *Rationale.* Legal representation is to be conducted to advance the client's objectives (see § 16), but the lawyer typically has knowledge and skill that the client lacks and often makes or implements decisions in the client's absence. The representation often can attain its end only if client and lawyer share their information and their views about what should be done. Articulate and sophisticated clients typically call for frequent communication with their lawyers when a matter is important to them. The need to communicate and consult is evident when a decision is entrusted to a client who cannot make it wisely without a lawyer's briefing (see §§ 21 & 22). That need may also be present even in matters the lawyer is to decide (see §§ 21 & 23), because the lawyer's decision must seek the objectives of the client as defined by the client (see § 16). Discussion may cause both participants to change their beliefs about what should be done. In any event, the client may wish to take into account the lawyer's estimate of the probable results of a course of action.

Sometimes it might be unclear whether a decision relating to the representation is to be made by client or lawyer (see §§ 21- 23), and here too consultation with the client is important. Discussion might lead client and lawyer to readjust the allocation of authority between them or to terminate the representation (see §§ 21 & 32).

Clients do not have a legally enforceable duty to communicate to the lawyer, except as provided under the law of misrepresentation. A client who does not disclose facts to a lawyer might be acting foolishly but is not liable to the lawyer, unless the nondisclosure renders the lawyer liable to a third party and thus entitled to claim indemnity from the client (see § 17, Comment *d*). The lawyer may also withdraw under the conditions stated in § 32.

c. *Informing and consulting with a client.* A lawyer must keep a client reasonably informed about the status of a matter entrusted to the lawyer, including the progress, prospects, problems, and costs of the representation (see Restatement Second, Agency § 381). The duty includes both informing the client of important developments in a timely fashion, as well as providing a summary of information to the client at reasonable intervals so the client may be apprised of progress in the matter.

Important events might affect the objectives of the client, such as the assertion or dismissal of claims against or by the client, or they might significantly affect the client-lawyer relationship, for example issues concerning the scope of the representation, the lawyer's change of address, the dissolution of the lawyer's firm, the lawyer's serious illness, or a conflict of interest. If the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client. For example, a lawyer who fails to file suit for a client within the limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw.

The lawyer's duty to consult goes beyond dispatching information to the client. The lawyer must, when appropriate, inquire about the client's knowledge, goals, and concerns about the matter, and must be open to discussion of the appropriate course of action. A lawyer should not necessarily assume that a client wishes to press all the client's rights to the limit, regardless of cost or impact on others. The appropriate extent of consultation is itself a proper subject for consultation. The client may ask for certain information (see Comment *d*) or may express the wish not to be consulted about certain decisions. The lawyer should ordinarily honor such wishes. Even if a client fails to request information, a lawyer may be obligated to be forthcoming because the client may be unaware of the limits of the client's knowledge. Similarly, new and unforeseen circumstances may indicate that a lawyer should ask a client to reconsider a request to be left uninformed.

To the extent that the parties have not otherwise agreed, a standard of reasonableness under all the circumstances determines the appropriate measure of consultation. Reasonableness depends upon such factors as the importance of the information or decision, the extent to which disclosure or consultation has already occurred, the client's sophistication and interest, and the time and money that reporting or consulting will consume. So far as consultation about specific decisions is concerned, the lawyer should also consider the room for choice, the ability of the client to shape the decision, and the time available. When disclosure to the client—for example, of a psychiatric report—might harm the client or others, the lawyer may take that into consideration (see Comment *d* hereto; § 24 & § 46, Comment *c*).

d. Client requests for information. A client is entitled to know how a lawyer is handling the client's matter and how it is progressing. The lawyer thus should respond in a timely and adequate manner to a client's request for information or to a client's general request to be kept informed about specified matters (see generally Restatement Second, Trusts § 173).

The lawyer may refuse to comply with unreasonable client requests for information. Sometimes a lawyer may have a duty not to disclose information, for example because it has been obtained in confidence from another client or because a court order limits its dissemination. Under extreme circumstances a lawyer may keep information from a client for that client's benefit, as in the case of a mentally incapacitated client (see Comment *c* hereto; § 24). As discussed in § 46, Comment *c,* certain internal law-firm information may also be kept from a client.

e. Matters calling for a client decision. When a client is to make a decision (see §§ 21 & 22), a lawyer must bring to the client's attention the need for the decision to be made, unless the client has given contrary instructions (see § 21(2)). A lawyer must ordinarily report promptly to the client a settlement offer in a civil action or a proposed plea bargain in a criminal prosecution. Further disclosure is required when a proposed settlement is part of an aggregate settlement involving claims of several clients. Before a client signs a contract, for example, the lawyer ordinarily should explain its provisions. In addition to legal considerations, advice properly may include economic, social, political, and moral implications of the courses of action open to the client (see § 94(3)). The lawyer ordinarily must explain the pros and cons of reasonably available alternatives. The appropriate detail depends on such factors as the importance of the decision, how much advice the client wants, what the client has already learned and considered, and the time available for deliberation.

Reporter's Note

*Comment b. Rationale.*See generally D. Rosenthal, Lawyer and Client: Who's in Charge? (1974); Martyn, Informed Consent in the Practice of Law, 48 Geo. Wash. L. Rev. 307 (1980). On a client's lack of duty to communicate with a lawyer, see Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir.1988) (client not liable for negligent misrepresentation).

*Comment c. Informing and consulting with a client.*On a lawyer's general duty to communicate with a client, see, e.g., ABA Model Rules of Professional Conduct, Rule 1.4(a) (1983) (“A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information”); Baker v. Humphrey, 101 U.S. 494, 500, 11 Otto 494, 500, 25 L.Ed. 1065 (1879) (“It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive….”); F.D.I.C. v. Clark, 978 F.2d 1541 (10th Cir.1992) (failure to inform corporate client's board of officers' fraud); Shalant v. State Bar, 658 P.2d 737 (Cal.1983) (failure to notify client who had been sued); State v. Dickens, 519 P.2d 750 (Kan.1974) (failure to find that client had died); In re Sullivan, 494 S.W.2d 329 (Mo.1973) (failure to notify that charges against client had been dismissed); State ex rel. Oklahoma Bar Assoc. v. O'Brien, 611 P.2d 650 (Okla.1980) (failure to tell client that client had lost trial and appeal); Annot., 80 A.L.R.3d 1240 (1977). On the duty to inform a client of matters relating to the client-lawyer relationship, see, e.g., Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 617 (3d Cir.1991) (lawyer liable for fraud damages for failure to disclose conflict of interest); Mayo v. State Bar, 587 P.2d 1158 (Cal.1978) (lawyer representing executor did not disclose lawyer's debt to estate); Nichols v. Keller, 19 Cal.Rptr.2d 601 (Cal.Ct.App.1993) (lawyer bringing worker-compensation claim liable for not informing client of possible tort claim); Carlson v. Fredrikson & Byron, 475 N.W.2d 882 (Minn.Ct.App.1991) (malpractice liability for failure to disclose conflict only when conflict required withdrawal); In re Carrigan, 452 A.2d 206 (N.J.1982) (lawyer's failure to notify of new address); In re Tallon, 447 N.Y.S.2d 50 (N.Y.App.Div.1982) (failure to disclose malpractice); Vollgraff v. Block, 458 N.Y.S.2d 437 (N.Y.Sup.Ct.1982) (failure to disclose dissolution of firm); Crean v. Chozick, 714 S.W.2d 61 (Tex.Ct.App.1986) (failure to disclose malpractice tolls statute of limitations).

*Comment d. Client requests for information.*ABA Model Rules of Professional Conduct, Rule 1.4(a) (1983); In re Cook, 526 N.E.2d 703 (Ind.1988), cert. denied, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990) (client requested monthly status and expenses reports); In re Maloney, 620 S.W.2d 362 (Mo.1981) (repeated failure to answer letters); In re Sullivan, 494 S.W.2d 329 (Mo.1973) (client requested breakdown of services rendered); In re Riccio, 517 N.Y.S.2d 791 (N.Y.App.Div.1987) (failure to respond as part of general neglect of clients).

*Comment e. Matters calling for a client decision.*For the duty to inform a client of a settlement or plea-bargain offer, see ABA Model Rules of Professional Conduct, Rule 1.4, Comment ¶ [1] (1983); ABA Model Code of Professional Responsibility, EC 7-7 (1969); Moores v. Greenberg, 834 F.2d 1105 (1st Cir.1987); Johnson v. Duckworth, 793 F.2d 898 (7th Cir.), cert. denied, 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367 (1986); Joos v. Drillock, 338 N.W.2d 736 (Mich.Ct.App.1983); State v. Simmons, 309 S.E.2d 493 (N.C.Ct.App.1983); Rizzo v. Haines, 555 A.2d 58 (Pa.1989). For the duty to inform a client of an adverse decision so that the client can decide whether to appeal, see, e.g., In re Craven, 390 N.E.2d 163 (Ind.1979) (civil case); Pires v. Commonwealth, 370 N.E.2d 1365 (Mass.1977) (criminal case). On a lawyer's duty to inform a client in connection with decisions the client is to make, see ABA Model Rules of Professional Conduct, Rule 1.4(b) (1983) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); id. Rule 1.8(g) (aggregate settlement; clients must be informed of other claims being settled); Spector v. Mermelstein, 361 F.Supp. 30 (S.D.N.Y.1972), aff'd in part, rev'd in part, 485 F.2d 474 (2nd Cir.1973) (facts raising questions about loan client contemplates making); Ramp v. St. Paul Fire & Marine Ins. Co., 269 So.2d 239 (La.1972) (consequences of contract); Somuah v. Flachs, 721 A.2d 680 (Md.1998) (failure to advise client at outset that lawyer was not licensed in state where suit would be filed gave client cause to discharge); Wood v. McGrath, 589 N.W.2d 103 (Neb.1999) (malpractice for failure to advise of fact that legal issue relevant to case was unsettled in controlling jurisdiction, although decided favorably in several others); Annot., 8 A.L.R. 4th 660, 676-84 (1981) (details and consequences of plea bargain).

Case Citations - by Jurisdiction

—

U.S.
C.A.8
D.Minn.Bkrtcy.Ct.
Conn.
Fla.App.
Miss.
N.J.
Okl.
S.D.
Utah
Utah App.
Wis.

U.S.

U.S.2000. Subsec. (3) quot. in conc. and diss. op. (citing § 31, Prop. Final Draft No. 1, 1996, which is now § 20). Criminal defendant petitioned for writ of habeas corpus, alleging ineffective assistance of counsel. The district court denied the relief. The intermediate appellate court reversed, concluding that attorney's failure to file a notice of appeal without defendant's consent constituted per se deficient representation. Vacating and remanding, this court held that defendant was required to establish either that a reasonable defendant would have wanted to appeal under the circumstances or that he actually indicated his interest in an appeal to attorney, and that he was prejudiced by attorney's failure to act. Concurring and dissenting opinion argued that an attorney almost always had a duty

to consult with a client about the choice to appeal, and that attorney's failure to do so here amounted to ineffective assistance of counsel. Roe v. Flores-Ortega, 528 U.S. 470, 491, 120 S.Ct. 1029, 1042, 145 L.Ed.2d 985.

C.A.8

C.A.8, 2009. Com. (c) cit. and quot. in sup. Trustee of Chapter 7 estate of investment bank that was lead lender for casino-development loans, and finance corporation that bought a participation interest in the loans, brought adversary complaints against Minnesota law firm for malpractice and breach of fiduciary duties. The bankruptcy court, inter alia, entered judgment for trustee, finding that defendant breached its fiduciary duty to bank by failing to disclose that it might have committed malpractice in the loan closings; the district court affirmed in part and reversed in part. Reversing, this court predicted that the Minnesota Supreme Court would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim created a conflict of interest that would disqualify the lawyer from representing the client; in this case, defendant was not liable for breach of fiduciary duty, because there was no substantial risk that its representation of bank in finance corporation's state-court action against bank was materially and adversely limited by defendant's own interests in avoiding malpractice liability. Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629.

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Cit. in sup., subsec. (1) cit. in sup. In one of two consolidated adversary proceedings, Chapter 7 trustee of estate of loan-placement agent brought claim for breach of fiduciary duty against law firm that agent hired to prepare loan documents for a multimillion-dollar casino loan that agent arranged. This court held, inter alia, that law firm violated its duty to disclose and its duty of loyalty to agent, because, although participant lenders for the casino loan were the actual clients represented by firm in an action against a third party in which agent was the named plaintiff, firm agreed to represent agent in a closely related action by one loan participant against agent without seeking informed consent from either agent or that participant. The court further concluded that firm's actions constituted a blatant conflict of interest for which disgorgement of law firm's fees was the appropriate remedy. In re SRC Holding Corp., 352 B.R. 103, 189, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

Conn.

Conn.2021. Subsec. (3) quot. in sup. Criminal defendant filed a petition for a writ of habeas corpus, alleging that he was rendered unconstitutionally ineffective assistance by criminal-defense counsel during his criminal proceedings for first-degree robbery, because counsel failed to correct defendant's misunderstandings of law and fact during pretrial plea negotiations and caused him to reject plea deals, resulting in defendant receiving an unnecessarily higher sentence. The habeas court denied defendant's petition, and the court of appeals dismissed his appeal. This court affirmed, holding that, although the objective standard of reasonableness of counsel's performance included a duty to correct defendant's incorrect understanding of facts and law, the habeas court credited counsel's testimony that he provided advice to defendant on the plea deals. Citing Restatement Third of the Law Governing Lawyers § 20(3), the court observed that attorneys were required to explain matters to clients to the extent reasonably necessary for them to make informed decisions regarding their representation. Moore v. Commissioner of Correction, 258 A.3d 40, 48.

Fla.App.

Fla.App.2001. Com. (c) quot. in disc. Trust beneficiary sued trustee bank for breach of fiduciary duty. Trial court entered judgment on jury verdict for beneficiary, finding that bank consulted its lawyers, not simply for advice about how the statute of limitations worked, but also as part of a scheme involving deliberate concealment thereafter, in order to defeat plaintiff's rights to seek redress for breach of fiduciary duty. This court affirmed,

holding, inter alia, that trial court properly ruled that documents embodying attorney-client communications in furtherance of bank's efforts to defeat plaintiff's potential claims for breach of fiduciary duty by creating grounds for setting up the statute of limitations fell within the crime-fraud exception to the attorney-client privilege. First Union Nat. Bank v. Turney, 824 So.2d 172, 190.

Miss.

Miss.2010. Cit. in case quot. in conc. and diss. op. (citing § 31, T.D. No. 5, 1992, which is now § 20 of the Official Text). Former client sued attorney, among others, alleging that defendant breached his fiduciary duty to plaintiff by engaging in a sexual affair with plaintiff's wife. The trial court denied defendant's motion for summary judgment. Reversing and remanding, this court held that, because there was no evidence that the adulterous affair was in any way related to the representation or arising therefrom, no genuine issue of material fact existed as to whether defendant's covert sexual conduct with plaintiff's wife was a breach of his fiduciary duty to plaintiff. The concurring and dissenting opinion argued that, because it was reasonable that plaintiff might have seen defendant's adulterous affair with plaintiff's wife as presenting a conflict of interest to defendant's representation of him, genuine issues of material fact existed as to whether the affair was a breach of the fiduciary duties that defendant owed to plaintiff. Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So.3d 474, 496.

Miss.1992. Cit. in sup. (citing § 31, T.D. No. 5, 1992, which is now § 20). Attorney sued former client to recover contingency fee under an employment contract relating to imposition of a constructive trust on client's stepmother's estate; client counterclaimed, alleging malpractice, fraud, and breach of fiduciary duty. The chancery court dismissed the counterclaims and awarded attorney his fee. Reversing in part, this court held that the parties' clear and unambiguous agreement entitled attorney only to 25% of what he gained for client over and above what she would have received had she not prevailed, not to 25% of her entire estate, and that he breached his duty of loyalty by overreaching and misinterpreting the amount of the fee and failing to tell client of his adverse interest regarding the fee, thus justifying her discharge of him and rendering the fee agreement unenforceable. However, given the uncertainty of Mississippi law regarding what property an attorney may retain and charge, attorney did not breach his duty of loyalty by demanding payment in kind and by asserting ownership in client's property. The court remanded in part for chancery court to determine a reasonable fee for attorney's work. Tyson v. Moore, 613 So.2d 817, 827.

N.J.

N.J.1997. Com. (c) quot. in disc. (citing § 31, Proposed Final Draft No. 1, 1996, which is now § 20). A client brought a legal malpractice action against an attorney who had initially represented him in a medical malpractice suit that was dismissed with prejudice for untimely service. Defendant moved to dismiss on the ground that plaintiff should have joined him in the medical malpractice action. The trial court denied defendant's motion, and the appellate division affirmed. Affirming, this court held, inter alia, that the entire controversy doctrine did not compel the assertion of the legal malpractice claim in the underlying action that gave rise to the claim. The court noted that an attorney was still required to notify a client that he or she might have a legal malpractice claim, even if notification was against the attorney's own interest. Olds v. Donnelly, 150 N.J. 424, 443, 696 A.2d 633, 643.

Okl.

Okl.1999. Com. (c) quot. in ftn. to diss. op. (citing § 31, T.D. No. 5, 1992, which is now § 20). Workers' compensation claimant challenged settlement agreement that allegedly awarded his attorneys' fees in excess of the statutorily allowed amount. The trial court treated the challenge as a motion to modify its order approving the settlement, which it denied on the ground of timeliness. The intermediate appellate court affirmed. Vacating and remanding, this court held that the order appealed from was not ripe for review as to attorneys' fees, and therefore the appellate court lacked jurisdiction to determine the merits of the appeal. Dissent wrote separately to address

some of the potential issues arising when attorney and client became adversaries in a fee dispute. Rowland v. City of Tulsa, 1999 OK 75, 988 P.2d 1282, 1288.

S.D.

S.D.2020. Com. (c) quot. in sup. and cit. in case quot. in sup. Client filed a legal-malpractice claim against attorney after the personal-injury lawsuit that attorney filed on her behalf was dismissed as untimely. The trial court granted summary judgment for attorney, finding that client's malpractice action was barred by the applicable three-year statute of repose. This court reversed in part and remanded, holding that, while client initially sustained damage from a single act of negligence more than three years prior when attorney failed to timely file her personal-injury lawsuit, questions of fact remained as to whether attorney's ongoing tortious conduct in failing to disclose that malpractice to client supported a separate claim that occurred less than three years before client initiated this action. The court explained that, under Restatement Third of the Law Governing Lawyers § 20, a lawyer who failed to file suit for a client within the limitations period was required to inform the client by pointing out the possibility of a malpractice suit and the resulting conflict of interest that might require the lawyer to withdraw. Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office, 939 N.W.2d 32, 45.

Utah

Utah, 2005. Com. (c) quot. in disc. After physician's medical-malpractice insurer sought a declaration that it had no duty to defend absent physician in a malpractice suit against him, patient moved for appointment of counsel to represent physician's interests. The trial court appointed an attorney, who petitioned this court for extraordinary relief, requesting review of the appointment order. Affirming, this court held that the trial court did not abuse its discretion when it appointed counsel for an absent, nonindigent civil litigant, and that, despite ethical concerns raised by physician's absence, such as the inability to keep physician informed about the status of his case and the lack of consent by physician to the lawyer-client relationship, good-faith compliance with the appointment order provided attorney with a safe harbor in which to be free from exposure to disciplinary action. Burke v. Lewis, 2005 UT 44, 122 P.3d 533, 540.

Utah App.

Utah App.2013. Cit. in diss. op. Defendant was convicted in trial court of aggravated assault and other crimes. Affirming, this court held that the trial court did not abuse its discretion in denying defendant's request for the appointment of new counsel, because his defense attorneys' ex parte communications with the trial court's presiding judge and others about feeling intimidated by defendant did not create an actual conflict of interest between defendant and his attorneys, and the trial court adequately inquired into defendant's dissatisfaction with his attorneys. The dissent argued that, because defendant's attorneys failed to consult with defendant, or even inform him of their actions on the conflict-of-interest issue, they violated their duty of loyalty to defendant, and the trial court, by perfunctorily questioning the attorneys about the potential conflict of interest, did not fulfill its duty to inquire into the circumstances of the conflict and ensure that the attorneys could pursue their client's best interest. State v. Martinez, 2013 UT App 39, 297 P.3d 653, 663.

Wis.

Wis.2007. Com. (b) quot. in ftn. to diss. op. Employer sued former employees who established a competing roofing-applications consulting business, alleging, in part, breach of contract. The trial court dismissed the case with prejudice as a sanction for plaintiff's attorney's failure to respond to discovery and violation of court orders; the court of appeals affirmed. Affirming, this court held that the trial court did not erroneously exercise its discretion in imputing attorney's conduct, which it found to be egregious, to plaintiff, after concluding that plaintiff itself was at fault for failing to act in a reasonable and prudent manner. The dissent argued that viewing plaintiff's conduct

as blameworthy distorted the traditional lawyer-client relationship, as it required plaintiff to have engaged in an unreasonably high level of supervision of attorney and to have responded rapidly to any question about attorney's conduct of discovery. Industrial Roofing Services, Inc. v. Marquardt, 299 Wis.2d 81, 726 N.W.2d 898, 926.

End of Document

Restatement (Third) of the Law Governing Lawyers § 21 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

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

As between client and lawyer:

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

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

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

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

Comment:

a. *Scope and cross-references.* This Section governs the authority of a lawyer as between client and lawyer. With respect to third persons, see Topic 4. A lawyer who acts without authority may be required to pay damages suffered by a client (see § 27, Comment *f*; Chapter 4), disciplined by professional authorities (see § 5), or subjected to other sanctions (see, e.g., §§ 30 & 110). When a lawyer does have authority to act under this Section, it follows that the client is bound as against third persons (see § 26). A lawyer who has acted with apparent authority (see § 27), for example to settle a case, binds the client as against third persons. Moreover, a lawyer's violation of a criminal defendant client's proper instruction would not necessarily invalidate a resulting conviction (see Comment *d* hereto).

The fact that a lawyer's act is authorized does not necessarily preclude liability to the client. For example, a client who has authorized a lawyer to file a suit in whatever court the lawyer thinks appropriate may still have a malpractice claim if the lawyer negligently causes harm to the client by filing in a court lacking jurisdiction (see Chapter 4).

This Section is limited by § 22, describing decisions that a client may not irrevocably delegate to a lawyer, and § 23, describing a lawyer's authority to reject certain instructions of a client. Standards for determining the validity and construction of client-lawyer contracts are set forth in §§ 18 and 19 (see also § 24 (clients under disabilities)).

b. *Rationale.* Allocation of authority between client and lawyer can influence both the outcome of a representation and the balances of power and respect within it. What allocation of authority a client desires may vary from client to client, from lawyer to lawyer, from case to case, and from issue to issue.

The lawyer begins with broad authority to make choices advancing the client's interests. But the client may limit the lawyer's authority by contract or instructions. The lawyer or the client may insist at the outset of the representation on an agreement defining the lawyer's authority. The lawyer is also protected if the client ratifies the lawyer's unauthorized act. Ideally, clients and lawyers will discuss decisionmaking authority, making allocations that both understand and approve. A lawyer who acts beyond authority is subject to disciplinary sanctions and to suit by the client (see § 27, Comment *f,* & Chapter 4).

c. *Agreements.* This Section recognizes broad freedom of clients and lawyers to work out allocations of authority (see Restatement Second, Agency § 376). Different arrangements may be appropriate depending on the importance of the case, the client's sophistication and wish to be involved, the level of shared understandings between client and lawyer, the significance and technical complexity of the decisions in question, the need for speedy action, and other considerations. The principal limits on this freedom are §§ 22 and 23 (see also § 19).

Contracts between clients and lawyers under this Section may specify procedures for making decisions as well as the person who is to decide. In a litigation context, for example, there might be agreement that the lawyer will submit monthly litigation plans to the client for approval or that the lawyer will not take depositions without the client's approval.

Under § 18 a contract concerning authority reached after the representation begins must be fair and reasonable to the client. A lawyer, for example, may not by threatening to withdraw during the representation obtain a client's agreement that the lawyer will have authority to settle the case (see § 22). On the effect of a client instruction modifying a client-lawyer contract, see Comment *d* hereto.

d. *Client instructions.* A client may give instructions to a lawyer during the representation about matters within the lawyer's reasonable power to perform, just as any other principal may instruct an agent (see Restatement Second, Agency § 385). As the client learns about the lawyer and the matter during the representation, the client might modify instructions to the lawyer accordingly.

A lawyer is not required to carry out an instruction that the lawyer reasonably believes to be contrary to professional rules or other law (see § 23(1) & Comment *c* thereto; see also § 32, Comment *d*) or which the lawyer reasonably believes to be unethical or similarly objectionable. A lawyer may advise a client of the advantages and disadvantages of a proposed client decision and seek to dissuade the client from adhering to it (see § 94(3) & Comment *h* thereto). However, a lawyer may not continue a representation while refusing to follow a client's continuing instruction. For example, if a client instruction violates a valid client-lawyer contract (see § 19, Comment *d*), the lawyer must nonetheless follow the instruction or withdraw (see § 32(3)(g)) (see generally Restatement Second, Agency § 385(2)). A lawyer may, after obtaining any required court permission, withdraw from the representation if the instructions are considered repugnant or imprudent (see § 32(3)(f)) or render the representation unreasonably difficult (see § 32(3)(h)) or if other ground for withdrawal exists under § 32.

Illustration:

1. Plaintiff, a lawyer, retains Lawyer to assert a claim against Defendant. Lawyer and Plaintiff agree that Lawyer shall be free to cooperate with Opposing Counsel concerning timing of pretrial discovery and other nonsubstantive matters. Subsequently, Plaintiff directs Lawyer to violate a general assurance that Lawyer had given to Opposing Counsel. Lawyer does not believe that Plaintiff's instruction is contrary to professional rules or other law. Lawyer is permitted to withdraw from the case if Plaintiff persists. If the tribunal refuses to permit Lawyer to withdraw, Lawyer must comply with Plaintiff's instruction, unless the matter is one addressed in § 23.

A client who has instructed a lawyer to act in a specified way, having received adequate advice about the risks of the proposed course of action (see § 20), cannot recover for malpractice if the lawyer follows the client's instructions and harm results to the client.

Client instructions given to a lawyer do not nullify the lawyer's apparent authority to act for the client in dealings with tribunals and third persons (see § 27), unless the latter have actual knowledge of the client's instructions. A lawyer's failure to follow valid client instructions in a criminal case does not necessarily constitute ineffective assistance of counsel rendering a conviction invalid.

A contract concerning the lawyer's authority can be made prior to the lawyer's employment or, subject to § 18, after the employment has begun. However, such a contract must comply with § 19, and a client may discharge a lawyer who refuses to modify a contract (see § 32(1)). On client instructions that are repugnant but not illegal, see § 23, Comment *c*.

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

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

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

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

f. Ratification by a client. A client may ratify a lawyer's unauthorized act by explicit consent, by knowingly accepting its benefits, or by other conduct manifesting knowing approval after the act (see § 22, Comment *c;* Restatement Second, Agency § 416). For the effect of ratification on the rights of clients and third parties against each other, see Topic 4. Ratification does not bar disciplinary proceedings against a lawyer, although the fact that the client ratified the unauthorized decision may be relevant in appraising the lawyer's conduct. As between lawyer and client, ratification does not absolve the lawyer if the client was obliged to affirm the lawyer's act in order to protect the client's interests or was induced to ratify by the lawyer's misrepresentation or other misconduct. The law governing ratification of acts by lawyers is the same as that applicable to other agents (see Restatement Second, Agency, Chapter 4).

Illustration:

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

Reporter's Note

*Comment c. Agreements.*See § 16, Comment *f,* and Reporter's Note thereto; § 17, Comment *d;* §§ 18 and 38; McInnis v. Hyatt Legal Clinics, 461 N.E.2d 1295 (Ohio 1984) (lawyer liable for violating agreement to keep divorce out of newspaper, even though service of process required some form of publication).

*Comment d. Client instructions.*People v. Frierson, 705 P.2d 396 (Cal.1985) (error for trial judge to allow counsel to make no defense in murder trial and postpone evidence of diminished capacity to sentencing hearing when judge knew that defendant wanted defense raised); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J.1980) (lawyer liable for settling against insured's instructions); State v. Ali, 407 S.E.2d 183 (N.C.1991) (criminal defendant's wish not to challenge juror prevails over lawyer's view); Vandermay v. Clayton, 984 P.2d 272 (Or.1999) (lawyer liable for consenting to removal of contract clause client wanted); Olfe v. Gordon, 286

N.W.2d 573 (Wis.1980) (lawyer liable for disobeying instructions to arrange for client to have first mortgage); Jarnagin v. Terry, 807 S.W.2d 190 (Mo.Ct.App.1991); R. Mallen & J. Smith, Legal Malpractice § 8.7 (3d ed. 1989). For instances in which a lawyer's disobedience of client instructions was held not to be ineffective assistance of counsel, see Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); Gustave v. United States, 627 F.2d 901 (9th Cir.1980). Illustration 1 is a close paraphrase of and agrees with the result in Restatement Second, Agency § 385, Comment *a,* Illustration 2.

Comment e. A lawyer's authority in the absence of an agreement or instruction. See generally ABA Model Rules of Professional Conduct, Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued"; paragraphs (c), (d), and (e) concern limitation of the objectives of a representation with a client's consent, a lawyer's obligation not to counsel or assist criminal or fraudulent behavior, and a lawyer's duties when a client expects assistance that the lawyer may not lawfully give); Spiegel, Lawyers and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U. Pa. L. Rev. 41 (1979); Maute, Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct, 17 U.C. Davis L. Rev. 1049 (1984); Siegel, Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes, 69 Neb. L. Rev. 473 (1990); § 26, Reporter's Note. On a lawyer's lack of authority to endorse a check made out to the client without explicit authorization, see Palomo v. State Bar, 685 P.2d 1185 (Cal.1984); Morris v. Ohio Casualty Ins. Co., 517 N.E.2d 904 (1988); State v. Musselman, 667 P.2d 1061 (Utah 1983) (forgery prosecution). But cf., e.g., Navrides v. Zurich Ins. Co., 488 P.2d 637 (Cal.1971) (when lawyer forged client's endorsement on check and opposing party paid it, opposing party's liability was discharged). On a lawyer's lack of authority to retain another lawyer not from the first lawyer's firm to represent a client without the client's consent, see Grennan v. Well Built Sales of Richmond County, Inc., 231 N.Y.S.2d 625 (N.Y.Sup.Ct.1962); People v. Betillo, 279 N.Y.S.2d 444 (N.Y.Sup.Ct.1967); 1 Mallen & Smith, Legal Malpractice 279 (3d ed.1989); E. Wood, Fee Contracts of Lawyers 284-88 (1936); see Koehler v. Wales, 556 P.2d 233 (Wash.Ct.App.1976) (vacationing lawyer may arrange for substitute if clients are notified).

Comment f. Ratification by a client. L.F.S. Corp. v. Kennedy, 337 S.E.2d 209 (S.C.1985) (claim of malpractice in failing to follow client's settlement instructions barred by client's acceptance of settlement); see Greene v. Greene, 437 N.Y.S.2d 339 (N.Y.App.Div.1981) (claim that lawyer improperly persuaded client to make lawyer trustee not barred unless client was aware of claimed breaches at time of alleged ratification). See § 22, Comment *c,* and Reporter's Note thereto; § 26, Comment *e,* and Reporter's Note thereto.

Case Citations - by Jurisdiction

C.A.D.C.
Ariz.
Wis.
Wis.App.

C.A.D.C.

C.A.D.C. 2002. Com. (e) cit. in disc. and cit. generally in diss. op. Female employee sued District of Columbia for Title VII sex discrimination and retaliatory firing. District court granted District's motion to enforce parties' settlement agreement, holding that employee's attorney had apparent authority to bind employee to the agreement. This court certified to District of Columbia Court of Appeals question whether a client was bound by a settlement agreement negotiated by her attorney when client had not given attorney actual authority to settle case, but authorized attorney to attend settlement conference before magistrate and to negotiate on her behalf, and attorney led opposing party to believe client agreed to settlement terms. Dissent argued that retaining a lawyer and holding

him out as an individual with whom opposing party should negotiate was sufficient to confer apparent authority to settle client's case. Makins v. District of Columbia, 277 F.3d 544, 552, 555.

Ariz.

Ariz.2015. Subsec. (3) quot. in sup. In a dispute between neighbors over a water line, plaintiffs moved to enforce a purported settlement with defendants, alleging that, although plaintiffs allowed the initial settlement offer presented by defendants' attorney to expire, plaintiffs timely accepted the offer a few days later when defendants' attorney presented it a second time under the mistaken belief that defendants were still willing to settle on the same terms. The trial court granted plaintiffs' motion. The court of appeals reversed. This court vacated the court of appeals' opinion and affirmed the trial court's judgment, holding that the settlement was binding on defendants because, under Restatement Third of the Law Governing Lawyers § 21, defendants' attorney acted within his apparent authority to complete the settlement on the terms initially agreed to by defendants. Defendants' actions allowed plaintiffs to reasonably assume that defendants' attorney had authority to keep the first settlement offer on the table or reoffer the same settlement terms days after the first offer's expiration, and plaintiffs reasonably relied on defendants' attorney's apparent authority. Robertson v. Alling, 351 P.3d 352, 356.

Wis.

Wis.2007. Com. (e) quot. in diss. op. and quot. and cit. in ftn. to diss. op. Employer sued former employees who established a competing roofing-applications consulting business, alleging, in part, breach of contract. The trial court dismissed the case with prejudice as a sanction for plaintiff's attorney's failure to respond to discovery and violation of court orders; the court of appeals affirmed. Affirming, this court held that the trial court did not erroneously exercise its discretion in imputing attorney's conduct, which it found to be egregious, to plaintiff, after concluding that plaintiff itself was at fault for failing to act in a reasonable and prudent manner. The dissent argued that viewing plaintiff's conduct as blameworthy distorted the traditional lawyer-client relationship, as it required plaintiff to have engaged in an unreasonably high level of supervision of attorney and to have responded rapidly to any question about attorney's conduct of discovery. Industrial Roofing Services, Inc. v. Marquardt, 299 Wis.2d 81, 726 N.W.2d 898, 926.

Wis.App.

Wis.App.2010. Com. (d) cit. in sup. Contractor sued home buyer, seeking the unpaid balance under the parties' contract for the construction of a residence. Less than a month before the scheduled jury trial, the trial court entered an arbitration order, and denied buyer's subsequent motion for reconsideration, filed by new counsel, alleging that her former attorney had agreed to arbitrate without her consent. Reversing and remanding, this court held that buyer had presented a prima facie case entitling her to have a factfinder decide whether she had authorized her former attorney to enter into the arbitration agreement, in light of her former attorney's admissions that buyer did not authorize him to enter into an arbitration agreement and that he knew buyer wanted a jury trial. D & D Carpentry, Inc. v. U.S. Bancorp, 2010 WI App 122, 329 Wis.2d 435, 792 N.W.2d 193, 198.

Restatement (Third) of the Law Governing Lawyers § 22 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

Topic 3. Authority to Make Decisions

§ 22 Authority Reserved to a Client

(1) As between client and lawyer, subject to Subsection (2) and § 23, the following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution.
(2) A client may not validly authorize a lawyer to make the decisions described in Subsection (1) when other law (such as criminal-procedure rules governing pleas, jury-trial waiver, and defendant testimony) requires the client's personal participation or approval.
(3) Regardless of any contrary contract with a lawyer, a client may revoke a lawyer's authority to make the decisions described in Subsection (1).

Comment:

a. *Scope and cross-references.* This Section specifies decisions that fall outside a lawyer's presumptive authority (see § 21(3)) and that a client may always choose to make, regardless of any contrary contract with a lawyer. Authorization to make these decisions (for example, to settle a civil claim) generally may be revocably delegated to a lawyer (see Comment *c* hereto). Law may prohibit even such a limited authorization for decisions such as whether to waive jury trial in a criminal case (see Comment *d* hereto). The law of wills, for example, would not allow a client to authorize a lawyer to write and sign new wills for the client from time to time. The client-lawyer relationship itself implies some decisions reserved to the client. Thus a client and lawyer could not enter into a valid contract that only the lawyer would have the authority to decide what would benefit the client (see § 16), what information the client could receive from the lawyer (see §§ 20 & 46), or when the relationship would end (see § 32). Rules that limit waiver of client rights (see, e.g., §§ 19, 122, & 126) likewise limit contracts authorizing a lawyer to waive those rights. The authority recognized by this Section must be exercised in accordance with

applicable procedural rules and other law. A client who wishes to plead guilty, for example, must obtain the court's acceptance of the plea after the court follows applicable procedures to ascertain its voluntariness.

b. *Rationale.* Because a representation concerns a client's affairs and is intended to advance the client's lawful objectives as the client defines them (see § 16), the client has general control over what the lawyer does. Some decisions are so vital to a client that a reasonable client would not agree to abandon irrevocably the right to make the decisions with the help of the lawyer's advice.

Limits on delegation are especially appropriate for decisions that concern important rights. In criminal prosecutions, moreover, a public interest requires preserving the trial or plea as a personal encounter with the defendant, rather than a transaction conducted entirely by agents.

c. *Delegation, authorization, and ratification; settlements.* This Section forbids a lawyer to make a settlement without the client's authorization. A lawyer who does so may be liable to the client or the opposing party (see § 30) and is subject to discipline. In some circumstances, the opposing party may enforce the settlement against the client (see § 27). The Section also prohibits an irrevocable contract that the lawyer will decide on the terms of settlement. A contract that the lawyer as well as the client must approve any settlement is also invalid (but compare § 125, Comment *f* (contract restricting client's right to bargain away attorney-fee award)).

In the absence of a contrary agreement or instruction, a lawyer normally has authority to initiate or engage in settlement discussions, although not to conclude them (see § 21). A client may authorize a lawyer to negotiate a settlement that is subject to the client's approval or to settle a matter on terms indicated by the client. In class actions, special rules apply; a court, after notice and hearing, may approve a settlement negotiated by the lawyer for the class without the approval of named representatives or members of the class (see § 14, Comment *f*).

The Section allows a client to confer settlement authority on a lawyer, provided that the authorization is revocable before a settlement is reached. A client authorization must be expressed by the client or fairly implied from the dealings of lawyer and client. Thus, a client may authorize a lawyer to enter a settlement within a given range. A client is bound by a settlement reached by such a lawyer before revocation.

Client revocation of the lawyer's authority to make a decision covered by this Section has prospective effect only. Revocation does not by itself entitle the lawyer to withdraw. Because the client retains the nondelegable right to revoke, doing so does not constitute repugnant or imprudent conduct, breach of obligation to the lawyer, or conduct rendering the representation unreasonably difficult within the meaning of § 32(3). In some circumstances, however, a client's revocation of authority may be among other circumstances warranting withdrawal, for example if the client revokes authority as part of an effort to defraud a third person.

d. *Decisions specified by this Section.* The decision to settle is reserved to the client, as described in Comment *c* hereto, because a settlement definitively disposes of client rights.

Constitutional criminal law requires decisions about three matters to be made personally by the client: whether to plead guilty, whether to waive jury trial, and whether to testify. Delegation of those decisions to a lawyer, even a revocable delegation, is not permitted. Guilty pleas in criminal prosecutions have drastic effects for the client. The legal system has strong interests in requiring the defendant to participate personally in securing pleas that are not susceptible to later claims of involuntariness. A criminal defendant's decision whether to waive the right to jury trial or to testify also involves surrender of basic constitutional rights and implicates the defendant's autonomy and participation in the trial.

Whether to appeal is an issue much like whether to settle, and that decision is likewise subject only to revocable delegation.

e. Comparable decisions. The rule of this Section also applies to decisions that are substantially equivalent to those specifically described. Just as lawyers cannot settle a claim without client authority, they cannot enter a stipulation or consent judgment that will similarly foreclose client rights. The principles applicable to settlements also apply to significant contracts outside the litigation context, for example to contracts to sell the client's real estate. A client may authorize a lawyer to act in such matters, but otherwise the lawyer lacks authority.

Whether a decision falls within this Section depends on factors such as the following: how important the decision is for the client; whether the client can reach an informed decision on authorizing the lawyer; whether reserving decision to the client would necessitate interrupting trials or constant consultations; whether reasonable persons would disagree about how the decision should be made; and whether the lawyer's interests may conflict with the client's.

Reporter's Note

*Comment c. Delegation, authorization, and ratification; settlements.*On reservation of ultimate settlement authority to the client, see ABA Model Rules of Professional Conduct, Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter"); ABA Model Code of Professional Responsibility, EC 7-7 (1969); Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir.1975) (contract that lawyer could settle case if majority of plaintiffs approved does not bar dissenters from rejecting settlement); Lockette v. Greyhound Lines, Inc., 817 F.2d 1182 (5th Cir.1987) (client effectively revoked settlement authority); In re Lewis, 463 S.E.2d 862 (Ga.1995) (contingent-fee contract purporting to give lawyer full authority to settle is invalid); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J.1980) (lawyer liable to client for settling after client revoked settlement authority). Compare, e.g., County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir.1990) (settlement of class action by lawyer with court approval). On the invalidity of a client-lawyer contract requiring the lawyer to consent to any settlement, see Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., 530 F.Supp. 910 (E.D.Pa.1981); Cummings v. Patterson, 442 S.W.2d 640 (Tenn.Ct.App.1968); 1 S. Speiser, Attorneys' Fees 203 (1973); cf. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo.Ct.App.1994) (invalidating contract authorizing lawyer to withdraw if client unreasonably refused to settle). On the sanctions imposed on a lawyer for settling without authority, see Lieberman v. Employers Ins. of Wausau, supra (damage liability); In re Miller, 625 P.2d 701 (Wash.1981) (discipline); Annot., 92 A.L.R. 3d 288 (1979) (discipline).

A client may employ various means to confer authority to settle. E.g., Edwards v. Born, Inc., 792 F.2d 387 (3d Cir.1986) (court could find authority when client repeatedly declined lawyer's request to specify settlement amount, saying that was lawyer's job); First Fed. Savings & Loan Assoc. v. C.P.R. Constr., Inc., 689 P.2d 981 (Or.Ct.App.1984) (retainer contract); Federal Land Bank v. Sullivan, 430 N.W.2d 700 (S.D.1988) (client knew that lawyer was making settlement offers and said nothing); see Smedley v. Temple Drilling Co., 782 F.2d 1357 (5th Cir.1986) (insurer had general authority from insured to settle claims against insured). See generally Annot., 90 A.L.R. 4th 326 (1991); § 26, Reporter's Note. Authorizing a lawyer to negotiate does not by itself authorize the lawyer to approve the settlement without consulting the client. Bursten v. Green, 172 So.2d 472 (Fla.Dist.Ct.App.1965); Johnson v. Tesky, 643 P.2d 1344 (Or.Ct.App.1982). For ratification of an unauthorized settlement, see, e.g., Navrides v. Zurich Insurance Co., 488 P.2d 637 (Cal.1971) (client sued on settlement contract); Nagymihaly v. Zipes, 353 So.2d 943 (Fla.Dist.Ct.App.1978) (client accepted benefits under contract); Annot., 5 A.L.R. 5th 56 (1992); § 26, Comment *e,* and Reporter's Note thereto.

*Comment d. Decisions specified by this Section.*ABA Model Rules of Professional Conduct, Rule 1.2(a) (1983) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."). For decisions reserved to a client being criminally prosecuted, see Taylor v. Illinois, 484 U.S. 400, 418 n.24, 108 S.Ct. 646, 657, 98 L.Ed.2d 798 (1988) (dictum) (plea; jury trial); Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) (dictum) (plea; jury trial; testify for self; appeal); Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) (appeal); Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (go to trial); Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942) (waive jury); Smith v.

Armontrout, 857 F.2d 1228 (8th Cir.1988) (waive appeal); United States v. Leggett, 162 F.3d 237 (3d Cir.1998), cert. denied, _ U.S. _, 120 S.Ct. 167, 145 L.Ed.2d 141 (1999) (testify for self); ABA Standards Relating to the Administration of Criminal Justice 4-5.2(a) (2d ed. 1982).

For decisions in civil litigation, see Comment *c,* supra (settlement); on the decision to appeal, see Soliman v. Ebasco Servs., Inc., 822 F.2d 320 (2d Cir.1987); In re Sherburne, 492 N.Y.S.2d 349 (N.Y.Sur.Ct.1985); In re Paauwe, 654 P.2d 1117 (Or.1982).

*Comment e. Comparable decisions.*For decisions that hold unauthorized lawyer acts that in effect bar trial in civil disputes, see, e.g., Davis v. Black, 406 So.2d 408 (Ala.Civ.Ct.1981) (stipulation that client's case will be governed by result in other party's test case); Roscoe Moss Co. v. Roggero, 54 Cal.Rptr. 911 (Cal.Dist.Ct.App.1966) (consent to summary judgment); In re Rosenthal, 446 A.2d 1198 (N.J.1982) (lawyer did not tell client case was about to be dismissed); Wilder v. Third Dist. Committee, 247 S.E.2d 355 (Va.1978) (lawyer dismissed suit, believing any judgment uncollectible); Graves v. P.J. Taggares Co., 616 P.2d 1223 (Wash.1980) (stipulations conceding central issues); see ABA Model Code of Professional Responsibility, EC 7-7 (1969) (waiver of affirmative defense). For other matters, see, e.g., Taylor v. Illinois, 484 U.S. 400, 418 n.24, 108 S.Ct. 646, 657, 98 L.Ed.2d 798 (1988) (dictum) (criminal defendant's right to be present during trial); Clemmons v. Delo, 124 F.3d 944 (8th Cir.1997), cert. denied, 523 U.S. 1088, 118 S.Ct. 1548, 140 L.Ed.2d 695 (1998) (criminal defendant; right to confront witness); United States v. Olano, 934 F.2d 1425 (9th Cir.1991) (consent to presence of alternative jurors during deliberations); Schafer v. Barrier Is. Station, Inc., 946 F.2d 1075 (4th Cir.1991) (execute contract); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.1987) (decision to proceed with alibi rather than insanity defense), aff'd as to other issues, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Blanton v. Womancare Inc., 696 P.2d 645 (Cal.1985) (submission to arbitration); Graves v. P.J. Taggares Co., supra (waiver of previously demanded jury trial); Note, An Attorney's Implied Authority to Bind His Client's Interests and Waive His Client's Rights, 3 J. Leg. Prof. 137, 143 (1978) (no implied authority to make contracts).

Case Citations - by Jurisdiction

—

C.A.5
C.A.7
C.A.11,
C.A.D.C.
C.D.Cal.
D.D.C.
Alaska
Ariz.App.
Conn.
Conn.App.
D.C.App.
Nev.
N.M.App.
Wis.App.

C.A.5

C.A.5, 2011. Subsec. (1) quot. in sup. United States charged Texas-based pro-Palestinian charity with conspiracy and substantive offenses for providing material aid and support to a designated foreign terrorist organization. After a trial in which charity, which had no employees and no officers, was unrepresented, the district court entered judgment on a jury verdict finding it guilty on all counts and sentenced it to "be placed on a one-year supervised

release" and to forfeit all of its assets. This court affirmed the conviction and dismissed for lack of jurisdiction an appeal filed on behalf of charity by state university law school clinic's director, who had no prior connection to the case, holding that the district court could not authorize a notice of appeal filed on behalf of an unrepresented defendant corporation by an attorney with no connection to the defendant and where no corporate representative authorized the appeal. The court noted that the decision to appeal belonged exclusively to the defendant, and a defendant's counsel could not prosecute an appeal if the defendant chose to forgo it. U.S. v. El-Mezain, 664 F.3d 467, 578.

C.A.5, 2009. Quot. in ftn. Mississippi shipbuilder sued the Ministry of Defense of the Republic of Venezuela for breach of contract under the Foreign Sovereign Immunities Act. After an attorney for defendant purported to agree to a settlement by which defendant would pay plaintiff a certain amount to resolve all claims, the district court entered judgment based on the alleged settlement and denied defendant's subsequent motion to vacate the judgment on grounds that it had not approved the settlement and that the attorney did not have authority to enter a binding agreement absent such approval. Reversing and remanding, this court predicted that the Supreme Court of Mississippi, applying Mississippi law, would give effect to Venezuelan statutes requiring such settlement authority to be specifically conveyed in writing. The court rejected plaintiff's argument that a written power-of-attorney and an initial engagement letter provided to the attorney by defendant satisfied the statutes, noting that such documents merely evidenced the attorney-client relationship and did not implicitly convey the authority to settle a dispute, as such authority had to be expressly granted. Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of Republic of Venezuela, 575 F.3d 491, 502.

C.A.7

C.A.7, 2005. Subsec. (1) and com. (e) cit. in ftn. Closely held corporation that negotiated oral agreement to purchase shares of nonpublicly traded stock from personal representative of estate brought breach-of-contract action after representative sold those shares to third party. Trial court entered judgment on a jury verdict in favor of plaintiff. Reversing and remanding, this court held, inter alia, that while attorney engaged by defendant was authorized to negotiate terms of a purchase agreement, mere retention did not impart actual authority to bind defendant in such a contract. Sarkes Tarzian v. U.S. Trust Co. of Fla. Savings Bank, 397 F.3d 577, 582, cert. denied 546 U.S. 928, 126 S.Ct. 398, 163 L.Ed.2d 276 (2005).

C.A.11,

C.A.11, 2020. Subsec. (1) cit. in sup. In bankruptcy proceedings for debtor that was created to ensure that law firm would collect its legal fees, this court disqualified law firm and its attorneys from representing a trust that was a 50% shareholder of debtor, finding that their representation of the trust presented a conflict of interest with their simultaneous representation of debtor. This court dismissed various notices of appeal that law firm and its attorneys subsequently attempted to file on behalf of the trust, finding that, because law firm and its attorneys remained disqualified from representing the trust, the notices of appeal were invalid. The court noted that, while defective notices of appeal could be excused in some circumstances, it was not objectively clear from the record that the trust intended to appeal, and, under Restatement Third of the Law Governing Lawyers § 22, the decision whether to pursue a civil appeal belonged exclusively to the client. J.J. Rissell, Allentown, PA Trust v. Marchelos, 976 F.3d 1233, 1235.

C.A.D.C.

C.A.D.C.2007. Com. (c) cit. in sup. Plaintiff, who entered into a settlement with defendant that required defendant to pay plaintiff's reasonable attorney's fees but left the amount and terms of the payment for future negotiation, moved for a declaratory judgment after defendant entered into a settlement with plaintiff's former attorney that was allegedly against plaintiff's instructions. The district court denied plaintiff's motion. Vacating and remanding, this court held, inter alia, that issues of fact remained as to whether the settlement contemplated further negotiations

regarding tax protections for plaintiff or represented a final resolution of the dispute. The court reasoned, in part, that, while plaintiff authorized former attorney to submit a motion for attorney's fees, she did not thereby abdicate her role in the final resolution of the fees issues. Sims v. Johnson, 505 F.3d 1301, 1305.

C.A.D.C.2002. Subsec. (1) cit. in disc. Female employee sued District of Columbia for Title VII sex discrimination and retaliatory firing. District court granted District's motion to enforce parties' settlement agreement, holding that employee's attorney had apparent authority to bind employee to the agreement. This court certified to District of Columbia Court of Appeals question whether a client was bound by a settlement agreement negotiated by her attorney when client had not given attorney actual authority to settle case, but authorized attorney to attend settlement conference before magistrate and to negotiate on her behalf, and attorney led opposing party to believe that client agreed to settlement terms. Makins v. District of Columbia, 277 F.3d 544, 550.

C.D.Cal.

C.D.Cal.2002. Subsec. (1) cit. in sup. Corporations sued inventor of silicone gastric band used in treating obesity, seeking declaration that certain patents held by inventor were invalid and unenforceable and that plaintiffs had not infringed patents. They also sought specific performance of purported settlement agreement or damages for its breach. This court entered partial summary judgment for inventor, but it rejected inventor's assertion that settlement agreement was not enforceable because inventor's lawyer did not have his client's authority to settle case. While agent's acts could not themselves create apparent authority, inventor knew that plaintiffs were negotiating with inventor's attorney as inventor's representative, and he permitted that negotiation to go forward with his input and participation. Inamed Corp. v. Kuzmak, 275 F.Supp.2d 1100, 1120, affirmed 64 Fed.Appx. 241 (Fed.Cir.2003).

D.D.C.

D.D.C.2021. Subsec. (1) quot. in ftn. Federal inmate, who was deported to El Salvador, filed an application for certificate of appealability, alleging that this court erred in dismissing as moot his motion to vacate his sentence for firearm-related offenses in light of U.S. Supreme Court decisions. This court denied inmate's application, holding that its dismissal of his motion to vacate was not reasonably debatable. The court noted that inmate's counsel did not explain how inmate made the decision to appeal the dismissal of his motion to vacate when he was in El Salvador at the time his counsel moved to appeal, and explained that, under Restatement Third of the Law Governing Lawyers § 22(1), decisions on whether to appeal was reserved to the client. United States v. Mejia, 541 F.Supp.3d 87, 92.

Alaska

Alaska, 2007. Cit. in treatise quot. in sup., com. (d) quot. in sup. and cit. in ftn. Bankruptcy trustee brought a legal-malpractice action against attorney who had represented debtors in a consumer-protection case pursuant to a "hybrid" fee agreement, after debtors, who had turned down a settlement offer in the underlying case because their attorney's fees under the agreement would have exceeded the $25,000 offered, lost at trial and were ordered to pay defendant car dealer $100,000 in costs and fees. The trial court dismissed. Reversing and remanding, this court held that Alaska law prohibited a fee agreement that used a client's decision to settle as a trigger to convert contingent-fee representation into an obligation to pay hourly fees, because a hybrid agreement of this kind impermissibly burdened the client's exclusive right to settle a case. The court noted that the decision to settle was reserved to the client because a settlement definitively disposed of client rights. Compton v. Kittleson, 171 P.3d 172, 177, 178.

Ariz.App.

Ariz.App.2014. Cit. in sup., subsec. (3) cit. in sup., com. (c) cit. and quot. in sup. After landowners sued neighbors to quiet title to an easement across neighbors' property, the parties attended a settlement conference, but failed

to reach an agreement. Although five of the twenty-seven defendants emailed their attorney that they no longer wished to settle with the terms that they had offered at the conference, defendants' attorney subsequently entered into a settlement agreement with plaintiffs' counsel. The trial court granted plaintiffs' motion to enforce the settlement. Reversing in part and remanding, this court held that defendants' attorney lacked actual authority to bind defendants to the settlement agreement, and genuine issues of material fact existed as to whether he had apparent authority to do so. The court cited Restatement Third of the Law Governing Lawyers § 22 in noting that, as a general rule, lawyers had no inherent or implied authority to settle a case, and clients were free to revoke their attorney's settlement authority at any time. Robertson v. Alling, 332 P.3d 76, 81, 82.

Conn.

Conn.2010. Subsec. (1) cit. in sup. In a series of disputes concerning the management and oversight of a family partnership and various family trusts, the trial court found that plaintiffs' attorney had apparent authority to make settlement proposals, engage in settlement discussions, and bind plaintiffs to a global settlement agreement with defendants. Affirming, this court held that the trial court's finding that plaintiffs clothed their attorney with apparent authority to settle the litigation was supported by evidence of a course of dealing involving plaintiffs, defendants, and the parties' attorneys that was well established before the settlement offer was accepted; in addition, there was sufficient evidence to support a finding that defendants reasonably could have believed the same. Ackerman v. Sobol Family Partnership, LLP, 298 Conn. 495, 509-510, 4 A.3d 288, 299.

Conn.App.

Conn.App.2003. Cit. in sup. State agency, as employer, appealed from decision of the workers' compensation review board affirming the decision of the workers' compensation commissioner granting employee's motion to open a stipulated agreement that settled employee's injury-related claims. This court reversed and remanded, holding, inter alia, that board's determination that stipulation was made without employee's valid consent and was invalid was made without a reasonable basis and, therefore, was improper. Plaintiff possessed the ability to enter into the stipulation and to settle his various claims, and the absence of his attorney did not invalidate the stipulation. The court stated that the authority to settle a claim rested with the client. Rodriguez v. State, Dept. of Corrections, 76 Conn.App. 614, 624, 820 A.2d 1097, 1103.

D.C.App.

D.C.App.2004. Quot. in disc., coms. (c) and (d) quot. in disc. Female employee sued District of Columbia in federal court, claiming sex discrimination and retaliatory firing. Following plaintiff's refusal to sign settlement agreement reached at conference by the parties' attorneys, defendant moved to enforce the settlement. The district court granted the motion, and the federal court of appeals certified the question whether plaintiff was bound by the settlement. Answering the question in the negative, this court held that plaintiff's acts of sending her attorney to the court-ordered settlement conference and permitting the attorney to negotiate on her behalf were insufficient to permit a reasonable belief by defendant that the attorney had apparent authority to conclude the settlement. The court said that the decision to settle a claim belonged to the client and not the attorney. Makins v. District of Columbia, 861 A.2d 590, 595.

Nev.

Nev.2018. Cit. in diss. op.; subsecs. (1) and (2) and com. (d) quot. in sup. After the trial court dismissed an ethics complaint filed with the state ethics commission against two state assemblymen, and commission appealed, assemblymen filed an open-meeting-law complaint against commission, alleging that commission's notice of appeal was defective, because it was filed without first making its decision, or taking action to appeal the dismissal in a public meeting. This court granted assemblymen's motion to dismiss, holding that the notice of appeal was

void because it was filed without commission's authorization. The court explained that, under Restatement Third of the Law Governing Lawyers § 22, the right to appeal was a substantive legal right that belonged to the client, and, while commission's executive director and chair allegedly authorized the appeal, it was commission as a whole that was the client. The dissent argued that § 22 did not translate into a rule that only a client entity's governing board could authorize an appeal. The Commission on Ethics of the State of Nevada v. Hansen, 419 P.3d 140, 142, 143, 146.

Nev.2017. Cit. in diss. op.; subsecs. (1) and (2) and com. (d) quot. in sup. Citizen filed an ethics complaint with the state commission on ethics against two elected officials, alleging that officials used their positions to benefit their personal interests. After the commission denied officials' motion to dismiss, the trial court granted their petition for judicial review and ordered the commission to dismiss the complaint. After the commission's in-house counsel, chair, and executive director filed a notice of appeal, this court granted officials' motion to dismiss for lack of jurisdiction, holding that the notice of appeal was defective and void because it was not authorized by the commission in a public meeting. The court explained that, under Restatement Third of the Law Governing Lawyers § 22, it was the client who determined whether an appeal would be taken. The dissent argued that the commission's counsel, chair, and executive director had authority to appeal on their own, without the commission's approval, and, in any event, the commission subsequently ratified the appeal in an open meeting convened for that purpose. Commission on Ethics of State v. Hansen, 396 P.3d 807, 809, 810, 813.

Nev.2009. Subsec. (1) cit. in sup. Plaintiffs brought a medical-malpractice action against hospital; after their attorney settled their case for $160,000 without their knowledge or approval, forged the necessary settlement papers, and disappeared with the money, they moved for relief from a stipulated final judgment terminating their claims. The trial court granted plaintiffs' motion for relief, and vacated the stipulated judgment, based on fraud on the court. Affirming, this court rejected hospital's argument that plaintiffs' agency relationship with their attorney bound them to the settlement, pointing to substantial evidence showing that attorney accomplished his fraud without the express, implied, or apparent authority of his clients. The court noted that, while a lawyer had apparent authority to handle procedural matters for a client, merely retaining a lawyer did not create apparent authority in the lawyer to settle his client's case. NC-DSH, Inc. v. Garner, 218 P.3d 853, 860.

N.M.App.

N.M.App.2012. Subsec. (1) and com. (c) quot. in sup. Accident victim brought a personal-injury action against, among others, employer of truck driver who allegedly caused the accident and lessor of the truck to driver's employer. The trial court granted employer's motion to enforce a pre-litigation oral settlement between plaintiff's attorney and counsel for both employer and lessor. Reversing, this court held that, while the settlement was valid as to lessor, it was of no effect as to employer, because plaintiff's attorney did not have specific authority to settle with employer. An attorney had to have specific authority in order to bind a client to a settlement, unless there was an emergency or some overriding reason to enforce the settlement despite the attorney's lack of specific authority, and no such reason existed here. Gomez v. Jones-Wilson, 2013-NMCA-007, 294 P.3d 1269, 1273.

N.M.App.1998. Com. (c) cit. in disc. (citing § 33, Prop. Final Draft No. 1, 1996, which is now § 22). A criminal defendant asserted that he was entitled to withdraw his guilty plea because the prosecuting attorney had a conflict of interest in that she previously represented defendant and counseled his plea in a substantially related case. Trial court denied defendant's motion to withdraw his plea of guilty to charges of burglary and conspiracy. This court vacated and remanded, holding, inter alia, that the trial court erred in concluding that a conflict was not present in this case. It would be necessary for the trial court to conduct a hearing to determine whether defendant was prejudiced by the deficient performance of his attorneys in counseling his plea. State v. Barnett, 125 N.M. 739, 965 P.2d 323, 331.

Wis.App.

Wis.App.2010. Com. (e) cit. in sup. Contractor sued home buyer, seeking the unpaid balance under the parties' contract for the construction of a residence. Less than a month before the scheduled jury trial, the trial court entered an arbitration order, and denied buyer's subsequent motion for reconsideration, filed by new counsel, alleging that her former attorney had agreed to arbitrate without her consent. Reversing and remanding, this court held that buyer had presented a prima facie case entitling her to have a factfinder decide whether she had authorized her former attorney to enter into the arbitration agreement, in light of her former attorney's admissions that buyer did not authorize him to enter into an arbitration agreement and that he knew buyer wanted a jury trial. D & D Carpentry, Inc. v. U.S. Bancorp, 2010 WI App 122, 329 Wis.2d 435, 792 N.W.2d 193, 197.

Restatement (Third) of the Law Governing Lawyers § 23 (2000)

§ 23 Authority Reserved to a Lawyer

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

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

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

Comment:

a. *Scope and cross-references.* This Section describes powers and obligations of a lawyer that neither a contract with a client nor a client's instruction may oblige a lawyer to forgo. Compare § 21 on allocation of authority between client and lawyer and § 22 on authority that a client may not irrevocably delegate. Although this Section, like §§ 21 and 22, deals directly with rights and obligations only as between lawyer and client, it also affects the authority of a lawyer to bind a client in dealings with third persons: if a decision falls within the lawyer's inherent authority under this Section, the client cannot disclaim the lawyer's act (see § 21, Comment *a,* & § 26(3)). On a lawyer's authority generally to bind the client with respect to third persons, see Topic 4.

b. *Rationale.* This Section protects certain public interests. Subsection (1) seeks to discourage unlawful acts. Subsection (2) seeks to avoid evasions by lawyers of their professional responsibilities and accommodates the need of the legal system to expedite litigation by authorizing lawyers to make immediate decisions.

c. *Performing or assisting acts believed to be unlawful.* A contract by an agent to help the principal to perform an unlawful act is unenforceable (see Restatement Second, Agency § 411). The rule has special force when applied

to lawyers. Lawyers who exercise their skill and knowledge so as to deprive others of their rights or to obstruct the legal system subvert the justifications of their calling. Unlawful acts include all those exposing a lawyer to civil or criminal liability, including procedural sanctions, or discipline for violation of professional rules. A lawyer may refuse to perform an act the lawyer reasonably believes to be unlawful even if the client has agreed to indemnify the lawyer against any resultant sanctions, even though nonfrivolous arguments can be made that the act is lawful, even when counseling the act of the client or nonclient would not subject the lawyer to liability, and even though some jurisdictions subject lawyers to discipline for assisting only those acts known to be criminal or fraudulent.

If a lawyer acts lawfully in exercising professional judgment to assist a client in a case of doubtful legality, neither the client nor any third person may recover damages from the lawyer solely on the ground that the lawyer had the power not to assist the client (see §§ 51 & 52).

This Section does not authorize a lawyer to refuse to assist a client in performing an act that might obligate the client to a third person but that would not ordinarily be considered unlawful. For example, a lawyer may not under this Section disobey a client's instruction to file a nonfrivolous discovery motion simply because the lawyer reasonably believes that the client will not prevail and will therefore be required to pay the opposing party's court costs. In proper instances, a lawyer may counsel a client to commit a violation of law in order to protect the client's rights, for example when a court order can be appealed only by violating it and being held in contempt (see § 94, Comment *e*).

A lawyer's discretion not to assist client conduct prevails, in the event of a conflict, over the client's authority stated in § 22. If time and other circumstances permit, the client should be afforded an opportunity to abandon the unlawful course of action, to persuade the lawyer that it is lawful, or to retain another lawyer. Thus the lawyer may not ordinarily decline to carry out a client's instruction pursuant to this Section without first consulting with the client (see § 20). The lawyer should advise the client about alternative courses of action, which may include the lawyer's withdrawal from the representation (see § 32). If the problem is foreseeable before the lawyer is retained, the lawyer should advise the prospective client then (see § 15) or decline to accept the case (see § 14, Comment *b*). In exercising the authority conferred by this Section, a lawyer should avoid causing a client unnecessary harm.

If a client's proposed course of action is repugnant but not illegal, the lawyer may decline the representation (see § 14, Comment *b*) or, if consistent with adequate representation, may accept it only on condition that the lawyer will not be required to perform or assist such acts (see § 16). Because the lawyer is more familiar with the vicissitudes of representation and with the lawyer's own moral standards, the lawyer bears the burden of seeking such a contract. With respect to taking moral considerations and professional courtesy into account, see § 21, Comment *e*. However, a lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action. On a lawyer's right to withdraw based on repugnance or imprudence of a client's intended acts, see § 32(3)(f).

d. Matters entrusted to lawyers by law. The legal system requires counsel to act immediately and definitively in many matters. Trials and hearings cannot be adjourned for client consultation whenever a decision is necessary, nor allowed to proceed subject to reversal if a client claims not to have been consulted or to have given directions that the lawyer disobeyed.

Lawyers therefore have inherent authority, not subject to alteration by contract with their clients, to act and decide for clients when the legal system requires an immediate decision without time for consultation. Whether a decision falls in that category depends on the requirements of procedural systems and orders of tribunals, as well as on such circumstances as the availability of the client for immediate consultation and the effect of interruption for consultation on the orderly and effective presentation of the client's matter. The lawyer must keep the client informed of the progress of the matter (see § 20) and must comply, when time permits, with the client's expressed wishes to be consulted about specified matters (see § 21(2)). Courts have discretion to grant adjournments and extensions when appropriate to permit such consultation. A client may give advance instructions, which the lawyer must honor to the extent that court rules and professional obligations permit.

Some jurisdictions entrust additional matters to lawyers, for example by requiring a lawyer to inform the court of a client's arguable incompetence to stand trial (see § 24, Comment *d*). Applicable law often authorizes government lawyers to make certain decisions for a governmental client (see § 97(1)).

Reporter's Note

Comment c. Performing or assisting acts believed to be unlawful. ABA Model Code of Professional Responsibility, DR 7-101(B)(2) (1969) allows a lawyer to "Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." On the prohibition of counseling or assisting illegal conduct, see id., DR 7-102(A)(7); ABA Model Rules of Professional Conduct, Rule 1.2(d) (1983) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law"); C. Wolfram, Modern Legal Ethics 692-706 (1986); Hazard, How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?, 33 U. Miami L. Rev. 669 (1981). See also Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (lawyer's refusal to help client commit perjury not ineffective assistance of counsel even though lawyer deterred client from taking stand); Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975) (lawyer may not be punished for counseling client to violate court order in good-faith effort to appeal constitutional claim); People v. Schultheis, 638 P.2d 8 (Colo.1981) (lawyer not required to call witness reasonably believed to be perjurious despite client's instructions).

Comment d. Matters entrusted to lawyers by law. See Frank v. Bloom, 634 F.2d 1245 (10th Cir.1980) (disobedience to client's instruction on matters of trial strategy did not forfeit lawyer's fee); Applegate v. Dobrovir, Oakes & Gebhardt, 628 F.Supp. 378 (D.D.C.1985) (no malpractice suit for refusing to introduce specific items of evidence at trial); People v. Wilkerson, 463 N.E.2d 139 (Ill.App.Ct.1984) (exchange of stipulations to chains of custody of prosecution and defense evidence over defendant's in-court objection is not evidence of inadequate defense). Some authorities seem to recognize a broader authority of lawyers to control litigation decisions, especially in criminal cases. E.g., State v. Poindexter, 318 S.E.2d 329 (N.C.Ct.App.), cert. denied, 322 S.E.2d 563 (N.C.1984) (no error for trial court not to require lawyer to present defendant's self-defense claim); ABA Standards Relating to the Administration of Criminal Justice § 4-5.2(b) (2d ed.1982) (lawyer decides after consultation what witnesses to call, whether and how to cross-examine, what jurors to accept or strike, what trial motions to make, all other strategic and tactical decisions). Such formulations may be influenced by authorities dealing, not with decisionmaking authority between lawyer and client, but with the authority of a lawyer to bind a client in dealings with third persons. See, e.g., Taylor v. Illinois, 484 U.S. 400, 417-18, 108 S.Ct. 646, 657-58, 98 L.Ed.2d 798 (1988) (except in instances of inadequate representation of counsel, client is bound by lawyer decisions to forgo cross-examination, not call witnesses, violate discovery obligations); Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel's refusal to argue point urged by client is not inadequate assistance of counsel warranting collateral attack on appellate decision). On informing the court of a client's arguable incompetence to stand trial, see § 24, Comment *d,* and Reporter's Note thereto.

Case Citations - by Jurisdiction

—

C.A.5,
D.Nev.Bkrtcy.Ct.

C.A.5,

C.A.5, 2016. Com. (c) quot. in ftn. Attorney brought a § 1983 claim against Texas state-court judge in his individual and official capacities, alleging that defendant refused to allow another justice on the same court to hire him in

retaliation for reporting defendant's malfeasance to state authorities, which constituted a violation of his right to exercise free speech under the First Amendment. The district court denied defendant's motion to dismiss. Affirming on interlocutory appeal, this court held, among other things, that plaintiff's speech was protected by the First Amendment because it was not made pursuant to his official duties as a public employee. The court cited Restatement Third of the Law Governing Lawyers § 23 in noting that all lawyers had a duty to report malfeasance, and that an agent who was a member of a profession did not have a duty to follow instructions given by a principal that exposed the agent to discipline for violating professional rules. Anderson v. Valdez, 845 F.3d 580, 598.

D.Nev.Bkrtcy.Ct.

D.Nev.Bkrtcy.Ct.2008. Cit. and quot. in sup., com. (c) quot. in sup. and cit. in ftn. As part of a Chapter 13 proceeding, lawyers for debtor and creditor entered a stipulation containing an erroneous property description, and despite both parties' agreement that a mistake was made, creditor's attorney refused to sign a stipulation vacating an order that had been entered on the mistaken stipulation. After vacating the order, and holding a hearing on its order to show cause why attorney, attorney's law firm, and creditor itself should not have been sanctioned for their refusal to help debtors correct an admitted mistake, this court ordered sanctions. The court held, inter alia, that because attorney and firm failed to maintain their professional independence from creditor, sanctions were required to deter such conduct in the future. The court explained that when attorney learned of the mistake, he should have declined to follow his client's instruction to oppose debtors' motion, because clients could not demand unethical or unlawful conduct from their lawyers and expect compliance. In re Martinez, 393 B.R. 27, 36.

End of Document

Restatement (Third) of the Law Governing Lawyers § 24 (2000)

§ 24 A Client with Diminished Capacity

(1) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, physical illness, mental disability, or other cause, the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as stated in Subsection (2).
(2) A lawyer representing a client with diminished capacity as described in Subsection (1) and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.
(3) If a client with diminished capacity as described in Subsection (1) has a guardian or other person legally entitled to act for the client, the client's lawyer must treat that person as entitled to act with respect to the client's interests in the matter, unless:
(a) the lawyer represents the client in a matter against the interests of that person; or
(b) that person instructs the lawyer to act in a manner that the lawyer knows will violate the person's legal duties toward the client.
(4) A lawyer representing a client with diminished capacity as described in Subsection (1) may seek the appointment of a guardian or take other protective action within the scope of the representation when doing so is practical and will advance the client's objectives or interests, determined as stated in Subsection (2).

Comment:

a. Scope and cross-references. This Section recognizes adjustments to the client-lawyer relationship that are required when a client has diminished capacity to make decisions in the representation. See also § 31, Comment *e,* stating that a client's incompetence does not automatically terminate a lawyer's authority, and § 14, Comment *c,*

on the liability of an incompetent client to pay for legal services constituting "necessaries." On the role of lawyer and client in defining the scope of the representation, see § 19.

b. *Rationale.* An unimpaired client can define the client's own objectives (see § 19), confer with counsel (see § 20), and make important decisions (see §§ 21 & 22). To the extent a client is incapable of doing so and no other person is empowered to make such decisions, the lawyer's role in making decisions will increase. An alternative is to appoint a guardian for the client, but that may be expensive, not feasible under the circumstances, and embarrassing for the client. In some cases, different views about the client's welfare may be presented by opposing counsel for a tribunal's decision. This Section recognizes that a lawyer must often exercise an informed professional judgment in choosing among those imperfect alternatives. Accordingly, each Subsection applies based on the reasonable belief of the lawyer at the time the lawyer acts on behalf of a client described in Subsection (1).

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

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

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

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

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

d. *Deciding for a client with diminished capacity.* When a client's disability prevents maintaining a normal client-lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused

or misguided. Because a disability might vary from time to time, the lawyer must reasonably believe that the client is unable to make an adequately considered decision without prejudicial delay.

A lawyer's reasonable belief depends on the circumstances known to the lawyer and discoverable by reasonable investigation. Where practicable and reasonably available, independent professional evaluation of the client's capacity may be sought. If a conflict of interest between client and lawyer is involved (see § 125), disinterested evaluation by another lawyer may be appropriate. Careful consideration is required of the client's circumstances, problems, needs, character, and values, including interests of the client beyond the matter in which the lawyer represents the client. If the client, when able to decide, had expressed views relevant to the decision, the lawyer should follow them unless there is reason to believe that changed circumstances would change those views. The lawyer should also give appropriate weight to the client's presently expressed views.

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

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

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

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

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

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

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

f. Representing a client for whom a guardian or similar person may act. When a guardian has been appointed, the guardian normally speaks for the client as to matters covered by the guardianship. (When under the law of the jurisdiction a client's power of attorney remains in effect during a disability, the appointee has such authority.)

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

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

Reporter's Note

*Comment c. Maintaining a normal client-lawyer relationship so far as possible.*ABA Model Rules of Professional Conduct, Rule 1.14(a) (1983) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client"); see ABA Model Code of Professional Responsibility, EC 7-12 (1969); Institute of Judicial Administration-ABA, Juvenile Justice Standards, Standards Relating to Counsel for Private Parties 3.1(b), 3.5 (1980) (decisionmaking and informing client); Alvord v. Wainwright, 731 F.2d 1486 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984) (lawyer bound to follow wish of defendant found competent to stand trial to raise alibi but not insanity defense); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D.Wis.1972) (defendant in civil commitment proceeding constitutionally entitled to advocate, not merely guardian who decides what is best for defendant); In re Crane, 449 N.E.2d 94 (Ill.1983) (discipline of lawyer who failed to explain basis of large fees to clients who had recently come of age); In re M.R., 638 A.2d 1274 (N.J.1994) (lawyer for retarded person must advocate client's stated custody preference); Quesnell v. State, 517 P.2d 568 (Wash.1973) (lawyer in civil commitment proceeding may not waive jury trial for client and should communicate with client).

*Comment d. Deciding for a client with diminished capacity.*ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [2] (1983) (lawyer must sometimes act as de facto guardian); ABA Model Code of Professional Responsibility, EC 7-12 (1969) (lawyer compelled to decide should act to advance client interests); see Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515. For examples of lawyer decisionmaking, see People v. Bolden, 160 Cal.Rptr. 268 (Cal.Dist.Ct.App.1979) (lawyer, in best interests of client, may argue client's incompetence to stand trial even though client disagrees); State v. Aumann, 265 N.W.2d 316 (Iowa 1978), reh'g denied, 268 N.W.2d 288 (Iowa 1978) (proper for lawyer to appeal incompetence-to-stand-trial issue against client's wishes); State ex rel. A.E., 448 So.2d 183 (La.Ct.App.1984) (proper to proceed with hearing to terminate parental rights of comatose mother represented by counsel); Juvenile Justice Standards, Reporter's Note to Comment *c,* supra, § 3.1(b)(c)(3) (lawyer representing juvenile incapable of considered judgment may stay neutral or support least intrusive intervention warranted by circumstances); see United States v. Marble, 940 F.2d 1543 (D.C.Cir.1991) (where client competent to stand trial, client and not court decides whether to plead guilty by reason of insanity); Uniform Probate Code §§ 4-407 & 5-303 (appointed lawyer in guardianship or conservatorship proceeding has authority and duties of guardian ad litem); C. Wolfram, Modern Legal Ethics 159-163 (1986).

On the duty of defense counsel in some jurisdictions to raise the issue of incompetence to stand trial regardless of the impact on the client, compare State v. Haskins, 407 N.W.2d 309 (Wis.Ct.App.1987) (lawyer must raise issue); ABA Standards Relating to the Administration of Criminal Justice § 7-4.2(c) (2d ed. 1982) (same) with Enriquez v. Procunier, 752 F.2d 111 (5th Cir.1984), cert. denied, 471 U.S. 1126, 105 S.Ct. 2658, 86 L.Ed.2d 274 (1985) (tactical reasons may warrant not raising issue).

*Comment e. Seeking appointment of a guardian.*ABA Model Rules of Professional Conduct, Rule 1.14(b) (1983) ("A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest"); Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515, 559-567 (discussing pros and cons of seeking guardianship). At times, a tribunal may require the appointment of a guardian ad litem. E.g., Noe v. True, 507 F.2d 9 (6th Cir.1974); Pettengill v. Gilman, 232 A.2d 773 (Vt.1967). For the lawyer's duty to defer in most circumstances to decisions made for the client by the guardian, see ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [3] (1983); ABA Model Code of Professional Responsibility, EC 7-12 (1969); Juvenile Justice Standards, Reporter's Note to Comment *c,* supra, at 3.1(b)(c)(1); Brode v. Brode, 298 S.E.2d 443 (S.C.1982) (criticizing lawyer's appeal from order approving sterilization of retarded minor, to which guardian had consented on showing of medical and other dangers).

*Comment f. Representing a client for whom a guardian or similar person may act.*See Metropolitan Life Ins. Co. v. Carr, 169 F.Supp. 377 (D.Md.1959) (lawyer or guardian may apply to the court for instructions if there is doubt as to the facts to which guardian may properly stipulate); In re Sippy, 97 A.2d 455 (D.C.1953) (lawyer retained by mother cannot represent minor daughter in disobedient child-commitment proceeding initiated by mother, when daughter has retained other counsel); In re Fraser, 523 P.2d 921 (Wash.1974) (when guardian improperly seeks pay out of ward's funds, lawyer may disobey guardian's order to withdraw, until replacement lawyer is found); ABA Model Rules of Professional Conduct, Rule 1.14, Comment ¶ [4] (1983) (lawyer representing guardian who acts adversely to ward may have duty to prevent or rectify that misconduct).

Case Citations - by Jurisdiction

—

Mass.
Neb.
N.Y.Surr.Ct.
Tex.

Mass.

Mass.2003. Cit. in disc., quot. in ftn. In a child-dependency proceeding, the juvenile court terminated father's parental rights as to two daughters, and placed two other daughters in the permanent custody of the Department of Social Services. Daughter who had expressed a preference to be returned to father's custody moved for a new trial on the ground of ineffective assistance of counsel. The appeals court affirmed. Affirming, this court held, inter alia, that daughter failed to demonstrate that her trial counsel's failure to advocate her wishes was prejudicial in light of overwhelming evidence of father's unfitness, which no measure of zealous advocacy could have overcome. In re Georgette, 439 Mass. 28, 41, 785 N.E.2d 356, 365.

Neb.

Neb.2014. Subsecs. (1) and (2) cit. in sup. and in ftn. Mother appealed from a court order appointing an unrelated individual as the guardian of her incapacitated adult son, alleging professional misconduct on the part of her son's appointed attorney and error in the court's appointment of the guardian over her statutory priority. This court reversed and remanded, holding that passing over mother was arbitrary and capricious, though it found no indication that the attorney was motivated by anything other than the son's best interests, nor that the guardian's nomination was contrary to his wishes or direction. The court cited Restatement Third of The Law Governing Lawyers § 24, in concluding that a lawyer representing a client with diminished capacity had to act in the best interests of the client and pursue the lawyer's reasonable view of the client's objectives or interests as the client

would define them if able to make adequately considered decisions on the matter, even if the client expressed no wishes or gave contrary instructions. In re Guardianship of Benjamin E., 856 N.W.2d 447, 453, 454.

N.Y.Surr.Ct.

N.Y.Surr.Ct.2008. Cit. in sup., subsec. (4) quot. in sup., subsecs. (1) and (2) quot. in ftn., com. (e) cit. in ftn. Mother sued daughter for allegedly engaging in a long course of harassment, threats, and mistreatment against her. Shortly before trial, after daughter had already gone through multiple separate sets of counsel, present counsel for daughter moved for leave to withdraw. This court, having found that daughter was both incapacitated and unable to appreciate the consequences of that incapacity, namely, that she risked losing both her home and more than $3.8 million, granted counsel's motion contingent upon counsel commencing a proceeding to appoint a limited property guardian for daughter under the state adult guardianship statute. The court concluded that there was no ethical impediment to counsel bringing such a proceeding for daughter or disclosing to the court in that proceeding whatever information was necessary to do so. Cheney v. Wells, 23 Misc.3d 161, 169-171, 877 N.Y.S.2d 605, 611, 612.

Tex.

Tex.2019. Cit. and quot. in sup., cit. in ftn.; com. (b) quot. in sup. and cit. in ftn. (cit. as § 24A). Niece filed an application for a temporary guardianship of aunt, who suffered from dementia. The trial court denied aunt's motion to disqualify niece's attorney, who formerly represented aunt in preparing a will and a power of attorney in which she designated niece as her attorney-in-fact and her preferred guardian if the need arose, and appointed niece as aunt's temporary guardian. After the court of appeals denied aunt's petition for a writ of mandamus, this court denied aunt's second petition for mandamus relief, holding that the trial court did not abuse its discretion by refusing to disqualify niece's attorney. The court reasoned, in part, that attorney's representation of niece did not create a conflict of interest based on his former representation of aunt, because it was not adverse to aunt under Restatement Third of the Law Governing Lawyers § 24; the court pointed out that the power of attorney showed that, before her dementia worsened, aunt wanted niece to serve as her guardian if the need arose. In re Thetford, 574 S.W.3d 362, 378, 379.

Restatement (Third) of the Law Governing Lawyers 2 4 Intro. Note (2000)

Introductory Note

Introductory Note: This Topic concerns the lawyer's authority to speak and act for the client with respect to the rights of third persons. Usually a lawyer binds a client by acting as the client has authorized. Limiting the lawyer's authority in dealing with third parties recognizes the primacy of the client within the client-lawyer relationship. The interests of third persons and the convenience of the judicial system nevertheless may override the interests of clients.

The Topic begins by stating the presumption that a lawyer making an appearance in litigation on behalf of a client in fact represents that client (see § 25). It then defines the lawyer's actual authority to act for the client (see § 26) and the lawyer's authority to bind the client through apparent authority (see § 27). The next Section states rules concerning attribution of a lawyer's knowledge and statements to the lawyer's client (see § 28). A client might sometimes rely on a lawyer's advice or conduct to avoid the client's own responsibility (see § 29). A final Section recognizes that a lawyer might also be personally responsible for acts on behalf of a client (see § 30).

The matters treated here are classical issues of the law of agency. The Restatement Second of Agency is therefore a useful source, and its concepts and terminology are followed here where applicable.

Restatement (Third) of the Law Governing Lawyers § 25 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

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

§ 25 Appearance Before a Tribunal

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

Comment:

a. *Scope and cross-references.* A lawyer who enters an appearance before a tribunal for a person is presumed to represent that person in the proceeding in question. The extent of the lawyer's authority is considered in §§ 26 and 27. The presumption applies only in proceedings before tribunals (including government agencies recognizing appearance by counsel), not for example to negotiations between private persons. What constitutes an appearance, for example whether a writing is required, is determined by the law of the tribunal. A lawyer who does not participate in proceedings before a tribunal may assist a litigant—as in preparing documents for the client to sign and submit to the court—without filing an appearance or disclosing the lawyer's involvement, unless a court rule or order requires the lawyer to do so. In some instances, the appearance and representation may be limited, for example when a lawyer files a special appearance solely to contest jurisdiction under rules permitting such appearances. For the termination of a lawyer's authority, see § 31. If the presumption of the lawyer's authority is rebutted, the effect of rebuttal on the rights of third persons and the interests of tribunals is beyond the scope of this Restatement.

b. *Rationale.* Lawyers commonly enter appearances before tribunals. It would be highly unusual for a lawyer to do so erroneously and still more unusual for that to remain uncorrected. On a lawyer's liability for acting as an agent without authorization, see § 27, Comment *f*, and § 30(3) and Comment *c* thereto; Restatement Second, Agency §§ 329, 330, and 430. Accordingly, it is presumed that a lawyer who formally claims to represent someone actually does so. That presumption facilitates the course of litigation. It would be wasteful to interrupt a proceeding to

require proof that a lawyer has been properly retained or that the losing party had authorized representation by that party's purported lawyer.

c. Rebuttal of the presumption of authority. An objecting party ordinarily bears the burden of persuading the tribunal that a lawyer's appearance was without actual authority. Raising the issue should lead the client either to disavow the representation or to confirm or ratify it. Should the situation prove more complex—for example, because it is unclear who has the right to act for an organizational client—appropriate inquiry may be made to resolve the issue. The party disputing a lawyer's authority need not bear the burden of persuasion when two lawyers enter conflicting appearances for the same client. When the person purportedly represented challenges the representation after losing the litigation, in an attempt to have its result set aside, the burden of persuasion is on that person. The purported client cannot assert the attorney-client privilege to exclude from evidence communications relevant to the question of the lawyer's authority to appear (see § 80(1)(b)).

d. Section inapplicable as between a client and a lawyer. This Section does not apply to proceedings in which the presumption is not necessary to protect the rights of third persons, for example with respect to lawyer-respondents in disciplinary proceedings or in litigation between lawyer and client, where the person seeking relief usually bears the burdens of persuasion and of coming forward with evidence. If, for example, a lawyer brings a suit for fees against a person who denies retaining the lawyer, the lawyer must prove the retainer. If a lawyer is charged with appearing without authority, the person seeking relief must prove the lack of authority.

Reporter's Note

For the presumption described in this Section, see, e.g., Pender v. McKee, 582 S.W.2d 929 (Ark.1979); McGee v. Superior Court, 221 Cal.Rptr. 421 (Cal.Dist.Ct.App.1985); Lovering v. Lovering, 380 A.2d 668 (Md.Ct.Spec.App.1977); Retzlaff v. Grand Forks Pub. School Dist., 424 N.W.2d 637 (N.D.1988); E. Weeks, A Treatise on Attorneys and Counselors at Law 404-13 (2d ed. 1892).

*Comment c. Rebuttal of the presumption of authority.*E.g., F.D.I.C. v. Oaklawn Apartments, 959 F.2d 170 (10th Cir.1992); Wilson v. Barry, 228 P.2d 331 (Cal.Dist.Ct.App.1951); Traxler v. Board of Trustees, 701 P.2d 607 (Colo.Ct.App.1984) (showing that majority of Board did not vote for appeal); NRK Management Corp. v. Donahue, 440 N.Y.S.2d 524 (N.Y.Civ.Ct.1981) (when plaintiff challenged lawyer's authority, lawyer admitted having been retained by relatives of defendant, whose whereabouts were unknown); Choi v. Hurley, 739 P.2d 1056 (Or.Ct.App.1987); see Ind. Code § 34-1-60-7 (court may require lawyer to produce and prove authority). On the waiver of the attorney-client privilege by a putative client who denies having authorized a lawyer to act, see § 26, Comment *c,* and Reporter's Note thereto; § 80, Reporter's Note.

*Comment d. Section inapplicable as between a client and a lawyer.*On sanctions for unauthorized appearance, see Calif. Bus. & Prof. Code § 6104 (discipline for wilfully appearing without authority); Ind. Code § 34-1-60-8 (court may require lawyer to repair injury caused by unauthorized appearance); 2 R. Mallen & J. Smith, Legal Malpractice § 24.18 (3d ed. 1989) (malpractice liability to client).

Case Citations - by Jurisdiction

E.D.Pa.
N.D.Tex.Bkrtcy.Ct.
Nev.

E.D.Pa.

E.D.Pa.2005. Cit. in sup. Attorney who had provided former client legal services in a divorce matter sued lawyer and law firm representing client, alleging that defendants assisted client in concealing his assets to defraud creditors like plaintiff. Denying defendants' motion to dismiss plaintiff's civil-conspiracy claim, this court held, inter alia, that, because plaintiff's allegations asserted that lawyer's representation of client assisted with furthering and participating in a fraudulent conveyance, the actions alleged fell outside the scope of legitimate representation, and lawyer could be liable to the extent that a nonlawyer would be in the same situation. The court noted that it was reasonable for it to look to the Restatement Third of the Law Governing Lawyers for guidance because various Commonwealth courts had relied on particular sections of that Restatement. Marshall v. Fenstermacher, 388 F.Supp.2d 536, 553.

N.D.Tex.Bkrtcy.Ct.

N.D.Tex.Bkrtcy.Ct.2007. Quot. in disc., com. (b) quot. in disc., com. (c) cit. in disc. Debtor's children brought an adversary proceeding against debtor, seeking a declaratory judgment that two prepetition Illinois state-court civil judgments against him for child sexual abuse were not discharged in his Chapter 13 and Chapter 7 cases. Entering judgment for plaintiffs, this court held that the judgment debt was excepted from discharge based on the state court's determination that debtor's conduct was willful, intentional, and malicious. The court concluded that debtor had a full and fair opportunity to litigate the issue in the Illinois court, rejecting debtor's argument that the attorney who entered an appearance on his behalf was not his lawyer; attorney's appearance, coupled with debtor's father's denial that he had hired attorney, was enough for this court to conclude that attorney was debtor's lawyer for purposes of the Illinois lawsuit. In re Gold, 375 B.R. 316, 329.

Nev.

Nev.2018. Cit. in diss. op.; com. (c) quot. in diss. op. After the trial court dismissed an ethics complaint filed with the state ethics commission against two state assemblymen, and commission appealed, assemblymen filed an open-meeting-law complaint against commission, alleging that commission's notice of appeal was defective, because it was filed without first making its decision, or taking action to appeal the dismissal in a public meeting. This court granted assemblymen's motion to dismiss, holding that the notice of appeal was void because it was filed without commission's authorization. The dissent argued that, under Restatement Third of the Law Governing Lawyers § 25, a lawyer representing a client before a tribunal was presumed to have actual authority to do so, that a challenger bore the burden of persuading the tribunal that a lawyer's appearance was without actual authority, and that assemblymen failed to meet that burden. The Commission on Ethics of the State of Nevada v. Hansen, 419 P.3d 140, 147.

Nev.2017. Cit. in diss. op.; com. (c) quot. in diss. op. Citizen filed an ethics complaint with the state commission on ethics against two elected officials, alleging that officials used their positions to benefit their personal interests. After the commission denied officials' motion to dismiss, the trial court granted their petition for judicial review and ordered the commission to dismiss the complaint. After the commission's in-house counsel, chair, and executive director filed a notice of appeal, this court granted officials' motion to dismiss for lack of jurisdiction, holding that the notice of appeal was defective and void because it was not authorized by the commission in a public meeting. The dissent argued that, under Restatement Third of the Law Governing Lawyers § 25, an objecting party bore the burden of persuading the tribunal that a lawyer's appearance before the tribunal was without actual authority, and, even if the commission's counsel, chair, and executive director lacked authority to appeal, the commission subsequently ratified the appeal in an open meeting convened for that purpose. Commission on Ethics of State v. Hansen, 396 P.3d 807, 814.

End of Document

Restatement (Third) of the Law Governing Lawyers § 26 (2000)

§ 26 A Lawyer's Actual Authority

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

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

Comment:

a. *Scope, cross-references, and terminology.* In general, a client is bound by a lawyer's acts in dealings with third persons discussed in this Section or, under § 27, by giving the lawyer an appearance of authority. For situations in which a client may avoid responsibility for authorized acts because of a lawyer's misconduct, see § 29. The word "act" includes failures to act, for example when a lawyer does not object to something done in court.

Although the forms of client approval set forth in this Section might be described as instances of actual authority, agency law has often used finer distinctions. Specific authorization, for example to sell an automobile to a stated person for a stated price, is sometimes called express authority, as opposed to implied authority arising out of a more general delegation of power to act (see Restatement Second, Agency § 7, Comment *c*). An authorization required by law, regardless of the wishes of the principal, is sometimes called inherent authority (see Restatement Second, Agency § 8A); the authority of a lawyer stated in § 26(2) may be so classified. A principal's approval following an agent's act, as provided in § 26(3), is referred to in agency law as ratification (see Restatement Second, Agency § 82). Those terminological matters and other aspects of the authority of an agent are set forth in Restatement Second, Agency, Chapters 1, 3, and 4.

On waiver of the attorney-client privilege by a client who disclaims a lawyer's authority, see § 80(1)(b).

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

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

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

c. *Forms of client authorization.* A client has authorized the act within the meaning of this Section in the circumstances described in §§ 21 and 23. A person dealing with the lawyer might require the lawyer to provide express authority from the lawyer's client. Courts likewise may require such authority, for example ordering a lawyer attending a pretrial conference either to secure settlement authority or to bring the client to the conference.

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

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

Illustrations:

1. Seller authorizes Lawyer to negotiate the sale of Seller's factory to Buyer. Lawyer states to Buyer that the factory's foundations are in good condition, knowing that they are not. Because making representations about the factory was within the scope of authority for one authorized to negotiate, Seller is liable to Buyer for misrepresentation and can be required to rescind the sale if the other conditions for rescission have been satisfied. That is so even if Seller did not know about Lawyer's statements or the condition of the foundations (see Restatement Second, Agency §§ 257-259).

2. Same facts as in Illustration 1, except that Lawyer negligently collides with Buyer's automobile while arriving for a negotiating session. Client is not liable to Buyer, unless

Lawyer was Seller's employee (for example, because Seller is a corporation and Lawyer is its inside legal counsel) (see Restatement Second, Agency §§ 250 & 251).

A lawyer's conduct may be attributed to a client to determine the client's criminal responsibility. Attribution depends on the criminal law. A client who asks a lawyer to perform a criminal act or assists in its performance is guilty of the lawyer's act as an accomplice (see Model Penal Code § 2.06). A client would be liable as a co-conspirator for crimes committed by a lawyer in pursuit of a criminal conspiracy in which both were engaged. In general, however, criminal liability for another's act is significantly more limited than civil liability.

This Section deals only with the effect of a lawyer's authorized acts on the client, not with their effects on the lawyer. Whether the lawyer can be held liable for contract breaches, torts, and sanctionable litigation behavior is considered in § 30.

e. Ratification by a client. A client may later ratify a lawyer's act for which the lawyer lacked actual authority when it occurred. A client who has ratified a lawyer's act is bound by it. For more detailed consideration, see § 21, Comment *f*, and Restatement Second, Agency, Chapter 4.

Reporter's Note

*Comment b. Rationale.*See generally Tolliver v. Northrop Corp., 786 F.2d 316 (7th Cir.1986); DeMott, The Lawyer as Agent, 67 Fordham L. Rev. 301 (1998); Mazor, Power and Responsibility in the Attorney-Client Relation, 20 Stan. L. Rev. 1120 (1968); C. Wolfram, Modern Legal Ethics 166-168 (1986). For the rule that a corporation may appear only through a lawyer, see § 14, Comment *f,* and Reporter's Note thereto.

*Comment c. Forms of client authorization.*For relatively specific authorization, see Trustees of Exermont Subdivision v. LaDriere, 636 S.W.2d 90 (Mo.Ct.App.1982) (seller of land bound through estoppel by representation of lawyer whom seller authorized to negotiate); Avendanio v. Marcantonio, 427 N.Y.S.2d 512 (N.Y.App.Div.1980) (contract providing for notice of cancellation to seller's lawyer implicitly authorized lawyer to extend cancellation time); Rekhi v. Olason, 626 P.2d 513 (Wash.Ct.App.1981) (oral authorization to sell home and signature on blank power of attorney); § 22, Comment *c,* and Reporter's Note thereto (authority to settle litigation). For authority arising from the representation, see Thomas v. INS, 35 F.3d 1332 (9th Cir.1994) (under ordinary principles of agency law, authority of United States attorney to prosecute all offenses gave implied authority to bind government not to oppose motions to INS for relief from deportation orders); Slocum v. Littlefield Public Schools, 338 N.W.2d 907 (Mich.Ct.App.1983) (board-of-education lawyer had implied authority to give statutory notice of extension of teacher's probation); Gordon v. Town of Esopus, 486 N.Y.S.2d 420 (N.Y.App.Div.1985) (lawyer not authorized to waive client's right to rent); Ottawa County Comm'rs v. Mitchell, 478 N.E.2d 1024 (Ohio Ct.App.1984) (clear and convincing evidence needed to show that lawyer had authority to convey easement); E. Weeks, A Treatise on Attorneys and Counselors at Law 440-508 (2d ed. 1892); Note, An Attorney's Implied Authority to Bind His Client's Interests and Waive His Client's Rights, 3 J. Leg. Prof. 137 (1978); § 21, Comment *e,* and Reporter's Note thereto. For authority reserved to the lawyer under § 23(3), see § 23, Comment *d,* and Reporter's Note thereto. The attorney-client privilege does not bar evidence of communications conveying the client's authority to the lawyer when the client denies the lawyer's authority. United States v. Miller, 874 F.2d 1255 (9th Cir.1989); Moyer v. Moyer, 602 A.2d 68 (Del.1992); Conlon v. Conlons Ltd., (1952) 2 All. E.R. 462 (C.A.1952) (Eng.). See generally § 80, Reporter's Note.

*Comment d. Effects of attributing authorized acts to a client.*For the contractual context, see, e.g., Tomerlin v. Canadian Indem. Co., 394 P.2d 571 (Cal.1964) (estoppel by lawyer's representation); Rekhi v. Olason, 626 P.2d 513

(Wash.Ct.App.1981); C. Wolfram, Modern Legal Ethics 152-153 (1986). For the litigation context, see, e.g., Link v. Wabash R.R., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (court inherently empowered to dismiss case when lawyer failed to appear at pretrial conference); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (lawyer's failure to raise issue at criminal trial ordinarily bars federal habeas corpus review); United States v. 7108 West Grand Ave., 15 F.3d 632 (7th Cir.), cert. denied, 512 U.S. 1212, 114 S.Ct. 2691, 129 L.Ed.2d 822 (1994); Mazor, Power and Responsibility in the Attorney-Client Relation, 20 Stan. L. Rev. 1120 (1968). For tort liability, see, e.g., Citizens Savings Bank v. Verex Assurance, Inc., 883 F.2d 299 (4th Cir.1989) (fraud on behalf of client); Bridge C.A.T. Scan Associates v. Ohio Nuclear, Inc., 608 F.Supp. 1187 (S.D.N.Y.1985) (trade libel); Plant v. Trust Co., 310 S.E.2d 745 (Ga.Ct.App.1983) (client not liable for lawyer's abusive treatment of opposing party causing heart attack); United Farm Bureau Mutual Ins. Co. v. Groen, 486 N.E.2d 571 (Ind.Ct.App.1985) (client liable when lawyer abuses process by obtaining default judgment against unserved defendant). Baldasarre v. Butler, 625 A.2d 458 (N.J.1993) (client not liable for lawyer's fraud that client neither authorized nor participated in). For criminal-law doctrines regulating when one person can be held criminally liable for the acts of another, see W. LaFave, Criminal Law 569-602 (2d ed. 1986); G. Fletcher, Rethinking Criminal Law 634-82 (1978).

*Comment e. Ratification by a client.*E.g., Daniel v. Scott, 455 So.2d 30 (Ala.Civ.Ct.1984) (plaintiff let lawyer keep settlement check 50 days and otherwise acted on settlement); Linn County v. Kindred, 373 N.W.2d 147 (Iowa Ct.App.1985) (county board ratified appeal by vote authorizing it); Bower v. Davis & Symonds, 406 A.2d 119 (N.H.1979) (extension of land-sale contract when lawyers exchanged extension letters and client continued to treat contract as in effect); Yahola Sand & Gravel Co. v. Marx, 358 P.2d 366 (Okla.1960) (client waited 16 months before disavowing settlement contract); § 21, Comment *f,* and Reporter's Note thereto, and § 22, Comment *c,* and Reporter's Note thereto.

Case Citations - by Jurisdiction

C.A.2
C.A.6,
D.Ariz.
D.D.C.
Idaho,
Mass.
Nev.
N.C.
N.C.App.
Wis.
Wis.App.

C.A.2

C.A.2, 1993. Cit. in sup. (citing § 38, T.D. No. 5, 1992, which is now § 26). After government brought contempt proceeding against union officers, officers' attorney entered into settlement agreement with government. Later, officers' attorney informed government that his clients would rather resign their posts than carry out settlement terms. Government replied by outlining terms under which it would accept resignations as substitute for settlement. Three officers resigned, but remaining officers did not resign or carry out settlement. Government moved for entry of judgment enforcing settlement terms, and New York federal district court granted motion for enforcement. Affirming, this court held, in part, that attorney had actual and apparent authority to enter into settlement. Attorney stated in court that he had authority to settle, attorney proposed clients' resignations at their instance, their resignations underscored clients' belief of his authority, and officers waited over one year before claiming that attorney lacked authority to settle. U.S. v. International Broth. of Teamsters, 986 F.2d 15, 20.

C.A.6,

C.A.6, 2019. Cit. in conc. op. §§ 26-27; com. (b) cit. in conc. op. Employee sued employer, seeking damages for injuries he allegedly sustained at work. The district court dismissed employee's complaint as a sanction for his and his attorney's conduct in refusing to answer questions at a court-ordered independent medical examination. Affirming, this court held that the record supported a finding that employee and his attorney both acted in bad faith and willfully violated the court's discovery order. The concurring opinion stressed that misconduct by a party was not a precondition to dismissing a case as a sanction for misconduct by the party's lawyer, because parties became bound by the actions of lawyers taken on their behalf with actual or apparent authority under the Restatement Third of Agency and the Restatement Third of the Law Governing Lawyers. Mager v. Wisconsin Central Ltd., 924 F.3d 831, 841.

D.Ariz.

D.Ariz.2003. Cit. in case quot. in sup. After son was killed at insureds' home, parents sued insureds for wrongful death and then obtained assignment of insureds' claims against insurer for bad faith and breach of policy. Insurer sought declaratory judgment that there was no coverage in wrongful death suit, alleging that one insured breached cooperation clause by agreeing to entry of judgment against them in underlying suit and assigning their rights against insurer in exchange for covenant not to execute judgment. Parents counterclaimed against insurer for breach of contract. This court granted insurer summary judgment, holding that no contract existed when insureds signed purported assignment agreement on June 4 and 5, 2001, since agreement was not delivered to parents. Insureds' law firm gave insurer until June 7 to withdraw reservation of rights; when insurer withdrew reservation as to one insured before deadline, law firm did not send assignment agreement to parents. Law firm was authorized to represent insured, and its extension of deadline to insurer was valid and binding upon her. American Family Mutual Ins. Co. v. Zavala, 302 F.Supp.2d 1108, 1117.

D.D.C.

D.D.C.2016. Cit. in sup. Insured sued insurer, alleging that insurer breached his homeowner's policy by failing to reimburse him for certain legal fees he incurred as the defendant in an underlying personal-injury action. This court granted in part insurer's motion for summary judgment, holding that, during a telephone conversation between insurer's representative and insured's attorney, the parties entered into a valid agreement governing the hourly rates to be charged by insured's attorney, and insurer paid insured the amount due under that agreement. The court rejected insured's argument that he was not bound by the agreement, which was made between his attorney and insurer, reasoning that, under Restatement Third of the Law Governing Lawyers §§ 26 and 27, a client was generally bound by his or her lawyer's acts in dealings with third persons, including the lawyer's assent to a contract. Feld v. Fireman's Fund Insurance Company, 206 F.Supp.3d 378, 389.

Idaho,

Idaho, 2020. Com. (d) and illus. 2 cit. in sup. Buyer of Wagyu calves sued seller, alleging that seller's attorney breached the confidentiality provision in a settlement of a prior civil action between the parties when he disclosed the terms of the settlement to the prosecutor in a related criminal action against seller. The trial court granted summary judgment for seller, finding that seller was not liable for his attorney's actions. Affirming, this court held that there was no genuine dispute of material fact that seller's attorney was not acting within the scope of his authority when he disclosed the confidential terms of the settlement to the prosecutor. The court rejected buyer's argument that improper actions, though not exactly necessary, usual, and proper, could still be within an agent's scope of authority, reasoning by analogy that, under Restatement Third of the Law Governing Lawyers § 26, a

client would not be liable to a third party if the client's lawyer negligently collided with the third party's automobile when arriving for a negotiating session on behalf of the client. Primera Beef, LLC v. Ward, 457 P.3d 161, 169.

Mass.

Mass.2008. Cit. in sup., com. (b) quot. in sup. Current trustees and beneficiary sued former trustees, alleging that defendants breached their fiduciary duties in 1972 by converting a number of stock shares that were being held in trust for beneficiary. The trial court granted summary judgment for defendants on limitations grounds. Vacating in part and remanding, this court held that, even though the trust's successor trustee knew in 1984, upon his succession to that position, of potential claims in connection with the alleged conversion in 1972, but did not assert them, the statute of limitations did not begin to run, and thus plaintiffs' claims were not time-barred, because successor trustee had served as attorney for one of the defendants and thus was his agent with respect to that redemption. O'Connor v. Redstone, 452 Mass. 537, 557, 896 N.E.2d 595, 611.

Nev.

Nev.2018. Subsec. (3) quot. in diss. op.; com. (e) cit. in diss. op. After the trial court dismissed an ethics complaint filed with the state ethics commission against two state assemblymen, and commission appealed, assemblymen filed an open-meeting-law complaint against commission, alleging that commission's notice of appeal was defective, because it was filed without first making its decision, or taking action to appeal the dismissal in a public meeting. This court granted assemblymen's motion to dismiss, holding that the notice of appeal was void because it was filed without commission's authorization. The dissent argued that, even accepting, arguendo, that commission's executive director, chair, and in-house counsel lacked authority to file the notice of appeal, commission properly ratified the appeal consistent with Restatement Third of the Law Governing Lawyers § 26 in an open meeting that was subsequently convened for that purpose. The Commission on Ethics of the State of Nevada v. Hansen, 419 P.3d 140, 147.

Nev.2017. Subsec. (3) quot. in diss. op.; com. (e) cit. in diss. op. Citizen filed an ethics complaint with the state commission on ethics against two elected officials, alleging that officials used their positions to benefit their personal interests. After the commission denied officials' motion to dismiss, the trial court granted their petition for judicial review and ordered the commission to dismiss the complaint. After the commission's in-house counsel, chair, and executive director filed a notice of appeal, this court granted officials' motion to dismiss for lack of jurisdiction, holding that the notice of appeal was defective and void because it was not authorized by the commission in a public meeting. The dissent argued that, even if the commission's counsel, chair, and executive director lacked authority to appeal, the commission subsequently ratified the appeal in an open meeting convened for that purpose under Restatement Third of the Law Governing Lawyers § 26. Commission on Ethics of State v. Hansen, 396 P.3d 807, 814.

Nev.2014. Cit. in sup. Civil litigants in a real-property contract action, whose consolidated appeals were dismissed for failure to timely file the opening brief and appendix, petitioned for en banc reconsideration, arguing that the dilatory conduct should be deemed attributable solely to their counsel's neglect, not to their own conduct. Denying the petition for en banc reconsideration, this court held that, to the extent that a prior decision of the court had concluded that dismissal would not follow violations of court rules or orders because counsel, acting on a client's behalf, occasioned such violations, that decision was overruled. The court noted that, pursuant to Restatement Third of the Law Governing Lawyers §§ 26 and 27, an attorney's act was considered to be that of the client in judicial proceedings when the client had expressly or impliedly authorized the act. Huckabay Props. v. NC Auto Parts, 322 P.3d 429, 434.

Nev.2009. Subsec. (3) cit. in disc. Plaintiffs brought a medical-malpractice action against hospital; after their attorney settled their case for $160,000 without their knowledge or approval, forged the necessary settlement papers, and disappeared with the money, they moved for relief from a stipulated final judgment terminating their

claims. The trial court granted plaintiffs' motion for relief, and vacated the stipulated judgment, based on fraud on the court. Affirming, this court held, inter alia, that the trial court did not err in finding that plaintiffs did not ratify the fraud by attempting to negotiate for a settlement involving new funds of an equal amount after the fraud came to light. The court pointed out that plaintiffs consistently protested their attorney's unauthorized settlement as fraudulent. NC-DSH, Inc. v. Garner, 218 P.3d 853, 860.

N.C.

N.C.2010. Com. (b) quot. in sup. After attorney hired by buyers to represent them in the purchase of a home embezzled the closing proceeds, sellers sued buyers and others, seeking to set aside the conveyance of property and revert fee title back to sellers or, in the alternative, monetary damages. The trial court granted summary judgment for defendants. The court of appeals reversed. Affirming, this court held that buyers had to bear the loss caused by the misconduct of their own retained attorney. The court noted the principle that it was more appropriate for costs flowing from a lawyer's misconduct to be borne by the client rather than by an innocent third person, and pointed out that a buyer had recourse to actionable legal claims not available to a seller. Johnson v. Schultz, 364 N.C. 90, 95, 691 S.E.2d 701, 705.

N.C.App.

N.C.App.2009. Com. (b) quot. in sup. Home sellers sued buyers, buyers' lawyer, and others for breach of contract, after lawyer misappropriated the purchase-money funds. The trial court entered summary judgment against plaintiffs, concluding that they bore the risk of the loss of the embezzled proceeds. Reversing and remanding, this court held, inter alia, that where, as here, there was no fault, and buyer and seller were essentially "innocent" parties, the risk of loss should have been allocated based on which party reposed confidence in lawyer, i.e., which party had an attorney-client relationship with him, and, here, it was buyers who retained lawyer responsible for seller's loss. Johnson v. Schultz, 195 N.C.App. 161, 671 S.E.2d 559, 565, 569.

Wis.

Wis.2004. Cit. and quot. in ftn., com. (b) quot. in ftn. During a lawsuit involving real-estate transactions, plaintiffs' attorney, apparently believing that documents were not privileged, disclosed them to defendants' counsel in response to a discovery request. Trial court ordered defendants to return the documents to plaintiffs, but court of appeals reversed. This court reversed the court of appeals, holding that a lawyer, without the consent or knowledge of a client, could not waive attorney-client privilege by voluntarily producing privileged documents (which the attorney did not recognize as privileged) to an opposing attorney in response to a discovery request. Only the client could waive attorney-client privilege under state statute regarding attorney-client privileged documents. Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust, 271 Wis.2d 610, 679 N.W.2d 794, 796, 801.

Wis.App.

Wis.App.2003. Quot. in sup., cit. generally in sup., coms. (a) and (d) quot. in sup. During litigation of family dispute over money, plaintiffs contended that some of the documents that their attorney had turned over to defendants in response to defendants' discovery request were protected by the attorney-client privilege. The trial court ordered return of the documents. Reversing and remanding, this court held, inter alia, that attorney's volitional act of transmitting the documents to defendants waived whatever attorney-client privilege plaintiffs had in connection with those documents. Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 265 Wis.2d 803, 667 N.W.2d 831, 836, 837, reversed 271 Wis.2d 610, 679 N.W.2d 794 (2004).

End of Document

Restatement (Third) of the Law Governing Lawyers § 27 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 27 A Lawyer's Apparent Authority

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

Comment:

a. *Scope and cross*-references. This Section addresses apparent authority. The concept is employed in this Restatement as defined in Restatement Second, Agency § 8. Because lawyers ordinarily have broad actual authority (see §§ 21 & 23), simply retaining a lawyer confers broad apparent authority on the lawyer unless other facts apparent to the third person show that the lawyer's authority is narrower (see Comment *c*). Such authority arising from the act of retention alone does not extend to matters, such as approving a settlement, reserved for client decision (see § 22). To create apparent authority in such matters, the client must do more than simply retain the lawyer (see Comment *d*). For the effect of a lawyer's discharge or withdrawal on apparent authority, see § 31(3) and Comments *c* and *i* thereto.

b. *Rationale.* Under the law of agency, a client is bound by the lawyer's act or failure to act when the client has vested the lawyer with apparent authority—an appearance of authority arising from and in accordance with the client's manifestations to third persons (see Restatement Second, Agency § 8). Apparent authority can be identical to, greater, or less than a lawyer's actual authority (see id. Comment *a*). The concepts of actual and apparent authority often lead to similar results. The same acts or statements of a client that confer actual authority can serve to manifest authority to a third person and vice versa. Apparent authority extends beyond actual authority in a lawyer's transactions with third persons when the client has limited the lawyer's actual authority but the limitation

has not been disclosed to that person and, instead, the client has manifested to the third person that the lawyer has authority to act in the matter.

Apparent authority exists when and to the extent a client causes a third person to form a reasonable belief that a lawyer is authorized to act for the client. Permitting disavowal would allow clients at their convenience to ratify or disavow their lawyer's acts despite the client's inconsistent manifestation of the lawyer's authority. It would also impose on the third person the burden of proving a fact better known to the client. A client usually can make clear to third persons the limited scope of a lawyer's authority or take care to act in ways that do not manifest authority that the client does not intend.

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

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

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

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

Illustrations:

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

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

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

Illustrations:

3. Lawyer represents Client in a civil action in which the court orders counsel either to appear at a pretrial conference with authority to settle the case or to arrange for the presence of a person so authorized. Client has not been informed of the order and has not authorized Lawyer to approve a settlement. Lawyer, without disclosing that lack of authority, attends the conference and agrees to a settlement. Client is not bound by the settlement. Lawyer can be subject to disciplinary sanctions, including contempt of court, and liability for damages or sanctions to the opposing party.

4. The same facts as in Illustration 3, except that the opposing party observes that Client is in the courtroom and hears the court's order but leaves as the settlement conference begins without further comment to the court or opposing party. Client's acts create apparent authority in Lawyer to enter the settlement on Client's behalf, and Client is bound by the settlement agreed to by Lawyer.

e. Effects of attributing to clients acts performed with apparent authority. A client is liable in tort to a third person when apparent authority manifested by the client aids a lawyer to perform a tortious act injurious to the third person. A client is liable, for example, for misrepresentations and defamatory statements made by a lawyer with

apparent authority to make the statements in representing the client (see Restatement Second, Agency § 265; compare § 57(1) (immunity for defamatory statements in the course of litigation)). The lawyer of the client is not considered an employee (servant) of the client unless employed full- or part-time as such an employee (see generally Restatement Second, Agency § 2(2)). The client is therefore not liable for tortious acts committed while the lawyer is acting within the scope of employment but outside the lawyer's actual or apparent authority (see § 26, Comment *d*).

The concept of apparent authority is of little utility in assessing criminal liability of the client. A client who manifested to third persons the lawyer's authority to act for the client might be convicted as an accessory, but only if the client knowingly advanced the criminal enterprise. Similar requirements apply for a client to be convicted as a co-conspirator in crimes committed by a lawyer (see § 26, Comment *d*).

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

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

Reporter's Note

*Comment b. Rationale.*For the requirement that the opposing person must believe that the lawyer has authority, see, e.g., Jones v. Nunley, 547 P.2d 616 (Or.1976).

*Comment c. Apparent authority created by retention of a lawyer.*E.g., N.L.R.B. v. Donkin's Inn, Inc., 532 F.2d 138 (9th Cir.1976), cert. denied, 429 U.S. 895, 97 S.Ct. 257, 50 L.Ed.2d 179 (1976) (lawyer who had negotiated settlement requiring employer client to bargain had apparent authority to approve collective bargaining contract for employer); Tesini v. Zawistowski, 479 So.2d 775 (Fla.Dist.Ct.App.1985) (lawyer had apparent authority to give one-day extension for real-estate closing); Bucher & Willis v. Smith, 643 P.2d 1156 (Kan.Ct.App.1982) (lawyer for estate has apparent authority to hire surveyor); Crisp, Courtemanche, Meador & Assoc. v. Medler, 663 P.2d 388 (Okla.Ct.App.1983) (lawyer has apparent authority to order complete transcript for appeal, even if lawyer and client privately agreed that partial transcript would suffice). On Illustration 1, see Restatement Second, Agency § 8, Comment *b,* Illustration 5.

*Comment d. Lawyer's apparent authority to settle and perform other acts reserved to a client.*E.g., Fennell v. TLB Kent Co., 865 F.2d 498 (2d Cir.1989) (no apparent authority unless client manifests assent to opposing party); Farris v. JC Penney Co., Inc., 176 F.3d 706 (3d Cir.1999); Malave v. Carney Hospital, 170 F.3d 217 (1st Cir.1999) (similar); Nehleber v. Anzalone, 345 So.2d 822 (Fla.Dist.Ct.App.1977) (no apparent authority to settle); Miotk v. Rudy, 605 P.2d 587 (Kan.Ct.App.1980) (similar); see Annot., 30 A.L.R.2d 944 (1953); § 22, Comment *c,* and Reporter's Note thereto. For rules differing from those set forth here, see, e.g., Morgan v. South Bend Community School Corp., 797 F.2d 471 (7th Cir.1986) (lawyer for government unit never has apparent authority to settle unless opposing party has relied); Capital Dredge & Dock Corp. v. Detroit, 800 F.2d 525 (6th Cir.1986) (litigating lawyer has apparent authority to settle); Koval v. Simon Telelect, Inc., 693 N.E.2d 1299 (Ind.1998) (lawyer has inherent authority to settle in court or court-ordered alternative dispute resolution); Lord Jeff Knitting Co. v. Mills, 315 S.E.2d 377 (S.C.Ct.App.1984) (lawyer has implied or apparent authority to confess judgment if acting in good faith). On the effect of a court rule requiring that lawyers at a conference have authority to settle, see Hallock v. State, 474 N.E.2d 1178 (N.Y.1984) (settlement binding when one coparty was at conference and other did not

object for 2 months after it); Lodowski v. Roenick, 307 A.2d 439 (Pa.Super.Ct.1973) (rule by itself did not create real or apparent authority); cf. G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir.1989) (court may require party to send person with settlement authority to accompany lawyer at conference). See generally Giesel, Enforcement of Settlement Contracts: The Problem of the Attorney Agent, 12 Geo. J. Legal Ethics 543 (1999).

*Comment e. Effects of attributing to clients acts performed with apparent authority.*For contractual and litigation effects, see Comments *c* and *d*, supra; § 26, Comment *d,* and Reporter's Note thereto. For tort liability, see Yohay v. City of Alexandria Employees Credit Union, 827 F.2d 967 (4th Cir.1987) (client liable when lawyer's apparent authority gave her access to third person's credit files which lawyer unlawfully misused); see generally American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982). For the doctrines relevant to criminal liability, see authorities cited in § 26, Reporter's Note to Comment *d*.

*Comment f. Recovery against a lawyer.*For the liability of a lawyer to a client, see Yohay v. City of Alexandria Employees Credit Union, 827 F.2d 967 (4th Cir.1987) (indemnity theory); Safeway Ins. Co. v. Spinak, 641 N.E.2d 834 (Ill.App.Ct.1994); Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J.1980) (malpractice liability); Barton v. Tidlund, 809 S.W.2d 74 (Mo.Ct.App.1991) (malpractice). For professional discipline for settling without authorization, see In re Estes, 212 N.W.2d 903 (Mich.1973); In re Stern, 406 A.2d 970 (N.J.1979); Annot., 92 A.L.R. 3d 288 (1979).

On a lawyer's liability to an opposing party, compare Schafer v. Fraser, 290 P.2d 190 (Or.1955) (liability of lawyer who represented that clients would share in litigation costs), with Henry W. Savage, Inc. v. Friedberg, 77 N.E.2d 213 (Mass.1948) (lawyer not liable when client ratified); Zamouski v. Gerrard, 275 N.E.2d 429 (Ill.App.Ct.1971) (lawyer not liable when lawyer had actual authority). But see Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 750 P.2d 118 (N.M.1988) (lawyer not liable for negligent misrepresentation that client would not claim immunity).

Case Citations - by Jurisdiction

—

C.A.2
C.A.6,
C.A.D.C.
C.D.Cal.
D.D.C.
E.D.Pa.
N.D.Tex.Bkrtcy.Ct.
Ariz.
Ariz.App.
Conn.
D.C.App.
Nev.
N.M.App.
N.D.
Pa.
Tex.
Wis.
Wis.App.

C.A.2

C.A.2, 1993. Cit. in sup. (citing § 39, T.D. No. 5, 1992, which is now § 27). After government brought contempt proceeding against union officers, officers' attorney entered into settlement agreement with government. Later, officers' attorney informed government that his clients would rather resign their posts than carry out settlement terms. Government replied by outlining terms under which it would accept resignations as substitute for settlement. Three officers resigned, but remaining officers did not resign or carry out settlement. Government moved for entry of judgment enforcing settlement terms, and New York federal district court granted motion for enforcement. Affirming, this court held, in part, that attorney had actual and apparent authority to enter into settlement. Attorney stated in court that he had authority to settle, attorney proposed clients' resignations at their instance, their resignations underscored clients' belief of his authority, and officers waited over one year before claiming that attorney lacked authority to settle. U.S. v. International Broth. of Teamsters, 986 F.2d 15, 20.

C.A.6,

C.A.6, 2019. Cit. in conc. op. §§ 26-27. Employee sued employer, seeking damages for injuries he allegedly sustained at work. The district court dismissed employee's complaint as a sanction for his and his attorney's conduct in refusing to answer questions at a court-ordered independent medical examination. Affirming, this court held that the record supported a finding that employee and his attorney both acted in bad faith and willfully violated the court's discovery order. The concurring opinion stressed that misconduct by a party was not a precondition to dismissing a case as a sanction for misconduct by the party's lawyer, because parties became bound by the actions of lawyers taken on their behalf with actual or apparent authority under the Restatement Third of Agency and the Restatement Third of the Law Governing Lawyers. Mager v. Wisconsin Central Ltd., 924 F.3d 831, 841.

C.A.D.C.

C.A.D.C.2002. Quot. in sup., coms. (a), (b), and (d) quot. in sup., illus. 3 quot. in sup. Female employee sued District of Columbia for Title VII sex discrimination and retaliatory firing. District court granted District's motion to enforce parties' settlement agreement, holding that employee's attorney had apparent authority to bind employee to the agreement. This court certified to District of Columbia Court of Appeals question whether a client was bound by a settlement agreement negotiated by her attorney when client had not given attorney actual authority to settle case, but authorized attorney to attend settlement conference before magistrate and to negotiate on her behalf, and attorney led opposing party to believe that client agreed to settlement terms. Makins v. District of Columbia, 277 F.3d 544, 550, 551.

C.D.Cal.

C.D.Cal.2002. Cit. in sup., com. (a) cit. in sup. Corporations sued inventor of silicone gastric band used in treating obesity, seeking declaration that certain patents held by inventor were invalid and unenforceable and that plaintiffs had not infringed patents. They also sought specific performance of purported settlement agreement or damages for its breach. This court entered partial summary judgment for inventor, but it rejected inventor's assertion that settlement agreement was not enforceable because inventor's lawyer did not have his client's authority to settle case. While agent's acts could not themselves create apparent authority, inventor knew that plaintiffs were negotiating with inventor's attorney as inventor's representative, and he permitted that negotiation to go forward with his input and participation. Inamed Corp. v. Kuzmak, 275 F.Supp.2d 1100, 1120, affirmed 64 Fed.Appx. 241 (Fed.Cir.2003).

D.D.C.

D.D.C.2016. Cit. in sup. Insured sued insurer, alleging that insurer breached his homeowner's policy by failing to reimburse him for certain legal fees he incurred as the defendant in an underlying personal-injury action. This court granted in part insurer's motion for summary judgment, holding that, during a telephone conversation between insurer's representative and insured's attorney, the parties entered into a valid agreement governing the hourly rates to be charged by insured's attorney, and insurer paid insured the amount due under that agreement. The court rejected insured's argument that he was not bound by the agreement, which was made between his attorney and insurer, reasoning that, under Restatement Third of the Law Governing Lawyers §§ 26 and 27, a client was generally bound by his or her lawyer's acts in dealings with third persons, including the lawyer's assent to a contract. Feld v. Fireman's Fund Insurance Company, 206 F.Supp.3d 378, 389.

E.D.Pa.

E.D.Pa.2005. Cit. in sup. Attorney who had provided former client legal services in a divorce matter sued lawyer and law firm representing client, alleging that defendants assisted client in concealing his assets to defraud creditors like plaintiff. Denying defendants' motion to dismiss plaintiff's civil-conspiracy claim, this court held, inter alia, that, because plaintiff's allegations asserted that lawyer's representation of client assisted with furthering and participating in a fraudulent conveyance, the actions alleged fell outside the scope of legitimate representation, and lawyer could be liable to the extent that a nonlawyer would be in the same situation. The court noted that it was reasonable for it to look to the Restatement Third of the Law Governing Lawyers for guidance because various Commonwealth courts had relied on particular sections of that Restatement. Marshall v. Fenstermacher, 388 F.Supp.2d 536, 553.

N.D.Tex.Bkrtcy.Ct.

N.D.Tex.Bkrtcy.Ct.2007. Com. (c) quot. in sup. Debtor's children brought an adversary proceeding against debtor, seeking a declaratory judgment that certain multimillion dollar claims held by plaintiffs against debtor pursuant to two prepetition civil judgments against him for child sexual abuse were not discharged in either his still-open Chapter 13 case or in his earlier-filed Chapter 7 case. Entering judgment for plaintiffs, this court held, inter alia, that the judgments were not discharged in the bankruptcy cases. The court concluded that service of notice of debtor's bankruptcy on plaintiffs' former counsel was constitutionally insufficient; the three lawyers' apparent authority was lacking because debtor's belief that the lawyers had authority to act for plaintiffs was not reasonable, where the last of the lawyers had ceased representing plaintiffs two years before debtor's Chapter 7 case was commenced. In re Gold, 375 B.R. 316, 326.

Ariz.

Ariz.2015. Quot. in sup. In a dispute between neighbors over a water line, plaintiffs moved to enforce a purported settlement with defendants, alleging that, although plaintiffs allowed the initial settlement offer presented by defendants' attorney to expire, plaintiffs timely accepted the offer a few days later when defendants' attorney presented it a second time under the mistaken belief that defendants were still willing to settle on the same terms. The trial court granted plaintiffs' motion. The court of appeals reversed. This court vacated the court of appeals' opinion and affirmed the trial court's judgment, holding that the settlement was binding on defendants because defendants' attorney was cloaked with apparent authority under Restatement Third of the Law Governing Lawyers § 27. Defendants' actions allowed plaintiffs to reasonably assume that defendants' attorney had authority to keep the first settlement offer on the table or reoffer the same settlement terms days after the first offer's expiration, and plaintiffs reasonably relied on defendants' attorney's apparent authority. Robertson v. Alling, 351 P.3d 352, 356.

Ariz.App.

Ariz.App.2014. Com. (b) cit. in disc., illus. 3 cit. in sup. After landowners sued neighbors to quiet title to an easement across neighbors' property, the parties attended a settlement conference, but failed to reach an agreement. Although five of the twenty-seven defendants emailed their attorney that they no longer wished to settle with the terms that they had offered at the conference, defendants' attorney subsequently entered into a settlement agreement with plaintiffs' counsel. The trial court granted plaintiffs' motion to enforce the settlement. Reversing in part and remanding, this court held that defendants' attorney lacked actual authority to bind defendants to the settlement agreement, and genuine issues of material fact existed as to whether he had apparent authority to do so. The court cited Restatement Third of the Law Governing Lawyers § 27, Illustration 3, in noting that a lawyer who failed to disclose his lack of settlement authority at a conference could not bind his client to a settlement. Robertson v. Alling, 332 P.3d 76, 83, 86.

Conn.

Conn.2010. Com. (d) quot. in sup. In a series of disputes concerning the management and oversight of a family partnership and various family trusts, the trial court found that plaintiffs' attorney had apparent authority to make settlement proposals, engage in settlement discussions, and bind plaintiffs to a global settlement agreement with defendants. Affirming, this court held that the trial court's finding that plaintiffs clothed their attorney with apparent authority to settle the litigation was supported by evidence of a course of dealing involving plaintiffs, defendants, and the parties' attorneys that was well established before the settlement offer was accepted; in addition, there was sufficient evidence to support a finding that defendants reasonably could have believed the same. Ackerman v. Sobol Family Partnership, LLP, 298 Conn. 495, 511, 4 A.3d 288, 300.

D.C.App.

D.C.App.2004. Com. (d) quot. in disc. and in sup. Female employee sued District of Columbia in federal court, claiming sex discrimination and retaliatory firing. Following plaintiff's refusal to sign settlement agreement reached at conference by the parties' attorneys, defendant moved to enforce the settlement. The district court granted the motion, and the federal court of appeals certified the question whether plaintiff was bound by the settlement. Answering the question in the negative, this court held that plaintiff's acts of sending her attorney to the court-ordered settlement conference and permitting the attorney to negotiate on her behalf were insufficient to permit a reasonable belief by defendant that the attorney had apparent authority to conclude the settlement. The court said that defendant bore the risk of an unauthorized settlement. Makins v. District of Columbia, 861 A.2d 590, 596, 597.

D.C.App.2003. Quot. in diss. op., coms. (b) and (d) quot. in diss. op., com. (f) quot. in diss. op. and cit. in ftn. in diss. op. District of Columbia moved to enforce settlement agreement after employee who alleged sexual discrimination and retaliatory firing against District refused to sign agreement reached at in-court settlement conference attended by employee's attorney. District court granted motion. Answering question certified by federal court of appeals, this court held that client was not bound by settlement agreement negotiated by her attorney at in-court proceeding where client was not present, absent actual authority granted to attorney to reach settlement. Dissent argued that if attorney acted with apparent authority and employee incurred loss, employee had malpractice claim against attorney. Makins v. District of Columbia, 838 A.2d 300, 307-309, rehearing en banc granted, opinion vacated 855 A.2d 280 (D.C.2004).

Nev.

Nev.2014. Cit. in sup. Civil litigants in a real-property contract action, whose consolidated appeals were dismissed for failure to timely file the opening brief and appendix, petitioned for en banc reconsideration, arguing that the dilatory conduct should be deemed attributable solely to their counsel's neglect, not to their own conduct. Denying the petition for en banc reconsideration, this court held that, to the extent that a prior decision of the court had concluded that dismissal would not follow violations of court rules or orders because counsel, acting on a client's

behalf, occasioned such violations, that decision was overruled. The court noted that, pursuant to Restatement Third of the Law Governing Lawyers §§ 26 and 27, an attorney's act was considered to be that of the client in judicial proceedings when the client had expressly or impliedly authorized the act. Huckabay Props. v. NC Auto Parts, 322 P.3d 429, 434.

Nev.2009. Com. (d) quot. in sup. Plaintiffs brought a medical-malpractice action against hospital; after their attorney settled their case for $160,000 without their knowledge or approval, forged the necessary settlement papers, and disappeared with the money, they moved for relief from a stipulated final judgment terminating their claims. The trial court granted plaintiffs' motion for relief, and vacated the stipulated judgment, based on fraud on the court. Affirming, this court rejected hospital's argument that plaintiffs' agency relationship with their attorney bound them to the settlement, pointing to substantial evidence showing that attorney accomplished his fraud without the express, implied, or apparent authority of his clients. The court noted that, while a lawyer had apparent authority to handle procedural matters for a client, merely retaining a lawyer did not create apparent authority in the lawyer to settle his client's case. NC-DSH, Inc. v. Garner, 218 P.3d 853, 860.

N.M.App.

N.M.App.2012. Sec. and coms. (a) and (d) quot. in sup. Accident victim brought a personal-injury action against, among others, employer of truck driver who allegedly caused the accident. The trial court granted employer's motion to enforce an alleged pre-litigation oral settlement between plaintiff's attorney and counsel for employer. Reversing, this court held that the settlement could not be enforced against employer, because plaintiff's attorney did not have specific or apparent authority to settle with employer. The court reasoned that defendant failed to meet his burden, as the party seeking to enforce the alleged settlement, to show that plaintiff's attorney had apparent authority, noting that it was the client's conduct, rather than the attorney's, that gave rise to apparent authority, and that there was no evidence of any conduct or communication by plaintiff suggesting that he had clothed his attorney with apparent authority to settle with employer. Gomez v. Jones-Wilson, 2013-NMCA-007, 294 P.3d 1269, 1275.

N.D.

N.D.2003. Com. (c) quot. in sup. Hearing panel recommended that attorney be suspended from practice of law for one year and pay costs. Attorney had threatened the father of his fiancée's child that, if father did not sign document seeking his consent to discuss child-visitation rights outside of his lawyer's presence, father would not receive visitation with his child that night. Father refused to sign and was denied visitation. This court adopted panel's recommendations, concluding that there was clear and convincing evidence that attorney violated state rules of professional conduct. The court determined that attorney had attorney-client relationship with his fiancée when he spoke to father, because attorney implied an attorney-client relationship when he inserted himself into the dispute between father and fiancée and acted with apparent authority. In re Application for Disciplinary Action Against Hoffman, 2003 ND 161, 670 N.W.2d 500, 504.

Pa.

Pa.2005. Cit. and quot. in conc. op. Physician and hospital petitioned for order enforcing agreement settling patient's medical-malpractice suit against them. Trial court entered order enforcing the settlement agreement. This court reversed and remanded, holding that patient's attorney's apparent authority was insufficient to bind patient to terms of oral settlement agreement, because an attorney could only bind his client to terms of settlement based on express authority. A concurring opinion argued for the prospective adoption of the doctrine of apparent authority as set forth in the Restatement Third of the Law Governing Lawyers § 27, asserting that this approach recognized the practical difficulties inherent in negotiating and enforcing settlements and properly balanced the competing policies of a client's right to control settlement, the protection of third parties, and a strong public interest in favor of settlement. Reutzel v. Douglas, 582 Pa. 149, 870 A.2d 787, 793-795.

Tex.

Tex.2004. Com. (e) cit. in sup. Client brought malpractice action against law firm and law-firm shareholder, who also served as a legislator on city council and who voted in favor of an ordinance that adversely affected client. The trial court granted law firm's motion for summary judgment, but the court of appeals reversed and remanded. This court reversed and rendered judgment for firm and shareholder, holding, inter alia, that an attorney was not liable for failing to act beyond the scope of his representation; because representing client before city council was not included in the scope of firm's representation here, firm had no duty to inform client of the city council meeting, which was also a matter of public record. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 160.

Wis.

Wis.2004. Cit. and quot. in ftn. During a lawsuit involving real-estate transactions, plaintiffs' attorney, apparently believing that documents were not privileged, disclosed them to defendants' counsel in response to a discovery request. Trial court ordered defendants to return the documents to plaintiffs, but court of appeals reversed. This court reversed the court of appeals, holding that a lawyer, without the consent or knowledge of a client, could not waive attorney-client privilege by voluntarily producing privileged documents (which the attorney did not recognize as privileged) to an opposing attorney in response to a discovery request. Only the client could waive attorney-client privilege under state statute regarding attorney-client privileged documents. Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust, 271 Wis.2d 610, 679 N.W.2d 794, 796, 801.

Wis.App.

Wis.App.2003. Quot. in sup., cit. generally in sup., coms. (a) and (c) quot. in sup., com. (b) quot. in disc. and in sup. During litigation of family dispute over money, plaintiffs contended that some of the documents that their attorney had turned over to defendants in response to defendants' discovery request were protected by the attorney-client privilege. The trial court ordered return of the documents. Reversing and remanding, this court held, inter alia, that attorney's volitional act of transmitting the documents to defendants waived whatever attorney-client privilege plaintiffs had in connection with those documents. Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust, 265 Wis.2d 803, 667 N.W.2d 831, 836, 837, reversed 271 Wis.2d 610, 679 N.W.2d 794 (2004).

Restatement (Third) of the Law Governing Lawyers § 28 (2000)

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

(1) Information imparted to a lawyer during and relating to the representation of a client is attributed to the client for the purpose of determining the client's rights and liabilities in matters in which the lawyer represents the client, unless those rights or liabilities require proof of the client's personal knowledge or intentions or the lawyer's legal duties preclude disclosure of the information to the client.
(2) Unless applicable law otherwise provides, a third person may give notification to a client, in a matter in which the client is represented by a lawyer, by giving notification to the client's lawyer, unless the third person knows of circumstances reasonably indicating that the lawyer's authority to receive notification has been abrogated.
(3) A lawyer's unprivileged statement is admissible in evidence against a client as if it were the client's statement if either:
(a) the client authorized the lawyer to make a statement concerning the subject; or
(b) the statement concerns a matter within the scope of the representation and was made by the lawyer during it.

Comment:

a. *Scope and cross-references.* The two preceding Sections deal with attributing a lawyer's act to a client because the client has authorized the act (see § 26) or because the client has led others to believe that the act has been authorized (see § 27). This Section deals with attribution to the client of a lawyer's knowledge (Subsections (1) & (2)) or statements (Subsection (3)).

The rules in this Section are related to concepts of actual and apparent authority set forth in the previous Sections. Receiving notification and making statements are acts that a client might authorize. A client's acts manifested to a third person can create apparent authority (see § 27); in other instances, it can be considered implied actual authority. The lawyer's authority to make statements admissible against the client sometimes results from express authority and sometimes from implied authority recognized by the law of evidence.

b. *Attribution of a lawyer's knowledge to a client.* Under traditional agency principles, a lawyer's knowledge relating to the representation is attributed to the lawyer's client. The client may not rebut the attribution by evidence that the lawyer never communicated the knowledge (see Restatement Second, Agency §§ 272-275). A client, for example, is liable for knowing misrepresentation if the client's lawyer is silent despite knowing that the client was making an assertion that the lawyer knew to be false, even if the client was unaware of the falsity. So also a lawyer's technical knowledge of a patent can similarly be attributed to the client.

Several related reasons support attribution. Lawyers usually transmit relevant information to their clients (see § 20). Proving that a lawyer has actually informed the client might be difficult given the attorney-client privilege (see Chapter 5, Topic 2). Even if the client did not receive the information in question, the lawyer could use it for the client's advantage. The rule recognizes the difficulty third persons might face in getting information directly to a client. The client, for example, might wish to communicate only through the client's lawyer; if the third person is represented by counsel, that counsel is prohibited from communicating directly with the opposing client (see §§ 99- 101).

A client is not charged with a lawyer's knowledge concerning a transaction in which the lawyer does not represent the client (see Restatement Second, Agency § 272). The knowledge of a lawyer not personally engaged in representing a client but in the same firm is not attributed to the client, unless the lawyer acquiring the knowledge is aware that the information is relevant to his or her firm's representation of the client (see Restatement Second, Agency § 275, Comment *d*). The client might show that the lawyer had forgotten the information or did not perceive its relevance, whenever a client could introduce similar evidence about the client's own state of knowledge. For other limits on attribution, see Restatement Second, Agency §§ 273, 277-280, and 282.

A lawyer's knowledge will not be attributed to the client to establish criminal liability, although evidence of the lawyer's knowledge might be admissible to show what the client knew. However, criminal defendants can be given notification of trial dates and the like through their lawyers just as can parties to civil actions (see Comment *c* hereto). Similarly, there might be civil matters in which a client's actual knowledge or intention must be shown and in which a lawyer's knowledge will not be attributed to the client. The client's lack of actual knowledge can sometimes be a ground for setting aside a court ruling (see § 29).

c. *Notification to a client through a lawyer.* Notification is a formal act intended to affect the rights of the person given notice, for example, a tenant's letter to a landlord stating that the tenant will not renew a lease or the service of process on a defendant in a civil action. Depending on the applicable law, notification can be effective even if the intended recipient receives no actual notice of the communication (see Restatement Second, Agency § 9(2) & Comment *f* thereto). The principle that notification to a lawyer counts as notification to the client is closely related to the principle attributing a lawyer's knowledge to the client and is based on the same reasons (see Comment *b* hereto; Restatement Second, Agency § 268). In proceedings before a tribunal, the principle facilitates procedural notifications.

Statutes and court rules specify to whom notification may or must be given, sometimes permitting or requiring notification to be given to a lawyer. In federal-court civil actions, for example, motions and other documents (other than the summons and complaint) ordinarily must be delivered to a represented party's lawyer, rather than to the party. Other documents, such as the summons and complaint, must be served on the party, unless the party authorizes a lawyer or other agent to receive process. The attorney-client privilege does not bar the testimony of a lawyer that the lawyer conveyed notice to the client (see § 69, Comment *i*).

A person who knows of the lawyer's absence of authority to receive notification bears the risk that the lawyer will not convey the notification to the client.

d. Use of a lawyer's statement as evidence against a client. If not privileged or inadmissible on another basis, statements made out of court by a party's agent generally are admissible in evidence against the party as admissions (see Restatement Second, Agency §§ 284-291). Such statements will be admitted even though they would otherwise be considered hearsay and even when they would otherwise be excluded as opinions. However, they can be excluded on other grounds of evidentiary objection. A party who takes the position that the statement is untrue or misleading can present opposing evidence.

Subsection (3) follows the broader definition of admissions found in Federal Rule of Evidence 801(d)(2). Under that definition, a lawyer's statement is an admission if the client authorized the lawyer to make statements about the subject. Lawyers, of course, are almost always authorized to speak about matters they handle, so that most lawyer statements will be admissions under the definition. The Section's alternative provision (Subsection (3)(b)) is broader, including any statement made during the representation concerning a matter within its scope.

Important barriers to the use of lawyer statements nevertheless remain. An admission is not binding on the client but is simply evidence, admitted for what it is worth; the client can explain or controvert the statement. Exclusionary rules also forbid lawyer statements covered by the attorney-client privilege (see §§ 68- 85) or made, for example, during settlement negotiations or plea bargaining when offered as proof of liability or guilt (see § 61, Comment *f*). On a court's discretion with respect to testimony of an advocate, see § 108, Comment *k*.

A lawyer's out-of-court statements can be admitted in evidence in ways other than as admissions, for example as part of the negotiating history of a contract. Should the lawyer testify, they can be used to impeach the lawyer's credibility as past inconsistent statements and sometimes to support it as past consistent statements.

Reporter's Note

*Comment b. Attribution of a lawyer's knowledge to a client.*E.g., Veal v. Geraci, 23 F.3d 722 (2d Cir.1994) (lawyer's knowledge attributed to client to determine when statute of limitations began to run); Argus Chem. Corp. v. Fibre Glass-Evercoat Co., 759 F.2d 10 (Fed.Cir.), cert. denied, 474 U.S. 903, 106 S.Ct. 231, 88 L.Ed.2d 230 (1985) (lawyer's failure to disclose information to Patent Office made client's patent unenforceable); Insurance Co. of North America v. Northampton Nat'l Bank, 708 F.2d 13 (1st Cir.1983) (bank bound by its lawyer's knowledge); People v. Tarkowski, 435 N.E.2d 1339 (Ill.App.Ct.1982) (lawyer's knowledge of amended indictment attributed to client regardless of whether it was actually communicated); Farr v. Newman, 199 N.E.2d 369 (N.Y. 1964) (client bound by lawyer's knowledge of contract to sell to another buyer); Strover v. Harrington, (1988) 2 W.L.R. 572 (Ch. Div.1987) (Eng.) (buyers cannot bring misrepresentation suit when true facts were disclosed to their solicitor).

A lawyer's knowledge is not attributed to the client when communicating it would violate the lawyer's obligations to another client. E.g., Arlinghaus v. Ritenour, 622 F.2d 629 (2d Cir.) (Friendly, J.), cert. denied, 449 U.S. 1013, 101 S.Ct. 570, 66 L.Ed.2d 471 (1980); Bayne v. Jenkins, 593 S.W.2d 519 (Mo.1980); C.B. & T. Co. v. Hefner, 651 P.2d 1029 (N.M.Ct.App.1982). For other exceptions, see, e.g., Dickman v. DeMoss, 660 P.2d 1 (Colo.Ct.App.1982) (notice to plaintiff's lawyer in tort suit of defendant's bankruptcy not attributed to client for purposes of impact of bankruptcy discharge on tort judgment, since lawyer did not represent client in bankruptcy proceeding); State v. Blackbird, 609 P.2d 708 (Mont.1980) (lawyer's knowledge of trial date not imputed to client in prosecution for bail-jumping); Jarvis v. Jarvis, 664 S.W.2d 694 (Tenn.Ct.App.1983) (notice of child-support modification proceeding to lawyer who represented client in child-support proceeding inadequate if lawyer no longer represents client).

*Comment c. Notification to a client through a lawyer.*For rules authorizing notification to a lawyer, see, e.g., Fed. R. Civ. P. 5(b); Fed. R. Crim. P. 49(b); Munday v. Brown, 617 S.W.2d 897 (Tenn.Ct.App.1981) (default judgment proper when notification conveyed under such a rule even though client had no actual knowledge). For the adequacy of notification to a lawyer in the absence of such a rule, see, e.g., Belton Indus., Inc. v.

United States, 6 F.3d 756 (Fed.Cir.1993), cert. denied, 510 U.S. 1093, 114 S.Ct. 925, 127 L.Ed.2d 218 (1994) (administrative proceedings); Ringgold Corp. v. Worrall, 880 F.2d 1138 (9th Cir.1989) (order setting trial date); People v. Smith, 429 N.E.2d 781 (N.Y.1981) (parole revocation); Canutillo Ind. School Dist. v. Kennedy, 673 S.W.2d 407 (Tex.Civ.App.1984) (teacher termination).

*Comment d. Use of a lawyer's statement as evidence against a client.*E.g., Hanson v. Waller, 888 F.2d 806 (11th Cir.1989) (lawyer's letter making assertions about accident); Andrews v. Metro North Commuter Ry., 882 F.2d 705 (2d Cir.1989) (complaint admitted against plaintiff who later changed story); Wilkerson v. Williams, 667 S.W.2d 72 (Tenn.Ct.App.1983) (lawyer's letter as evidence of how client construed contract). See generally Mansfield, Evidential Use of Litigation Activity of the Parties, 43 Syr. L. Rev. 695 (1992); Annot., 117 A.L.R. Fed. 599 (1994). For the inadmissibility of certain lawyer statements made during the course of settlement discussions and plea bargaining, see Fed. R. Evid. 408, 410. For the court's discretion to exclude lawyer admissions, see United States v. Valencia, 826 F.2d 169 (2d Cir.1987) (statement in bail discussions); MacDonald v. General Motors Corp., 110 F.3d 337 (6th Cir.1997) (unclear comment in opening statement); Hogenson v. Service Armament Co., 461 P.2d 311 (Wash.1969) (passing comment in letter); 1 C. McCormick, Evidence § 159, at 645 (J. Strong 4th ed. 1992) (plea bargaining); 2 id. § 266 (civil settlement discussions and criminal-case plea bargaining).

Case Citations - by Jurisdiction

—

U.S.C.M.C.R.
D.Del.Bkrtcy.Ct.
N.D.Ill.
Utah App.

U.S.C.M.C.R.

U.S.C.M.C.R.2020. Subsec. (1) quot. in sup. After alien pleaded guilty before the military commission for charges of conspiracy to commit terrorism and was repatriated to Sudan, alien's defense counsel filed an appeal on behalf of alien, seeking to vacate the judgment entered by the commission. This court abated the appeal, holding, inter alia, that alien's counsel was required to demonstrate that they had his authority to represent him in an appeal. The court explained that, although notice given to alien's counsel normally was imparted onto alien under Restatement Third of the Law Governing Lawyers § 28(1), the circumstances here were not clear that the attorney–client relationship between counsel and alien authorized counsel to represent him on appeal, because counsel had not spoken with alien for eight years, previous findings by the military court did not determine the scope of their relationship, and counsel had departed from active duty prior to filing this appeal. al Qosi v. United States, 462 F.Supp.3d 1181, 1193.

D.Del.Bkrtcy.Ct.

D.Del.Bkrtcy.Ct.2012. Subsec. (1) quot. in ftn. Chapter 11 debtor business and seller of debtor's assets during a prior Chapter 11 reorganization brought an adversary proceeding against purchaser of debtor's assets, alleging that defendant was bound by and breached the prior reorganization plan and confirmation order by funding the purchase through a combination of debt and equity, rather than solely through equity. Denying defendant's motion to dismiss, this court held that plaintiffs plausibly alleged that defendant was required to use equity only and not debt, based on the order's use of the term "capital contribution." The court noted that, even if defendant was unaware that the universally accepted meaning of the term "capital contribution" meant equity rather than debt, defendant's attorneys surely knew, or at least were bound through the prior order. In re Autobacs Strauss, Inc., 473 B.R. 525, 588.

N.D.Ill.

N.D.Ill.2009. Com. (b) quot. in sup. Group of employee benefit funds and other organizations that represented plastering company's employees brought suit under ERISA and the Labor Management Relations Act against purchaser of company's assets, seeking to collect, under a successor-liability theory, allegedly delinquent employee-benefit-fund contributions, union dues, and other amounts owed by company. Granting summary judgment for defendant, this court held, inter alia, that the knowledge of plaintiffs' claims against company could not be imputed to defendant through company's attorney, who represented defendant for the limited purpose of acquiring company's assets; while the fact that attorney learned of plaintiffs' claims before representing defendant did not by itself make imputation inappropriate, the limited scope of his authority negated imputation to defendant of his knowledge of company's potential liability to plaintiffs. Trustees of Chicago Plastering Institute Pension Trust v. Elite Plastering Co., Inc., 603 F.Supp.2d 1143, 1150.

Utah App.

Utah App.2019. Com. (b) quot. in sup. In lenders' action to recover under a note that was secured by borrowers' membership interest in a company that owned certain real property, lenders alleged, among other things, that company's transfer of its interest in the property to an investment firm was void as a fraudulent transfer. After a bench trial, the trial court ruled in favor of defendants, finding, among other things, that the knowledge of borrowers' attorney, who prepared the loan agreements with lenders for borrowers and who also represented the investment firm in company's transfer of its property interest, could not be imputed to the investment firm. The court cited Restatement Third of the Law Governing Lawyers § 28 in explaining that, under traditional agency principles, a lawyer's knowledge relating to the representation was attributed to the lawyer's client, but a client was not charged with a lawyer's knowledge concerning a transaction in which the lawyer did not represent the client. Eskelsen v. Theta Investment Company, 437 P.3d 1274, 1288.

Restatement (Third) of the Law Governing Lawyers § 29 (2000)

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

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

Comment:

a. *Scope and cross-references.* Clients sometimes can defend themselves by blaming their lawyer. Law might permit a client charged with malicious or knowingly unlawful conduct to defend by showing that counsel advised that the conduct was lawful. A client involved in litigation might seek to avoid a sanction on the ground that counsel rather than client has been to blame for a default. In both situations, tribunals are often reluctant to let a client escape responsibility but will nevertheless consider evidence to that effect.

b. *Rationale.* Most acts performed by a lawyer are attributed to the client in determining the client's rights against a third person. That attribution can harm a client whose lawyer acted incompetently, unlawfully, or against the client's wishes. A client's usual remedies are to supervise the lawyer, to notify others of the limits of the lawyer's authority, and, if those measures fail, to sue the lawyer for malpractice (see Chapter 4). Those remedies are often unavailing or incomplete (see § 16, Comment *b*). Certain exceptions are therefore recognized to the rules making clients responsible for acts performed by or on the advice of lawyers.

c. *Advice of counsel.* Erroneous legal advice is often no defense, just as ignorance of the law is usually no defense. Nevertheless, in some instances a client can introduce evidence of counsel's advice when the client's knowing violation of law is in dispute, as it often is in criminal cases. The same principle often applies when the client is charged, criminally or civilly, with malice or the like. In actions for malicious prosecution or wrongful use of civil proceedings, for example, if a client relied in good faith on a lawyer's advice that there were good grounds to institute litigation (based on the client's full disclosure), such reliance conclusively establishes probable cause (see Restatement Second, Torts §§ 666 & 675(b)). Usually, however, counsel's advice is merely evidence to be considered in appraising the client's state of mind.

When evidence of advice of counsel is admissible, the party opposing the client can also introduce evidence on the subject. The attorney-client privilege might prevent the opposing party from discovering or using such evidence (see § 69, Comment *i*). If the client asserts the lawyer's advice as a defense, however, it waives the privilege (see §§ 80(1)(a) & 92(12)).

d. *Evidence of improper representation.* A tribunal considering whether to impose sanctions on a litigant, or to relieve a litigant from a judgment or default, can go beyond the usual assumption (see §§ 26 & 25) that acts done by a lawyer in the litigant's name were done in accordance with the litigant's wishes. Sanctions against clients and lawyers for procedural defaults and misconduct have become increasingly common in civil and criminal procedure. Courts are generally accorded broad discretion when deciding whether to grant a litigant a second chance, for example by allowing a new trial or an amendment to a pleading or setting aside a default.

In criminal cases, appeal or collateral-review proceedings might challenge effective assistance of counsel, so that the adequacy of a client's representation will be directly addressed (see § 23, Comment *d*).

In considering the fairness of binding a client by the acts of a lawyer, a client might argue that counsel provided incompetent representation or that the lawyer's acts were contrary to the client's directions or otherwise unauthorized. However, countervailing concerns can preclude such an inquiry. A sanction as severe as default may be appropriate even in the absence of any fault of the client if the conduct of the lawyer substantially prejudiced an opposing party or the administration of justice and default will remedy the lawyer's conduct. In the absence of default, an inquiry will sometimes be costly and burdensome to third persons and to the judicial system, delay resolution of the main dispute, encounter complications concerning the attorney-client privilege, and create conflicts of interest between client and lawyer. Whether the inquiry should be allowed depends on such factors as the likelihood that the inquiry will reveal additional relevant information, how likely it is that the lawyer's misconduct affected the result, the impact on the client of disallowing the inquiry, and the impact of releasing the client on reliance and other interests of opposing parties and the judicial system (see also § 110, Comment *g*).

Reporter's Note

*Comment c. Advice of counsel.*For recognition of the defense, see, e.g., United States v. Boyle, 469 U.S. 241, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985) (reliance on lawyer to file tax return not "reasonable cause" for late filing, but erroneous legal advice would be); Pace v. Insurance Co. of North America, 838 F.2d 572 (1st Cir.1988) (bad-faith breach of contract); Angell v. Leslie, 832 F.2d 817 (4th Cir.1987) (punitive damages); Watertown Equipment Co. v. Norwest Bank, 830 F.2d 1487 (8th Cir.1987) (in civil-rights action, advice relevant to qualified immunity for good faith); Dawson v. Mead, 557 P.2d 595 (Idaho 1976) (complete defense to malicious-prosecution claim); Derby v. Jenkins, 363 A.2d 967 (Md.Ct.Spec.App.), cert. denied, 278 Md. 720 (Md.1976) (malicious prosecution; not defense when all facts not before lawyer); W. Keeton, Prosser & Keeton on Torts 878-879, 894 (5th ed. 1984); Hawes & Sherard, Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases, 62 Va. L. Rev. 1 (1976); see Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (defendant's mistaken beliefs about tax laws negative mental state required for evasion conviction). For the rejection of an advice-of-counsel defense, see, e.g., United States v. Remini, 967 F.2d 754 (2d Cir.1992) (criminal contempt); Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (Emer.Ct.App.1987) (suit for restitution of overcharges violating legislation against individual dominating corporation); People v. Guinn, 196 Cal.Rptr. 696 (Cal.Super.1983)

(prosecution for selling alcoholic beverages without license; issue involved scope of licenses); In re Rothko's Estate, 372 N.E.2d 291 (N.Y.1977) (liability of executor for coexecutor's breach, where advice was on business issue); see generally W. LaFave, Criminal Law 208, 412-416 (2d ed. 1986) (relevance of ignorance of law).

For the impact of an advice-of-counsel issue on the attorney-client privilege, see Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir.1988) (no waiver when client only used advice-of-counsel defense after court wrongly ruled client had waived privilege); In re Burlington N., Inc., 822 F.2d 518 (5th Cir.1987) (no waiver when client does not rely on advice of counsel in litigation); United States v. Mierzwicki, 500 F.Supp. 1331 (D.Md.1980) (waiver when client does so rely); Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D.Ill.1978) (similar); § 80, Comment *c,* and Reporter's Note thereto. On work product, see § 92, Comment *e,* and Reporter's Note thereto.

*Comment d. Evidence of improper representation.*For the usual assumption that a lawyer's action or inaction in litigation binds the client, see § 26, Comment *d,* Reporter's Note. For the relevance of lawyer incompetence to relieve a client from an adverse verdict, see, e.g., Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (inadequate assistance of counsel in criminal prosecution as ground for habeas corpus relief); Beeson v. Smith, 893 F.2d 930 (7th Cir.1990) (default in civil case should have been vacated when caused by lawyer, not client); Shea v. Donohoe Constr. Co., 795 F.2d 1071 (D.C.Cir.1986) (dismissal sanction improper in civil case unless client was at fault or dismissal needed to protect opposing party's rights); John J. Ming, Inc. v. District Court, 466 P.2d 907 (Mont.1970) (lawyer's excusable failure to introduce evidence warrants new trial in civil action); N.Y. Civ. Prac. L. & R. § 2005 (court may excuse delay or default resulting from law-office failure); Annot., 64 A.L.R. 4th 323 (1988) (lawyer incompetence as ground for relief from state-court judgment in civil action); 1 R. Mallen & J. Smith, Legal Malpractice § 2.33 (3d ed. 1989).

For lawyer disregard of client instructions or client prerogatives as a ground for relief, see In re Benoit, 514 P.2d 97 (Cal.1973) (appeal reinstated when criminal defendant asked lawyer to file but lawyer did not do so on time); Pierce v. Terra Mar Consultants, Inc., 566 S.W.2d 49 (Tex.Civ.App.1978) (relief from nonsuit entered by lawyer without consulting client); see Soliman v. Ebasco Serv., Inc., 822 F.2d 320 (2d Cir.1987) (lawyer sanctioned for appealing over client objections). Conflict of interest is a related ground for relief. See, e.g., Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (actual conflict adversely affecting criminal defense required for habeas corpus relief); Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir.1987) (setting aside remedial decision tainted by class counsel's conflict of interest).

Cases stating that whether sanctions fall on client or lawyer should depend on which was to blame include Calloway v. Marvel Entertainment Group, 854 F.2d 1452 (2d Cir.1988) (Rule 11 sanction should fall on lawyer unless client knowingly at fault), rev'd on other grounds sub nom. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989); Stotler & Co. v. Able, 837 F.2d 1425 (7th Cir.1988) (client can avoid sanction for failure to file brief by demonstrating responsibility of lawyer); Reynolds v. Humko Prods., 756 F.2d 469 (6th Cir.1985) (court should sanction blameworthy person); see Note, The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for their Attorneys' Procedural Errors, 1988 Duke L.J. 733. But other decisions sanction clients regardless of whether their lawyers were at fault. E.g., Farm Constr. Serv., Inc. v. Fudge, 831 F.2d 18 (1st Cir.1987); see generally Annot., 64 A.L.R. 4th 323 (1988).

Restatement (Third) of the Law Governing Lawyers § 30 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 2. The Client–Lawyer Relationship

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

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

(1) For improper conduct while representing a client, a lawyer is subject to professional discipline as stated in § 5, to civil liability as stated in Chapter 4, and to prosecution as provided in the criminal law (see § 7).
(2) Unless at the time of contracting the lawyer or third person disclaimed such liability, a lawyer is subject to liability to third persons on contracts the lawyer entered into on behalf of a client if:
(a) the client's existence or identity was not disclosed to the third person; or
(b) the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer's credit.
(3) A lawyer is subject to liability to a third person for damages for loss proximately caused by the lawyer's acting without authority from a client under § 26 if:
(a) the lawyer tortiously misrepresents to the third person that the lawyer has authority to make a contract, conveyance, or affirmation on behalf of the client and the third person reasonably relies on the misrepresentation; or
(b) the lawyer purports to make a contract, conveyance, or affirmation on behalf of the client, unless the lawyer manifests that the lawyer does not warrant that the lawyer is authorized to act or the other party knows that the lawyer is not authorized to act.

Comment:

a. *Rationale.* An agent is ordinarily civilly liable for tortious acts that the agent commits against third persons (see § 56). That a principal has authorized the agent to act cannot authorize the agent to injure others, except to the

extent that the principal would be immune from liability had the principal performed the act. The injured person might also have a claim against the principal, relying on principles such as respondeat superior. The principal's responsibility, however, does not excuse an agent who has committed a tortious act. Likewise an agent is subject to criminal prosecution and (if a professional) to disciplinary proceedings for misconduct committed when acting on behalf of a principal.

Although those rules are generally applicable to a client and lawyer, the civil liability of lawyers is restricted where necessary to facilitate effective advocacy and advice. A lawyer is not liable to a third person merely because the lawyer's client commits a nonintentional tort, even if the tort occurs because of the lawyer's negligent advice to the client (see §§ 51 & 56). A lawyer's liability for malicious prosecution is limited (see § 57). Similarly, a privilege often protects lawyers from liability for defamation (see id.). Chapter 4 sets forth that and other aspects of the tort liability of lawyers.

b. A lawyer's liability on contracts. An agent who negotiates a contract for a disclosed principal is usually not liable for its breach, but is liable if the other person does not know that the agent is acting for another or does not know the identity of the principal, and the agent or other person has not disclaimed liability (see Restatement Second, Agency §§ 321 & 322). In such situations, the other person relies on the credit of the agent rather than on that of the unknown principal. When the other person knows of the existence and identity of the principal, however, the person will generally be assumed to have relied on the credit of the principal. The agent is therefore not liable, unless the agent was considered an additional party to the contract. Those principles are applicable to contracts negotiated by lawyers.

Even when the client is a disclosed principal, a lawyer is liable for the compensation of a court reporter, printer, expert, appraiser, surveyor, or other person the lawyer has hired who provides goods or services used by lawyers, and who when doing so reasonably relies on the lawyer's credit as stated in Subsection (2)(b). Liability attaches unless the lawyer disclaims liability or the circumstances show that the third person did not rely on the lawyer's credit, for example if the lawyer was inside legal counsel of the client. Merely disclosing the client's name does not convey that the client rather than the lawyer is to pay. Such persons are likely to rely on the credit of the lawyer because they regularly deal with lawyers, while investigating the reliability of the client might be costly. On a lawyer's right to indemnity from the client, see § 17(2) and § 38, Comment *e*. On a lawyer's advancing litigation expenses, see § 36. The lawyer's liability does not foreclose the supplier from proceeding, additionally or alternatively, against the client in whose behalf the lawyer obtained the goods or services.

c. A lawyer's liability to third persons for unauthorized acts. A lawyer who acts beyond the authority conferred by a client might cause harm to a third person. As a consequence, a third person dealing with the lawyer might lose the benefit of a contract that had been negotiated or suffer other harm. The third person, although foreclosed from recovering from the client, can in appropriate circumstances recover damages from the lawyer whose pretense of authority caused the harm. Subsection (3) states two different bases for liability, employing the formulation of the Restatement Second of Agency. As stated in Subsection (3)(a), the suit might be one for tortious misrepresentation, if the lawyer negligently or intentionally misrepresented the lawyer's authority (see Restatement Second, Agency § 330). Alternatively, as stated in Subsection (3)(b), the third person can also sue in contract, for the lawyer is deemed to have given an implied warranty of authority (see id. § 329). Choice of one theory over another can affect the measure of damages (see id. § 330, Comment *c*).

Reporter's Note

*Comment a. Rationale.*For a lawyer's tort liability, see, e.g., Hartford Accident & Indem. Co. v. Sullivan, 846 F.2d 377 (7th Cir.1988) (lawyer helped obtain bank loan through fraud); Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir.1987) (knowing misrepresentation in opinion letter); C. Wolfram, Modern Legal Ethics 227-235 (1986); see generally Chapter 4. For criminal liability, see, e.g., United States v. Goot, 894 F.2d 231 (7th Cir.), cert. denied, 498 U.S. 811, 111 S.Ct. 45, 112 L.Ed.2d 22 (1990) (illegally "fixing" criminal cases for clients); United States v. Jerkins, 871 F.2d 598 (6th Cir.1989) (helping defraud Internal Revenue Service by concealing drug profits);

United States v. Cintolo, 818 F.2d 980 (1st Cir.), cert. denied, 484 U.S. 913, 108 S.Ct. 259, 98 L.Ed.2d 216 (1987) (obstructing justice by advising immunized client not to testify, in order to protect other clients and nonclients); People v. Zelinger, 504 P.2d 668 (Colo.1972) (receiving stolen property as fee). See generally Hazard, How Far May a Lawyer Go in Assisting a Client in Unlawful Conduct?, 35 U. Miami L. Rev. 669 (1981).

For lawyer malpractice and disciplinary liability for incompetent and unauthorized acts, see generally Chapters 4 & 1; see also § 21, Comment *d,* and Reporter's Note thereto; § 27, Comment *f,* and Reporter's Note thereto. For litigation sanctions against lawyers, see, e.g., 28 U.S.C. § 1927; Fed. R. Civ. P. 11, 37; Calif. Civ. Proc. Code § 128.5; Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); Annot., 56 A.L.R. 4th 486 (1987); § 29, Comment *d,* and Reporter's Note thereto; § 110, Comment *g*, and Reporter's Note thereto. For litigation sanctions imposed on disobedient lawyers, see Soliman v. Ebasco Serv., Inc., 822 F.2d 320 (2d Cir.1987) (lawyer appealed over client's objection); see In re Bithoney, 486 F.2d 319 (1st Cir.1973) (discipline for failure to prosecute appeals).

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

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

Case Citations - by Jurisdiction

Neb.

Neb.2012. Subsec. (2)(b) and com. (b) cit. and quot. in sup. and cit. in ftn. Court-reporting service sued attorney and attorney's law firm for failure to pay for court-reporting services it provided for firm's clients in five cases. The trial court entered judgment against defendants. Affirming in part, this court held, inter alia, that, despite some evidence that plaintiff generally received payment for its services from law firm's clients, sufficient evidence existed that law firm did not disclaim liability for plaintiff's court-reporting services at the time of contracting, and thus law firm, rather than its clients, was responsible for payment of plaintiff's bills; furthermore, even when a client was a disclosed principal, a lawyer was liable for the compensation of a court reporter who reasonably relied upon the lawyer's credit. Thomas & Thomas Court Reporters, L.L.C. v. Switzer, 283 Neb. 19, 24-26, 810 N.W.2d 677, 683, 684.

Restatement (Third) of the Law Governing Lawyers 2 5 Intro. Note (2000)

Introductory Note

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

The first Section of this Topic sets forth the circumstances in which lawyers lose actual and apparent authority to act on behalf of clients (see § 31). Section 32 describes the client's right to discharge a lawyer, the lawyer's right to withdraw when there is justification for doing so, and the situations in which the lawyer is required to withdraw. Section 33 describes a lawyer's duty to protect a client's interests during termination and the lawyer's duties to a former client that survive the termination of the relationship.

Restatement (Third) of the Law Governing Lawyers § 31 (2000)

§ 31 Termination of a Lawyer's Authority

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

Comment:

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

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

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

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

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

e. *A client's death or incompetence.* A client's death terminates a lawyer's actual authority (see Restatement Second, Agency § 120). The rights of a deceased client pass to other persons—executors, for example—who can, if they wish, revive the representation. Procedural rules usually provide for substitution for the deceased client in actions to which the client was a party. The lawyer for the deceased client must cooperate in such a transition and seek to protect the deceased client's property and other rights (see § 33). In extraordinary circumstances, the lawyer may exercise initiative, for example taking an appeal when the time for doing so would expire before a personal representative could be appointed (see § 33, Comment *b*).

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

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

f. *A lawyer's withdrawal.* A lawyer's withdrawal terminates authority, subject to the duties stated in § 33. The circumstances in which a lawyer may properly withdraw are stated in § 32. Withdrawal, whether proper or

improper, terminates the lawyer's authority to act for the client (see Restatement Second, Agency § 118). The client is not bound by acts of a lawyer who refuses to represent the client, except when a tribunal that must authorize the withdrawal has not done so (see Comment *c*).

When a client retains a lawyer who practices with a firm, the presumption is that both the lawyer and the firm have been retained (see § 14, Comment *h*). Hence, when a lawyer involved in a representation leaves the firm, the client can ordinarily choose whether to be represented by that lawyer, by lawyers remaining at the firm, by neither, or by both. In the absence of client direction, whether the departing lawyer continues to have authority to act for the client depends on the circumstances, including whether the client regarded the lawyer to be in charge of the matter, whether other lawyers working on the matter also leave, whether firm lawyers continue to represent the client in other matters, and whether the lawyer had filed an appearance for the client with a tribunal. Similar principles apply when a firm dissolves. When a lawyer leaves a large firm, for example, it can usually be assumed that, absent contrary client instructions or previous contract, the firm continues to represent the client in pending representations and the lawyer does not.

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

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

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

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

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

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

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

Reporter's Note

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

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

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

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

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

*Comment f. A lawyer's withdrawal.*On sanctions for improper withdrawal, see ABA Model Rules of Professional Conduct, Rule 1.16 (1983); ABA Model Code of Professional Responsibility, DR 2-110 (1969); Delesdernier v. Porterie, 666 F.2d 116 (5th Cir.), cert. denied, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982) (malpractice

liability); Central Cab Co. v. Clarke, 270 A.2d 662 (Md.1970) (same); Greenstreet v. Ederer, 567 S.W.2d 54 (Tex.Civ.App.1978) (lawyer's threat to withdraw without ground can vitiate promissory note); § 40, Reporter's Note (effect on lawyer's fees). Although withdrawal clearly ends a lawyer's authority, assuming that rules requiring court approval or the like have been satisfied, no authority has been found so stating or considering the impact on a lawyer's authority of withdrawal from a firm. See E. Wood, Fee Contracts of Lawyers 178-181, 220-221 (1936) (effect on representation when one lawyer in firm departs or dies or firm dissolves).

*Comment g. A lawyer's death, disbarment, disqualification, or incapacity.*See Lovato v. Santa Fe Int'l Corp., 198 Cal.Rptr. 838 (Cal.Dist.Ct.App.1984) (service on suspended lawyer not notice to client); N.Y. C.P.L.R. § 321(c) (no further proceedings without leave of court if lawyer dies, is incapacitated, or is removed or suspended); Note, The Death of a Lawyer, 56 Colum. L. Rev. 606 (1956); see Simpson v. James, 903 F.2d 372 (5th Cir.1990) (firm continued to represent client although original lawyer left firm, and no bills were sent); C. Wolfram, Modern Legal Ethics 130-131 (1986) (duties of suspended lawyer); Annot., 33 A.L.R.3d 1375 (1975) (effect of lawyer's death on fees); § 32, Comment *f,* and Reporter's Note thereto (duty of disabled lawyer to withdraw).

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

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

Case Citations - by Jurisdiction

—

U.S.
C.A.3
C.A.6,
C.A.9,
C.A.9
N.D.Tex.Bkrtcy.Ct.
Alaska
Cal.
D.C.App.
Iowa,

Iowa
Md.Spec.App.
Mont.
Neb.
N.J.
N.J.Super.App.Div.
N.D.
Wis.

U.S.

U.S.2012. Com. (f) quot. in sup. and in diss. op. After being sentenced to death on a conviction of murder and denied postconviction relief in state court, petitioner sought a federal writ of habeas corpus. The federal district court denied the writ on grounds of a procedural default, namely, petitioner's failure to timely appeal the denial of postconviction relief. The court of appeals affirmed. Reversing, this court held that, on the extraordinary facts of this case, there was "cause" to excuse the default, because petitioner's lawyers—who departed from their law firm and commenced employment that prevented them from representing petitioner—had abandoned his case without leave of court, without informing him that they could no longer represent him, and without securing any recorded substitution of counsel, which left him unrepresented at a critical time for his state postconviction petition, and without a clue of any need to protect himself pro se. The dissent argued that, while lawyers' failure to take action should not be imputed to petitioner, because their renunciation of their roles as his agents terminated their authority to act on his behalf, petitioner continued to be represented by a team of attorneys in lawyers' former firm. Maples v. Thomas, 132 S.Ct. 912, 923, 930-931.

C.A.3

C.A.3, 2007. Cit. in disc. Chapter 11 debtor subsidiaries brought an adversary proceeding against controlling corporation for breach of contract, breach of fiduciary duties, estoppel, and misrepresentation arising from the manner in which it ceased funding debtors' corporate parent. The district court ordered defendant to turn over documents that were withheld based on the attorney-client privilege. This court vacated and remanded for a determination of whether defendant and debtors were parties to a joint representation, since the district court could only compel defendant to produce the disputed documents because of the adverse-litigation exception to the co-client privilege if it found that defendant and debtors were jointly represented by the same attorneys on a matter of common interest that was the subject matter of those documents. In re Teleglobe Communications Corp., 493 F.3d 345, 362.

C.A.6,

C.A.6, 2013. Subsecs. (2)(e) and (3) quot. in sup. Creditor moved to revive her prepetition judgment against debtor after the judgment was discharged in debtor's bankruptcy proceedings eight years after the entry of the judgment, alleging that debtor improperly submitted to the bankruptcy court the address of a law firm that previously represented creditor, rather than creditor's residential address, and that creditor never received the notice that was sent to the firm. The district court denied creditor's motion. Reversing and remanding for further proceedings, this court held that the bankruptcy court could not discharge the judgment, because notice to creditor's former legal representative was not reasonably calculated to reach creditor. The court reasoned, in part, that lawyers had no general continuing obligation to pass information along to people whom they no longer represented, and that, in the absence of further investigation, it was unreasonable under the circumstances for debtor to believe that the firm still worked for creditor. Lampe v. Kash, 735 F.3d 942, 945.

C.A.9,

C.A.9, 2013. Quot. in sup. Four years after Chapter 7 debtor received a general discharge of his debts and his bankruptcy was closed, creditor moved to reopen debtor's bankruptcy in order to challenge the dischargeability of its arbitration award against debtor. The bankruptcy court granted the motion, and subsequently declared the arbitration debt nondischargeable. The bankruptcy appellate panel affirmed. Affirming, this court held, inter alia, that creditor's attorney's notice or actual knowledge of debtor's bankruptcy filing could not be imputed to creditor in order to preclude creditor from invoking an exception to the 60-day period for filing a nondischargeability complaint. The court reasoned that the contemplated services that attorney performed for creditor consisted of handling the arbitration, and, once the arbitration ended, attorney no longer represented creditor in that matter when debtor filed for bankruptcy. In re Perle, 725 F.3d 1023, 1027.

C.A.9

C.A.9, 2012. Com. (f) quot. in disc. Defendant, who was convicted of murder and sentenced to death, moved for relief from the denial of his federal habeas petition, arguing that his counsel had abandoned him. The district court denied the motion. Affirming, this court held that defendant was not abandoned by counsel in this case, since counsel did not refuse to represent defendant or renounce the attorney-client relationship; on the contrary, he diligently pursued habeas relief on defendant's behalf, although omitting a colorable constitutional claim from defendant's amended petition. Towery v. Ryan, 673 F.3d 933, 942.

N.D.Tex.Bkrtcy.Ct.

N.D.Tex.Bkrtcy.Ct.2007. Com. (h) quot. in sup. Debtor's children brought an adversary proceeding against debtor, seeking a declaratory judgment that certain multimillion dollar claims held by plaintiffs against debtor pursuant to two prepetition civil judgments against him for child sexual abuse were not discharged in either his still-open Chapter 13 case or in his earlier-filed Chapter 7 case. Entering judgment for plaintiffs, this court held, inter alia, that the judgments were not discharged in the bankruptcy cases. The court concluded that service of notice of debtor's bankruptcy on plaintiffs' former counsel was constitutionally insufficient; the evidence showed that the actual authority of the three lawyers to act on plaintiffs' behalf had ceased long before debtor's Chapter 7 case was commenced. In re Gold, 375 B.R. 316, 326.

Alaska

Alaska, 2007. Com. (d) quot. in ftn. Bankruptcy trustee brought a legal-malpractice action against attorney who had represented debtors in a consumer-protection case under a “hybrid” fee agreement, after debtors, who had turned down a settlement offer in the underlying case because their attorney's fees under the agreement would have exceeded the $25,000 offered, lost at trial and were ordered to pay defendant car dealer $100,000 in costs and fees. The trial court dismissed. Reversing and remanding, this court held that Alaska law prohibited a fee agreement that used a client's decision to settle as a trigger to convert contingent-fee representation into an obligation to pay hourly fees, because a hybrid agreement of this kind impermissibly burdened the client's exclusive right to settle a case. The court noted that courts had declined to enforce fee agreements that interfered with the client's analogous right to end the attorney-client relationship. Compton v. Kittleson, 171 P.3d 172, 177.

Cal.

Cal.2018. Com. (h) cit. in sup. Law firm that was disqualified from representing two clients who were adverse to one another brought a lawsuit against one of those clients, alleging that defendant owed plaintiff damages for services rendered. An arbitrator awarded damages to plaintiff. The court of appeals reversed, finding that the agreement between the parties, which included the arbitration clause and a blanket waiver of any conflict of

interests that might arise if plaintiff ever represented a party adverse to defendant, was unenforceable because plaintiff violated California ethical rules by failing to disclose plaintiff's conflict of interest. This court affirmed, inter alia, holding that the blanket waiver included in the agreement was a violation of ethical rules because it did not fully disclose existing conflicts. The court quoted Restatement Third of the Law Governing Lawyers § 31, Comment *h*, in explaining that, when there was uncertainty as to whether an attorney had stopped representing a client, a client's understanding of when the attorney–client relationship ended would control. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., 425 P.3d 1, 15.

D.C.App.

D.C.App.2004. Com. (c) quot. in sup. In a legal-malpractice action, plaintiffs' attorney moved for leave to withdraw, asserting that plaintiffs had not paid him for his services and had impeded his proper pursuit of the action on their behalf. Upon trial court's denial of attorney's motion, attorney filed second motion, asserting that recent federal indictment of one of the plaintiffs expanded the scope of representation beyond what he was competent to handle. The trial court denied second motion. Declining to dismiss appeal for lack of jurisdiction, this court held that an order denying attorney's motion to withdraw satisfied conditions for the collateral-order doctrine, and was therefore immediately appealable. Galloway v. Clay, 861 A.2d 30, 36.

Iowa,

Iowa, 2016. Subsec. (2)(d) quot. in disc., subsec. (2)(e) cit. in case cit. in disc. State disciplinary board charged lawyer with violating the rules of professional conduct in connection with allegations that, following her removal as the attorney for an estate in probate proceedings, she sought and received a loan from the executor without obtaining the executor's informed consent. After the grievance commission found that lawyer violated the rules, this court suspended her license for 60 days, holding that she was still in an attorney-client relationship with the executor at the time of the loan. Although, under Restatement Third of the Law Governing Lawyers § 31, a lawyer's actual authority to represent a client ended when the lawyer was ordered by a tribunal to cease representing a client, lawyer's discussion of the loan with the executor occurred very close in time after the hearing in which she was removed from participating in the estate and ordered to return certain fees, at a time when she continued to exercise influence over the executor and had yet to comply with the order to return the fees. Iowa Supreme Court Attorney Disciplinary Bd. v. Pederson, 887 N.W.2d 387, 392.

Iowa

Iowa,2011. Subsec. (2)(3) quot. in sup. Attorney disciplinary board brought a complaint against attorney relating to his representation of four separate clients, alleging, as to one client, that attorney violated the rules of professional conduct by failing to satisfy a hospital's lien on the proceeds of a settlement of the client's personal-injury action. Suspending attorney's license to practice law, this court held, inter alia, that, while an attorney-client relationship existed during attorney's prosecution and settlement of client's personal-injury action, such a relationship did not exist when attorney filed an appearance on behalf of client in hospital's lien action, because the undisputed evidence established that attorney filed an answer on behalf of client in that action without client's authority to do so. Iowa Supreme Court Attorney Disciplinary Bd. v. Netti, 797 N.W.2d 591, 599.

Md.Spec.App.

Md.Spec.App.2015. Subsec. (2)(b) quot. in sup. Guardian of patient who was in a vegetative state following an injury filed a medical-malpractice complaint against treating physician and others. The trial court entered judgment on a jury verdict for defendant. After plaintiff appealed, defendant filed a motion to dismiss, arguing that plaintiff's counsel lacked the legal authority to file the appeal because patient had died after judgment was entered in the trial court but before the notice of appeal was filed. Denying defendant's motion to dismiss, this court held that, because

plaintiff's counsel was given authority to note the appeal pursuant to plaintiff's instructions as guardian prior to patient's death, and because counsel noted the appeal prior to being notified of patient's death, plaintiff's counsel had valid authority to note the appeal. The court noted that, although the general rule set out in Restatement Third of the Law Governing Lawyers § 31(2)(b) was that an attorney did not have authority to note an appeal on behalf of a client who had died, that rule did not apply where, as here, the attorney did not learn of the client's death until after the appeal was noted. Rosebrock v. Eastern Shore Emergency Physicians, LLC, 108 A.3d 423, 429.

Mont.

Mont.2012. Com. (f) cit. in sup. Developers sued bank after bank refused to further disburse funds to them under a loan agreement, alleging, inter alia, breach of contract. After attorney who had advised plaintiffs about tax issues regarding their action joined law firm that represented defendant, plaintiffs moved to disqualify law firm. The trial court denied the motion. Reversing and remanding, this court held that law firm was disqualified from representing defendant in this action, because plaintiffs were current clients of tax attorney at the time he joined defendant's law firm. The court noted that, while plaintiffs could not have chosen to stay with tax attorney or his firm (because the firm appeared to have disbanded), tax attorney could have delayed his move until after the trial or could have discussed with plaintiffs his wishes to join defendant's law firm prior to doing so and taken appropriate steps to withdraw from their representation; in that case, a proper screen could have been implemented to protect plaintiffs' confidences. Krutzfeldt Ranch, LLC v. Pinnacle Bank, 202 MT 15, 363 Mont. 366, 272 P.3d 635, 645.

Neb.

Neb.2004. Subsec. (2)(b) quot. in sup., com. (e) cit. in sup. Attorney filed exceptions to report and recommendation for suspension following disciplinary proceeding resulting from two grievances that were filed against him. Affirming, this court held, inter alia, that attorney violated code of professional responsibility by neglecting client's personal-injury case when he failed to inform personal representative of client, following client's death, of impending expiration of statute of limitations. State ex rel. Counsel for Discipline of the Nebraska Supreme Court v. James, 267 Neb. 186, 194, 673 N.W.2d 214, 223.

N.J.

N.J.1996. Cit. in disc. (citing § 43, P.F.D. No. 1, 1996, which is now § 31). Discharged attorney sued client to recover fees allegedly owed under the parties' retainer agreement. Client argued that the agreement, which required client to provide attorney with six months' notice of termination, was unenforceable as an unreasonable restriction of its right to discharge counsel. The trial court entered judgment for attorney, but the intermediate appellate court reversed and remanded. Affirming as modified, this court held that fair and reasonable attorney-client agreements, though usually construed against the attorney, were enforceable where they satisfied both general contracts and professional ethics requirements; that, while attorneys and clients were free to negotiate such innovative arrangements as the engagement retainer, the notice provision here was excessive; and that attorney could recover the fair value of his pretermination services. Cohen v. ROU, 146 N.J. 140, 679 A.2d 1188, 1196.

N.J.Super.App.Div.

N.J.Super.App.Div.2020. Subsec. (2)(b) cit. in sup. Counsel, on behalf of pedestrian, brought a slip-and-fall action against hospital; after counsel was notified pedestrian had died nine months earlier from causes unrelated to her fall, counsel moved to amend its complaint to file suit on behalf of pedestrian's estate. The trial court granted the motion of pedestrian's estate to substitute itself in the action as plaintiff. This court reversed, holding that estate could not avail itself of the relation-back rule to amend the original complaint naming pedestrian individually as plaintiff, because the original complaint became a nullity upon pedestrian's death. The court noted that, under Restatement Third of the Law Governing Lawyers § 31 and Restatement Second of Agency § 120, counsel also

lacked authority to bring suit on pedestrian's behalf following her death, because counsel and pedestrian's attorney–client relationship ended upon her death. Repko v. Our Lady of Lourdes Medical Center, Inc., 237 A.3d 956, 959.

N.D.

N.D.2010. Subsec. (2)(e) quot. in sup. Disciplinary board filed a petition against attorney for violating the rules of professional conduct, alleging that, after his longtime client had been judicially declared incapacitated, he represented client's sons at a hearing in which they sought to be appointed as client's guardians/conservators, and then drafted a new will for client, purportedly on client's behalf, which favored sons' interests. While suspending attorney from the practice of law for 90 days based on other grounds, this court rejected the panel's finding that attorney's actions violated the rules on conflict of interest, concluding that there was no clear and convincing evidence that longtime client was attorney's client at the time of the hearing; attorney's status as client's current or former attorney was unclear in the absence of evidence as to client's understanding of his professional relationship with attorney and whether client hired attorney on retainer or whether they entered into a new contract each time client requested that attorney perform a task. In re Disciplinary Action Against Kuhn, 2010 ND 127, 785 N.W.2d 195, 200.

Wis.

Wis.2002. Com. (e) quot. and cit. in ftn. Mother sued son for return of funds that son was to manage on her behalf. Following mother's death, defendant son served suggestion of death on mother's attorney. Other son, personal representative of mother's estate, moved for substitution. Trial court issued order substituting other son, and appellate court granted defendant leave to appeal. Affirming the trial court, this court held that defendant's service of suggestion of death on mother's attorney only, and not on other appropriate parties, did not trigger 90-day period in which to file motion for substitution. Schwister v. Schoenecker, 258 Wis.2d 1, 21, 654 N.W.2d 852, 863.

Restatement (Third) of the Law Governing Lawyers § 32 (2000)

§ 32 Discharge by a Client and Withdrawal by a Lawyer

(1) Subject to Subsection (5), a client may discharge a lawyer at any time.
(2) Subject to Subsection (5), a lawyer may not represent a client or, where representation has commenced, must withdraw from the representation of a client if:
(a) the representation will result in the lawyer's violating rules of professional conduct or other law;
(b) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(c) the client discharges the lawyer.
(3) Subject to Subsections (4) and (5), a lawyer may withdraw from representing a client if:
(a) withdrawal can be accomplished without material adverse effect on the interests of the client;
(b) the lawyer reasonably believes withdrawal is required in circumstances stated in Subsection (2);
(c) the client gives informed consent;
(d) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal, fraudulent, or in breach of the client's fiduciary duty;
(e) the lawyer reasonably believes the client has used or threatens to use the lawyer's services to perpetrate a crime or fraud;
(f) the client insists on taking action that the lawyer considers repugnant or imprudent;
(g) the client fails to fulfill a substantial financial or other obligation to the lawyer regarding the lawyer's services and the lawyer has given the client reasonable warning that the lawyer will withdraw unless the client fulfills the obligation;
(h) the representation has been rendered unreasonably difficult by the client or by the irreparable breakdown of the client-lawyer relationship; or
(i) other good cause for withdrawal exists.
(4) In the case of permissive withdrawal under Subsections (3)(f)-(i), a lawyer may not withdraw if the harm that withdrawal would cause significantly exceeds the harm to the lawyer or others in not withdrawing.

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

Comment:

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

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

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

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

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

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

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

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

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

d. *Approval of a tribunal.* Rules of tribunals typically require approval of the tribunal when a lawyer withdraws from a pending matter (see § 31, Comment *c*, & § 105). In applying to a tribunal for approval of withdrawal, a lawyer must observe the requirements of confidentiality (see § 60), unless an exception (see §§ 61- 67) applies. In applying to withdraw under Subsection (3)(f), for example, it would not be permissible for the lawyer to state that the client intended to pursue a repugnant objective. A lawyer therefore will often be limited to the statement that professional considerations motivate the application.

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

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

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

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

Subsection (3)(d) permits withdrawal when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal, fraudulent, or in breach of a client's fiduciary duty. A lawyer is not required to assist such a course even though the lawyer could do so without acting illegally (see § 23, Comment *c*, & § 94, Comment *c*). A lawyer has a personal interest in not being involved in criminal or fraudulent schemes or

breach of fiduciary duty (see Comment *j* hereto). Withdrawal also protects the lawyer against the risk of criminal, civil, or disciplinary sanctions.

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

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

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

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

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

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

i. Withdrawal with a client's consent. The client-lawyer relationship can be ended by mutual consent, subject to the power of a tribunal to require the lawyer to serve a client willing to accept the lawyer's services (see Comment *d*

hereto & § 31, Comment *c*). An agreement for withdrawal is subject to the requirements stated in § 18(1)(A) and to the requirement stated in Subsection (3)(c) that the client's consent be informed. In order to be informed, the client must understand the consequences of withdrawal, that the client need not agree to withdrawal, and that the lawyer is obliged to continue proper representation should the client refuse to consent. Determining the reasonableness of consent requires consideration of the lawyer's reasons, the client's sophistication in dealing with lawyers or lack thereof, and the impact of withdrawal on the client's rights and finances.

A lawyer may more readily withdraw when another lawyer is immediately available, for example another lawyer in the same firm. In such a situation, an informed client's consent to the withdrawal ordinarily can be assumed if the client makes no objection. Nevertheless, the client may insist that any lawyer representing the client continue to do so unless the lawyer has cause for withdrawal or can withdraw without material adverse effect on the interests of the client under Subsection (3).

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

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

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

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

l. Client obstruction and irreparable breakdown of the relationship. A lawyer may withdraw when a client renders the representation unreasonably difficult, for example, by refusing to communicate with the lawyer or persistently misrepresenting facts to the lawyer. The considerations stated in Comment *h(i)* are relevant in determining whether a client's course of conduct renders the representation unreasonably difficult. Irreparable breakdown of the client-

lawyer relationship due to other causes is likewise a ground for withdrawal. However, withdrawal is not warranted simply because a client disagrees with a lawyer, expresses worry or suspicion, or refuses to accept the lawyer's advice about a decision that is to be made by the client (see §§ 21 & 22). Withdrawal is permissible, for example, if the client's refusal to disclose facts to the lawyer threatens to involve the lawyer in fraud or other unlawful acts (compare Comment *f* hereto), compromises the lawyer's professional reputation, or otherwise renders the representation unreasonably difficult.

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

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

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

Reporter's Note

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

*Comment b. Discharge by a client.*On a client's right to discharge a lawyer with or without cause, see ABA Model Rules of Professional Conduct, Rule 1.16, Comment ¶ [4] (1983); In re Succession of Wallace, 574 So.2d 348 (La.1991) (executor may discharge lawyer designated by testator despite statute purporting to make lawyer nondischargeable); Belli v. Shaw, 657 P.2d 315 (Wash.1983) (retaining new lawyer for retrial discharged previous lawyer, who had no right to fees); cf. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (constitutional right of criminal defendant to self-representation). Fee contracts improperly discouraging the exercise of this right have been set aside. Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994); AFLAC Inc. v. Williams, 444 S.E.2d 314 (Ga.1994); § 40, Comment *e,* Reporter's Note. Cf. Mass v. McClenahan, 893 F.Supp. 225 (S.D.N.Y.1995) (discharge of private-practice lawyer actionable when discriminatory under federal law). For the lawyer's duty to withdraw when discharged, see ABA Model Rules of Professional Conduct, Rule 1.16(a)(3) (1983); ABA Model Code of Professional Responsibility, DR 2-110(B)(4) (1969); Trulis v. Barton, 107 F.3d 685 (9th Cir.1995) (court sanctions for failure to withdraw); Attorney Grievance Comm'n v. Montgomery, 460 A.2d 597 (Md.1983) (discipline for failure to withdraw); Lake County Bar Ass'n v. Needham, 419 N.E.2d 1104 (Ohio 1981) (similar); In re Greenlee, 658 P.2d 1 (Wash.1983) (similar). Although a tribunal might not allow a discharged lawyer to continue to act as such (see § 31, Comment *c,* and Reporter's Note thereto), it has discretion to deny the client a continuance to obtain new counsel. E.g., Kashefi-Zihagh v. I.N.S., 791 F.2d 708 (9th Cir.1986); C. Wolfram, Modern Legal Ethics 797-798 (1986); cf. Ohntrup v. Firearms Center, Inc., 802 F.2d 676 (3d Cir.1986) (discharged lawyer required to stay in case to facilitate post-judgment communication with foreign defendant).

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

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

*Comment f. Withdrawal to avoid involvement in unlawful acts.*Sections 32(2)(a) and 32(3)(c) and (d) are the same, with one change, as ABA Model Rules of Professional Conduct, Rules 1.16(a)(1) and 1.16(b)(1) and (b)(2) (1983). ABA Model Code of Professional Responsibility, DR 2-110(B)(1)-(2), (C)(1)(a)-(c), (C)(2) (1969), contains similar but not identical provisions. See, e.g., Lamborn v. Dittmer, 873 F.2d 522 (2d Cir.1989) (lawyer must withdraw to avoid disciplinary violation when lawyer is important witness against client on central issue); Leversen v. Superior Court, 668 P.2d 755 (Cal.1983) (tribunal should have allowed withdrawal of lawyer to avoid disciplinary violation when lawyer's firm had represented witness); Riley v. District Court, 507 P.2d 464 (Colo.1973) (lawyer must withdraw to avoid disciplinary violation when client is pressing inadequate-assistance-of-counsel claim involving lawyer); Bailey v. Martz, 488 N.E.2d 716 (Ind.Ct.App.1986) (proper for plaintiff's lawyer to avoid conflict by withdrawing when lawyer had failed to file suit within limitations period); Rindner v. Cannon Mills, Inc., 486 N.Y.S.2d 858 (N.Y.Sup.Ct.1985) (lawyer may withdraw when convinced client's claim is baseless); In re Carter & Johnson, [1981] CCH Fed. Sec. L. Reports ¶ 82,847 (SEC 1981) (duties of lawyer whose services have been used in client fraud); Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 854-862 (1977) (withdrawal as an option when client insists on committing perjury); see § 121, Comment *e(ii),* and Reporter's Note thereto and § 6, Comment *e*, and Reporter's Note thereto (disqualification remedy for conflicts of interest). See also § 67, Reporter's Note.

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

*Comment h(i) Permissive withdrawal—in general.*No authority directly in point has been found. The principle that harm to the client disproportionate to justification for the lawyer's withdrawal prevents permissive withdrawal

flows from the fiduciary nature of the relationship as well as the requirement that the lawyer seek to protect the interests of the client in withdrawing. See Comment *n* and Reporter's Note thereto.

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

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

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

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

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

*Comment l. Client obstruction and irreparable breakdown of the relationship.*ABA Model Code of Professional Responsibility, DR 2-110(C)(1)(d) (1969) (withdrawal permitted if client "by other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively"); see ABA Model Rules of Professional Conduct, Rule 1.16(b)(6) (1983) (allowing withdrawal if "other good cause for withdrawal exists"). E.g., Whiting v. Lacara, 187 F.3d 317 (2d Cir.1999) (client threats to sue lawyer unless lawyer pursues claim dismissed by court); State v. Lee, 689 P.2d 153 (Ariz.1984) (if criminal defendant insists on calling witness when that would be unethical or against client's best interests, lawyer refuses, and significant antagonism results, lawyer may seek leave to withdraw); Ambrose v. Detroit Edison Co., 237 N.W.2d 520 (Mich.Ct.App.1975) (lawyer may withdraw without forfeiting fees when client entirely refuses to cooperate); Sharp v. Melendez, 531 N.Y.S.2d 554

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

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

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

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

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

Case Citations - by Jurisdiction

—

C.A.9
D.D.C.
Ala.
Conn.Super.
Mass.
N.J.
N.J.Super.App.Div.
N.J.Super.
Tenn.

C.A.9

C.A.9, 2008. Com. (c) quot. in disc. Law firm that served as local counsel in environmental-contamination litigation before withdrawing from the lawsuit brought a breach-of-contract action against out-of-state law firm that had hired it, seeking additional payments allegedly owed to it on the lawsuit's termination by settlement. After the district court ruled on plaintiff's partial-summary-judgment motion that plaintiff had not forfeited the additional payments by withdrawing, it entered summary judgment holding that plaintiff was owed the additional payments. Affirming, this court held that payment of the additional fees was triggered by defendant's recovery of gross, rather than net, proceeds from the settlement, and that defendant presented no evidence that any burden was put on any client by plaintiff's withdrawal from the litigation. Brown & Bain, P.A. v. O'Quinn, 518 F.3d 1037, 1041.

D.D.C.

D.D.C.2017. Com. (m) quot. in sup. Following the settlement of a class action in which the Department of the Interior was found to have mismanaged funds that it held in trust for Native Americans, the district court granted class counsel's motion for an award of attorney's fees and costs, and the court of appeals affirmed. Attorney who had withdrawn from representation before the settlement and was omitted from class counsel's motion filed a petition for his share of the award. Granting in part attorney's petition, this court held that, even if attorney's contract for legal services made his right to compensation contingent upon withdrawal for good cause, attorney's withdrawal was justified and satisfied that standard. The court explained that, under Restatement Third of the Law Governing Lawyers § 32, withdrawal was permitted when, as here, a lawyer's inability to work with co-counsel indicated that the best interests of the client would be served by withdrawal. Cobell v. Jewell, 234 F.Supp.3d 126, 162.

Ala.

Ala.2021. Com. (b) cit. in state bar opinion cit. in disc. Law firm sued city water-works board, alleging that defendant breached the parties' agreement, under which plaintiff would administer defendant's contract-compliance program, because defendant terminated the agreement without supermajority approval. The trial court granted defendant's motion for summary judgment. This court affirmed, holding, inter alia, that provisions requiring defendant's supermajority approval to terminate the parties' agreement was against public policy and void. In describing the procedural history of this instant case, the court noted that the state bar cited Restatement Third of the Law Governing Lawyers § 32 in its opinion letter, stating that provisions in the parties' agreement —under which defendant was required to provide 90 days' notice prior to terminating the agreement—was unenforceable, because clients had the right to terminate their attorney–client relationship at any time. Fuston, Petway & French, LLP v. Water Works Board of City of Birmingham, 343 So.3d 1118, 1126.

Conn.Super.

Conn.Super.2003. Com. (b) cit. in sup. Former general counsel who resigned after employer allegedly failed to cease and rectify ongoing criminal conduct sued employer, alleging constructive discharge and breach of covenant of good faith and fair dealing, seeking declaration as to his rights to reveal confidential client information protected by attorney-client privilege, and brought claim against employer's chairman for interference with reasonable business expectations. Denying in part defendants' motion to strike, trial court held, inter alia, that the attorney-client relationship, or the potential impairment thereof, did not bar attorney's action for constructive discharge. O'Brien v. Stolt-Nielsen Transportation Group, Ltd., 48 Conn.Supp. 200, 211, 838 A.2d 1076, 1084.

Mass.

Mass.2011. Com. (m) cit. in sup. Named partner of a law firm petitioned for interlocutory relief from a trial court order denying firm's request to withdraw as counsel for a client who had entered into a contingent-fee agreement with firm and ordering named partner to enter an appearance on client's behalf. This court remanded for entry of a

judgment affirming the order to the extent that it denied firm's motion to withdraw, holding, among other things, that a law firm, after agreeing to represent a client for a contingent fee and filing a complaint that presumably complied with the state's requirement of a good-faith basis could not withdraw from the action simply because it recognized belatedly that the action would not be profitable for the law firm. In re Kiley, 459 Mass. 645, 654, 947 N.E.2d 1, 9.

N.J.

N.J.2011. Subsecs. (2)(a), (3)(g), and (5) and com. (m) quot. in sup. In disciplinary proceedings brought against attorney for suing a current client to collect legal fees, the Disciplinary Review Board concluded that attorney's conduct created a conflict of interest and that a reprimand was warranted. This court ordered the imposition of a reprimand, holding that attorneys were not to sue a present or existing client during active representation, nor was an attorney to seek any remedy against a client that resulted in a conflict under the rules of professional conduct; in this case, by filing suit against client, attorney knowingly created an irreconcilable conflict of interest for the purpose of forcing his withdrawal from representation of client in the face of mounting unpaid fees, and such conduct could not be tolerated. In re Simon, 206 N.J. 306, 320, 20 A.3d 421, 430.

N.J.1996. Cit. in disc., com. (b) quot. in disc. and cit. in conc. and diss. op. (citing § 44, T.D. Nos. 5-6, 1993, and P.F.D. No. 1, 1996, which is now § 32). Discharged attorney sued client to recover fees allegedly owed under the parties' retainer agreement. Client argued that the agreement, which required client to provide attorney with six months' notice of termination, was unenforceable as an unreasonable restriction of its right to discharge counsel. The trial court entered judgment for attorney, but the intermediate appellate court reversed and remanded. Affirming as modified, this court held that fair and reasonable attorney-client agreements, though usually construed against the attorney, were enforceable where they satisfied both general contracts and professional ethics requirements; that, while attorneys and clients were free to negotiate such innovative arrangements as the engagement retainer, the notice provision here was excessive; and that attorney could recover the fair value of his pretermination services. Concurring and dissenting opinion believed that the notice provision, which directly contravened client's right to discharge attorney at any time, rendered the entire agreement unenforceable. Cohen v. ROU, 146 N.J. 140, 679 A.2d 1188, 1196, 1202.

N.J.Super.App.Div.

N.J.Super.App.Div.2021. Com. (b) quot. in sup. Former in-house counsel sued school board, alleging that it breached the parties' contract by terminating his employment when he was indicted on charges related to an investigation into board's administration of the National School Lunch Program, because he was later acquitted of all charges. After a bench trial, the trial court found in favor of plaintiff. Affirming in part, this court held that a discharged in-house counsel like plaintiff, who did not seek reinstatement to his former position, was not precluded from pursuing damages stemming from a defendant employer's breach of contract by Restatement Third of the Law Governing Lawyers § 44, which provided that a client could always discharge a lawyer regardless of cause and regardless of any agreement between them. The court explained that, under § 32, a lawyer-employee had the same rights as other employees under applicable law to recover for bad-faith discharge. Nelson v. Elizabeth Board of Education, 246 A.3d 802, 810.

N.J.Super.App.Div.2011. Subsec. (1) cit. in sup. Attorney discharged by his client brought a claim for tortious interference against successor attorney that later settled client's medical-malpractice action. The trial court denied defendant's motion to dismiss the claim. This court reversed, holding that, where, as here, there was no allegation that a successor attorney used wrongful means, such as fraud or defamation, to induce the client to discharge the original attorney, such an action was not maintainable. The court noted that a client's freedom to terminate the attorney-client relationship unilaterally meant that a contract between an attorney and client was a contract that was “terminable at will.” Nostrame v. Santiago, 420 N.J.Super. 427, 22 A.3d 20, 23.

N.J.Super.

N.J.Super.2001. Subsec. (c) and com. (b) cit. in disc. County counsel who had been appointed to a three-year term by prior Board of Chosen Freeholders sued current Board for a declaratory judgment that he was the valid office holder, after the current Board rescinded his employment contract. Reversing the trial court's grant of judgment for plaintiff, this court held, inter alia, that, pursuant to the disciplinary rule that required an attorney to withdraw his representation of a client when he was discharged, the Board could terminate plaintiff as county counsel, without cause, prior to the end of his term. Coyle v. Board of Chosen Freeholders of Warren County, 340 N.J.Super. 277, 293, 774 A.2d 559, 570, reversed 170 N.J. 260, 787 A.2d 881 (2002).

N.J.Super.1993. Cit. in ftn. (citing § 44, T.D. No. 5, 1992, which is now § 32). Law firms that had been representing the estate of a smoker in an action against cigarette manufacturers moved to withdraw from representation, alleging that they were sustaining an unreasonable financial burden. Reversing the law division's grant of the motion and remanding, this court held that the trial court had been presented with insufficient proof on which to analyze the probability of recovery and the reasonably anticipated prospective costs of achieving such recovery. Remand was necessary, said the court, for receipt of evidence that foreseeable damages discounted by the likelihood of recovering them would be substantially less than the value of additional attorney time and expenses that would have to be devoted from the time of the withdrawal application through trial. Smith v. R.J. Reynolds Tobacco Co., 267 N.J.Super. 62, 80, 630 A.2d 820, 831.

Tenn.

Tenn.2009. Com. (b) cit. in disc. Defendant whose conviction in trial court of felony murder in the perpetration of aggravated child abuse and sentence of life imprisonment were upheld by the court of criminal appeals petitioned for postconviction relief, alleging ineffective assistance of counsel by his public defenders. The trial court denied the petition for postconviction relief, and the court of criminal appeals affirmed. This court granted defendant's application for permission to appeal to determine whether he had effectively discharged his newly retained lawyer and could represent himself in his postconviction proceeding, and vacated and remanded the judgment affirming the denial of postconviction relief, holding that defendant effectively discharged his retained lawyer, and that the lawyer should have notified the court of criminal appeals that he desired to withdraw from the case because he had been discharged. Lovin v. State, 286 S.W.3d 275, 285, 287.

Restatement (Third) of the Law Governing Lawyers § 33 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 33 A Lawyer's Duties When a Representation Terminates

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

Comment:

a. Scope and cross-references. This Section describes the duties of a lawyer during (see § 33(1)) and after (see § 33(2)) the termination of a client-lawyer relationship. The Section applies regardless of whether client or lawyer initiates the termination or whether termination occurs prematurely or when contemplated. Grounds for

termination are set forth in §§ 31 and 32. Former clients owe the duty discussed in Chapter 3 to compensate for services rendered.

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

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

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

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

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

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

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

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

A lawyer has no general continuing obligation to pass on to a former client information relating to the former representation. The lawyer might, however, have such an obligation if the lawyer continues to represent the client in other matters or under a continuing relationship. Whether such an obligation exists regarding particular information depends on such factors as the client's reasonable expectations; the scope, magnitude, and duration of

the client-lawyer relationship; the evident significance of the information to the client; the burden on the lawyer in making disclosure; and the likelihood that the client will receive the information from another source.

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

Reporter's Note

*Comment b. Protecting a client's interests when a representation ends.*Section 33(1) is drawn, with clarifying stylistic changes, from ABA Model Rules of Professional Conduct, Rule 1.16(d) (1983), and ABA Model Code of Professional Responsibility, DR 2-110(A)(2) (1969). On required protective measures, see Hanlin v. Mitchelson, 794 F.2d 834 (2d Cir.1986) (malpractice claim for failure of lawyer to have client's arbitration award confirmed or notify client clearly of withdrawal); Olguin v. State Bar, 616 P.2d 858 (1980) (discipline for not answering substitute lawyer's inquiries or providing files); Academy of California Optometrists, Inc. v. Superior Court, 124 Cal.Rptr. 668 (Cal.Dist.Ct.App.1975) (former lawyer ordered to turn over files); People v. Archuleta, 638 P.2d 255 (Colo.1981) (discipline for leaving practice without arranging for substitute counsel); People v. Gellenthien, 621 P.2d 328 (Colo.1981) (discipline for failing to refund unearned fees when hospitalization required withdrawal); Central Cab Co. v. Clarke, 270 A.2d 662 (Md.1970) (malpractice liability for not notifying client of withdrawal, leading to default judgment against client); Matter of Schwartz, 493 A.2d 1248 (N.J.1985) (discipline for withdrawing without notice to client); Dayton Bar Ass'n v. Weiner, 317 N.E.2d 783 (Ohio 1974) (discipline for refusing to file divorce decree until paid); § 45, Comment *b,* and Reporter's Note thereto (returning unearned fees); § 46, Comment *c* (returning files).

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

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

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

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

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

*Comment g. The duty not to act for a former client.*See Sterling v. Jones, 233 So.2d 537 (1970) (client entitled to relief from default judgment entered when lawyer withdrew and then purported to cancel pleadings filed for client); State v. Dickens, 519 P.2d 750 (Kan.1974) (discipline for acting after client's death); In re Collins, 271 S.E.2d 473 (Ga.1980) (discipline for failure of lawyer to withdraw after discharge); § 32, Comment *b,* and Reporter's Note

thereto (similar). On a lawyer's liability for acting without authority, see § 27, Comment *f,* and Reporter's Note thereto; § 30, Comment *e,* and Reporter's Note thereto.

*Comment h. Conveying communications to a former client.*Decisions conflict on whether an opposing party can give notice of a proceeding to modify or enforce a child-support decree by notifying the lawyer who formerly represented a party in the original proceeding. Compare Griffith v. Griffith, 247 S.E.2d 30 (N.C.Ct.App.1978) (notice adequate), with Guthrie v. Guthrie, 429 S.W.2d 32 (Ky.1968) (notice invalid), with Jarvis v. Jarvis, 664 S.W.2d 694 (Tenn.Ct.App.1983) (whether notice adequate depends on facts); see Annot., 62 A.L.R.2d 544 (1958). Compare IBM Corp. v. Levin, 579 F.2d 271 (3d Cir.1978) (client with continuing relationship considered current client for current-client conflicts purposes although no matters were pending). See also, e.g., Okla. Stat. tit. 12, § 2005.1 (1991) (service of post-judgment motions in divorce case on former lawyer).

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

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

Case Citations - by Jurisdiction

—

C.A.6,
C.A.D.C.
Ariz.
Cal.
Conn.
Iowa
Neb.
N.J.Super.
Tenn.
Tex.App.
Wis.
Wyo.

C.A.6,

C.A.6, 2013. Com. (h) quot. in sup. (erron. cit. as § 33A). Creditor moved to revive her prepetition judgment against debtor after the judgment was discharged in debtor's bankruptcy proceedings eight years after the entry of the judgment, alleging that debtor improperly submitted to the bankruptcy court the address of a law firm that previously represented creditor, rather than creditor's residential address, and that creditor never received the notice that was sent to the firm. The district court denied creditor's motion. Reversing and remanding for further proceedings, this court held that the bankruptcy court could not discharge the judgment, because notice to creditor's former legal representative was not reasonably calculated to reach creditor. The court reasoned, in part, that lawyers had no general continuing obligation to pass information along to people whom they no longer represented, and that, in the absence of further investigation, it was unreasonable under the circumstances for debtor to believe that the firm still worked for creditor. Lampe v. Kash, 735 F.3d 942, 943.

C.A.D.C.

C.A.D.C.1998. Subsec. (2) cit. in ftn. (citing § 45, Prop. Final Draft No. 1, 1996, which is now § 33). Independent counsel moved to compel testimony of Deputy White House Counsel, who had declined to answer certain questions before the grand jury on the ground, in part, of the President's personal attorney-client privilege. Affirming in part and reversing in part the district court's grant of the motion, this court held, inter alia, that the President's personal attorney-client privilege allowed the Deputy White House Counsel to refuse to disclose information obtained while serving as an intermediary between the President and his private counsel. In re Lindsey, 158 F.3d 1263, 1281.

Ariz.

Ariz.1995. Subsec. (1) quot. in ftn., com. (b) cit. in disc. and quot. in ftn. (citing § 45, T.D. No. 5, 1992, which is now § 33). The State Bar filed a complaint against an attorney. Concluding that the attorney violated ethics rules and rules of professional conduct by lacking competence and diligence, failing to maintain proper client communications, and failing to adequately protect his client's interests upon termination of the representation, the Disciplinary Commission recommended that the attorney be suspended from the practice of law, be placed on probation, and pay restitution. This court declined to suspend the attorney, but it censured and condemned the attorney for his conduct, upheld the imposed probation, and ordered the attorney to make restitution to the client. It determined that even though the attorney did not return the client's documents after being terminated, his failure to return copies of the documents did not violate ER 1.16(d) because the client at all times had the originals of all his documents. Matter of Curtis, 184 Ariz. 256, 908 P.2d 472, 479.

Cal.

Cal.2011. Subsec. (2) quot. in sup. Former client brought claims for breach of fiduciary duty, professional negligence, and breach of contract against, among others, attorney who had represented it in its effort to obtain approval of a redevelopment project from city council, after attorney became involved in a campaign opposing plaintiff's project. The trial court denied defendant's motion to strike the complaint under the anti-SLAPP statute; the court of appeals reversed. Reversing, this court held that plaintiff's claims possessed at least minimal merit within the meaning of the anti-SLAPP statute; plaintiff demonstrated a "probability of prevailing" on the claims when it asserted that defendant used confidential information acquired during his representation of plaintiff in support of a referendum to overturn the city council's approval of the project, where the council's approval of the project had been the explicit objective of the prior representation. Oasis West Realty, LLC v. Goldman, 51 Cal.4th 811, 124 Cal.Rptr.3d 256, 250 P.3d 1115, 1123.

Conn.

Conn.2014. Cit. in ftn. Lottery winner brought, inter alia, a claim for aiding and abetting in breach of fiduciary duty against company that purchased his future lottery-installment payments for a discounted lump-sum payment, alleging that defendant failed to disclose that attorney whom plaintiff had hired to represent him in connection with the transaction was in a business relationship with defendant. The trial court granted summary judgment for defendant. The appellate court affirmed. Affirming, this court held that the continuing-course-of-conduct doctrine did not apply to equitably toll the running of the governing statute of limitations. The court reasoned that, once attorney's representation of plaintiff had ceased when the lottery transaction was completed, any remaining duties that attorney owed to plaintiff as a former client were limited and did not include an indefinite duty to inform him of the prior conflict of interest that no longer existed. The court cited Restatement Third of the Law Governing Lawyers § 33 in noting that, following termination of a relationship, an attorney should return client's property, take reasonable steps to convey material communications to client, and refrain from further representation absent new authorization from client. Flannery v. Singer Asset Finance Co., LLC, 312 Conn. 286, 318, 94 A.3d 553, 573.

Iowa

Iowa, 2011. Subsec. (2)(b) quot. in sup. Attorney disciplinary board brought a complaint against attorney relating to his representation of four separate clients, alleging, as to one client, that attorney violated the rules of professional conduct by failing to satisfy a hospital's lien on the proceeds of a settlement of the client's personal-injury action. Suspending attorney's license to practice law, this court held, inter alia, that, while an attorney-client relationship existed during attorney's prosecution and settlement of client's personal-injury action, such a relationship did not exist when attorney filed an appearance on behalf of client in hospital's lien action, because the undisputed evidence established that attorney filed an answer on behalf of client in that action without client's authority to do so. Iowa Supreme Court Attorney Disciplinary Bd. v. Netti, 797 N.W.2d 591, 599-600.

Neb.

Neb.2004. Cit. in sup., com. (b) cit. in sup. Attorney filed exceptions to report and recommendation for suspension following disciplinary proceeding resulting from two grievances that were filed against him. Affirming, this court held, inter alia, that attorney violated code of professional responsibility by neglecting client's personal-injury case when he failed to inform personal representative of client, following client's death, of impending expiration of statute of limitations. State ex rel. Counsel for Discipline of the Nebraska Supreme Court v. James, 267 Neb. 186, 194, 673 N.W.2d 214, 223.

N.J.Super.

N.J.Super.1997. Subsec. (1) quot. in sup. (citing § 45, Proposed Final Draft No. 1, 1996, which is now § 33). When an attorney let a statute of limitations run after he was retained to represent a husband and wife in a personal injury action, the clients sued the attorney and the attorney's former law firm for legal malpractice. The trial court granted the law firm summary judgment; this court reversed and remanded, holding that fact issues existed as to whether the law firm was liable for the attorney's malpractice. Plaintiffs made a sufficient showing that the firm became their counsel by virtue of both the retainer agreement and the fact that the attorney had at least apparent authority to enter into such agreements on the firm's behalf. Although the firm did not know of the clients' case and for that reason failed to notify plaintiffs that its relationship with the attorney was terminated, the retainer agreement referred to the firm as the firm retained. Furthermore, evidence of the firm's role in the attorney's cases and its entitlement to a share of the proceeds of any recovery obtained by the attorney was not developed, nor did the court know what the firm did to assure knowledge of, and proper control over, cases retained by the attorney as “of counsel” to the firm. Staron v. Weinstein, 305 N.J.Super. 236, 701 A.2d 1325, 1328.

Tenn.

Tenn.2009. Subsec. (2)(b) cit. in ftn. Defendant whose conviction in trial court of felony murder in the perpetration of aggravated child abuse and sentence of life imprisonment were upheld by the court of criminal appeals petitioned for postconviction relief, alleging ineffective assistance of counsel by his public defenders. The trial court denied the petition for postconviction relief, and the court of criminal appeals affirmed. This court granted defendant's application for permission to appeal to determine whether he had effectively discharged his newly retained lawyer and could represent himself in his postconviction proceeding, and vacated and remanded the judgment affirming the denial of postconviction relief, holding that defendant effectively discharged his retained lawyer, and that the lawyer should have notified the court of criminal appeals that he desired to withdraw from the case because he had been discharged. Lovin v. State, 286 S.W.3d 275, 289.

Tex.App.

Tex.App.2004. Subsec. (1) and com. (b) cit. in diss. op. Woman brought action to terminate parental rights of inmate, the biological father of her two children, and trial court appointed inmate an attorney ad litem on day of final hearing; without consulting with inmate, attorney allowed hearing to proceed, and trial court terminated inmate's parental rights. After granting extension of time to file notice of appeal, this court reversed, holding that inmate was denied effective assistance of counsel. Dissent argued, inter alia, that case should have been remanded to trial court to determine whether appointed counsel continued to represent inmate on appeal and consider problem of abandonment upon counsel's failure to prosecute appeal or at least advise party of right to appeal. Brice v. Denton, 135 S.W.3d 139, 148.

Wis.

Wis.2002. Coms. (e) and (g) quot. in ftn. Mother sued son for return of funds that son was to manage on her behalf. Following mother's death, defendant son served suggestion of death on mother's attorney. Other son, personal representative of mother's estate, moved for substitution. Trial court issued order substituting other son and appellate court granted defendant leave to appeal. Affirming the trial court, this court held that defendant's service of suggestion of death on mother's attorney only, and not on other appropriate parties, did not trigger 90-day period in which to file motion for substitution. Schwister v. Schoenecker, 258 Wis.2d 1, 21, 654 N.W.2d 852, 863.

Wyo.

Wyo.2002. Quot. in disc. Former client sued attorney for legal malpractice, after attorney represented former client's wife in the couple's divorce proceeding. Affirming in part the trial court's grant of summary judgment for defendant, this court held, inter alia, that plaintiff presented no evidence of any injury or damages arising from defendant's subsequent representation of plaintiff's wife. The court said that, although a showing of substantial relationship between the two representations did not give rise to an irrebuttable presumption that confidentiality had been breached, it could give rise to an inference that the client's confidences had been used against him in contravention of the attorney's continuing duties of confidentiality and loyalty. Bevan v. Fix, 42 P.3d 1013, 1028.

Restatement (Third) of the Law Governing Lawyers 3 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Introductory Note

Introductory Note: This Chapter concerns the law governing fee arrangements between clients and lawyers. It also deals with certain property aspects of their relationship, including such matters as a lawyer's duties to safeguard and deliver a client's property and papers. Those matters are in practice intertwined with fee issues, often being governed by the same contracts, and with the balance of economic power between clients and lawyers. The Chapter does not consider, except when relevant to other topics, rights to recover attorney-fee awards from opposing parties under fee-shifting rules.

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

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

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

Restatement (Third) of the Law Governing Lawyers 3 1 Case Notes

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 1. Legal Controls on Attorney Fees

General Case Citations

D.D.C.

D.D.C.2017. Cit. in sup. §§ 34-37, which constitute all of Ch. 3, Topic 1. Following the settlement of a class action in which the Department of the Interior was found to have mismanaged funds that it held in trust for Native Americans, the district court granted class counsel's motion for an award of attorney's fees and costs, and the court of appeals affirmed. Attorney who had withdrawn from representation before the settlement and was omitted from class counsel's motion filed a petition for his share of the award. Granting in part attorney's petition, this court held that attorney satisfied his ethical obligations upon his withdrawal under Restatement Third of the Law Governing Lawyers, such that he was entitled to compensation for his work. The court reasoned that attorney's unintentional failure to notify the client or the court of his withdrawal was not a sufficient basis to deny him compensation under the facts of this case, particularly given that he completed all the work he had been assigned before withdrawing, that plaintiffs were never left without competent counsel, and that the litigation proceeded to its successful conclusion undisturbed by his absence. Cobell v. Jewell, 234 F.Supp.3d 126, 164.

End of Document

Restatement (Third) of the Law Governing Lawyers 3 1 Intro. Note (2000)

Introductory Note

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

Restatement (Third) of the Law Governing Lawyers § 34 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 34 Reasonable and Lawful Fees

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

Comment:

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

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

Second, this Section applies when courts or other disciplinary authorities seek to discipline a lawyer for charging unreasonably high fees (see Comment *f* hereto & § 5). In many jurisdictions, authorities have been reluctant to discipline lawyers on such grounds. For a variety of reasons, discipline might be withheld for charging a fee that would nevertheless be set aside as unreasonable in a fee-dispute proceeding. It is therefore important to distinguish between applying this Section in fee disputes (see Comments *b* through *e* hereto) and applying it in disciplinary proceedings (see Comment *f* hereto).

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

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

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

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

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

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

sophisticated in entering into such arrangements (such as a fee contract made by inside legal counsel in behalf of a corporation) should almost invariably be found reasonable.

Second, does the contract provide for a fee within the range commonly charged by other lawyers in similar representations? To the extent competition for legal services exists among lawyers in the relevant community, a tribunal can assume that the competition has produced an appropriate level of fee charges. A stated hourly rate, for example, should be compared with the hourly rates charged by lawyers of comparable qualifications for comparable services, and the number of hours claimed should be compared with those commonly invested in similar representations. The percentage in a contingent-fee contract should be compared to percentages commonly used in similar representations for similar services (for example, preparing and trying a novel products-liability claim). Whatever the fee basis, it is also relevant whether accepting the case was likely to foreclose other work or to attract it and whether pursuing the matter at the usual fee was reasonable in light of the client's needs and resources. See § 39, Comment *b,* which discusses the fair-value standard applied in quantum meruit cases and possible defects of a market standard.

Third, was there a subsequent change in circumstances that made the fee contract unreasonable? Although reasonableness is usually assessed as of the time the contract was entered into, later events might be relevant. Some fee contracts make the fee turn on later events. Accordingly, the reasonableness of a fee due under an hourly rate contract, for example, depends on whether the number of hours the lawyer worked was reasonable in light of the matter and client. It is also relevant whether the lawyer provided poor service, such as might make unreasonable a fee that would be appropriate for better services, or services that were better or more successful than normally would have been expected (compare §§ 37 & 40 concerning forfeiture of fees). Finally, events not known or contemplated when the contract was made can render the contract unreasonably favorable to the lawyer or, occasionally, to the client. Compare Restatement Second, Contracts §§ 152-154 and 261-265 (doctrines of mistake, supervening impracticality, supervening frustration). To determine what events client and lawyer contemplated, their contract must be construed in light of its goals and circumstances and in light of the possibilities discussed with the client (see id. §§ 294 & 250). A contingent-fee contract, for example, allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial fee. Events within that range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made.

Illustration:

1. Bank Clerk is charged with criminal embezzlement and retains Lawyer to defend against the charges for a $15,000 flat fee. The next day another employee confesses to having taken the money, and the prosecutor (not knowing of Lawyer's retention by Bank Clerk) immediately drops the charges against Bank Clerk. Lawyer has done nothing on the case beyond speaking with Bank Clerk. In the absence of special circumstances, such as prior discussion of this possibility or the lawyer having rejected another representation offering a comparable fee in reliance on this engagement, it would be unreasonable for Lawyer to be paid $15,000 for doing so little. Client must pay the fair value of Lawyer's services (see § 39), but more than that is not due and the lawyer must refund the excess if already paid (see § 42). If, however, the prosecutor dropped the charges as the result of a plea bargain negotiated by Lawyer, the rapid disposition would not render unreasonable an otherwise proper $15,000 flat fee. A negotiated disposition without trial is a common event that parties are assumed to contemplate when they agree that the lawyer will receive a flat fee.

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

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

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

An engagement-retainer fee satisfies the requirements of this Section if it bears a reasonable relationship to the income the lawyer sacrifices or expense the lawyer incurs by accepting it, including such costs as turning away other clients (for reasons of time or due to conflicts of interest), hiring new associates so as to be able to take the client's matter, keeping up with the relevant field, and the like. When a client experienced in retaining and compensating lawyers agrees to pay an engagement-retainer fee, the fee will almost invariably be found to fall within the range of reasonableness. Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees (see § 38, Comment *g,* & § 40, Illustrations 2A & 2B). In some circumstances, large engagement-retainer fees constitute unenforceable liquidated-damage clauses (see Restatement Second, Contracts § 356(1)) or are subject to challenge in the client's bankruptcy proceeding.

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

A lawyer can be disciplined for unreasonably making a large fee claim even though the fee was not collected. In a fee dispute, however, the tribunal is concerned primarily with the reasonableness of the fee the lawyer actually

seeks before the tribunal rather than the reasonableness of earlier fee claims made between the parties. On the extent to which a lawyer's abusive fee-collection methods affects the lawyer's entitlement to a fee, see § 41.

g. Unlawful fees. A fee that violates a statute or rule regulating the size of fees is impermissible under this Section. General principles governing the enforceability of contracts that violate legal requirements are set forth in Restatement Second, Contracts §§ 178-185. Statutes or rules in some jurisdictions control the percentage of a contingent fee, generally or in particular categories such as worker-compensation claims or medical-malpractice litigation. Other common legislation limits the fees chargeable in proceedings against the government, forbids contingent fees for legislative lobbying, prohibits public defenders or defense counsel paid by the government from accepting payment from their clients, and prohibits lawyers representing wards of the court from accepting payments not approved by the court. A fee for a service a lawyer may not lawfully perform, such as questioning jurors after a trial where that is forbidden (see § 115), is likewise unlawful regardless of the size of the fee (see Restatement Second, Contracts §§ 192 & 193). A lawyer may not require a client to pay a fee larger than that contracted for, unless the client validly agrees to the increase.

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

Reporter's Note

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

*Comment c. Unenforceable fee contracts.*On the client's free and informed choice, see, e.g., Dunn v. H.K. Porter Co., 602 F.2d 1105 (3d Cir.1979) (unsophisticated class members); Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir.1979) (large corporation with inside legal counsel); Jenkins v. District Court, 676 P.2d 1201 (Colo.1984) (lawyer must show client was advised of all pertinent facts); In re Williams, 23 A.2d 7 (Md.1941) (client was not informed of terms of fee contract); Citizens Bank v. C. & H. Constr. & Paving Co., 600 P.2d 1212 (N.M.Ct.App.1979) (sophisticated client); Jacobson v. Sassower, 489 N.E.2d 1283 (N.Y.1985) (lawyer did not explain meaning of clause concerning nonrefundable engagement retainer to client in divorce representation); Calif. R. Prof. Conduct, Rule 4-200(B)(2) (client's sophistication is relevant factor).

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

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

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

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

*Comment e. Retainer fees.*On reasonable engagement-retainer fees, see, e.g., Brickman & Cunningham, Nonrefundable Retainers Revisited, 72 N.C. L. Rev. 1 (1993); Lubet, The Rush to Remedies: Some Conceptual Questions About Nonrefundable Retainers, 73 N.C. L. Rev. 271 (1994); Brickman & Cunningham, Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law, 57 Fordham L. Rev. 149 (1988). Several courts have held that an engagement-retainer fee that is nonrefundable is unenforceable. E.g., Wong v. Kennedy, 853 F.Supp. 73 (E.D.N.Y.1994) (summary judgment for client); In re Cooperman, 633 N.E.2d 1069 (N.Y.1994) (matrimonial lawyer disciplined for routine charging of $5,000 nonrefundable retainer); Cuyahoga Cty. Bar Ass'n v. Okocha, 697 N.E.2d 594 (Ohio 1998) (lawyer disbarred; nonrefundable retainers appropriate only when used to make lawyer available or preclude lawyer from providing services to client's competitor); Wright v. Arnold, 877 P.2d 616 (Okla.Ct.App.1994) (invalidating in client's fee suit); see also, e.g., FSLIC v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.1988) (law firms' attempt to keep retainer as nonrefundable violates federal policy permitting banking agency to disaffirm contracts of insolvent bank); AFLAC, Inc. v. Williams, 444 S.E.2d 314 (Ga.1994) (“damages” clause of retainer contract providing monetary penalty in event that client prematurely terminated multiyear retainer invalid as unreasonable estimate of lawyer's damages); Jennings v. Backmeyer, 569 N.E.2d 689 (Ind.Ct.App.1991) (lawyer under nonrefundable retainer to represent client against potential criminal charges entitled to only reasonable value of services after death of client); compare, e.g., Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210 (3d Cir.1999) (million-dollar nonrefundable general-retainer agreement sustained, despite sophisticated corporate client's dismissal of firm 10 weeks later, when client known for not paying lawyers insisted on it and lawyer gave fee concessions); Bunker v. Meshbesher, 147 F.3d 691 (8th Cir.1998) (upholding nonrefundable lump-sum fee); Wright v. Arnold, 877 P.2d 616 (Okla.Ct.App.1994) (retainer may not be nonrefundable, but representations foregone by lawyer through accepting representation of client relevant to quantum meruit assessment).

The courts in *Kim Cheung Wong* and in *Cooperman* both distinguished an impermissible nonrefundable engagement-retainer fee (termed a “special retainer”) from a (permissible) nonrefundable fee paid in exchange for the lawyer's promise to be available to perform, at an agreed-upon price, any legal service that arose during a specified period and which was not made nonrefundable regardless of level of services. See 853 F.Supp. at 79-80; 633 N.E.2d at 1074; see also, e.g., Cohen v. Radio-Electronics Officers Union, 679 A.2d 1188 (N.J.1996)

(provision of retainer agreement requiring client to give 6 months' notice of termination unreasonable and unenforceable, but lawyer may recover agreed retainer compensation for 1 additional month; 3-day notice provided by client was unreasonable in circumstances). In all events, the burden is on the lawyer who drafts a contract with a client to inform the client adequately concerning the nature of the charge. E.g., Jacobson v. Sassower, 489 N.E.2d 1283 (N.Y.1985) (lawyer bears burden of making nonrefundable clause clear and explaining it to client).

*Comment f. The standard for lawyer discipline.*On the generally more stringent standards in disciplinary cases than in fee disputes, see, e.g., McKenzie Constr., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir.1985); In re Greer, 61 Wash.2d 741, 380 P.2d 482 (1963); Committee on Legal Ethics v. Coleman, 377 S.E.2d 485 (W.Va.1988). On discipline of a lawyer for claiming, but not collecting, an unreasonably large fee, see, e.g., Cal. R. Prof. Conduct, Rule 4-200(A); Dixon v. State Bar, 702 P.2d 590 (Cal.1985); Att'y Grievance Comm'n v. Kerpelman, 438 A.2d 501 (Md.1981). Cases imposing discipline when abusive lawyer behavior aggravated the overcharge include Florida Bar v. Morales, 366 So.2d 431 (Fla.1978) (lawyer intimated he would pay bribe); In re Harris, 50 N.E.2d 441 (Ill.1943) (lawyer used threat of disclosure to enlist clients); Louisiana State Bar Assoc. v. McGovern, 481 So.2d 574 (La.1986) (lawyer failed to provide services); In re Sullivan, 494 S.W.2d 329 (Mo.1973) (lawyer did not disclose that charge against client had been dropped before lawyer was retained).

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

Case Citations - by Jurisdiction

—

Ct.Fed.Cl.
N.D.Ala.
D.D.C.
D.Mass.
E.D.N.Y.
E.&S.D.N.Y.
S.D.N.Y.
S.D.Tex.

Ariz.
Colo.App.
D.C.App.
Ind.
Iowa,
Md.
Md.Spec.App.
Mass.
Mass.App.
Miss.
Miss.App.
Neb.
N.J.
N.Y.
N.D.
Okl.
Tex.
Tex.App.
Wis.

Ct.Fed.Cl.

Ct.Fed.Cl.2021. Com. (c) quot. in sup. After class counsel obtained a judgment on behalf of a class of qualified health-plan issuers in a dispute over whether class members were entitled to risk-corridor payments from the United States, class members objected to class counsel's request for compensation equaling 5% of the judgment, alleging that the lodestar method of calculating class counsel's compensation was more appropriate under the circumstances. This court granted class counsel's motion for approval of attorney's fees, holding that class counsel's requested attorney's fees were reasonable. Citing Restatement Third of the Law Governing Lawyers § 34, Comment *c*, the court explained that fees agreed to by sophisticated clients, such as class members who were given sufficient notice of class counsel's proposal to request 5% of the judgment as compensation, were invariably found to be reasonable. Health Republic Insurance Company v. United States, 156 Fed.Cl. 67, 80.

N.D.Ala.

N.D.Ala.2019. Com. (b) quot. in sup. Patent holder sued competitor, alleging that defendant's product infringed its patent. This court granted defendant's motion to disqualify plaintiff's law firm, which previously represented defendant in various small matters over the better part of a decade and continued to do so for three days after it began representing plaintiff, holding that law firm violated Rule 1.7(a) of the Alabama Rules of Professional Conduct by simultaneously representing two directly adverse clients. This court rejected law firm's argument that defendant's unilateral modification of a material contract term effectively terminated its contract with defendant, noting that, under Restatement Third of the Law Governing Lawyers § 34, it was well-settled that lawyers had duties to their clients that other contracting parties did not owe to their contracting parties, and that the duty of loyalty prevented a lawyer from treating a current client like a former client before formally ending the attorney–client relationship simply because the lawyer believed that the client breached their contractual agreement. Southern Visions, LLP v. Red Diamond, Inc., 370 F.Supp.3d 1314, 1330.

D.D.C.

D.D.C.2008. Quot. in sup., com. (g) quot. in sup. After former captive of terrorists won $9 million in damages in his two lawsuits against the Republic of Iran, which allegedly had provided material support and resources to the terrorists who kidnapped him in Lebanon and held him for 532 days, he sued the attorneys who represented him in those actions, asserting that they breached the duty of loyalty that attorneys owed to their clients by charging an unreasonable and excessive fee, and that some or all of their fee should be disgorged. Granting summary judgment for defendants, this court held that plaintiff's claim failed because plaintiff's consent to the fee agreement was free and informed, the 35% contingency fee was within the range commonly charged by other lawyers in similar representations, and neither Iran's failure to appear in the case nor plaintiff's contribution to defendants' lobbying efforts to seek legislation to satisfy plaintiff's judgment rendered the fee unreasonable. Jacobsen v. Oliver, 555 F.Supp.2d 72, 80, 84, 85.

D.Mass.

D.Mass.2001. Quot. in ftn. Former employees of a janitorial-services company and two of company's competitors sued company for violating the Racketeer Influenced and Corrupt Organizations Act (RICO). District court awarded treble damages to two plaintiffs and granted plaintiffs' motion for attorneys' fees and costs under RICO, concluding, inter alia, that there was no reason to stray from the strong presumption that the lodestar figure in this case was a reasonable attorneys' fee. To determine a reasonable hourly rate, the court examined the prevailing local hourly rate for persons with comparable skill, experience, and reputation as the persons who worked on plaintiffs' case. System Management, Inc. v. Loiselle, 154 F.Supp.2d 195, 201.

E.D.N.Y.

E.D.N.Y.1994. Com. (e) quot. in disc. (citing § 46, T.D. No. 4, 1991, which is now § 34). A client who fired the attorneys that he had hired to represent him in a criminal proceeding brought suit seeking return of all sums paid and a return of all funds that were to be escrowed. The parties had entered into a written retainer agreement that provided that plaintiff would pay defendants for all legal services rendered in connection with the litigation. The court granted plaintiff's motion for summary judgment to the extent that it declared the retainer agreement unenforceable, but it ordered a hearing to determine the reasonable value of any services defendants actually rendered on plaintiff's behalf. The court held, inter alia, that the $75,000 paid to defendants upon the execution of the retainer agreement was a special nonrefundable retainer fee agreement such as the one found invalid in a prior New York Court of Appeals case. It noted that general retainers, in which a fee was given in exchange for the attorney's availability, were still valid. Wong v. Michael Kennedy, P.C., 853 F.Supp. 73, 80.

E.&S.D.N.Y.

E.&S.D.N.Y.1991. Cit. and quot. in disc., com. (d) at 209-210 cit. generally in disc. (citing § 46, T.D. No. 4, 1991, which is now § 34). Personal injury settlement trust beneficiaries sought settlement revisions. The court entered final judgment approving settlement, holding, inter alia, that it would not disapprove settlement on ground that attorneys' fees provision for 25% of claimants' recovery was unreasonable, noting that 25% would not be paid out of settlement fund, depleting the res, but out of claimants' award. In re Joint Eastern & Southern Dist. Asbestos Lit., 129 B.R. 710, 864, 865, vacated 982 F.2d 721 (2d Cir.1992).

S.D.N.Y.

S.D.N.Y.1998. Coms. (a) and (c) cit. in ftn., com. (e) cit. in disc. (citing § 46, Prop. Final Draft No. 1, 1996, which is now § 34). Attorney sued corporate client for breach of a three-year retainer agreement when defendant terminated the contract 14 months after its execution. Defendant moved to dismiss on the ground that the agreement violated New York public policy because, if enforced, plaintiff would recover payment for services he would never render. Denying the motion, the court held, in part, that the agreement at issue was a general retainer agreement, rather

than a special retainer agreement, and that general agreements did not limit attorneys to recovery in quantum meruit; to the contrary, where general retainer agreements were involved, the attorney was entitled to claim the total contract price. Kelly v. MD Buyline, Inc., 2 F.Supp.2d 420, 448, 451.

S.D.Tex.

S.D.Tex.2008. Cit. in sup., com. (c) quot. in sup. Lead counsel for plaintiffs moved for an award of attorney's fees in the amount of approximately $688 million, or 9.52% of the total recovery of approximately $7.2 billion achieved in the settlements of a securities class action against multiple defendants, pursuant to and in accordance with a fee agreement negotiated with lead plaintiff at the outset of the litigation. Granting lead counsel's motion, this court held, as a matter of law, that the 9.52% fee in the ex ante agreement was fair and reasonable and should be enforced under the Private Securities Litigation Reform Act. The court reasoned, in part, that lead counsel negotiated the agreement at arm's length with lead plaintiff, a highly sophisticated investor with a substantial stake in the litigation and a strong motivation to maximize the recovery of the class, and that the 9.52 percentage was lower than that awarded in most securities class actions. In re Enron Corp. Securities, Derivative & ERISA Litigation, 586 F.Supp.2d 732, 747, 748.

Ariz.

Ariz.2002. Com. (e) quot. in ftn. Attorney's client filed a complaint with the state bar, alleging that attorney charged an unreasonably high fee. Supreme court disciplinary commission affirmed hearing officer's recommendation of censure and increased the amount of restitution awarded. This court vacated and remanded for arbitration, holding, inter alia, that the state bar should not have begun formal disciplinary proceedings against attorney until arbitration of the fee dispute had concluded. Although hearing officer considered the eight factors listed under state ethics rule 1.5 and noted that attorney charged a nonrefundable fixed fee, she erred in not discussing the appropriateness of the nonrefundable flat fee in light of the negotiated risk involved and the type of legal services provided. In re Connelly, 203 Ariz. 413, 55 P.3d 756, 762.

Colo.App.

Colo.App.2010. Coms. (b) and (c) quot. in sup., Rptr's Note cit. in sup. Client sued law firm that represented her in collecting a judgment that she had obtained with the help of another attorney, alleging that firm's contingent fee was unreasonable and excessive. After a bench trial, the trial court found in favor of client. Affirming, this court held, inter alia, that the trial court, in determining the agreement's enforceability, did not err in taking into consideration events that occurred after the parties entered into the agreement. The court noted that the risk to client and firm of nonrecovery against the judgment debtor was not substantial, that the agreed-upon fee percentage was not within the range commonly charged by other lawyers in similar representations, and that the size and fact of client's recovery ultimately had little to do with firms' efforts. Berra v. Springer and Steinberg, P.C., 251 P.3d 567, 571, 573.

D.C.App.

D.C.App.2009. Com. (e) quot. in disc. In disciplinary proceedings, attorney was charged with violating various rules of professional conduct after he commingled with his own funds a “flat fee” paid by a client in advance for legal services. Adopting the board on professional responsibility's recommendation that attorney be sanctioned with a public censure, this court held, as a matter of first impression, that when an attorney received payment of a flat fee at the outset of a representation, the payment was an advance of unearned fees that was to be treated as property of the client until earned unless the client consented to a different arrangement. The court noted that a flat fee, which embraced all work to be done, was different from an engagement retainer, which was a fee paid, apart from any other compensation, to ensure that a lawyer would be available for a client if required, and, while

potentially refundable in part if the lawyer withdrew or was discharged prematurely, was earned when received. In re Mance, 980 A.2d 1196, 1202.

Ind.

Ind.2010. Quot. in diss. op. In a paternity and custody dispute between father and mother regarding their daughter, daughter's guardian ad litem submitted a request for guardian ad litem fees totaling $34,800. The trial court reduced the fees to $20,000, finding that the amount of fees requested was unreasonable. The court of appeals vacated in part and remanded. Vacating the court of appeals, reversing the judgment of the trial court, and remanding, this court held that the trial court erred by failing to enforce the terms of the written agreements father and mother entered into with guardian ad litem, which set forth hourly rates and other matters. The dissent argued that, even if the agreed-upon hourly rate was reasonable, a fee agreement was not a blank check for an attorney to fill in the amount of services rendered irrespective of the need for services. In re Paternity of N.L.P., 926 N.E.2d 20, 26.

Iowa,

Iowa, 2020. Com. (c) quot. in sup. Law firm filed a petition to enforce a contingency-fee contract against client who hired it to represent him after he was critically injured in a severe car accident with a city bus, alleging that, after client agreed to a settlement with city during mediation, he failed to pay law firm the one-third contingency fee provided for in the contract. The trial court granted summary judgment for law firm. Affirming, this court held that the fee at issue was reasonable at the time of its inception, and declined to reevaluate the fee from a position of hindsight. The court noted that, under Restatement Third of the Law Governing Lawyers § 34, contingency-fee agreements allotted to the attorney the risk that the case would require much time and produce no recovery, and allotted to the client the risk that the case would require little time and produce a substantial fee. Munger, Reinschmidt & Denne, L.L.P. v. Lienhard Plante, 940 N.W.2d 361, 366.

Md.

Md.2012. Sec. and com. (e) quot. in sup. State attorney-grievance commission filed a petition for disciplinary action against attorney, charging attorney with professional misconduct for, among other things, collecting excessive fees from a client. The trial court found that attorney committed numerous violations of the Maryland Rules of Professional Conduct (MLRPC). Affirming, and disbarring attorney, this court held, inter alia, that attorney violated the MLRPC when she did scant work to justify over $11,000 that she billed client, including a $7,000 "engagement fee." The court explained that, while an engagement fee could be utilized by an attorney if she performed a service or provided a benefit to the client in exchange for the fee, the benefit provided here to client was nothing more than the ethical obligation imposed on all lawyers when they agreed to provide legal services to a client.; attorney did not file any pleadings, did not attend any hearings, and did not obtain any results for client. Attorney Grievance Com'n of Maryland v. Stinson, 428 Md. 147, 50 A.3d 1222, 1243.

Md.Spec.App.

Md.Spec.App.2001. Cit. in ftn. but dist. (citing § 46, Proposed Final Draft No. 1, 1996, which is now § 34 of the Official Draft). Attorneys sued former clients for over $4.8 million in attorneys' fees for representing clients in U.S. Tax Court. Affirming a trial court judgment for clients, this court stated that the parties' reverse-contingency-fee agreement was unfair and unreasonable in light of attorneys' dominance over clients. Brown & Sturm v. Frederick Road Ltd. Partnership, 137 Md.App. 150, 768 A.2d 62, 75.

Mass.

Mass.1996. Com. (f) quot. in disc. (citing § 46, P.F.D. No. 1, 1996, which is now § 34). After attorney charged client $50,000 to represent him on a charge of driving while intoxicated, bar counsel served attorney with a petition for discipline, alleging that the fee was excessive. The board of bar overseers dismissed the petition. Ordering that public censure be entered in the county court, this court held that a fee of $50,000 was clearly unreasonable and excessive where, among other things, the theories and issues involved in client's case were not particularly novel, and expert testimony established that the fee customarily charged by other local lawyers for similar services was approximately $10,000. Matter of Fordham, 423 Mass. 481, 668 N.E.2d 816, 822, certiorari denied 519 U.S. 1149, 117 S.Ct. 1082, 137 L.Ed.2d 216 (1997).

Mass.App.

Mass.App.2003. Com. (c) cit. in ftn. Insurer brought suit for a declaratory judgment that it was not liable under lawyers' professional liability insurance policy to defend or indemnify insured lawyer for any amounts he was required to pay in connection with underlying action against him for fraudulent billing. Affirming the trial court's entry of judgment for insurer, this court held that the billing function of a lawyer was not a professional service covered by the professional liability policy, and thus insurer was not liable. Reliance Nat. Ins. Co. v. Sears, Roebuck & Co., Inc., 58 Mass.App.Ct. 645, 648, 792 N.E.2d 145, 148.

Mass.App.1998. Com. (b) cit. in disc. and quot. in case quot. in sup. (citing § 46, T.D. No. 4, 1991, and P.F.D. No. 1, 1996, which is now § 34). Attorney's law firm brought a contract action against client to recover attorney's fees for services rendered in connection with a modification of a divorce judgment. The trial court held that the most that plaintiff could charge under the contract was $150 per hour and that defendant was not obligated to pay for services rendered by other members of the firm. Affirming and remanding, this court held, inter alia, that the $150-per-hour fee set in the letter establishing the terms of representation was the appropriate measure of compensation. The court said that, in setting fees, lawyers were fiduciaries who owed their clients greater duties than were owed under the general law of contracts. Garnick & Scudder, P.C. v. Dolinsky, 45 Mass.App.Ct. 925, 926, 701 N.E.2d 357, 358.

Mass.App.1991. Com. (b) quot. in disc. (citing § 46, T.D. No. 4, 1991, which is now § 34). A law firm sued its client to recover a performance premium, alleging that it was part of a fair and reasonable fee. The trial court granted summary judgment for the client, holding that the law firm could not charge the premium. Affirming, this court held, inter alia, that, although the firm had in the past charged clients a premium, their subjective and unexpressed expectations could not refute the expressed manifestations, based on the previous billing pattern and a letter from the firm to the client confirming a time charge fee arrangement, to charge on the basis of time only. Beatty v. NP Corp., 31 Mass.App.Ct. 606, 581 N.E.2d 1311, 1315.

Miss.

Miss.1992. Com. (d) cit. in sup. (citing § 46, T.D. No. 4, 1991, which is now § 34). Attorney sued former client to recover contingency fee under an employment contract relating to imposition of a constructive trust on client's stepmother's estate; client counterclaimed, alleging malpractice, fraud, and breach of fiduciary duty. The chancery court dismissed the counterclaims and awarded attorney his fee. Reversing in part, this court held that the parties' clear and unambiguous agreement entitled attorney only to 25% of what he gained for client over and above what she would have received had she not prevailed, not to 25% of her entire estate, and that he breached his duty of loyalty by overreaching and misinterpreting the amount of the fee and failing to tell client of his adverse interest regarding the fee, thus justifying her discharge of him and rendering the fee agreement unenforceable. However, given the uncertainty of Mississippi law regarding what property an attorney may retain and charge, attorney did not breach his duty of loyalty by demanding payment in kind and by asserting ownership in client's property. The court remanded in part for chancery court to determine a reasonable fee for attorney's work. Tyson v. Moore, 613 So.2d 817, 825.

Miss.App.

Miss.App.2019. Quot. in sup., com. (a) cit. and quot. in sup., coms. (b) and (c) quot. in sup. Estate of attorney sued estate of client, seeking to recover under a contract in which attorney agreed to provide estate-planning and estate-administration services to client in exchange for payment of $265,000 from client's estate upon client's death. After a hearing, the trial court found that the contract was cancelled due to impossibility of performance arising from the fact that attorney died before client did, and concluded that attorney's estate was entitled to collect fees from client's estate on a quantum meruit basis in the amount of $9,000 for approximately 36 hours of work that attorney was actually proven to have performed for client. Affirming, this court held, among other things, that the fee provided for the contract was invalid and unenforceable under Restatement Third of the Law Governing Lawyers § 34, because the amount due was unreasonable and excessive relative to the amount of services that attorney actually provided to client. Estate of Burford v. Freeman, 281 So.3d 942, 950-952.

Neb.

Neb.2007. Com. (c) quot. in conc. op. and cit. in ftn. to conc. op. Law firm sued former client to enforce an attorney lien. The trial court granted summary judgment for firm. Reversing and remanding, this court held that a genuine issue of material fact existed as to whether the claimed fee, computed pursuant to the contingent-fee agreement, was reasonable. The concurring justice, writing separately to discuss the parties' respective evidentiary burdens, explained that once a lawyer had established a prima facie case that the fee was reasonable, judgment as a matter of law was precluded only if the client produced specific evidence on factors relevant to the fee's reasonableness, thereby shifting the burden of proof back to the lawyer on the issue. Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Turco, 273 Neb. 924, 934, 735 N.W.2d 368, 376.

N.J.

N.J.1996. Cit. in disc., com. (e) quot. in disc. (citing § 46, P.F.D. No. 1, 1996, which is now § 34). Discharged attorney sued client to recover fees allegedly owed under the parties' retainer agreement. Client argued that the agreement, which required client to provide attorney with six months' notice of termination, was unenforceable as an unreasonable restriction of its right to discharge counsel. The trial court entered judgment for attorney, but the intermediate appellate court reversed and remanded. Affirming as modified, this court held that fair and reasonable attorney-client agreements, though usually construed against the attorney, were enforceable where they satisfied both general contracts and professional ethics requirements; that, while attorneys and clients were free to negotiate such innovative arrangements as the engagement retainer, the notice provision here was excessive; and that attorney could recover the fair value of his pretermination services. Cohen v. ROU, 146 N.J. 140, 679 A.2d 1188, 1196, 1198.

N.Y.

N.Y.2014. Com. (c) quot. in sup. After wife settled the estate-administration proceedings for her husband for twice the amount expected, she brought an action against law firm that represented her in the proceedings, contesting the contingent-fee contract, among other things. The surrogate's court found that the 40% contingent fee was too high and lowered the amount plaintiff had to pay, and the court of appeals reversed in part and remanded for the surrogate's court to apply the original hourly-fee agreement. Reversing and remitting, this court held, inter alia, that the contingency-fee retainer agreement should be enforced because it was not procedurally or substantively unconscionable. Citing Restatement Third of the Law Governing Lawyers § 34, the court explained that defendant took a risk entering into a contingent-fee contract, and events that were within the range of risks, such as a high recovery, did not make the contract unreasonable. In re Lawrence, 24 N.Y.3d 320, 341, 998 N.Y.S.2d 698, 712, 23 N.E.3d 965, 979.

N.D.

N.D.2006. Com. (b) cit. in sup. After relative of deceased hired attorney to administer deceased's estate, heir initiated disciplinary proceedings against attorney for charging excessive fees to estate, thereby reducing her inheritance. The hearing panel found that attorney violated the North Dakota Rules of Professional Conduct and recommended that he be reprimanded and pay costs. Adopting the recommendation as modified, this court held, inter alia, that attorney violated the Rules by charging an excessive amount of hours for a simple administration of a cash estate, as well as a higher than average hourly rate, which was counterintuitive, given attorney's acknowledged unfamiliarity with North Dakota probate law; while the court acknowledged that attorneys' fees were generally subject to freedom-of-contract principles, it stated that attorneys owed clients greater duties than were owed under general contract law. In re Disciplinary Action Against Hellerud, 2006 ND 105, 714 N.W.2d 38, 42.

Okl.

Okl.2004. Com. (c) cit. in ftn. to conc. op., com. (f) quot. in part in ftn. to conc. op. State bar association filed a disciplinary complaint against attorney, alleging that attorney charged an unreasonable fee to a client. This court dismissed the complaint, holding that bar association failed to meet its burden of proof that attorney charged an unreasonable fee. The court said that there was no evidence of impropriety when client agreed to pay a contingency fee in a will-probate case after rejecting payment of a retainer and hourly fee. The concurring opinion argued that a fee dispute was not a ground for imposition of professional discipline absent some proof of culpability, such as deceit or fraud, associated with the fee's exaction. State ex rel. Oklahoma Bar Ass'n v. Flaniken, 85 P.3d 824, 828.

Tex.

Tex.2006. Cit. in ftn. to diss. op. §§ 34-35; com. (c) quot. in ftn. to diss. op. Discharged law firm sued former client, seeking payment under a fee agreement. The trial court entered judgment on a jury verdict for law firm. The court of appeals reversed. Affirming that portion of the decision, this court held, inter alia, that a provision of the agreement requiring client to pay law firm a percentage based on the value of client's underlying claim at the time of discharge, rather than on client's actual recovery, was unconscionable as a matter of law. The dissent argued that whether the agreement was unconscionable should have been determined by the parties' initial expectations and the actual consequences, rather than on the possibility that law firm's fee could equal or exceed client's recovery, which was unlikely and, in fact, did not occur. Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 570, 572.

Tex.2001. Com. (c) quot. in conc. op. Law firm, whose contingent-fee agreement with clients was for one-third of "any amount received by settlement or recovery" of clients' award against their mortgagor, sued clients for attorneys' fee after clients' award was offset by mortgagors' counterclaim. The trial court granted law firm summary judgment, and appellate court affirmed. Reversing, this court held that contingent-fee agreement entitled firm to net amount of clients' recovery, which was computed after any offset. Concurrence asserted that whether a contingent fee should be based on net or gross recovery depended on the circumstances. Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 97.

Tex.2000. Cit. in conc. and diss. op. (citing § 47, Prop. Final Draft No. 1, 1996, which is now § 35). Clients sued attorneys for, inter alia, breach of contract in connection with attorneys' collection of an additional 5% in fees following settlement in clients' wrongful-death suit against third party. The trial court entered summary judgment for attorneys, but the intermediate appellate court reversed. Reversing, this court held, in part, that attorneys were entitled to the additional fees provided for in the fee agreement when the wrongful-death judgment was "appealed to a higher court," or, in other words, when defendant in that action filed a cash deposit with the appellate court. Concurring and dissenting opinion believed that the contingent-fee agreement should be construed against attorneys/drafters, and that the term "appealed to a higher court," as used therein, was ambiguous and could reasonably be interpreted to mean something more than the initial step taken by defendant to preserve its appellate rights. Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 867.

Tex.App.

Tex.App.2004. Coms. (a) and (e) cit. in disc. After former client discharged law firm, hired new counsel, and settled his claims for $900,000, law firm sued former client to collect contingent fee of over $1.7 million. The trial court entered judgment on a jury verdict awarding law firm $900,000 in damages plus attorneys' fees. Reversing and rendering a take-nothing judgment, this court held that the fee charged by law firm was unconscionable as a matter of law. The court said that, because the fee charged was not based on the value of the work performed or tied to former client's actual recovery, allowing law firm to collect a fee equaling 63%-100% of its former client's recovery would violate public policy by penalizing client for discharging the firm. Walton v. Hoover, Bax & Slovacek, L.L.P., 149 S.W.3d 834, 845, vacated 2007 WL 416694 (Tex.App. El Paso 2007).

Wis.

Wis.2004. Com. (b) quot. in ftn. to conc. and diss. op. (citing § 46, T.D. No. 4, 1991, which is now § 34 of the Official Draft). Law firm brought action against former client and guarantor to enforce retainer letter and guaranty to collect legal fees and retroactive interest. Trial court entered judgment for law firm, and court of appeals affirmed in part and reversed in part. Affirming in part, this court held, inter alia, that award of retroactive interest was proper. The concurring and dissenting opinion disagreed regarding retroactive interest, arguing that retainer letter in which the interest terms were stated was ambiguous, and, as a general rule, contractual ambiguities were to be construed against the drafter. DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Limited Partnership, 273 Wis.2d 577, 682 N.W.2d 839, 853-854.

Restatement (Third) of the Law Governing Lawyers § 35 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 35 Contingent-Fee Arrangements

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

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

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

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

Comment:

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

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

b. *Rationale.* Contingent-fee arrangements perform three valuable functions. First, they enable persons who could not otherwise afford counsel to assert their rights, paying their lawyers only if the assertion succeeds. Second,

contingent fees give lawyers an additional incentive to seek their clients' success and to encourage only those clients with claims having a substantial likelihood of succeeding. Third, such fees enable a client to share the risk of losing with a lawyer, who is usually better able to assess the risk and to bear it by undertaking similar arrangements in other cases (cf. Restatement Second, Agency § 445).

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

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

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

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

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

Illustration:

1. Client seeks Lawyer's help in collecting life-insurance benefits under a $15,000 policy on Client's spouse and agrees to pay a one-third contingent fee. There is no reasonable ground to contest that the benefits are due, the claim has not been contested by the insurer, and when Lawyer presents it the insurer pays without dispute. The $5,000 fee provided by the client-lawyer contract is not reasonable.

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

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

Illustrations:

2. Client agrees to pay Lawyer "35 percent of the recovery" in a suit. The court awards Client $20,000 in damages, $500 in costs for disbursements, and $1,000 in attorney fees because of the defendant's discovery abuses. Lawyer is entitled to receive a contingent fee of $7,000 (35% of $20,000), but not 35 percent of the costs' payments. If Lawyer advanced the $500 costs in question, Client must reimburse Lawyer unless their contract validly provides to the contrary (see § 38, Comment *e*). Whether Lawyer is entitled to recover a portion of the $1,000 attorney-fee award requires both interpretation of the fee contract and consideration of the nature of the fee-shifting award (see § 38(3)(b) & Comment *f* thereto).

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

e. Contingent fees in structured settlements. Under "structured settlements" and some legislation, a claimant will receive regular payments over the claimant's lifetime or some other period rather than receiving a lump sum. If so, under the rule of this Section the lawyer is entitled to receive the stated share of each such payment if and when it is made to the client or (when so provided) for the client's benefit, unless the client-lawyer contract

provides otherwise. When a contingent-fee contract provides that the fee is to be paid at once if there is a structured settlement and provides no other method of calculation, the fee should be calculated only on the present value of the settlement.

Illustration:

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

f(i). Contingent fees in criminal cases—defense counsel. Contingent fees for defending criminal cases have traditionally been prohibited. The prohibition applies only to representations in a criminal proceeding. It does not forbid a contingent fee for legal work that forestalls a criminal proceeding or work that partly relates to a criminal matter and partly to a noncriminal matter. A lawyer may thus contract for a contingent fee to persuade an administrative agency to terminate an investigation that might have led to civil as well as criminal proceedings or to bring a police-brutality damages suit in which the settlement includes dismissal of criminal charges against the plaintiff.

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

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

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

When either of the two policies supporting the prohibition is inapplicable, the Section should not apply. If, for example, a divorce or custody order has already been finally approved when the fee contract is entered into, there can be little concern that a contingent fee based on the size of the property settlement or child-support payments will discourage reconciliation or custody compromises. (On limitations on post-inception fee contracts, see § 18(1)(a).) In such a situation, the fee is not contingent upon the securing of a divorce or custody order, and this Section does not apply, just as it does not apply to a contingent fee in a property dispute between nondivorcing or already divorced spouses. The prohibition would, however, apply to a contract with a client who is then married that provides for a fee contingent on the amount of the alimony, property disposition, or child-support award but that does not explicitly condition the fee on the grant of a divorce.

Reporter's Note

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

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

Contingency fees may not be used when the lawyer bears little risk of nonpayment and the fee is otherwise unreasonable in amount when measured on a noncontingent basis, e.g., Redevelopment Comm'n v. Hyder, 201 S.E.2d 236 (N.C.Ct.App.1973); In re Hanna, 362 S.E.2d 632 (S.C.1987); Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107 (W.Va.1986), the client is not offered alternative fee arrangements, see In re Reisdorf, 403 A.2d 873 (N.J.1979); Wis. Stat. Ann. § 655.013(2), the fee percentage is high, see Int'l Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255, 1277-78 (8th Cir.1980); 1 S. Speiser, Attorneys' Fees 93-94 (1973), or the base does not fairly measure the lawyer's work, e.g., In re Mercer, 614 P.2d 816 (Ariz.1980) (item of recovery for which lawyer did no work); People v. Nutt, 696 P.2d 242 (Colo.1984) (client's royalties). See generally Brickman, Contingent Fees Without Contingencies: *Hamlet* Without the Prince of Denmark?, 37 UCLA L. Rev. 29 (1989); cf. ABA Model Rules of Professional Conduct, Rule 1.5 Comment ¶ [5] (1983) ("… When there is doubt whether a contingent fee is consistent with the client's best interests, the lawyer should offer the client alternative bases for the fee and explain their implications…."); see also ABA Formal Op. 94-389 (1994) (permissible to charge and collect contingent fee on portion of claim that was not in dispute if overall amount of fee is reasonable in circumstances); Rohan v. Rosenblatt, 1999 WL 643501 (Conn.Super.Ct.1999) (in client's suit for excessive fee, entire fee ordered returned where lawyer charged 1/3 contingent fee after forecasting "horrendous" litigation but then obtaining, with minimal effort, entire proceeds due on life-insurance policy on client's wife).

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

Contingent-fee contracts are most commonly used when representing claimants. If reasonable and entered into by a fully informed client, such a contract may also be appropriate when defending a client against a civil claim. See

C. Wolfram, Modern Legal Ethics § 9.4.2, at 533 (1986), and authority cited; Comment, Toward a Valid Defense Contingent Fee Contract: A Comparative Analysis, 67 Iowa L. Rev. 350 (1982); ABA Formal Opin. 93-373 (1993).

*Comment d. Reasonable rate and basis of a contingent fee.*For the principle that, unless the contract clearly states otherwise, a lawyer is entitled to a contingent fee only when the client's judgment is paid, see, e.g., Byrd v. Clark, 153 S.E. 737 (Ga.1930); Cox v. Cooper, 510 S.W.2d 530, 538 (Ky.1974); 1 S. Speiser, Attorneys' Fees § 2:14 (1973). Illustration 3 is supported by Lowe v. Pate Stevedoring Co., 595 F.2d 256 (5th Cir.1979); Russo v. State of New York, 515 F.Supp. 470 (S.D.N.Y.1981). Contra, Aetna Casualty & Surety Co. v. Taff, 502 S.W.2d 903 (Tex.Civ.App.1973). For Illustration 4, see N.J. Rule 1.21-7 (percentage calculated on net sum recovered after deducting disbursements).

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

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

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

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

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

are, however, improper under the law of most American jurisdictions. See C. Wolfram, Modern Legal Ethics § 9.4.4. (1986).

There is some support for contingent fees when a divorce has already been obtained and the only dispute is financial. E.g., Salter v. St. Jean, 170 So.2d 94 (Fla.Dist.Ct.App.1964); Roberds v. Sweitzer, 733 S.W.2d 444 (Mo.1987); Ill. R. Prof. Conduct, Rule 1.5(d); Ky. R. Prof. Conduct, Rule 1.5(d); S. Car. R. Prof. Conduct, Rule 1.5(d); Wis. R. Prof. Conduct, Rule 1.5(d) (past-due support payments). Contra, e.g., ABA Model Rule 1.5(d)(1); Meyers v. Handlon, 479 N.E.2d 106 (Ind.Ct.App.1985). Some courts allow such fees when the fee contract and lawsuit are limited to the financial dispute, although the client is simultaneously seeking a divorce. Olivier v. Doga, 384 So.2d 330 (La.1979); Burns v. Stewart, 188 N.W.2d 760 (Minn.1971); In re Cooper, 344 S.E.2d 27 (N.C.Ct.App.1986); cf. Krieger v. Bulpitt, 251 P.2d 673 (Cal.1953) (defendant in divorce suit may contract to pay contingent fee based on property defendant preserves, since lawyer has no incentive to discourage reconciliation).

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

Case Citations - by Jurisdiction

—

C.A.7,
C.A.9,
D.D.C.
D.Me.
D.N.M.
N.D.Ohio
N.D.Tex.
S.D.Tex.
Alaska,
Cal.App.
Colo.
Colo.App.
Ind.
Ind.App.
Iowa,
Me.
Mass.
Mich.App.
Mont.
Nev.
N.Y.Sup.Ct.
Tex.

Tex.App.

C.A.7,

C.A.7, 2013. Subsec. (2) quot. in sup. After former employee, acting without the aid of legal representation, reached a $1.3 million settlement of his lawsuit alleging retaliation for whistleblowing against former employer, he moved to quash a lien for unpaid fees that his former attorney, who had briefly represented him during settlement negotiations prior to the filing of the lawsuit, had filed on any settlement or judgment that was recovered resulting from his claims. The district court granted employee's motion to quash. Affirming, this court held that attorney was not entitled to an equitable lien on employee's settlement funds. While attorney had previously obtained a settlement offer for employee from employer in the amount of $375,000, employee had rejected that offer, and, thus, because it was a fundamental principle of contract law that there was no contract (and no settlement) without both offer and acceptance, employer's offer, alone, in no way "secured" funds for employee, and thus no funds were "secured" by attorney, as required in order for a lien to be properly asserted under the retainer agreement. The court noted that attorney did not take employee even as far as an agreement, and yet he unreasonably claimed a right to a fee based on having obtained an unacceptable offer. Goyal v. Gas Technology Institute, 718 F.3d 713, 719.

C.A.9,

C.A.9, 2012. Cit. in sup. Consumers, on behalf of themselves and a nationwide class, brought federal antitrust claims against providers of bar-preparation courses. After the parties reached a settlement in which defendants agreed to pay $49 million into a settlement fund that would be allocated pro rata to class members, with 25% of the fund set aside for attorney's fees, the district court found that class counsel was not entitled to any attorney's fees from the fund for its representation of the class, because it had entered into "incentive agreements" with certain class representatives that gave rise to a conflict of interest between the class representatives and other members of the class. Affirming, this court held that, under long-standing equitable principles, a district court had broad discretion to deny fees to an attorney who committed an ethical violation, and the representation of clients with conflicting interests and without informed consent was a particularly egregious ethical violation that could be a proper basis for complete denial of fees. Rodriguez v. Disner, 688 F.3d 645, 655.

D.D.C.

D.D.C.2008. Cit. in sup., com. (c) cit. and quot. in disc. and sup. After former captive of terrorists won $9 million in damages in his two lawsuits against the Republic of Iran, which allegedly had provided material support and resources to the terrorists who kidnapped him in Lebanon and held him for 532 days, he sued the attorneys who represented him in those actions, asserting that they breached the duty of loyalty that attorneys owed to their clients by charging an unreasonable and excessive fee, and that some or all of their fee should be disgorged. Granting summary judgment for defendants, this court held that plaintiff's claim failed because plaintiff's consent to the fee agreement was free and informed, the 35% contingency fee was within the range commonly charged by other lawyers in similar representations, and neither Iran's failure to appear in the case nor plaintiff's contribution to defendants' lobbying efforts to seek legislation to satisfy plaintiff's judgment rendered the fee unreasonable. Jacobsen v. Oliver, 555 F.Supp.2d 72, 84, 86, 87.

D.D.C.2006. Cit. in sup., com. (c) quot. in sup., illus. 2 cit. in sup. Former client sued law firm that represented him in obtaining a default judgment against Iran that eventually, after new legislation was passed, enabled him to recover nine million dollars in damages, alleging, in part, that law firm's 35% contingent fee was unreasonable and excessive. This court denied defendants' motion for summary judgment as to that issue without prejudice, and directed the parties to engage in settlement discussions. The court observed that the reasonableness of fees was generally addressed in terms of risk, and pointed out that when the action was commenced, law firm apparently faced numerous challenges, as well as a consistently and invariably high risk of nonpayment, until the new legislation was passed. Jacobsen v. Oliver, 451 F.Supp.2d 181, 200, 201.

D.Me.

D.Me.2011. Com. (c) quot. in ftn. After claimant successfully challenged Commissioner of Social Security's denial of her claim for disability benefits, Commissioner objected to her motion for attorney's fees under her contingent-fee agreement with law firm, arguing that the requested fee would result in firm being compensated according to an unreasonable hourly rate, given that only 4.7 of the 30.15 hours that firm spent on her case were performed by an attorney. This court declined to adopt the magistrate's recommendation that firm be awarded a lesser amount, holding that the fee was not too large, despite the significant role of firm's paralegal in reversing the denial of claimant's benefits. The court noted, among other things, that firm had to receive more than its ordinary billing rates for contingent-fee cases that it won, to offset the time and expenditures on those where it lost and received no reimbursement. Siraco v. Astrue, 806 F.Supp.2d 272, 277.

D.N.M.

D.N.M.2008. Com. (b) cit. in sup. Former employee, who was represented by attorneys licensed to practice law in Texas and admitted in New Mexico pro hac vice, sued former employer, alleging violations of federal law. This court granted defendant's motion to revoke attorneys' pro hac vice admission, holding that attorneys violated the New Mexico Rules of Professional Conduct by cosigning an $86,400 loan to subsidize plaintiff's living expenses; while contingent fees and advancement of litigation expenses were permitted as exceptions to the general rule prohibiting financial assistance to clients, despite their potential to create conflicts of interest, to ensure access to the courts, there was no indication in this case that the $86,400 loan was necessary to allow plaintiff access to the courts. Rubio v. BNSF Railway Co., 548 F.Supp.2d 1220, 1224.

N.D.Ohio

N.D.Ohio, 2003. Com. (c) quot. in sup. and in ftn., com. (c), illus. 1 cit. in sup. Issuing order regarding contingent-fee agreements between plaintiff class members and their attorneys, the district court held that any contingent-fee agreement between an attorney and a plaintiff class member entered into after the date when a settlement agreement was announced was unethical, impermissible, and unenforceable. In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation, 290 F.Supp.2d 840, 851.

N.D.Tex.

N.D.Tex.2011. Quot. in sup. Attorneys sued former clients, after clients challenged the validity of, and amount owed under, the parties' 30% contingency fee agreement. This court held that attorneys' fee had to be reduced to reflect the more than $7.5 million that clients were required to pay their opponents as part of a global settlement of the underlying action. The court reasoned that the agreement's use of the term "gross affirmative recovery" was ambiguous and had to be construed against attorneys as the drafters, and that this finding was in keeping with the principal that a contingent fee based on "any amount received" had to be calculated only on a client's net recovery. Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron and Blue, 843 F.Supp.2d 673, 683.

S.D.Tex.

S.D.Tex.2007. Cit. in case cit. but dist. Attorney who had negotiated a prepetition settlement of his client's suit against Chapter 11 debtor and who claimed as his contingency fee a 50% interest in a mortgage securing debtor's promise to pay reached a proposed compromise of his fee claim with bankruptcy trustee who had filed an adversary proceeding against attorney and client to avoid the mortgage as a preference or fraudulent transfer. The bankruptcy court denied trustee's application to compromise, objected to by debtor. Reversing and remanding, this court held, inter alia, that attorney was vested with an equitable ownership interest in the mortgage at the time trustee applied for the compromise, since the contingency that vested attorney with his interest occurred when client's case was

settled. The court noted that a client was not required to obtain a monetary recovery before his lawyer could be paid; in this case, the fee contract extended to "intangible rights" such as a mortgage. In re Dykeswill, Ltd., 365 B.R. 683, 689, affirmed 261 Fed.Appx. 795 (5th Cir.2008).

Alaska,

Alaska, 2014. Subsec. (1) quot. in ftn. Client sued attorney who represented him in underlying litigation to recover remediation costs for his mobile-home park, alleging that attorney breached the parties' agreement to release client from paying further fees and costs when he took his fees off the top of gross recoveries. After the jury returned a verdict that attorney did not breach the agreement, the trial court entered judgment for attorney. Affirming, this court held that, while the wording of the agreement that client would "owe nothing more" and further work would be "charged to" owner of an option to purchase client's mobile-home park was ambiguous, the jury had an evidentiary basis for accepting attorney's interpretation that the language merely shifted the billing to option owner. The court, however, rejected attorney's alternative argument that client was not paying contingency fees because attorney was collecting fees directly from the insurer-defendants in the underlying litigation, noting that this argument was incorrect as a matter of law because, as provided by Restatement Third of the Law Governing Lawyers § 35, clients contracted with attorneys to pay contingency fees, and recoveries were held in trust for the client and paid to the attorney out of the client's trust fund. Zamarello v. Reges, 321 P.3d 387, 395.

Cal.App.

Cal.App.2021. Com. (a) quot. in sup. Attorney who formerly worked for employer as its in-house counsel filed claims for breach of an oral promise and promissory fraud against employer and its founder, alleging that defendants breached a verbal agreement to pay him a bonus and a share of the recovery from certain litigation. After a jury returned a special verdict finding employer liable on both claims, the trial court granted judgment notwithstanding the verdict for employer on attorney's promissory-fraud claim. This court reversed in part and remanded, holding that the oral agreement at issue was a contingency-fee agreement that was unenforceable as a matter of state law because it was not in writing. The court cited Restatement Third of the Law Governing Lawyers § 35 in explaining that a contingency-fee contract was one providing for a fee the size or payment of which was conditioned on some measure of the client's success. Missakian v. Amusement Industry, Inc., 285 Cal.Rptr.3d 23, 32.

Cal.App.2010. Com. (a) quot. in sup. Attorney who specialized in taxation matters and complex business transactions sued clients, seeking to recover his fees from them under his service contracts, which combined fixed monthly payments with a variable success fee. Clients moved for summary adjudication on attorney's claim, maintaining that the contracts were void for want of the statutorily required statement that the success fees were "not set by law but [were] negotiable between attorney and client." The trial court denied clients' summary-adjudication motion. Granting clients' petition for writ of mandate, this court held, as a matter of first impression, that hybrid fee arrangements of the type established in attorney's service contracts were contingency fee agreements subject to the statutory requirements. Arnall v. Superior Court, 190 Cal.App.4th 360, 370, 118 Cal.Rptr.3d 379, 386.

Colo.

Colo.2012. Com. (b) cit. in sup. Consumer sued debt collector in county court, alleging violations of the state's Fair Debt Collection Practices Act. On remand, the county court found in favor of consumer. Affirming in part, this court held that the payment of consumer's appellate counsel fees by consumer's trial attorney was within the ambit of an exception, for litigation expenses, to the rule prohibiting lawyers from providing financial assistance to clients. The court noted that litigation expenses were virtually indistinguishable from contingent fees, and that contingent fees and advancement of litigation expenses were both permitted, because, despite their potential to

create conflicts of interest, they ensured access to the courts. Mercantile Adjustment Bureau, L.L.C. v. Flood, 2012 CO 38, 278 P.3d 348, 355.

Colo.App.

Colo.App.2010. Com. (c) quot. in sup. Client sued law firm that represented her in collecting a judgment that she had obtained with the help of another attorney, alleging that firm's contingent fee was unreasonable and excessive. After a bench trial, the trial court found in favor of client. Affirming, this court held, inter alia, that the trial court, in determining the agreement's enforceability, did not err in taking into consideration events that occurred after the parties entered into the agreement. The court noted that the risk to client and firm of nonrecovery against the judgment debtor was not substantial, that the agreed-upon fee percentage was not within the range commonly charged by other lawyers in similar representations, and that the size and fact of client's recovery ultimately had little to do with firms' efforts. Berra v. Springer and Steinberg, P.C., 251 P.3d 567, 571, 573, 574.

Ind.

Ind.2003. Subsec. (2) quot. in disc. In attorney disciplinary proceeding, the court imposed a public reprimand on attorney, holding, in part, that attorney's recovery of his entire contingent fee from the initial payment of a structured settlement, without discounting the future settlement payments to present value in calculating his fee, exceeded the fee agreed to in the initial written fee agreement with clients by over $200,000, and thus amounted to an unreasonable fee. In re Hailey, 792 N.E.2d 851, 861.

Ind.2003. Subsec. (2) quot. in sup. Attorney was charged by state supreme court disciplinary commission with lawyer misconduct arising out of a fee dispute with a client in a contingent-fee case. The court accepted the sanction of a public reprimand agreed to by the parties. The court stated that, absent a contrary written agreement between attorney and client, attorney's fees should be taken only as settlement proceeds were received. In re Stochel, 792 N.E.2d 874, 876.

Ind.App.

Ind.App.2006. Subsec. (2) cit. in case cit. in sup. Law firm sued former client to recover attorney's fees for work it performed in connection with an underlying lawsuit. The trial court entered judgment for law firm. Affirming, this court rejected client's argument that, pursuant to the parties' contingent-fee agreement, law firm was entitled to nothing unless and until client recovered in the underlying action, which was still pending. The court concluded that because a contrary agreement in the form of a termination clause existed here, the terms of payment were converted from a contingent fee into an hourly fee, which law firm was entitled to receive upon its discharge. Four Winds, LLC v. Smith & DeBonis, LLC, 854 N.E.2d 70, 75.

Iowa,

Iowa, 2020. Coms. (b) and (c) quot. in sup. Law firm filed a petition to enforce a contingency-fee contract against client who hired it to represent him after he was critically injured in a severe car accident with a city bus, alleging that, after client agreed to a settlement with city during mediation, he failed to pay law firm the one-third contingency fee provided for in the contract. The trial court granted summary judgment for law firm. Affirming, this court held that, while large fees unearned by effort or a significant period of risk were unreasonable under Restatement Third of the Law Governing Lawyers § 35, the fee at issue was reasonable at the time of its inception, and declined to reevaluate the fee from a position of hindsight. The court reasoned that the contract was a gamble for both parties, and pointed out that law firm was highly regarded and very knowledgeable regarding personal injury, and that it was reasonable to assume that law firm's appearance as the attorney of record, its effort, and its

negotiating skills greatly contributed to city's settlement offer. Munger, Reinschmidt & Denne, L.L.P. v. Lienhard Plante, 940 N.W.2d 361, 366, 367.

Me.

Me.2010. Subsec. (2) cit. and quot. in sup., com. (d) cit. and quot. in sup., cit. in case cit. in sup., and cit. in diss. op. Judgment debtor filed an interpleader action to determine the priority of judgment creditor's creditors, which included, among others, judgment creditor's attorney. After a bench trial, the trial court determined that attorney had established a valid attorney lien as to 35% of judgment creditor's "gross recovery" from the prior lawsuit, attorney's fees in that amount would be reasonable, and the attorney lien had first priority. Vacating in part, this court held that attorney's contingent fee should have been based on judgment creditor's net recovery in its action against judgment debtor, not the total jury award plus interest. The dissent argued that the only reason that judgment creditor never collected the total jury award was because of an improper court-imposed set off, and that, absent a proper set off, the "recovery" in a contingent fee case should include all cash and credit received by the client. Camden Nat. Bank v. Steamship Navigation Co., 2010 ME 29, 991 A.2d 800, 803, 804, 806.

Mass.

Mass.2008. Subsec. (2) cit. in ftn. Attorney sought legal and equitable recovery from client for legal services performed under a contingent-fee agreement in client's employment-discrimination action against his former employer, after withdrawing as counsel of record. The trial court granted summary judgment for client. This court affirmed, holding that attorney, who could not recover on the contract because client had been unsuccessful in the underlying action after proceeding to trial pro se, also could not recover in quantum meruit for the same reason —i.e., the contingency did not occur. The court declined to address whether an attorney could ever collect on a contingent-fee agreement after the client had discharged the attorney or the attorney had withdrawn because of the client's breach. Liss v. Studeny, 450 Mass. 473, 478, 879 N.E.2d 676, 681.

Mich.App.

Mich.App.2013. Com. (a) quot. in ftn. Condominium association that had terminated law firm's services on its construction-defect case against developer brought a declaratory-judgment action asserting that it owed firm no additional fees for legal services under the retainer agreement's hybrid compensation arrangement, which provided for both an hourly rate and a contingent fee, after firm asserted an attorney's charging lien for the contingency portion of its fee against any recovery obtained from developer. The trial court denied both parties' motions for summary disposition, finding that the retainer agreement was ambiguous. Reversing and remanding, this court held, inter alia, that the retainer agreement unambiguously provided that, upon association's recovery of damages against developer, firm would earn a contingency fee even if it was discharged before the case concluded; although the agreement contained language concerning certain noncontingent charges that might be incurred as part of the termination process, nothing in the agreement suggested that those additional fees would nullify firm's contractual right to claim a fee contingent on association's recovery. The court explained that the agreement qualified as contingent even though it incorporated a noncontingent aspect. Island Lake Arbors Condominium Ass'n v. Meisner & Associates, PC, 301 Mich.App. 384, 837 N.W.2d 439, 445.

Mont.

Mont.2000. Com. (b) cit. in disc. (citing § 47, Prop. Final Draft No. 1, 1996, which is now § 35). Withdrawing law firm brought action against former client, seeking to foreclose attorney's lien and recover payment allegedly due under contingent fee agreement. The trial court entered summary judgment for plaintiff. Reversing and remanding, this court held that an attorney or firm that voluntarily withdrew as counsel before occurrence of the contingency

was entitled to payment for services rendered only if it could show that withdrawal was for good cause, which had not been established here. Bell & Marra, pllc v. Sullivan, 2000 MT 206, 300 Mont. 530, 6 P.3d 965, 970.

Nev.

Nev.2006. Cit. in ftn. Conservator of client's estate initiated a claim through state bar's fee-dispute arbitration program against law firm that had charged a one-third contingency fee for successfully representing client in a divorce settlement-agreement dispute. On remand, the arbitration committee issued an award in favor of law firm, and the trial court affirmed. This court granted client's petition for a writ of mandamus directing the trial court to vacate its order, holding that the parties' fee agreement violated a rule of professional conduct prohibiting contingency agreements that made payment contingent on the amount of alimony awarded in domestic-relations matters. The court explained that, while contingency agreements were not prohibited in actions to collect past-due amounts owed, here, ex-husband's underlying action against client involved modification of a property settlement agreement that expressly provided for alimony. Marquis & Aurbach v. Eighth Judicial Dist. Court, 122 Nev. 1147, 146 P.3d 1130, 1138.

N.Y.Sup.Ct.

N.Y.Sup.Ct.1995. Com. (d) cit. in disc. (citing § 47, T.D. No. 4, 1991, which is now § 35). Client who executed Performance Fee Agreement (PFA) with her matrimonial attorney under which she agreed to pay attorney $2 million "in light of the results achieved" in her divorce sought to rescind the contract on the ground that it was void under the Code of Professional Responsibility (Code). Defendant argued that the PFA was valid because payment was to be made only after the case was completed and finally resolved. The court, however, disagreed and granted client's motion for summary judgment, holding that any fee agreement executed before complete resolution of a matrimonial matter and providing for payment conditioned upon the results obtained was an agreement for a contingent fee and in violation of the Code. The court explained that contingent fees in domestic relations actions were disallowed because they might induce lawyers to discourage reconciliation and encourage bitter and contentious litigation. V.W. v. J.B., 165 Misc.2d 767, 629 N.Y.S.2d 971, 973, reversed 219 A.D.2d 77, 640 N.Y.S.2d 103 (1st Dep't 1996).

Tex.

Tex.2006. Cit. in ftn. to diss. op. §§ 34-35; subsec. (2) quot. in sup. and quot. in case quot. in sup. Discharged law firm sued former client, seeking payment under a fee agreement. The trial court entered judgment on a jury verdict for law firm. The court of appeals reversed. Affirming that portion of the decision, this court held, inter alia, that a provision of the agreement requiring client to pay law firm a percentage based on the value of client's underlying claim at the time of discharge, rather than on client's actual recovery, was unconscionable as a matter of law. The court reasoned that the provision subverted several policies underlying the use of contingent fees, including the principle that a lawyer was only entitled to receive a contingent fee when and to the extent the client received payment. The dissent argued that whether the agreement was unconscionable should have been determined by the parties' initial expectations and the actual consequences, rather than on the possibility that law firm's fee could equal or exceed client's recovery. Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 562, 563, 572.

Tex.2001. Cit. and quot. in sup., cit. in ftn.; com. (d) cit. and quot. in disc., cit. in ftn., cit. in conc. op., cit. in ftn. to diss. op.; subsec. (2) cit. and quot. in conc. op., cit. in diss. op. Law firm, whose contingent-fee agreement with clients was for one-third of "any amount received by settlement or recovery" of clients' award against their mortgagor, sued clients for attorneys' fee after clients' award was offset by mortgagors' counterclaim. The trial court granted law firm summary judgment, and appellate court affirmed. Reversing, this court held that contingent-fee agreement entitled firm to net amount of clients' recovery, which was computed after any offset. Concurrence asserted that whether a contingent fee should be based on net or gross recovery depended on the circumstances. Dissent argued that the court should have deferred to the plain meaning of the language "any amount received

by settlement or recovery" in the contingent-fee agreement. Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 94-95, 97, 99, 102.

Tex.2000. Cit. in conc. and diss. op. (citing § 47, Prop. Final Draft No. 1, 1996, which is now § 35). Clients sued attorneys for, inter alia, breach of contract in connection with attorneys' collection of an additional 5% in fees following settlement in clients' wrongful-death suit against third party. The trial court entered summary judgment for attorneys, but the intermediate appellate court reversed. Reversing, this court held, in part, that attorneys were entitled to the additional fees provided for in the fee agreement when the wrongful-death judgment was "appealed to a higher court," or, in other words, when defendant in that action filed a cash deposit with the appellate court. Concurring and dissenting opinion believed that the contingent-fee agreement should be construed against attorneys/drafters, and that the term "appealed to a higher court," as used therein, was ambiguous and could reasonably be interpreted to mean something more than the initial step taken by defendant to preserve its appellate rights. Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 867.

Tex.App.

Tex.App.2016. Subsec. (2) quot. in sup. County employee who was struck by a car and injured in the course and scope of his employment brought an action against employer and driver; employer paid employee workers' compensation benefits and held subrogation rights against employee's settlement with driver. The trial court granted employee's motion for summary judgment on his calculation of his attorney's fees and county's subrogation interest in dividing the settlement proceeds. This court reversed in part, holding that the trial court erred in calculating attorney's fees on the settlement proceeds before deducting county's lien. Citing Restatement Third of the Law Governing Lawyers § 35, the court explained that a contingent-fee attorney was entitled to receive the specified fee only when and to the extent his client received payment, and the attorney's fees should have been calculated based on the percentage contingent fee against employee's portion of the settlement, which was the settlement proceeds less county's lien. Harris County, Texas v. Knapp, 496 S.W.3d 871, 880.

Tex.App.2004. Com. (a) cit. in disc. After former client discharged law firm, hired new counsel, and settled his claims for $900,000, law firm sued former client to collect contingent fee of over $1.7 million. The trial court entered judgment on a jury verdict awarding law firm $900,000 in damages plus attorneys' fees. Reversing and rendering a take-nothing judgment, this court held that the fee charged by law firm was unconscionable as a matter of law. The court said that, because the fee charged was not based on the value of the work performed or tied to former client's actual recovery, allowing law firm to collect a fee equaling 63%-100% of its former client's recovery would violate public policy by penalizing client for discharging the firm. Walton v. Hoover, Bax & Slovacek, L.L.P., 149 S.W.3d 834, 844, vacated 2007 WL 416694 (Tex.App. El Paso 2007).

Restatement (Third) of the Law Governing Lawyers § 36 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 1. Legal Controls on Attorney Fees

§ 36 Forbidden Client–Lawyer Financial Arrangements

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

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

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

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

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

Comment:

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

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

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

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

The justification for the rule in its present form is that a lawyer's ownership gives the lawyer an economic basis for claiming to control the prosecution and settlement of the claim and provides an incentive to the lawyer to relegate the client to a subordinate position (compare §§ 16 & 21- 23 (client control over a representation)). The risk in such an arrangement is greater than it would be with a contingent fee; a contingent fee—in addition to being limited in most cases to well less than half of the recovery—is clearly designated as payment for the lawyer's services rendered for the client. The rule also prevents a lawyer from disguising an unreasonably large fee, violative of § 34, by buying part of the claim for a low price.

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

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

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

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

Loans for purposes other than financing litigation expenses are forbidden in most jurisdictions and under this Section. That prohibition precludes attempts to solicit clients by offering living-expenses loans or similar financial assistance. A few jurisdictions permit such payments, limiting them to basic living and similar expenses and sometimes with the restriction that they not be discussed prior to the lawyer's retention. Such permission is usually based on a policy of enabling clients to avoid being forced to abandon meritorious claims or to agree to inadequate settlements.

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

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

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

Reporter's Note

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

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

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

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

The great majority of jurisdictions bar lawyers from making any loan for nonlitigation expenses, such as for living expenses. E.g., In re Minor Child K. A. H., 967 P.2d 91 (Alaska 1998), cert. denied, _ U.S. _, 120 S.Ct. 57, 145 L.Ed.2d 50 (1999); State ex rel. Okla. Bar Assoc. v. Smolen, 837 P.2d 894 (Okla.1992) (over dissent); 1 G. Hazard & W. Hodes, The Law of Lawyering 274-75 (2d ed.1990). A small minority of jurisdictions allows lawyers to advance living expenses to their clients so long as that is not done or promised before the lawyer is retained. E.g., Louisiana State Bar Assoc. v. Edwins, 329 So.2d 437 (La.1976); Ala. Rules of Prof. Conduct, Rule 1.8; California Rules of Professional Conduct, Rule 4-210(A)(2) (lawyer may lend to client); D.C. Rules of Prof. Conduct, Rule 1.8(d)(2); Minn. Rules of Professional Conduct, Rule 1.8(e)(3); Miss. Rules of Prof. Conduct, Rule 1.8(e); see also Mont. Rules of Prof. Conduct, Rule 1.8(e)(3) (lawyer may guarantee loan reasonably needed to enable client to withstand delay in litigation if client remains ultimately liable to repay); N.D. Rules of Prof. Conduct, Rule 1.8(e) (as amended 1996) (similar); Vt. Code of Prof. Responsibility, DR 5-103(B) (similar). Prior to enactment of the modern lawyer codes, some jurisdictions also allowed such advances by judicial decision. E.g., People v. McCallum, 173 N.E. 827 (Ill.1930); Johnson v. Great Northern Ry., 151 N.W. 125 (Minn.1915). See also Texas Code of Professional Responsibility, DR 5-103 (omitting all prohibitions of advances to client); Commission on Professional Responsibility, Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, Rule 5.6(a) (1980) (allowing advances to client on any terms that are fair). The Reporters support the minority position, but that position was not accepted by the Institute.

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

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

Case Citations - by Jurisdiction

—

D.Nev.
D.N.M.
Colo.
Ill.App.
Ind.
Mass.App.
Miss.
Okl.
Tex.

D.Nev.

D.Nev.2011. Cit. in ftn. Consumers brought a purported class action against debt collector for violation of the Fair Debt Collection Practices Act; defendant moved to disqualify plaintiffs' counsel, alleging that counsel's personal payment of a settlement on behalf of one indigent plaintiff violated the Nevada Rules of Professional Conduct. Denying defendant's motion, this court held that although counsel's payment of the settlement clearly constituted a no-interest loan and therefore violated the prohibition on attorneys providing financial assistance to clients in connection with pending litigation, this violation was not sufficiently egregious to require counsel's disqualification. The court reasoned that, because, among other things, counsel forgave client's obligation to reimburse him for the balance of the loan, any conflict-of-interest concern was substantially reduced; moreover, because counsel did not engage in the practice of making such advances to this client or other clients for purposes of obtaining cases or facilitating the prosecution of cases, this single violation did not warrant disqualification. Hernandez v. Guglielmo, 796 F.Supp.2d 1285, 1291.

D.N.M.

D.N.M.2008. Com. (c) cit. in sup. Former employee, who was represented by attorneys licensed to practice law in Texas and admitted in New Mexico pro hac vice, sued former employer, alleging violations of federal law. This court granted defendant's motion to revoke attorneys' pro hac vice admission, holding that attorneys violated the New Mexico Rules of Professional Conduct by cosigning an $86,400 loan to subsidize plaintiff's living expenses; while contingent fees and advancement of litigation expenses were permitted as exceptions to the general rule prohibiting financial assistance to clients, despite their potential to create conflicts of interest, to ensure access to the courts, there was no indication in this case that the $86,400 loan was necessary to allow plaintiff access to the courts. Rubio v. BNSF Railway Co., 548 F.Supp.2d 1220, 1224.

Colo.

Colo.2012. Com. (c) quot. in sup. (cit. correctly and erron. cit. as § 35). Consumer sued debt collector in county court, alleging violations of the state's Fair Debt Collection Practices Act. On remand, the county court found in favor of consumer. Affirming in part, this court held that the payment of consumer's appellate counsel fees by consumer's trial attorney was within the ambit of an exception, for litigation expenses, to the rule prohibiting lawyers from providing financial assistance to clients. The court noted that litigation expenses were virtually indistinguishable from contingent fees, and that contingent fees and advancement of litigation expenses were both permitted, because, despite their potential to create conflicts of interest, they ensured access to the courts. Mercantile Adjustment Bureau, L.L.C. v. Flood, 2012 CO 38, 278 P.3d 348, 355, 356.

Ill.App.

Ill.App.2001. Quot. in disc., com. (c) cit. in disc. Concrete contractor sued to foreclose a mechanic's lien against store owner for concrete and paving work. Store owner counterclaimed, alleging that work was defective. Trial court awarded store owner damages, attorneys' fees, and costs. This court reversed in part and remanded, holding, inter alia, that trial court should have included reasonable expert-witness fees in award of "expenses" to defendant, as prevailing party, under fee-shifting clause in the parties' contract. J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership, 325 Ill.App.3d 276, 286, 259 Ill.Dec. 136, 145, 757 N.E.2d 1271, 1280.

Ind.

Ind.2003. Quot. in conc. and diss. op., com. (c) cit. in conc. and diss. op. Claimant-employee's attorney sought review of Indiana Worker's Compensation Board's decision that no expenses of claimant's nontreating physician/expert witness were to be paid by employee. Appeals court affirmed. This court affirmed, holding that board's order was within board's statutory authority to approve physician's fees, and that law firm did not show that board's order necessarily conflicted with fee contract between firm and claimant or with firm's obligations under Indiana Professional Conduct Rule 1.8(e). Concurring and dissenting opinion argued that, while workers' compensation statute precluded collection of physician's fee from worker, the Rules of Professional Conduct presented no obstacle to a lawyer's paying physician's fee without reimbursement from client. It argued that lawyer should be able to decide whether he or she was willing to underwrite potential expense of physician's fees. Wernle, Ristine & Ayers v. Yund, 790 N.E.2d 992, 999.

Mass.App.

Mass.App.2006. Com. (b) quot. in sup. Special master appointed to sell and distribute the proceeds of real property owned by husband and wife after a divorce brought action for interpleader against, among others, wife's attorney, who had made personal loans to wife and secured them by taking a mortgage on the property. The trial court ruled that attorney's recovery was limited to the amount of wife's debt at the time of the mortgage. Vacating and remanding, this court held that attorney's actions in representing wife and obtaining the mortgage violated Massachusetts public policy and other principles of law concerning the enforcement of contracts and accordingly declined to recognize or to give effect to the mortgage. The court reviewed numerous actions by attorney that were intended to advance his own interests in the litigation and were directly in opposition to wife's interests. McLaughlin v. Amirsaleh, 65 Mass.App.Ct. 873, 883, 844 N.E.2d 1105, 1113.

Miss.

Miss.1992. Cit. in sup. (citing § 48, T.D. No. 4, 1991, which is now § 36). Attorney sued former client to recover contingency fee under an employment contract relating to imposition of a constructive trust on client's stepmother's estate; client counterclaimed, alleging malpractice, fraud, and breach of fiduciary duty. The chancery court dismissed the counterclaims and awarded attorney his fee. Reversing in part, this court held that the parties' clear and unambiguous agreement entitled attorney only to 25% of what he gained for client over and above what she would have received had she not prevailed, not to 25% of her entire estate, and that he breached his duty of loyalty by overreaching and misinterpreting the amount of the fee and failing to tell client of his adverse interest regarding the fee, thus justifying her discharge of him and rendering the fee agreement unenforceable. However, given the uncertainty of Mississippi law regarding what property an attorney may retain and charge, attorney did not breach his duty of loyalty by demanding payment in kind and by asserting ownership in client's property. The court remanded in part for chancery court to determine a reasonable fee for attorney's work. Tyson v. Moore, 613 So.2d 817, 826.

Okl.

Okl.2000. Cit. and quot. in ftn., cit. generally in sup., com. (c) cit. in ftn.; quot. in disc., cit. in ftn., com. (d) cit. in disc. (citing § 48, T.D. No. 4, 1991, which is now § 36 of the Official Draft). State bar association brought disciplinary proceeding against attorney for advancing funds to a client for living expenses during representation. Ordering a 60-day suspension of attorney, the court refused to adopt an ad hoc exception to the state professional-conduct rule prohibiting attorneys from making loans to clients for necessary living expenses after the attorney-client relationship had been established, and rejected attorney's argument that he should not be disciplined because he did not violate the intent of the rule, citing potential ethical problems and the explicit prohibition against such conduct in the rules of professional conduct. State ex rel. Oklahoma Bar Ass'n v. Smolen, 17 P.3d 456, 458, 459, 462.

Okl.1993. Cit. in ftn., cit. in conc. and diss. op., quot. in ftn. to conc. and diss. op. (citing § 48, T.D. No. 4, 1991, which is now § 36). In disciplinary proceeding, the court approved the Professional Responsibility Tribunal's recommendation that attorney be suspended from the practice of law for a six-month period followed by supervised probation for two and one-half years for lending money to clients, commingling clients' funds with his own, failing to keep a proper account of a client's funds, and failing to deliver funds promptly to a client. A concurring and dissenting opinion argued that the provision of humanitarian, noninterest-bearing loans to clients did not warrant discipline. State ex rel. Oklahoma Bar Ass'n v. Carpenter, 863 P.2d 1123, 1127, 1132, 1133.

Okl.1992. Cit. in conc. op., quot. in ftn. in conc. op.; com. (d) cit. in conc. op. and quot. in ftn. to conc. op., cit. and quot. in conc. and diss. op., cit. and quot. in ftn. to conc. and diss. op. (citing § 48, T.D. No. 4, 1991, which is now § 36). A disciplinary proceeding was brought against a lawyer who provided humanitarian, noninterest-bearing loans to destitute clients. This court ordered a public censure, determining that attorney had violated state rules of professional conduct. The concurring opinion, although stating its agreement with the Restatement view of allowing advances to clients where the client needs financial assistance to avoid a coerced settlement, argued that the court should not adopt the Tentative Draft's view on its own authority to effect retroactive changes in professional ethics rules. An opinion concurring in part and dissenting in part urged that the current rule be found unconstitutional and argued that the court should adopt the Restatement rule. State ex rel. Okl. Bar Ass'n v. Smolen, 837 P.2d 894, 897, 900-901, 905-906.

Tex.

Tex.2000. Quot. in conc. op., cit. in ftn. in conc. op., com. (b) cit. in ftn. in conc. op. (citing § 48, Proposed Final Draft No. 1, 1996, which is now § 36). An intoxicated man who was injured while fleeing from police officers obtained a default judgment against the purported owner of the bar that sold him alcohol when he was intoxicated, but his attorney sued the wrong party. Because his claim against the real owner was barred by limitations, the client sued the attorney for legal malpractice and assigned an interest in the proceeds from his malpractice claim against the attorney to a third party in exchange for the third party's assistance in pursuing the claim. The appellate court reversed a grant of summary judgment for attorney, holding that the arrangement between the client and the third party did not violate public policy. This court affirmed, holding, inter alia, that even if the assignment was invalid, that fact would not vitiate the client's right to sue the attorney. Concurring opinion argued that an assignment of an interest in a legal malpractice claim was contrary to public policy if the assignee took the interest purely as an investment unrelated to any other transaction and acquired, not merely a financial interest in the outcome, but a significant right of control over the prosecution of the claim. Mallios v. Baker, 11 S.W.3d 157, 170.

Restatement (Third) of the Law Governing Lawyers § 37 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

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

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

Comment:

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

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

Illustration:

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

Second, under contract law a lawyer's conduct can render unenforceable the lawyer's fee contract with a client. Thus under contract law the misconduct could constitute a material breach of contract (see § 40) or vitiate the formation of the contract (as in the case of misrepresentations concerning the lawyer's credentials). Alternatively, the contract can be unenforceable because it contains an unlawful provision (see Restatement Second, Contracts §§ 163, 164, 184, 237, 241, & 374; Restatement Second, Agency § 467). In some cases, although the contract is unenforceable on its own terms, the lawyer will still be able to recover the fair value of services rendered (see § 39, Comment *e*).

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

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

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

c. *Violation of a duty to a client.* This Section provides for forfeiture when a lawyer engages in a clear and serious violation (see Comment *d* hereto) of a duty to the client. The source of the duty can be civil or criminal law, including, for example, the requirements of an applicable lawyer code or the law of malpractice. The misconduct

might have occurred when the lawyer was retained, during the representation, or during attempts to collect a fee (see § 41). On improper withdrawal as a ground for forfeiture, see § 40, Comment *e*.

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

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

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

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

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

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

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

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

When a lawyer-employee of a client is discharged for misconduct, except in an extreme instance this Section does not warrant forfeiture of all earned salary and pension entitlements otherwise due. The lawyer's loss of employment will itself often be a penalty graver than would be the loss of a fee for a single matter for a nonemployee lawyer. Employers, moreover, are often in a better position to protect themselves against misconduct of their lawyer-

employees through supervision and other means. See Comment *a* hereto; Restatement Second, Agency § 401. For an employer's liability for unjust discharge of a lawyer employee, see § 32, Comment *b*.

Reporter's Note

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

*Comment b. Rationale.*See generally Perillo, The Law of Lawyer's Contract is Different, 67 Fordham L. Rev. 443, 446-49 (1998) (criticizing the Section as "lawyer friendly" compared to general contracts law).

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

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

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

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

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

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

On nonforfeiture of the salary of a lawyer employee, see Schwartz v. Leonard, 526 N.Y.S.2d 506 (N.Y.App.Div.1988); cf. Greenberg v. Jerome H. Remick & Co., 129 N.E. 211 (N.Y.1920).

Case Citations - by Jurisdiction

—

C.A.4,
C.A.9
C.A.D.C.
D.D.C.
S.D.Ind.
D.Mass.
D.Minn.Bkrtcy.Ct.
S.D.N.Y.Bkrtcy.Ct.
Cal.
Cal.App.
Colo.

Colo.O.P.D.J.
Fla.App.
Idaho,
Ind.App.
Mass.App.
Mo.
Nev.
Ohio App.
S.D.
Tex.
Tex.App.
Wash.
W.Va.

C.A.4,

C.A.4, 2016. Quot. in sup. Law firm sued former client to recover attorney's fees related to litigation in which firm was disqualified from representing client for failing to obtain client's and adverse party's consent to firm's simultaneous representation of adverse party in an unrelated matter. The trial court granted firm's motion to compel arbitration based on the parties' engagement agreement. The arbitration panel entered judgment for firm; the trial court confirmed the award. This court reversed and remanded, holding that firm was not entitled to fees for the work it did while violating the rules of professional conduct. Citing Restatement Third of the Law Governing Lawyers § 37, the court explained that, even though client provided no evidence of damages, forfeiture of attorney's fees was appropriate because the damages caused by an attorney's misconduct were often difficult to assess. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., 244 Cal.App.4th 590, 617, 619, 198 Cal.Rptr.3d 253, 272, 274.

C.A.9

C.A.9, 2012. Quot. in case quot. in sup. (quoting § 49 of Prop. Final Draft 1, 1996, which is now § 37 of the Official Text) (erron. cit. as T.D. No. 1, 1996). Consumers, on behalf of themselves and a nationwide class, brought federal antitrust claims against providers of bar-preparation courses. After the parties reached a settlement in which defendants agreed to pay $49 million into a settlement fund that would be allocated pro rata to class members, with 25% of the fund set aside for attorney’s fees, the district court found that class counsel was not entitled to any attorney’s fees from the fund for its representation of the class, because it had entered into “incentive agreements” with certain class representatives that gave rise to a conflict of interest between the class representatives and other members of the class. Affirming, this court held that, under long-standing equitable principles, a district court had broad discretion to deny fees to an attorney who committed an ethical violation, and the representation of clients with conflicting interests and without informed consent was a particularly egregious ethical violation that could be a proper basis for complete denial of fees. Rodriguez v. Disner, 688 F.3d 645, 654-655.

C.A.9, 2008. Cit. in sup., cit. in case cit. in disc. Law firm that served as local counsel in environmental-contamination litigation before withdrawing from the lawsuit brought a breach-of-contract action against out-of-state law firm that had hired it, seeking additional payments allegedly owed to it on the lawsuit's termination by settlement. After the district court ruled on plaintiff's partial-summary-judgment motion that plaintiff had not forfeited the additional payments by withdrawing, it entered summary judgment holding that plaintiff was owed the additional payments. Affirming, this court held that payment of the additional fees was triggered by defendant's recovery of gross, rather than net, proceeds from the settlement, and that defendant presented no evidence that any burden was put on any client by plaintiff's withdrawal from the litigation. Brown & Bain, P.A. v. O'Quinn, 518 F.3d 1037, 1039, 1042.

C.A.D.C.

C.A.D.C.2012. Com. (e) quot. in disc. Former client who lost millions in a Ponzi scheme sued attorney who was hired by client's agent to assist in recovering the funds, asserting a claim for, inter alia, breach of fiduciary duty. The district court held that defendant breached his fiduciary duty to plaintiff by violating the rules of professional conduct governing conflicts of interest, and ordered defendant to disgorge the legal fees he had collected from plaintiff during two conflicted periods of his representation. Remanding as to plaintiff's cross-appeal, this court held that defendant's conflicts of interest were not limited to the two periods identified by the district court; for instance, his joint representation of plaintiff and his agent was conflicted from the outset, because plaintiff had potential claims against agent. The court directed that, on remand, the district court was to fashion a remedy that would account for, among other things, the full extent of the conflicts found and the decreased value of the services provided to plaintiff, noting that, ordinarily, forfeiture extended to all fees for the matter for which the lawyer was retained. So v. Suchanek, 670 F.3d 1304, 1311.

C.A.D.C.1996. Coms. (b) and (d) cit. in disc. (citing § 49, T.D. No. 4, 1991, which is now § 37). Three clients sued their former attorney and his law firm for breach of fiduciary duty, seeking punitive damages, compensatory damages, and disgorgement of the legal fees they had paid. The attorney's law firm counterclaimed for unpaid legal fees. District court granted lawyer's motion for judgment as a matter of law on punitive damages and on the breach-of-fiduciary-duty claim for compensatory damages and disgorgement of legal fees. This court affirmed the denial of punitive damages, but vacated as to the fiduciary duty claim, holding, inter alia, that clients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury. Because plaintiffs presented evidence that the attorney breached his duty of loyalty by violating DR 5-105, they were entitled to have their fiduciary duty claim for disgorgement of legal fees go to the jury. Hendry v. Pelland, 73 F.3d 397, 402.

D.D.C.

D.D.C.2017. Cit. and quot. in sup., cit. in case cit. in sup. Following the settlement of a class action in which the Department of the Interior was found to have mismanaged funds that it held in trust for Native Americans, the district court granted class counsel's motion for an award of attorney's fees and costs, and the court of appeals affirmed. Attorney who had withdrawn from representation before the settlement and was omitted from class counsel's motion filed a petition for his share of the award. Granting in part attorney's petition, this court held that attorney satisfied his ethical obligations upon his withdrawal under Restatement Third of the Law Governing Lawyers, such that he was entitled to compensation for his work. The court reasoned that attorney's unintentional failure to notify the client or the court of his withdrawal was not a sufficient basis to deny him compensation under the facts of this case, particularly given that he completed all the work he had been assigned before withdrawing, that plaintiffs were never left without competent counsel, and that the litigation proceeded to its successful conclusion undisturbed by his absence. Cobell v. Jewell, 234 F.Supp.3d 126, 164.

D.D.C.2011. Cit. and quot. in disc. Law firm sued clients to recover unpaid legal fees; clients counterclaimed for disgorgement or forfeiture of legal fees, alleging that the complaint filed by law firm divulged privileged communications in violation of its fiduciary duty to keep client confidences secret. Granting summary judgment for plaintiff on defendants' counterclaim, this court held that, even assuming that there was a genuine issue as to whether plaintiff revealed secrets or confidences by filing its complaint, the facts here did not warrant an equitable award of fee disgorgement under District of Columbia law, because defendants did not show that the alleged breach compromised any portion of plaintiff's representation of them, or assert that plaintiff revealed client confidences or secrets during the parties' 13-year attorney-client relationship. The court noted that, while both parties analyzed defendants' counterclaim under the rule set forth in Restatement Third of the Law Governing Lawyers § 37, they did not provide authority that the District of Columbia followed that rule. Bode & Grenier, L.L.P. v. Knight, 821 F.Supp.2d 57, 65.

D.D.C.2008. Quot. in disc. After former captive of terrorists won $9 million in damages in his two lawsuits against the Republic of Iran, which allegedly had provided material support and resources to the terrorists who kidnapped him in Lebanon and held him for 532 days, he sued the attorneys who represented him in those actions, asserting that they breached the duty of loyalty that attorneys owed to their clients by violating various ethical rules, and that some or all of their fee should be disgorged. Granting summary judgment for defendants, this court held that the evidence of ethical violations offered here, even when viewed in the light most favorable to plaintiff, would not permit a reasonable trier of fact to find that defendants breached their fiduciary duty of loyalty. Jacobsen v. Oliver, 555 F.Supp.2d 72, 87.

S.D.Ind.

S.D.Ind.2014. Cit. and quot. in sup., coms. (d) and (e) quot. in sup. Law firm sued former clients, seeking to recover unpaid attorney's fees stemming from firm's representation of clients in an underlying action; clients counterclaimed for legal malpractice. This court granted summary judgment for law firm on clients' claim seeking disgorgement of fees on the basis that law firm breached its duties of loyalty and/or its fiduciary duty by representing clients under a conflict of interest, holding that, even if clients' allegations were sufficient to establish a conflict of interest, disgorgement of law firm's attorney's fees would not be equitable or proportionate to the harm suffered by clients. The court noted that, under Restatement Third of the Law Governing Lawyers § 37, forfeiture had to be proportionate to the seriousness of the offense. Price Waicukauski & Riley, LLC v. Murray, 47 F.Supp.3d 810, 826, 827.

D.Mass.

D.Mass.2001. Cit. in disc. Massachusetts law professor, licensed to practice in New York, sought to enforce oral fee-splitting agreement allegedly formed in Illinois with law firms from South Carolina and Mississippi that profited from tobacco industry's settlement of numerous lawsuits. This court denied in part South Carolina defendants' motion for summary judgment, holding, inter alia, that plaintiff could recover on a quantum meruit basis even if the alleged oral fee-splitting agreement was unenforceable as matter of public policy. The court took defendants' motion under advisement as to enforceability of fee-splitting agreement, instructing parties to brief issue of which state's disciplinary rules were applicable. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 178 F.Supp.2d 9, 13.

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Quot. in sup., com. (c) quot. in disc. In one of two consolidated adversary proceedings, Chapter 7 trustee of estate of loan-placement agent brought claim for breach of fiduciary duty against law firm that agent hired to prepare loan documents for a multimillion-dollar casino loan that agent arranged. This court held, inter alia, that law firm violated its duty to disclose and its duty of loyalty to agent, because, although participant lenders for the casino loan were the actual clients represented by firm in an action against a third party in which agent was the named plaintiff, firm agreed to represent agent in a closely related action by one loan participant against agent without seeking informed consent from either agent or that participant. The court further concluded that firm's actions constituted a blatant conflict of interest for which disgorgement of law firm's fees was the appropriate remedy. In re SRC Holding Corp., 352 B.R. 103, 189, 190, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2007. Cit. and quot. in sup., coms. (b), (d), and (e) quot. in sup. This court ordered the imposition of sanctions against creditor's attorney who had failed to appear for the second day of trial in an adversary proceeding in which creditor had sought to except debt owed him by Chapter 7 debtor from discharge;

the court concluded that the most appropriate sanction was an order barring attorney from recovering any additional fees or expenses from creditor, beyond the amount of the retainer previously received. The court reasoned that attorney's violations, which began when he appeared without being properly admitted and continued until he withdrew without obtaining a court order permitting it, were clear and serious, the applicable law was reasonably accessible, and the facts were never in dispute; a reasonable lawyer would have known that the conduct was wrongful. In re Chase, 372 B.R. 142, 158.

Cal.

Cal.2018. Cit. in sup., cit. in conc. op. (general cite); coms. (b) and (d) cit. in sup. Law firm that was disqualified from representing two clients who were adverse to one another brought a lawsuit against one of those clients, alleging that defendant owed plaintiff damages for services rendered. An arbitrator awarded damages to plaintiff. The court of appeals reversed, finding that the agreement between the parties, which included the arbitration clause and a blanket waiver of any conflict of interests that might arise if plaintiff ever represented a party adverse to defendant, was unenforceable because plaintiff violated California ethical rules by failing to disclose plaintiff's conflict of interest. This court affirmed, inter alia, holding that the blanket waiver included in the agreement was a violation of ethical rules because it did not fully disclose existing conflicts. The court explained that Restatement Third of the Law Governing Lawyers § 37 did not automatically bar all compensation for services performed under an improperly waived conflict of interest but instead required an examination of the facts surrounding the ethical violations. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., 425 P.3d 1, 19-21, 23, 28.

Cal.App.

Cal.App.2020. Quot. in case quot. in sup. Attorney who represented plaintiff in a class action appealed a ruling by the trial court approving a settlement of the action, alleging, inter alia, that a fee agreement entered into by attorney and co-attorney was unenforceable, because co-attorney failed to obtain written consent by a class representative. This court reversed and remanded on other grounds, holding, inter alia, that, although the fee agreement was unenforceable due to the fact that co-attorney violated ethical rules by failing to disclose his lack of professional liability insurance, the ethical violation did not preclude him from obtaining quantum meruit recovery. The court explained that Restatement Third of the Law Governing Lawyers § 37 did not categorically require forfeiture of all fees if the attorney's ethical violation was not egregious, and observed that the trial court needed to determine the extent of co-attorney's violation on remand. Hance v. Super Store Industries, 257 Cal.Rptr.3d 761, 771.

Cal.App.2011. Quot. in ftn., com. (b) cit. in sup. Attorney brought various claims against client in connection with the termination of several business agreements between the parties. The trial court found that the agreements were unenforceable on grounds in part of attorney's breach of his fiduciary duties in violation of the state probate code. Affirming, this court held that the trial court did not abuse its discretion in denying attorney leave to amend his complaint to assert a cause of action for quantum meruit to recover the reasonable value of the services he provided to client. The court rejected attorney's argument that there was no damage to client because the business ventures were successful; while it made sense to require proof of damages where a client sought compensatory damages in addition to forfeiture of fees as a tort remedy for breach of fiduciary duty, such proof was not required to void an agreement for breach of fiduciary duty in violation of the probate code or to deny the attorney quantum meruit recovery of fees where the breach was sufficiently serious. Fair v. Bakhtiari, 195 Cal.App.4th 1135, 1153, 1161, 125 Cal.Rptr.3d 765, 779, 785.

Cal.App.2005. Quot. in case quot. in sup. (citing § 49, Proposed Final Draft No. 1, 1996, which is now § 37 of the Official Draft). In lawsuit to partition property, in which property owners objected to unconsummated sale arranged by referee, referee filed motions to be removed and to relieve the attorneys and broker and award them fees. Trial court granted the motions. This court affirmed the trial court's award of attorneys' fees, reversed the order allowing broker's commission, and remanded to permit referee to seek reasonable compensation for his services. Although one law firm had an alleged conflict of interest through a preexisting relationship with prospective buyer,

owners did not show that any violation of rules governing representation of adverse interests was serious enough to compel forfeiture of fees. Sullivan v. Dorsa, 128 Cal.App.4th 947, 965, 27 Cal.Rptr.3d 547, 561.

Cal.App.1999. Quot. in ftn. (citing § 49, Prop. Final Draft No. 1, 1996, which is now § 37). Attorney brought action against corporate CEO to recover fees for services rendered to him and to corporation. The trial court entered judgment for attorney. Affirming, this court held that even if CEO was correct in his assertion that attorney violated that section of the Rules of Professional Conduct relating to consent in cases of dual representation, such a violation did not automatically result in a forfeiture of fees. Pringle v. La Chapelle, 73 Cal.App.4th 1000, 87 Cal.Rptr.2d 90, 94.

Colo.

Colo.2002. Quot. in ftn. Client sued attorney who had represented her in a workers' compensation proceeding, asserting that attorney was not entitled to attorney's fees from the settlement because the contingent-fee agreement was not in writing as required by the Colorado Rules of Civil Procedure, and therefore was not enforceable. The trial court allowed attorney to retain fees under quantum meruit, but the court of appeals reversed. Reversing and remanding, this court held that an attorney was entitled to fees under quantum meruit when the agreed-upon services were successfully completed but the contingent-fee agreement was not in writing. The court noted that, since client never alleged any misconduct on attorney's part, disgorgement of fees did not apply to this case. Mullens v. Hansel-Henderson, 65 P.3d 992, 999.

Colo.O.P.D.J.

Colo.O.P.D.J.2013. Cit. and quot. in sup., cit. in ftn. The state of Colorado brought a disciplinary action against attorney who was terminated by clients, alleging that, before returning unearned legal fees to clients, attorney commingled those fees with personal funds and unintentionally used them for her own purposes. The hearing board suspended attorney for three months, stayed upon the successful completion of a six-month probation period. This court affirmed the suspension. The court determined, however, that attorney properly retained fees that she earned under a flat-fee agreement based on the theory of quantum meruit, and, citing Restatement Third of the Law Governing Lawyers § 37, explained that attorney should not be forced to forfeit her right to recover in quantum meruit because her failure to segregate her clients' funds did not amount to the type of serious misconduct that would require such a forfeiture. People v. Gilbert, 348 P.3d 970, 982.

Fla.App.

Fla.App.1993. Quot. in part in sup., coms. (a), (b), (d), and (e) quot. in sup. (citing § 49, T.D. No. 4, 1991, which is now § 37). An attorney who represented, pursuant to a contingency fee agreement, a prevailing party sued to recover fees after the client discharged the attorney in postappeal settlement negotiations for alleged breach of fiduciary obligations in attempting to coerce the client to renegotiate the contingency fee arrangement after an acceptable settlement offer had been made. Reversing the trial court's ruling that the attorney's breach barred recovery and remanding with directions, this court held that, as the breach occurred after the attorney's essential duties were near their end and the attorney had successfully obtained a favorable jury verdict that was upheld on appeal, the failure of the trial court to consider the adequacy of legal remedies for the breach before ordering a fee forfeiture was error. Meting out appropriate punishment for the attorney, said the court, was the responsibility of the bar disciplinary process. Searcy, Denney, et al. v. Scheller, 629 So.2d 947, 951-953.

Idaho,

Idaho, 2019. Adopted and cit. in sup., adopted and cit. in cases cit. in sup. (general cite); com. (d) quot. in sup. Former client brought a lawsuit against attorney, alleging that defendant breached his fiduciary duty by, among

other things, disclosing confidential attorney–client information to opposing counsel without her knowledge or consent, and seeking disgorgement of attorney's fees. The trial court granted defendant's motion to dismiss. This court reversed and remanded, holding that the trial court erred in finding that plaintiff failed to state a claim because she did not allege that she suffered legal damages. The court adopted Restatement Third of the Law Governing Lawyers § 37 in extending fee disgorgement as an equitable remedy available when an attorney violated his duty to a client in a serious way, reasoning that the factors for determining whether an attorney forfeited some or all of his compensation under § 37 had been adopted by other jurisdictions and were appropriate for deterring attorney misconduct. Parkinson v. Bevis, 448 P.3d 1027, 1035, 1036.

Ind.App.

Ind.App.2006. Cit. in ftn. Law firm sued former client to recover attorney's fees for work it performed in connection with an underlying lawsuit. The trial court entered judgment for law firm. Affirming, this court held, inter alia, that the trial court did not err in failing to conduct a separate hearing on whether law firm's conduct following its termination by client constituted a breach of fiduciary duty that could have reduced the fees that client owed to law firm. The court reasoned that client waived for appeal the issue of whether law firm's correspondence with client was coercive and amounted to financial pressure, because client did not raise the matter at a hearing before the special master, who was appointed by the trial court to hear and determine the attorney's fees issues. Four Winds, LLC v. Smith & DeBonis, LLC, 854 N.E.2d 70, 76.

Mass.App.

Mass.App.2006. Cit. in sup., coms. (a)-(d) cit. in sup. Attorney who was suspended by Board of Bar Overseers from the practice of law for engaging in unethical conduct in personal-injury action was required, as a result of suspension, to withdraw from representing the same client in wrongful-termination action. After replacement counsel settled the wrongful-termination action, attorney's firm moved to enforce a charging lien against the proceeds. The trial court, inter alia, denied firm's motion for summary judgment. Affirming, this court held, among other things, that attorney's breach of his duty of loyalty to client, which involved intentional prejudice or damage to client, represented such a violation of professional obligation as merited forfeiture of his compensation. Kourouvacilis v. American Federation of State, County and Municipal Employees, 65 Mass.App.Ct. 521, 535, 841 N.E.2d 1273, 1285.

Mo.

Mo.1992. Cit. in disc. (citing § 49, T.D. No. 4, 1991, which is now § 37). The trial court ordered a client to pay attorneys' fees to its former counsel. The intermediate appellate court reversed, holding that the attorneys were not entitled to recovery in quantum meruit, since they withdrew their representation pursuant to the disciplinary rules due to insufficient resources to handle the case. Reversing, this court rejected the client's claim for complete forfeiture of the attorneys' fees, holding that there was no evidence of any clear and serious violation of a duty to the client that destroyed the lawyer-client relationship and thereby the justification for the attorneys' claim to compensation. The court remanded for a determination of the value of the benefits conferred on the client on a theory of quantum meruit. International Materials v. Sun Corp., 824 S.W.2d 890, 895.

Nev.

Nev.2017. Cit. in sup.; coms. (a) and (b) quot. in sup.; com. (d) cit. and quot. in sup. Mall patron brought claims sounding in premises liability and failure to provide adequate security against mall, after he was shot by another patron while attending an event at the mall. The trial court granted patron's motion to disqualify mall's law firm, which employed an attorney who had initially agreed to represent patron in filing this action against mall but ultimately declined representation after reviewing the evidence, and subsequently awarded mall attorney's fees

against patron as a sanction for discovery abuses. This court granted patron's petition for a writ of mandamus, holding that the trial court improperly failed to analyze and apply the factors set forth in Restatement Third of the Law Governing Lawyers § 37 in awarding mall attorney's fees based in part on work done by a disqualified law firm. The court explained that, under § 37, a lawyer's improper conduct could reduce or eliminate the fee that the lawyer could reasonably charge. Hawkins v. Eighth Judicial District Court in and for County of Clark, 407 P.3d 766, 768-771.

Ohio App.

Ohio App.2019. Quot. in case quot. in sup. Attorney sued former client, who had hired him to defend her in a foreclosure action, alleging, among other things, that client failed to pay the balance of her bill under the parties' fee agreement; client maintained that attorney failed to provide receipts, sent her bills with errors, denied that she had paid, and refused to withdraw after she discharged him. The trial court granted summary judgment for client, finding that, while it was undisputed that there was a fee agreement between the parties, attorney failed to present proper independent expert evidence to create a genuine issue of material fact as to whether his full bill was a reasonable fee that could be collected. This court affirmed. The court noted that, under Restatement Third of the Law Governing Lawyers § 37, a lawyer engaging in clear and serious violation of duty to a client could be required to forfeit some or all of the lawyer's compensation for the matter. Eichenberger v. Chilton-Clark, 141 N.E.3d 648, 658.

S.D.

S.D.2005. Cit. in ftn., com. (b) cit. in ftn. Funeral-home sellers who did not receive full payment from bankrupt buyer sued their attorney for, in part, breach of fiduciary duty. The trial court entered judgment on a jury verdict for defendant. This court affirmed, holding that plaintiffs were not entitled to breach-of-fiduciary-duty instruction as they did not show that failure to communicate basis of attorneys' fee, or dispute over fee's reasonableness, was a breach of fiduciary duty. Since plaintiffs did not plead or propose jury instructions as to forfeiture of fee based on breach of fiduciary duty, the court did not resolve whether full or partial forfeiture would be appropriate remedy for attorney's disclosure violation. Behrens v. Wedmore, 2005 SD 79, 698 N.W.2d 555, 577.

Tex.

Tex.2010. Quot. in case quot. in sup. (citing § 49, Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Consulting company and its shareholder sued former business partner for breach of fiduciary duty in connection with plaintiffs' buyout of defendant's interest in company. The trial court entered judgment for plaintiffs; the court of appeals reversed. Affirming in part and reversing in part, this court held that, when a partner in a business breached his fiduciary duty by fraudulently inducing another partner to buy out his interest, the consideration received by the breaching party for his interest in the business was subject to equitable forfeiture as a remedy for the breach. The court noted that several factors relevant to equitable-forfeiture remedies in the context of attorney-client relationships and breaches of trust were applicable in this case: the gravity and timing of the breach of duty, the level of intent or fault, whether the principal received any benefit from the fiduciary despite the breach, the centrality of the breach to the fiduciary relationship, and any threatened or actual harm to the principal. ERI Consulting Engineers, Inc. v. Swinnea, 318 S.W.3d 867, 874.

Tex.2009. Quot. in case quot. in disc. (citing § 49 of Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Client brought legal-malpractice action against law firm, based on firm's handling of an underlying suit. The trial court rendered judgment on a jury verdict for client. The court of appeals reversed that part of the judgment awarding client attorney's fees and expenses paid in the underlying lawsuit. Reversing and remanding, this court held that a malpractice plaintiff could recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence. The court rejected firm's argument that client was essentially seeking fee disgorgement, which was available only if firm breached a fiduciary duty to

client, pointing out that a negligence claim, unlike a fee forfeiture claim for breach of fiduciary duty, was about compensating an injured party. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development and Research Corp., 299 S.W.3d 106, 121.

Tex.1999. Cit. and quot. in sup., cit. in ftn., coms. (a), (b), (d), and (e) quot. in sup. and cit. in ftn. (citing § 49, Proposed Final Draft No. 1, 1996, which is now § 37). After explosions at a chemical plant killed 23 workers and injured hundreds of others, plaintiffs received $190 million in a settlement, out of which the attorneys received a contingent fee of over $60 million. The clients then sued their attorneys for breach of fiduciary duty, fraud, breach of contract, and forfeiture of all fees the attorneys received, among other claims. Trial court granted the attorneys summary judgment. The appellate court reversed in part, and remanded, holding, inter alia, that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client. Affirming as modified and remanding, this court held that whether an attorney must forfeit any or all of his fee for a breach of fiduciary duty to his client must be determined by applying the rule in § 49 of the proposed Restatement and other equitable factors. Burrow v. Arce, 997 S.W.2d 229, 237, 238, 240, 241, 243-245.

Tex.App.

Tex.App.2020. Com. (a) quot. in sup. Attorney sued husband and wife who had hired him to review a personal-injury settlement that they had reached with husband's employer, seeking a declaratory judgment that he owned a 35% interest in an annuity and annuity payments they received under the settlement; husband and wife counterclaimed for breach of fiduciary duty. At the close of attorney's case, the trial court granted husband and wife's motion for a directed verdict, finding that the parties' attorney-fee agreement was unconscionable, and that, while husband and wife's counterclaim was untimely, they were entitled to disgorgement of attorney's fees. This court reversed in part, holding that husband and wife did not have an affirmative claim supporting the remedy of fee forfeiture, as required to recover disgorgement of fees under Restatement Third of the Law Governing Lawyers § 37, Restatement of Restitution § 5, and the Restatement of Agency § 469. Izen v. Laine, 614 S.W.3d 775, 791.

Tex.App.2017. Quot. in sup. (quoting § 49 of Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Co-beneficiary of estate brought an action against executrix and co-beneficiary, asserting, inter alia, claims for negligence and breach of fiduciary duty, and seeking division of estate's real property; at trial, plaintiff nonsuited most claims but reserved the right to compel distribution and to contest and request forfeiture of attorney's fees. The trial court denied plaintiff's application for forfeiture against executrix's attorneys. This court affirmed, holding, inter alia, that plaintiff had failed to plead any claim for fee forfeiture against executrix's attorneys and did not have standing to assert such a claim, because, even if opposing counsel had been professionally negligent or breached fiduciary duties, fee forfeiture was a remedy reserved for agency relationships. Quoting Restatement Third of the Law Governing Lawyers § 37, the court explained that plaintiff was not entitled to pursue any claim for the forfeiture of executrix's attorney's fees, because that equitable remedy was available only to a client for an attorney's clear and serious violation of duty to the client. Estate of Nunu, 542 S.W.3d 67, 75.

Tex.App.2017. Cit. in disc., quot. in case quot. in disc. (quoting § 49 of Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Church sued law-firm attorney, among others, following the loss of church's funds that were deposited in firm's trust account and subsequently transferred by firm's principal to other accounts for his personal and firm expenses. The trial court granted defendant's motion for summary judgment on all claims and the court of appeals affirmed. Affirming in part and reversing in part, this court held that while plaintiff failed to demonstrate sufficient evidence to support some claims, evidence that defendant's breach of fiduciary duty in untimely disclosing the theft of funds caused plaintiff's damages was not required in order for plaintiff to recover in an attorney—client context where equitable remedies were sought. Referencing Restatement Third of the Law Governing Lawyers § 49 (Prop. Final Draft No. 1, 1996), the court expressed approval for the rule that a lawyer engaging in a clear and serious violation of his duty to a client could be required to forfeit some or all of the lawyer's compensation for the matter. First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 221.

Tex.App.2015. Coms. (b) and (e) quot. in case cit. and quot. in sup. (quoting coms. (b) and (e) of § 49 of Prop. Final Draft No. 1, 1996, which is now coms. (b) and (e) of § 37 of the Official Text). Joint venturers in oil-and-gas leases filed a breach-of-fiduciary-duty claim against company that was attorney in fact and record title holder for its and plaintiffs' interests, alleging that defendant failed to provide written notice regarding its proposed sale of plaintiffs' interest in the joint venture and its purchase of a controlling interest, which allowed it to select its alter-ego as the operator of an oil-and-gas field. The trial court found that plaintiffs' claim was barred by the statute of limitations; the court of appeals reversed and remanded. On remand, the court entered judgment for plaintiffs. This court affirmed in part, holding that forfeiture of all fees paid by plaintiffs to defendant's alter-ego was appropriate. The court explained that the total fee forfeiture was not excessive by relying on Restatement Third of the Law Governing Lawyers § 37. Dernick Resources, Inc. v. Wilstein, 471 S.W.3d 468, 482, 486.

Tex.App.2013. Cit. in sup., com. (b) cit. and quot. in sup. Former client sued law firm for breach of fiduciary duty, alleging that law firm failed to disclose the conflict of interest that arose when it undertook representation of the trustee in a bankruptcy proceeding involving a judgment creditor of former client. After a jury found in favor of law firm, the trial court granted a take-nothing judgment against former client. Affirming, this court held that former client was not entitled to seek forfeiture of the $1 million in attorney's fees paid to law firm by trustee, because, under Texas law, a client seeking forfeiture of an attorney's fee was not entitled to recover fees paid by another party. Moreover, former client was not entitled to recover the $10,000 in fees that it had paid to law firm, because that amount was compensation for legal services that law firm had provided during the first of two distinct attorney-client relationships, and former client's claims against law firm related exclusively to the second representation, for which no fees had been paid. Gregory v. Porter & Hedges, LLP, 398 S.W.3d 881, 885, 886.

Tex.App.2012. Cit. in case cit. in sup. (citing § 49 of Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Oil-and-gas-production company brought claims for, inter alia, breach of fiduciary duty against its former landman, seeking, among other things, forfeiture of all compensation paid or granted to defendant. The trial court denied defendant's motion to transfer venue pursuant to the applicable state statute's mandatory venue provision for writs of injunction. While conditionally granting defendant's petition for mandamus on other grounds, this court held that the trial court did not err in denying defendant's motion, because plaintiff's request for the equitable remedy of forfeiture did not seek purely or primarily injunctive relief. The court observed that multiple factors could be relevant to deciding whether a party who breached a fiduciary duty should forfeit his compensation and, if so, in what amount, noting that Restatement Third of the Law Governing Lawyers § 49 of Proposed Final Draft No. 1, 1996 (which was now § 37 of the Official Text) listed factors relevant to forfeiture of attorney's fees. In re Hardwick, 426 S.W.3d 151, 159.

Tex.App.2011. Cit. in sup.; com. (d) quot. in case quot. in sup. (citing § 49 of Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Attorney intervened in client's suit against insurer, seeking to collect his fee; client counterclaimed for breach of fiduciary duty, inter alia. The trial court, among other things, denied client's motion for summary judgment, and entered judgment on a jury verdict awarding attorney damages. Affirming in part, this court held that the trial court did not err in failing to order that attorney forfeit all fees, because the trial court could reasonably have concluded that attorney's use of information that he had learned in a prior representation of client in order to negotiate a contingent fee with client did not affect the value of his work for client or harm client; attorney had disclosed the contingent-fee arrangement to client, client's bankruptcy counsel in a separate matter, and bankruptcy court, and, if the contingent-fee contract provided a means by which client could secure representation while in bankruptcy, attorney's knowledge regarding the potential value of the lawsuit would not necessarily have been to client's detriment. Wythe II Corp. v. Stone, 342 S.W.3d 96, 104.

Tex.App.2008. Cit. in ftn.; quot. in case quot. in sup. (citing § 49 of Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Executives of corporation brought a legal-malpractice case against attorneys that represented them in underlying litigation, seeking forfeiture of fees. The trial court granted attorneys' motions for summary judgment. Affirming, this court held, inter alia, that, because plaintiffs did not themselves pay any legal fees to the attorneys, allowing them to recover such amounts as a fee forfeiture would result in a windfall to them, and, because equity did not support such a "windfall" result, fee forfeiture was not an appropriate remedy. Swank v. Cunningham, 258 S.W.3d 647, 673.

Tex.App.2008. Quot. in case quot. in ftn. to conc. and diss. op., com. (d) quot. in case quot. in ftn. to conc. and diss. op. (citing § 49, Prop. Final Draft No. 1, 1996, which is § 37 of the Official Text). Former client sued attorneys for legal malpractice and breach of fiduciary duties. The trial court granted summary judgment for defendants on limitations grounds. Affirming in part, reversing in part, and remanding, this court held that the legal-malpractice claim was time-barred, but that the breach-of-fiduciary-duty claim was separate from the malpractice claim and was timely filed. The concurring and dissenting opinion argued that plaintiff failed to prove the existence of an independent breach-of-fiduciary-duty claim, pointing out that an attorney who breached his fiduciary duty to his client could be required to forfeit his fees, but that, here, plaintiff did not seek the return of the fees by which defendants benefited, and did not allege matters necessary to support such relief. Trousdale v. Henry, 261 S.W.3d 221, 241.

Tex.App.1997. Cit. in ftn., coms. (b) and (d) cit. in disc. (citing § 49, Proposed Final Draft No. 1, 1996, which is now § 37). Clients brought action against attorneys who represented them in personal injury lawsuit, alleging, among other things, that defendants breached their fiduciary duty by accepting an aggregate settlement on behalf of plaintiffs, and that, as a remedy, plaintiffs were entitled to a fee forfeiture. The trial court granted in part and denied in part defendants' motion for summary judgment, finding that material factual issues existed as to defendants' breach of duty, but that plaintiffs were not harmed and, in any event, fee forfeiture was not a viable remedy in Texas. Affirming in part, reversing in part, and remanding, this court held that Texas, which long recognized fee forfeiture as a viable remedy for breach of fiduciary duty in principal-agent relationships, also recognized it as a remedy in the attorney-client context; that the client need only prove breach of a fiduciary relationship to be entitled to fee forfeiture; that the wrongdoing attorney was not required to forfeit his or her entire fee; and that the trial court would determine the amount of the forfeiture, considering such factors as the character of attorney's misconduct, the degree of attorney's culpability, and the adequacy of other available remedies. Arce v. Burrow, 958 S.W.2d 239, 249, 250, affirmed in part, reversed in part, and remanded 997 S.W.2d 229 (Tex.1999).

Wash.

Wash.2010. Com. (a) cit. in sup. Clients sued former attorney for legal malpractice and breach of fiduciary duty, seeking interest on a settlement payment they would have received approximately 10 years earlier had he not mishandled their case. After attorney admitted liability, the trial court awarded interest calculated on a figure representing the settlement less attorney's contingency fee. The court of appeals reversed, ruling that the interest should have been calculated on the total amount of the settlement, not the amount clients would have recovered after paying a contingency fee. Affirming, this court held that a legal malpractice plaintiff's damages could appropriately include forfeiture of the attorney's hypothetical contingency fee, reasoning that such a plaintiff should not be burdened with the obligation to pay twice for the same services. In addition, the court noted the rationale that a negligent lawyer should not be “credited” with a fee that he never earned. Shoemake ex rel. Guardian v. Ferrer, 168 Wash.2d 193, 225 P.3d 990, 995.

W.Va.

W.Va.2006. Quot. in sup. and adopted (erron. cit. as Restatement Second). Lawyer disciplinary board determined that attorney committed numerous violations of the Rules of Professional Conduct in preparing wills for two deceased clients and recommended, among other things, that he receive reduced fees for his services. This court rejected the board's recommendations and imposed additional sanctions, including full restitution of all fees. The court reasoned that total restitution was required because the violations involved a clear and serious breach of duty, the misconduct was intentional and caused clients actual harm, and to permit attorney to retain any proceeds of his unethical conduct would send a chilling message to the public and, because of the amount of money involved, would be an incentive for other lawyers to engage in similar conduct. Lawyer Disciplinary Bd. v. Ball, 219 W.Va. 296, 633 S.E.2d 241, 253, 254.

End of Document

Restatement (Third) of the Law Governing Lawyers 3 2 Intro. Note (2000)

Introductory Note

Introductory Note: This Topic sets forth rules governing the compensation of lawyers: the creation and construction of fee contracts (see § 38; see also § 18); the lawyer's right to recover the fair value of services rendered when there is no enforceable contract (see § 39); and modification of fee arrangements when the client-lawyer relationship is terminated before the lawyer has finished providing the contemplated legal services (see § 40). Compared to the usual rules of contract law, those described in this Topic seek to protect clients by placing the burden of specifying contractual arrangements on the lawyer and by allowing clients to change lawyers without having to pay double fees.

Restatement (Third) of the Law Governing Lawyers § 38 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 2. A Lawyer's Claim to Compensation

§ 38 Client-Lawyer Fee Contracts

(1) Before or within a reasonable time after beginning to represent a client in a matter, a lawyer must communicate to the client, in writing when applicable rules so provide, the basis or rate of the fee, unless the communication is unnecessary for the client because the lawyer has previously represented that client on the same basis or at the same rate.
(2) The validity and construction of a contract between a client and a lawyer concerning the lawyer's fees are governed by § 18.
(3) Unless a contract construed in the circumstances indicates otherwise:
(a) a lawyer may not charge separately for the lawyer's general office and overhead expenses;
(b) payments that the law requires an opposing party or that party's lawyer to pay as attorney-fee awards or sanctions are credited to the client, not the client's lawyer, absent a contrary statute or court order; and
(c) when a lawyer requests and receives a fee payment that is not for services already rendered, that payment is to be credited against whatever fee the lawyer is entitled to collect.

Comment:

a. Scope and cross-references. This Section concerns fee contracts between clients and lawyers. A lawyer's contract with a nonclient to pay the fee of a client (see generally § 134) is subject to similar rules under general law if, for example, the fee-payor is a spouse or parent of the client and is thus in a situation similar to that of a client.

A fee contract may not provide for an unreasonably large fee (see § 34) or violate the other restrictions on fee arrangements (see §§ 35- 37).

A fee contract must meet the usual requirements of contract law as well as the special rules of § 18. Subsection (1) incorporates the disciplinary rules requiring lawyers to disclose the basis or rate of their fees at the outset of a representation. Subsection (3) implements the general principle of construction for client-lawyer contracts in § 18 by providing threerules of construction concerning fees.

When there is an enforceable contract, it governs the rights of both lawyer and client, and, unless both agree, neither can elect to set it aside and proceed under § 39 (see Restatement of Restitution § 107). When a fee contract is unenforceable, the lawyer can proceed under § 39 for the fair value of services rendered, unless entering an unenforceable contract warrants forfeiture of the lawyer's compensation (see § 37 & § 39, Comment *e*). Section 40 deals with the effect of a lawyer's discharge or withdrawal on a fee contract.

b. *A lawyer's duty to inform a client.* Subsection (1) sets forth the lawyer's duty to inform a client of the basis or rate of the fee. Noncompliance with that duty is enforceable through professional discipline and by limiting the lawyer's remuneration to the fair-value standard described in § 39. When the client is already aware of the basis or rate of the fee, for example because the client's letter states that the client will pay a specified hourly fee for specific services, the lawyer need not further inform the client. The client should also be informed if the lawyer proposes to use a different basis or rate in the event of settlement, trial, or appeal.

The lawyer should inform the client early enough so that the client will not be inconvenienced unnecessarily if, upon considering the information, the client decides to seek another lawyer. The basis or rate might be a specified hourly charge, a percentage, or a set of factors on which the fee will be based. If the fee is based on a percentage of recovery (or other base), the client should also be informed if a different percentage applies in the event of settlement, trial, or appeal. For a client sophisticated in retaining lawyers, a statement that "we will charge our usual hourly rates" ordinarily will suffice. The less specific the notice, the less it should control a tribunal passing on the propriety of the fee. Thus, a lawyer's statement "I will charge what I think fair, in light of the hours expended and the results obtained," even if deemed part of a valid contract, does not bind the client or tribunal to accept whatever fee the lawyer thinks fair. The level of information imparted to the client might comply with disciplinary rules but not give rise to an enforceable contract.

The information should indicate the matter for which the fee will be due, for example, "preparing and trying (but not appealing) your auto injury suit." If the services are not specifically described, the lawyer will be held under § 18 to provide the services that a reasonable client would have expected.

Most states require that contingent-fee contracts be in writing. Even when there is no such requirement, tribunals are reluctant to uphold oral contingent-fee contracts. Tribunals adjudicating fee disputes are free to reject a lawyer's testimony concerning the fee when the client testifies more credibly to the contrary. The statute of frauds might render unenforceable some unwritten client-lawyer contracts (see Restatement Second, Contracts § 130).

c. *Representation without charge.* Lawyers sometimes represent clients without payment. A lawyer's agreement, explicit or implicit, to render services without charge is as enforceable as any other fee contract. The lawyer's obligation to seek no compensation can also result from a waiver or estoppel (see Restatement Second, Contracts § 90). When a client reasonably believes that no compensation will be expected, the client does not owe the lawyer a fee. Circumstances indicating such a belief include the small quantity of legal services in question, the absence of any history of paid legal services by the lawyer for the client, and the client's evident indigence. Compare Restatement Second, Agency § 411 (pay due unless circumstances indicate agent was not to be compensated). On payment for a preliminary consultation not leading to employment, see § 15, Comment *g*.

d. Construction of fee contracts. Under § 18, a contract between a client and lawyer is to be construed as a reasonable client would have construed it, considering the contract in the circumstances in which it was made (see § 18, Comment *h*).

e. Disbursements. Under generally prevailing practice, the actual amount of disbursements to persons outside the office for hired consultants, printers' bills, out-of-town travel, long-distance telephone charges, and the like ordinarily are charges in addition to the lawyer's fee. Reimbursement is limited to the actual amount of disbursements the lawyer was authorized to make under the lawyer's general authority or a more specific delegation or contract (see §§ 21- 23). Compare Restatement Second, Agency §§ 438(2)(a) and 439(e) (principal must indemnify agent for payment authorized or necessary in managing principal's affairs or where agent was not officious in making expenditure, principal was benefited, and it would be inequitable not to indemnify). See also § 17 as to a client's duty to indemnify a lawyer for certain expenses. As to whether a nonclient who provides goods and services can hold the client or lawyer liable for them, see §§ 26, 27, and 30.

Court costs and expenses of litigation, such as filing fees, expert-witness fees, and witness expenses, are normally payable by clients. In most states, a lawyer may not advance such expenses unless the client is obligated to repay them out of the client's recovery (see § 36(2) & Comment *c* thereto). Under a contingent-fee contract, however, a client who does not prevail is not liable to the lawyer for court costs and litigation expenses, unless the client agreed to pay them or nonrefundable advances by the lawyer of such costs and expenses are unlawful in the jurisdiction.

Subsection (3)(a) provides that, unless the contract construed in its circumstances provides otherwise, a lawyer may not recover from a client payment in addition to the agreed fee for items of general office and overhead expense such as secretarial costs and word processing. A client lacking knowledge of the lawyer's usual practice cannot be expected to assume that the lawyer will charge extra for such expenses. The lawyer may, however, charge separately for such items if the client was told of the billing practice at the outset of the representation or was familiar with it from past experience with the lawyer or (in the case of a general billing custom in the area) from past experiences with other lawyers.

f. Payments by an opposing party. Prevailing litigants in some types of litigation are entitled to recover attorney fees from an opposing party. On possible conflict-of-interest considerations in such cases, see § 125, Comment *f*. A litigant might be awarded a monetary sanction imposed on the opposing party (see § 110, Comment *g*). Most fee statutes provide for recovery by a "prevailing party" rather than the party's lawyer. Under this Section, if a lawyer for the prevailing litigant does not foresee and contract for the possibility of a court-awarded fee consistently with §§ 18 and 34, the client rather than the lawyer is entitled to any such fee and can settle or waive the right to recover such a fee. The lawyer will recover from the client the fee otherwise contracted for or, in the absence of any contract, the fair value of services the client received as provided in § 39.

However, the fee award would go to the lawyer rather than the client if the parties had reached an enforceable contract so providing or if law or the tribunal so directed. Such a contract must comply with §§ 18 and 34- 37, but would not ordinarily constitute a client-lawyer business arrangement subject to § 126. Also, in a suit in which a fee award is available, if client and a lawyer have neither agreed to a basis or rate for a fee nor agreed that the lawyer will serve without payment, it is ordinarily appropriate to assume that the lawyer's fee is to be any attorney-fee award. A contract providing that a lawyer is to receive both a standard contractual fee and a fee award, without crediting the award against the contractual fee, is presumptively unreasonable under § 34.

Illustrations:

1. Lawyer agrees to represent Client in a lawsuit for an hourly fee. Because the opposing party defends the suit in bad faith, the court orders that party to pay reasonable attorney fees.

The payment goes to Client, not Lawyer, unless they have otherwise agreed. A contract that Lawyer should receive the payment might sometimes be inferred from the circumstances, for example if the lawyer was to be paid a flat fee and the opposing party's bad faith had greatly extended the services required beyond what might have been expected.

2. Lawyer agrees to represent Client in a lawsuit without discussing attorney fees or the possibility that the opposing party will be ordered to pay attorney fees. The suit is brought under a statute that has been construed to entitle virtually all prevailing plaintiffs to attorney fees. Client prevails, recovering $10,000 in damages and $5,000 in attorney fees. In the absence of special circumstances indicating agreement between Client and Lawyer to the contrary, Client is entitled to the $10,000 damage award and Lawyer to the $5,000 fee award.

This Section does not address who should pay attorney fees or sanctions, as opposed to who should receive them. The court ordering the fee or sanction payment usually specifies the payor (see §§ 29 & 30). This Section also does not address who should receive attorney-fee awards under the "common fund" or "common benefit" doctrines.

g. An advance payment, engagement-retainer fee, or lump-sum fee. A fee payment that does not cover services already rendered and that is not otherwise identified is presumed to be a deposit against future services. The lawyer's fee for those services will be calculated according to any valid fee contract or, if there is none, under the fair-value standard of § 39. If that fee is less than the deposit, the lawyer must refund the surplus (see § 33(1)). If the fee exceeds the deposit, the client owes the lawyer the difference. The deposit serves as security for the payment of the fee. See also § 43 (considering other security devices); § 44, Comment *f* (considering when lawyer may transfer advance-fee payment to lawyer's personal account).

A client and lawyer might agree that a payment is an engagement-retainer fee (see § 34, Comment *e*) rather than a deposit. Clients who pay a fee without receiving an explanation ordinarily will assume that they are paying for services, not readiness (see § 38(3)(c)). A client and lawyer might also agree that an advance payment is neither a deposit nor an engagement retainer, but a lump-sum fee constituting complete payment for the lawyer's services. Again, the lawyer must adequately explain this to the client. In any event, an engagement-retainer or lump-sum fee must be reasonable (see § 34 & Comment *d* thereto). If the lawyer withdraws or is discharged prematurely or for other misconduct, the contractual fee might be subject to reduction (see § 40, Illustration 3; see also § 37 (fee forfeiture)).

h. Interest. A client and lawyer may agree for the payment of a reasonable amount in interest on past-due and unpaid charges of the lawyer (see §§ 18 & 34). In the absence of contract, the lawyer's entitlement to interest is determined by other law. Similarly, a lawyer's right to receive interest on cost and similar advances (see § 36(2)) is determined either by contract or other law.

Reporter's Note

*Comment b. A lawyer's duty to inform a client.*ABA Model Rules of Professional Conduct, Rule 1.5(b) (1983) ("When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."). See generally ABA Formal Opin. 93-379 (1993); Gillers, Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers, 10 Geo. J. Legal Ethics 581 (1997). On the effect of unspecific notice, see, e.g., Finch v. Hughes Aircraft, 469 A.2d 867 (Md.Ct.Spec.App.1984) (lawyer committed fraud by billing without notice for time spent on previous related matter); First Nat'l Bank v. Brink, 361 N.E.2d 406 (Mass.1977) (where contract provides for

payment without specifying amount, lawyer recoups what court finds to be fair and reasonable); Jacobs v. Holston, 434 N.E.2d 738 (Ohio Ct.App.1980) (where contract states hourly fee but not number of hours, lawyer must show what hours were actually and reasonably devoted to case).

ABA Model Rule 1.5(c) requires contingent-fee contracts to be in writing. Accord, e.g., Calif. Bus. & Prof. Code § 6147; Illinois Code of Professional Responsibility, DR 2-106(c). See N.J. Rules of Professional Conduct, Rule 1.5(b) (written notice required for all fees where lawyer has not regularly represented client); 1 G. Hazard & W. Hodes, The Law of Lawyering 112 (2d ed. 1990) (urging similar rule). For examples of reluctance to uphold disputed oral-fee arrangements, see Foodtown, Inc. v. Argonaut Ins., 102 F.3d 483 (11th Cir.1996); Kirby v. Liska, 334 N.W.2d 179 (Neb.1983) (contingent fee); Becnel v. Montz, 384 So.2d 1015 (La.Ct.App.1980); Roehrdanz v. Schlink, 368 N.W.2d 409 (Minn.Ct.App.1985). On the other hand, if a contract is sufficiently proved, a court in a jurisdiction in which a writing is required will often permit the lawyer a fair-value recovery in the absence of any indication of overreaching. E.g., Vaccaro v. Estate of Gorovoy, 696 A.2d 724 (N.J.Super.Ct.App.Div.1997). For construction of unclear contracts to require the lawyer to provide representation on appeal, see § 18, Reporter's Note to Comment *e*.

*Comment c. Representation without charge.*See ABA Model Rules of Professional Conduct, Rule 6.1 (1983) ("A lawyer should render public interest legal service" for example "by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations"). On circumstances indicating that services were gratuitous, see, e.g., Briggs v. Clinton County Bank & Trust Co., 452 N.E.2d 989 (Ind.Ct.App.1983) (history of services over the years without bill or payment); In re Cutler & Horgan, 212 N.W. 573 (Iowa 1927) (lawyer brother of client, who had other counsel); In re Estate of Orris, 622 P.2d 337 (Utah 1980) (lawyer's services performed out of friendship and reciprocity); Cadle v. Black, 154 P. 997 (Wyo.1916) (lawyer offered to serve without charge).

*Comment e. Disbursements.*See generally ABA Formal Opin. 93-379 (1993); 1 S. Speiser, Attorney's Fees §§ 1:46-49 (1973). For items presumptively nonrecoverable from a client, see Ramos Colon v. Secretary of Health & Human Services, 850 F.2d 24 (1st Cir.1988) (computer and word processing time); In re Ireland, 706 P.2d 352 (Ariz.1985) (secretarial costs); In re Estate of Muccini, 460 N.Y.S.2d 680 (N.Y.Sur.Ct.1983) (normal operating overhead costs; but other out-of-pocket disbursements are recoverable); 1 B. Witkin, California Procedure § 140 (3d ed.1985); cf. In re Zaleon, 494 S.E.2d 669 (Ga.1998) (discipline for adding surcharge to disbursements without disclosure to client); Henican, James & Cleveland v. Strate, 348 So.2d 689 (La.Ct.App.1977) ("out of pocket expenses" does not include in-office copying expenses). For items presumptively recoverable, see Roberts, Walsh & Co. v. Trugman, 264 A.2d 237 (N.J.Dist.Ct.1970) (court reporter); Levy v. State, 420 N.Y.S.2d 154 (N.Y.Ct.Cl.1979) (investigation costs); E. Wood, Fee Contracts of Lawyers 284-88 (1936) (printing, expert witnesses, court reporters; but not associate counsel retained without client's approval); cf. Missouri v. Jenkins, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (attorney-fee award should include separate payment for paralegals, because their time is customarily billed separately). On the construction of contingent-fee contracts with respect to court costs and litigation expenses, see Coon v. Landry, 408 So.2d 262 (La.1981); Shaw v. Manufacturers Hanover Trust Co., 499 N.E.2d 864 (N.Y.1986).

*Comment f. Payments by an opposing party.*For payment of litigation sanctions to the client, see Hamilton v. Ford Motor Co., 636 F.2d 745 (D.C.Cir.1980). Authority holding that attorney-fee awards should be credited against the client's contractual fee debt to the lawyer unless the contract provides otherwise includes Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir.1986); Wheatley v. Ford, 679 F.2d 1037 (2d Cir.1982); Chalmers v. Oregon Auto. Ins. Co., 502 P.2d 1378 (Or.1972); Commercial Union Ins. Co. v. Estate of Plute, 356 So.2d 54 (Fla.Dist.Ct.App.1978); Luna v. Gillingham, 789 P.2d 801, 805 (Wash.Ct.App.1990); see In re Atencio, 742 P.2d 1039 (N.M.1987) (disciplinary proceeding). When the attorney-fee award is larger than the contractual fee, some courts allow the lawyer to keep the surplus even without a contractual provision so stating. Sullivan v. Crown Paper Bd. Co., 719 F.2d 667 (3d Cir.1983); Cooper v. Singer, 719 F.2d 1496, 1507 (10th Cir.1983); see Sargeant v. Sharp, 579 F.2d 645, 649 (1st Cir.1978). Blanchard v. Bergeron, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989), seems to assume this result. The contrary view is supported by the principles of construction of § 18 and by the Supreme Court's conclusion that attorney-fee awards belong to the client, not the lawyer. Evans v. Jeff

D., 475 U.S. 717, 730-32, 106 S.Ct. 1531, 1538-40, 89 L.Ed.2d 747 (1986); Venegas v. Mitchell, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990). See Benalcazar v. Goldsmith, 507 N.E.2d 1043 (Mass.1987). A client-lawyer contract might alter the result, but courts have held unreasonable and unenforceable contracts that give the lawyer both a contractual and a statutory fee. Harrington v. Empire Constr. Co., 167 F.2d 389 (4th Cir.1948); In re Atencio, 742 P.2d 1039 (N.M.1987); see Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir.1969). But see Jensen v. Dept. of Transportation, 858 F.2d 721 (Fed.Cir.1988).

This Section does not address whether a client-lawyer fee contract should affect the size of a statutory fee recovered from an opposing party. See Blanchard v. Bergeron, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989); Annot., 76 A.L.R. Fed. 347 (1986).

*Comment g. An advance payment, engagement-retainer fee, or lump-sum fee.*Wong v. Kennedy, 853 F.Supp. 73 (E.D.N.Y.1994) (citing Restatement, advance payment for criminal-defense services up to 10 weeks prior to trial found to be deposit, not engagement retainer); Jersey Land & Development Co. v. United States, 342 F.Supp. 48 (D.N.J.1972) (similar); In re Stern, 458 A.2d 1279 (N.J.1983) (bar-association opinions differ as to whether a retainer-advance payment is presumed to be on account or to reserve the lawyer's services); Cannon v. First Nat'l Bank of East Islip, 469 N.Y.S.2d 101 (N.Y.App.Div.1983), aff'd, 468 N.E.2d 699 (N.Y.1984) (when lawyer accepted fixed monthly fee, he cannot later claim additional payment for extraordinary services). Courts have rejected claims that a lawyer may keep advance payments when discharged during the representation, applying the principles of § 40. Federal Savings & Loan Ins. Corp. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.1988) (overruling nonrefundability clause); Simon v. Auler, 508 N.E.2d 1102 (Ill.App.Ct.1987); Smith v. Binder, 477 N.E.2d 606 (Mass.App.Ct.1985); Jacobson v. Sassower, 489 N.E.2d 1283 (N.Y.1985) (construing nonrefundability clause narrowly); see Jennings v. Backmeyer, 569 N.E.2d 689 (Ind.Ct.App.1991) (lawyer may not keep "nonrefundable" fixed fee when client dies soon after retaining lawyer); ABA Model Rules of Professional Conduct, Rule 1.16(d) (1983) (lawyer must refund unearned fee); Calif. R. Prof. Conduct 2-111(A)(3) (duty to refund unearned fees inapplicable to engagement retainer paid solely to ensure lawyer's availability); Brickman & Cunningham, Nonrefundable Retainers: Impermissible under Fiduciary, Statutory and Contract Law, 57 Ford. L. Rev. 149 (1988).

*Comment h. Interest.*See generally ABA Formal Opin. 338 (1974) (permissible for lawyer to charge interest on past-due fees pursuant to contract with client); ABA/BNA Law. Manual Prof. Conduct §§ 41:309, 41:2006 & 41:2017-19 (1993) (citing ethics-opinion authority in many states). On interest provided by contract, see, e.g., Katz & Lange, Ltd. v. Beugen, 356 N.W.2d 733 (Minn.Ct.App.1984) (in absence of contract, lawyer's unilateral charge of usurious rate of interest as finance charge on statements unenforceable). On interest provided by law, see, e.g., Davis & Cox v. Summa Corp., 751 F.2d 1507, 1522-23 (9th Cir.1985) (in diversity case, state statutory and case law determines lawyer's right to pre- and post-judgment interest); Florida Bar v. Dunagan, 565 So.2d 1327 (Fla.1990) (lawyer disciplined for charging interest on prior bills, which themselves billed interest, resulting in interest-on-interest charge in excess of statutory limit); Cannell v. Rhodes, 509 N.E.2d 963 (Ohio Ct.App.1986) (prejudgment-interest statute applies); cf. also, e.g., Anderson & Adams v. Bayou Land & Marine Contractors, Inc., 566 So.2d 438 (La.Ct.App.1990) (statutory fee shifting); Gunter v. Bailey, 808 S.W.2d 163 (Tex.Ct.App.1991) (court costs and fee-shifting under statute).

Case Citations - by Jurisdiction

—

C.A.10
N.D.Ill.Bkrtcy.Ct.
Alaska
Ariz.
Colo.

D.C.App.
Mass.App.
N.J.
S.D.
Tex.

C.A.10

C.A.10, 2007. Com. (e) quot. in sup. Daughter of a deceased uranium worker and law firm that allegedly could not afford to represent her in filing a claim for payment under the Radiation Exposure Compensation Act (RECA) sued the United States, challenging a regulation that combined costs and fees for purposes of RECA's attorney-fee limitations. The district court dismissed. Reversing and remanding, this court held, as a matter of first impression, that the regulation was contrary to RECA's plain language and was therefore invalid, because a fee for services rendered was not the equivalent of reimbursement for costs incurred; in light of the general rule that an attorney could not assume a client's expenses but could advance expenses in the form of an interest-free loan, to equate an "interest-free loan" that had to be reimbursed with a "fee for services rendered" was to deny those words their ordinary meaning. Hackwell v. U.S., 491 F.3d 1229, 1239.

N.D.Ill.Bkrtcy.Ct.

N.D.Ill.Bkrtcy.Ct.2011. Quot. in sup. Law firm that obtained a prepetition protection order in state court for its client on the basis that Chapter 7 debtor had physically abused her, harassed her, and interfered with her liberty brought an adversary proceeding against debtor, seeking a determination that the state court's attorney's fee award was excepted from discharge as a debt for willful and malicious injury. Granting judgment for plaintiff, this court held, inter alia, that, while plaintiff was already paid by client for legal fees arising out of the protection order, any payment from debtor would not constitute a double recovery or windfall for plaintiff, since payments that the law required an opposing party to pay as attorney's fee awards were credited to the client, not the client's lawyer, absent a contrary statute or court order. In re Lymberopoulos, 453 B.R. 340, 345.

Alaska

Alaska, 2009. Com. (a) quot. in ftn. After their underlying personal-injury case settled for policy limits, clients sued law firm, disputing the amount of attorney's fees due under the parties' modified contingent-fee agreement, which provided for a flat fee of $250,000 if law firm obtained a policy-limits settlement without requiring "further substantial litigation," but otherwise reverted to the percentages in the prior fee agreement. The trial court granted summary judgment for law firm. Affirming, this court held that the trial court did not err in interpreting the phrase "further substantial litigation" to mean "additional considerable efforts in carrying on the legal contest." The court concluded that reasonable persons in the clients' circumstances would not have expected "further substantial litigation" to mean purely in-court proceedings and filings to the exclusion of work done in preparation for mediation or trial, and noted that attorney-client contracts were to be construed as any other contract, using general rules of contract interpretation. Weiner v. Burr, Pease & Kurtz, P.C., 221 P.3d 1, 9.

Ariz.

Ariz.2002. Com. (g) quot. in disc. Attorney's client filed a complaint with the state bar, alleging that attorney charged an unreasonably high fee. Supreme court disciplinary commission affirmed hearing officer's recommendation of censure and increased the amount of restitution awarded. This court vacated and remanded for arbitration, holding, inter alia, that the state bar should not have begun formal disciplinary proceedings against attorney until arbitration of the fee dispute had concluded. Although hearing officer considered the eight factors listed under state ethics rule 1.5 and noted that attorney charged a nonrefundable fixed fee, she erred in not

discussing the appropriateness of the nonrefundable flat fee in light of the negotiated risk involved and the type of legal services provided. In re Connelly, 203 Ariz. 413, 55 P.3d 756, 762.

Colo.

Colo.2000. Com. (g) quot. and cit. in disc. (citing § 50, Prop. Final Draft No. 1, 1996, which is now § 38). In attorney regulation proceeding, hearing board suspended attorney from the practice of law for, among other things, failing to deposit flat fee paid by client into a trust account until the fees were earned. Disagreeing with the length of the suspension but agreeing that attorney had violated various Colorado rules of professional conduct, the court held, in part, that an attorney earned fees only when he conferred a benefit on or provided a service for a client, and that, under the rules of professional conduct, an attorney was required to hold all client funds, including but not limited to engagement retainers, advance fees, flat fees, and lump-sum fees, in trust until there was some basis on which to conclude that the fees had been earned. In re Sather, 3 P.3d 403, 411.

D.C.App.

D.C.App.2009. Com. (g) quot. in disc. In disciplinary proceedings, attorney was charged with violating various rules of professional conduct after he commingled with his own funds a "flat fee" paid by a client in advance for legal services. Adopting the board on professional responsibility's recommendation that attorney be sanctioned with a public censure, this court held, as a matter of first impression, that when an attorney received payment of a flat fee at the outset of a representation, the payment was an advance of unearned fees that was to be treated as property of the client until earned unless the client consented to a different arrangement. The court noted that, by contrast, an engagement retainer, while potentially refundable in part if the lawyer withdrew or was discharged prematurely, was earned when received. In re Mance, 980 A.2d 1196, 1202.

Mass.App.

Mass.App.1991. Cit. in ftn. in sup. (citing § 50, T.D. No. 4, 1991, which is now § 38). A law firm sued its client to recover a performance premium, alleging that it was part of a fair and reasonable fee. The trial court granted summary judgment for the client, holding that the law firm could not charge the premium. Affirming, this court held, inter alia, that, although the firm had in the past charged clients a premium, their subjective and unexpressed expectations could not refute the expressed manifestations, based on the previous billing pattern and a letter from the firm to the client confirming a time charge fee arrangement, to charge on the basis of time only. Beatty v. NP Corp., 31 Mass.App.Ct. 606, 581 N.E.2d 1311, 1315.

N.J.

N.J.1996. Cit. in disc. (citing § 50, P.F.D. No. 1, 1996, which is now § 38). Discharged attorney sued client to recover fees allegedly owed under the parties' retainer agreement. Client argued that the agreement, which required client to provide attorney with six months' notice of termination, was unenforceable as an unreasonable restriction of its right to discharge counsel. The trial court entered judgment for attorney, but the intermediate appellate court reversed and remanded. Affirming as modified, this court held that fair and reasonable attorney-client agreements, though usually construed against the attorney, were enforceable where they satisfied both general contracts and professional ethics requirements; that, while attorneys and clients were free to negotiate such innovative arrangements as the engagement retainer, the notice provision here was excessive; and that attorney could recover the fair value of his pretermination services. Cohen v. ROU, 146 N.J. 140, 679 A.2d 1188, 1196.

S.D.

S.D.2005. Cit. in ftn. Funeral-home sellers who did not receive full payment from bankrupt buyer sued their attorney for, in part, breach of fiduciary duty. The trial court entered judgment on a jury verdict for defendant. This court affirmed, holding that plaintiffs were not entitled to a breach-of-fiduciary-duty instruction as they did not show that failure to communicate basis of fee, or dispute over fee's reasonableness, was breach of fiduciary duty involving confidentiality or loyalty. Behrens v. Wedmore, 2005 SD 79, 698 N.W.2d 555, 575.

Tex.

Tex.2006. Subsec. (1) cit. in case quot. in disc. Discharged law firm sued former client, seeking payment under a fee agreement. The trial court entered judgment on a jury verdict for law firm. The court of appeals reversed. Affirming that portion of the decision, this court held, inter alia, that a provision of the agreement requiring client to pay law firm a percentage based on the value of client's underlying claim at the time of discharge, rather than on client's actual recovery, was unconscionable as a matter of law, in part because it did not fulfill firm's obligation to give client at the outset a clear and accurate explanation of how such a fee was to be calculated, specifically, how the present value of the claims was to be measured. Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 565.

Tex.2001. Cit. in ftn., com. (f) quot. in conc. op., com. (f) quot. in ftn. in diss. op. Law firm, whose contingent-fee agreement with clients was for one-third of "any amount received by settlement or recovery" of clients' award against their mortgagor, sued clients for attorneys' fee after clients' award was offset by mortgagors' counterclaim. The trial court granted law firm summary judgment, and appellate court affirmed. Reversing, this court held that contingent-fee agreement entitled firm to net amount of clients' recovery, which was computed after any offset. Concurrence asserted that whether a contingent fee should be based on net or gross recovery depended on the circumstances. Dissent argued that the court should have deferred to the plain meaning of the language "any amount received by settlement or recovery" in the contingent-fee agreement. Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 96, 100, 104.

Restatement (Third) of the Law Governing Lawyers § 39 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

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

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

Comment:

a. *Scope and cross-references.* This Section sets forth a lawyer's right to recover a fair fee in quantum meruit for legal services provided to a client when a lawyer and client have not agreed upon another fee. It assumes that a client-lawyer relationship has been created (see § 14). Section 18 specifies requirements for a fee contract (see also § 38). The circumstances might also show that the lawyer was to serve without charge (see § 38, Comment *c*). A fee in quantum meruit may not exceed the applicable legal limits described in Topic 1 of this Chapter. Topic 3 discusses fee-collection procedures, including the various proceedings in which fee disputes can be resolved (see § 42); this Section applies to those proceedings.

A contract gives a client notice of what the fee will be, as required by § 38. A lawyer who fails to give such notice has a weaker claim to a fee whose amount the client might not have anticipated. The reasonableness requirement of § 34 is relevant (a) when a fee contract is challenged as unenforceable because the fee is too large or (b) when disciplinary authorities seek to discipline for a fee that is unreasonably large. The provisions of this Section are relevant but not conclusive when a lawyer faces such charges. However, discipline is inappropriate simply because a lawyer in good faith seeks a larger fee than a tribunal later determines to be due under this Section. If there

is no valid fee contract, this Section measures the fee that is due, and a lawyer may then not seek a fee plainly improper under this Section.

The "fair value" fee recoverable under this Section is not measured by the standards applied when a party recovers a reasonable attorney fee from an opposing party under a fee-award statute or doctrine. The latter kind of fee often implicates factors—such as a legislative intent to encourage such suits or to limit fee awards to less than full compensation (for example, when the main purpose of the fee award is to deter misconduct by the fee-paying party)—not present in quantum meruit recovery under this Section.

b. *Rationale.* The fair-value standard of this Section persists (see Restatement Second, Agency § 443(b)), largely because of the defects of other standards.

b(i). *The extent of a right to recover in the absence of a contract.* The law permits a lawyer who has not agreed on a fee to recover one. Although both lawyers and clients might be reluctant to discuss fees in advance, both usually expect that some payment will be due. Denying compensation would be unfair to the lawyer and a windfall to the client. Moreover, the parties might have agreed on a measure of compensation, but in a contract unenforceable because it does not meet an applicable legal standard (see Comment *e* hereto)—for example, because it is a contingent-fee contract but is not in writing as a court rule requires. Quantum meruit recovery then provides compensation in circumstances in which it would be contrary to the parties' expectation to deprive the lawyer of all compensation.

b(ii). *Measuring fair value.* The market value of a lawyer's services is relevant in determining fair value but is not as such the measure of restitutionary recovery. Market value is the basis on which quantum meruit recoveries for other services or goods are often computed (see Restatement of Restitution § 152). When applicable, it assists the tribunal's inquiry, because those active in the market will know the going price and can give evidence about it.

However, some measures of price from a competitive market might be inappropriate. For example, the market price of services for the vigorous litigation of a claim for specific performance of a land-purchase contract might be disproportionate to the value of a particular claim. For some clients, particularly those of small means, paying that price might be a foolish investment. Moreover, a strictly economic calculation of market value presupposes an informed client. But market prices might reflect client ignorance rather than fair bargaining. Where there has been no prior contract as to fee, the lawyer presumably did not adequately explain the cost of pursuing the claim and is thus the proper party to bear the risk of indeterminacy. Hence, the fair-value standard assesses additional considerations and starts with an assumption that the lawyer is entitled to recovery only at the lower range of what otherwise would be a reasonable negotiated fee.

c. *Applying the fair-value standard.* Assessing the fair value of a lawyer's services might require answers to three questions. What fees are customarily charged by comparable lawyers in the community for similar legal services? What would a fully informed and properly advised client in the client's situation agree to pay for such services? In light of those and other relevant circumstances, what is a fair fee (see Comment *b* hereto)?

In some cases, a standard market rate for a legal service might in fact exist. A lawyer who proves that a standard fee exists in the area should ordinarily be entitled to receive it, unless the client shows that a sophisticated, informed, and properly advised client in the client's situation would have refused to pay the standard fee-for example, because such a client would have decided not to proceed (see Comment *b(ii)* hereto). Similarly, a client should not be required to pay more than the standard fee unless the lawyer shows that, because of the circumstances of the case, a sophisticated, informed, and properly advised client would have agreed to pay a higher fee.

Calculation of an hourly fee might provide guidance. Except in certain areas such as criminal-defense or tort-plaintiff representation, hourly fees are a common contractual basis of payment for legal services. The hourly fee would be that charged by lawyers of similar experience and other credentials in comparable cases, but not more than the standard rate of the lawyer in question for that type of work. The lawyer must show, by records

or otherwise, the hours actually and reasonably devoted to the case in view of the importance of the case to the client, the client's financial situation and instructions, and the time that a comparable lawyer would have needed.

The standard rate or hourly fee might be modified by other factors bearing on fairness, including success in the representation and whether the lawyer assumed part of the risk of the client's loss, as in a contingent-fee contract (see § 35). Reference can be made to the factors in § 34, Comment *c.* Concerning expenses and disbursements paid by the lawyer and attorney-fee awards and sanctions collected from an opposing party, the principles of § 38(3)(a) and (b) apply.

A conservative evaluation is usually appropriate in assessing fees under this Section. When a lawyer fails to agree with the client in advance on the fee to be charged, the client should not have to pay as much as some clients might have agreed to pay. A fair-value fee under this Section is thus less than the highest contractual fee that would be upheld as reasonable under § 34.

d. Services other than legal services. This Section presupposes that the client has retained the lawyer to perform legal services. If the client retained the lawyer to perform other kinds of services, general principles of quantum meruit apply. When a lawyer has properly performed both legal and other services, the lawyer may recover for both kinds of services if that is just considering all the circumstances. It is relevant to consider the prior dealings between client and lawyer and the interconnection of the legal and other services in question.

e. Recovery of fees when a fee contract is unenforceable. A lawyer typically seeks recovery as provided under this Section when there is no applicable client-lawyer fee contract (see Restatement Second, Agency §§ 441 & 443(b)) or the parties have agreed to abrogate such a contract. In addition, should a fee contract be unenforceable a lawyer can obtain quantum meruit recovery under this Section, unless the lawyer's conduct warrants fee forfeiture under § 37. See also § 40, stating the effects of a lawyer's withdrawal or discharge on a fee contract. On the liability of an incompetent client for services constituting "necessaries," see § 14, Comment *c*; § 31, Comment *e*.

When a lawyer recovers compensation under this Section despite the unenforceability of a fee contract, ordinarily the lawyer should recover no more than the fee specified in the contract. See Restatement Second, Agency §§ 452, 455, and 456.

Reporter's Note

*Comment c. Applying the fair-value standard.*On the relevance of market value, see, e.g., Sharp v. Hui Wahine, Inc., 413 P.2d 242 (Haw.1966); In re Estate of Parlier, 354 N.E.2d 32 (Ill.App.Ct.1976); Bekins Bar V Ranch v. Utah Farm Production Credit Ass'n, 642 P.2d 714 (Utah 1982). For an hourly fee approach, see, e.g., Dean v. Holiday Inns, Inc., 860 F.2d 670 (6th Cir.1988); In re Estate of Marks, 393 N.E.2d 538 (Ill.App.Ct.1979); Heninger & Heninger, P.C. v. Davenport Bank & Trust Co., 341 N.W.2d 43 (Iowa 1983); In re Estate of Larson, 694 P.2d 1051 (Wash.1985); cf. Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (hourly fee approach for statutory attorney fee paid by losing party to prevailing one).

Other factors have also been considered in assessing the fair value of a lawyer's services. E.g., Searcy, Denney, Scarola, Barnhart & Shipley v. Poletz, 652 So.2d 366 (Fla.1995) (totality of circumstances, including reasons for lawyer's discharge, benefit conferred on client, and other factors; "lodestar" method disapproved); In re O'Leary, 356 N.Y.S.2d 640 (N.Y.App.Div.1974) (skill); Murphy v. Stringer, 285 So.2d 340 (La.Ct.App.1973) (mistakes); First Nat'l Bank of Boston v. Brink, 361 N.E.2d 406 (Mass.1977) (success); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994) (totality of circumstances); S. Speiser, Attorneys' Fees § 8:12 (1973) (client's ability to pay); Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473 (1981) (risk of nonpayment).

Comment d. Services other than legal services. There is little authority. See Page v. Penrose, 127 A. 748 (Md.1925) (lawyer retained as bank's special counsel entitled to lawyer pay, although performing legal and executive work that nonlawyer might have done).

Comment e. Recovery of fees when a fee contract is unenforceable. For recovery when the lawyer is not responsible for unenforceability, see, e.g., Roe v. Sears, Roebuck & Co., 132 F.2d 829 (7th Cir.1943) (lawyer died); Lewis v. Omaha St. Ry., 114 N.W. 281 (Neb.1907) (lawyer disabled); Sargent v. N.Y. Central & H. R.R., 103 N.E. 164 (N.Y.1913) (lawyer died); Spencer v. Collins, 104 Pac. 320 (Cal.1909) (underage client disavowed contract). For authority on fee forfeiture, see § 37, Comments *d* and *e,* and Reporter's Notes thereto.

For the contractual fee as a limit on quantum meruit recovery, see Sargent v. N.Y. Central & H. R.R., 103 N.E. 164 (N.Y.1913); Oil Purchasers, Inc. v. Kuehling, 334 So.2d 420 (La.1976); § 40, Reporter's Note to Comment *e.* But see 1 S. Speiser, Attorneys' Fees § 8:18 (1973) (contractual fee as evidence of fair value of legal services).

Case Citations - by Jurisdiction

—

D.Mass.
Cal.
Colo.
Colo.O.P.D.J.
Fla.
N.J.
N.J.Super.
Tex.

D.Mass.

D.Mass. 2001. Com. (e) quot. in sup. Massachusetts law professor, licensed to practice in New York, sought to enforce oral fee-splitting agreement allegedly formed in Illinois with law firms from South Carolina and Mississippi that profited from tobacco industry's settlement of numerous lawsuits. This court denied in part South Carolina defendants' motion for summary judgment, holding, inter alia, that plaintiff could recover on a quantum meruit basis even if the alleged oral fee-splitting agreement was unenforceable as matter of public policy. The court took defendants' motion under advisement as to enforceability of fee-splitting agreement, instructing parties to brief issue of which state's disciplinary rules were applicable. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 178 F.Supp.2d 9, 13.

Cal.

Cal. 2018. Cit. in sup., quot. in ftn. Law firm that was disqualified from representing two clients who were adverse to one another brought a lawsuit against one of those clients, alleging that defendant owed plaintiff damages for services rendered. An arbitrator awarded damages to plaintiff. The court of appeals reversed, finding that the agreement between the parties, which included the arbitration clause and a blanket waiver of any conflict of interests that might arise if plaintiff ever represented a party adverse to defendant, was unenforceable because plaintiff violated California ethical rules by failing to disclose plaintiff's conflict of interest. This court affirmed, inter alia, holding that the blanket waiver included in the agreement was a violation of ethical rules because it did not fully disclose existing conflicts. The court cited and quoted Restatement Third of the Law Governing Lawyers § 39 in explaining that attorneys could not recover fees under quantum meruit if their conduct warranted fee forfeiture. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., 425 P.3d 1, 19.

Colo.

Colo.2002. Cit. in disc. Client sued attorney who had represented her in a workers' compensation proceeding, asserting that attorney was not entitled to attorney's fees from the settlement because the contingent-fee agreement was not in writing as required by the Colorado Rules of Civil Procedure, and therefore was not enforceable. The trial court allowed attorney to retain fees under quantum meruit, but the court of appeals reversed. Reversing and remanding, this court held that an attorney was entitled to fees under quantum meruit when the agreed-upon services were successfully completed but the contingent-fee agreement was not in writing. Mullens v. Hansel-Henderson, 65 P.3d 992, 995.

Colo.O.P.D.J.

Colo.O.P.D.J.2013. Cit. in ftn. The state of Colorado brought a disciplinary action against attorney who was terminated by clients, alleging that, before returning unearned legal fees to clients, attorney commingled those fees with personal funds and unintentionally used them for her own purposes. The hearing board suspended attorney for three months, stayed upon the successful completion of a six-month probation period. This court affirmed the suspension. Citing Restatement Third of the Law Governing Lawyers § 39, the court determined, however, that attorney properly retained fees that she earned under a flat-fee agreement based on the theory of quantum meruit. People v. Gilbert, 348 P.3d 970, 981.

Fla.

Fla.1995. Cit. in disc. (citing § 51, T.D. No. 4, 1991, which is now § 39). Law firm sued former client seeking fee for work its former associate performed on client's behalf in a contingency fee case before client discharged firm when associate left firm and joined another firm. Relying on prior decisions holding that the "lodestar" method must be used to determine attorneys fees recoverable under a quantum meruit theory, trial court computed firm's quantum meruit recovery as a straight hourly fee. This court quashed and remanded, holding that trial court erred as a matter of law by failing to consider the totality of circumstances in this case, instead of considering only the time reasonably expended and the reasonably hourly rate for the services. The lodestar method of computing reasonable attorneys fees was inapplicable because it was never intended to control in cases where the disputed fee would be paid by client or other contracting party. Searcy, Denney, Scarola v. Poletz, 652 So.2d 366, 368.

N.J.

N.J.2002. Com. (b)(i) quot. in sup. An attorney entered into an oral contingency-fee agreement that was later deemed unenforceable because it was not reduced to writing within a reasonable time. The attorney sued clients' heirs to collect either a fee or an award based on quantum meruit for services rendered before the contingency had occurred. Trial court held that the attorney was entitled to payment based on quantum meruit notwithstanding that the contingency had not been satisfied. Appellate court affirmed. This court affirmed as modified, holding, inter alia, that attorney could recover under theory of quantum meruit. Attorney provided valuable legal services in good faith, clients accepted his services, there was an expectation of payment, and the reasonable value of his services had been established in a trial. Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 172 N.J. 60, 69, 796 A.2d 238, 243.

N.J.Super.

N.J.Super.2001. Quot. in case quot. in disc., com. b(i) quot. in case quot. in disc. (citing § 51, Proposed Final Draft No. 1, 1996, which is § 39 of the Official Draft). Attorney who failed to timely secure written contingent-fee agreement from clients sued clients' heirs for compensation for work done for clients, seeking to recovery fees by enforcement of contingent-fee agreement or pursuant to doctrine of quantum meruit. Trial court awarded plaintiff

fee based on quantum meruit. Affirming, this court held that recovery under contingent-fee agreement was not justified, because the agreement was not executed within a reasonable time after commencement of representation; however, plaintiff was entitled to quantum meruit recovery for reasonable value of legal services rendered. Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 340 N.J.Super. 104, 123, 773 A.2d 1176, 1189.

N.J.Super.1997. Quot. in sup., com. (e) quot. in disc., com. (i) quot. in sup. (citing § 51, Proposed Final Draft No. 1, 1996, which is now § 39). Attorneys who were discharged before the zoning application they had been hired to obtain was granted sued clients to recover attorneys' fees. Reversing the trial court's grant of summary judgment for defendants and remanding, this court held that the failure to enter into a written retainer agreement did not preclude recovery in quantum meruit. Vaccaro v. Estate of Gorovoy, 303 N.J.Super. 201, 206-207, 696 A.2d 724, 727.

Tex.

Tex.2006. Com. (c) quot. in ftn. to diss. op. Discharged law firm sued former client, seeking payment under a fee agreement. The trial court entered judgment on a jury verdict for law firm. The court of appeals reversed. Affirming that portion of the decision, this court held, inter alia, that a provision of the agreement requiring client to pay law firm a percentage based on the value of client's underlying claim at the time of discharge, rather than on client's actual recovery, was unconscionable as a matter of law. The dissent argued that the agreement was enforceable, noting that plaintiff could potentially recover even more without the provision, because, in Texas, when a client discharged an attorney before representation was complete without good cause, the attorney could recover the full amount under the contract; the fee was not prorated for the services actually performed. Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 567.

End of Document

Restatement (Third) of the Law Governing Lawyers § 40 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 2. A Lawyer's Claim to Compensation

§ 40 Fees on Termination

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

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

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

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

(b) the lawyer has performed severable services; and

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

Comment:

a. *Scope and cross-references.* This Section considers how a lawyer's compensation is affected when a client-lawyer relationship ends before completion of the lawyer's services. On the circumstances in which a client may discharge a lawyer and in which a lawyer must or may withdraw, see § 32. The rules set forth here apply when the lawyer seeks to recover a fee and when the client, having paid in advance or otherwise, claims a refund. See § 33(1) (lawyer must return unearned fees when representation ends) and § 42 (client's suit for refund). Whatever the basis of the fee computation, the lawyer's fee may not be larger than is reasonable (see § 34).

This Section concerns only the lawyer's fee, not the lawyer's civil liability, which is considered in Chapter 4. On forfeiture of a lawyer's fee, see § 37 and Comment *e* hereto.

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

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

The rule of § 40(1) entitles the discharged lawyer to the lesser of the fair value of the lawyer's services and the contractual fee prorated for the services actually performed. See Restatement Second, Agency § 452 (when principal exercises privilege of termination, agent recovers agreed compensation for services for which contract appoints compensation plus value of other services, not exceeding ratable proportion of the agreed compensation). The lawyer receives a fair fee. The client pays only for work already performed and should be able to find new counsel willing not to charge for work already performed. Limiting recovery to the contractual fee, moreover, accepts the parties' own valuation of the worth of the whole representation as a limit on the valuation of part of it. See § 39, Comment *e*; see also § 37, Comment *e* (discharged lawyer who was client's employee does not forfeit salary otherwise due). If the contractual fee was an hourly one and the fee is reasonable (see § 34), the fair value of the lawyer's services is usually the same as the hourly fee for the number of hours worked (see Illustration 4 hereto).

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

Illustrations:

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

2. The same facts as in Illustration 1, except that the $2,000 advance payment is designated in the contract between Client and Lawyer not as full payment for Lawyer's services but as a nonrefundable engagement retainer (see § 34, Comment *e*). If the fair value of Lawyer's work is $100 per hour, Lawyer is entitled to $800 for the eight hours worked. Because Client and Lawyer had agreed to an engagement retainer to ensure that Lawyer would be compensated

for costs incurred in reliance on being retained, Lawyer can also recover for the fair value not exceeding $2,000 (see § 39) of expenses or loss of income Lawyer reasonably incurred by accepting the engagement retainer (see § 34, Comment *e*).

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

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

5. Client retained Lawyer to prepare a securities registration statement for a fee of $100 per hour. Because Client preferred to work with another lawyer, Client discharged Lawyer after Lawyer had worked 80 hours but before Lawyer had substantially completed the work. Client owes Lawyer $8,000, unless the tribunal finds that the fair value of Lawyer's services was less than the rate to which Client and Lawyer agreed. Even if the tribunal makes such a finding, to the extent that successor counsel would not have to repeat what the discharged lawyer has already done, the lawyer has completed a severable part of the services and may recover at the contractual rate (see Comment *c* hereto).

c. *Allowing a contractual fee.* Allowing a discharged or withdrawing lawyer to recover compensation under a fee contract with the client is sometimes more appropriate than fee forfeiture or recovery of the lesser of fair value and contractual compensation. The most common situation calling for such treatment is where the client discharges a contingent-fee lawyer without cause just before the contingency occurs, perhaps in order to avoid paying the contractual percentage fee. The reasons for the usual restrictions on contractual recovery then do not apply. See Restatement Second, Agency §§ 445 and 454 (recovery of contractual compensation by agent when compensation depends on specified result and principal discharges agent in bad faith).

The tribunal therefore may in its discretion allow contractual compensation when circumstances warrant it, as specified in Subsection (2). As is true when a contractual fee is calculated under Subsection (1), the contractual fee is prorated for the services actually performed (see Comment *b* hereto). For example, if a lawyer who has performed half of the work required on a matter subject to a contingent-fee contract is allowed under Subsection (2) to recover a contractual fee, the lawyer should recover half of the contingent fee.

Whether the discharge or withdrawal is attributable to the lawyer's misconduct is relevant to whether contractual compensation should be allowed (see Restatement Second, Agency §§ 455 & 456). The claim to contractual compensation of a lawyer discharged without reasonable grounds, or forced to withdraw by a client's misconduct (see § 32), is stronger than that of a lawyer whose acts have provided such grounds, even if not warranting forfeiture of the entire fee (see § 37), or civil liability (see Chapter 4). In the context of Subsection (2), misconduct of the lawyer is not limited to conduct that would warrant professional discipline (see § 5), fee forfeiture (see § 37), or civil liability (see Chapter 4). It also includes other conduct that would cause a reasonable client to discharge the

lawyer, for example, a series of errors that reasonably leads the client to doubt the lawyer's competence although they cause no damage and do not constitute incompetence subjecting the lawyer to discipline.

The lawyer's provision of severable services (Subsection (2)(b)) is also a prerequisite for granting compensation at the contractual rate for those services. When a new lawyer would not have to repeat what has already been done in order to carry on the representation and when it is possible (for example, because the parties agreed to an hourly fee) to determine with reasonable accuracy the portion of the contractual fee allocable to the services performed, there is less occasion than otherwise to apply the rule of Subsection (1). See Restatement Second, Agency §§ 452, 455, and 456 (using as criterion whether compensation is apportioned in the contract).

A third condition stated in Subsection (2)(c) is whether allowing contractual compensation would significantly burden the client's choice of counsel or ability to change counsel, a choice which the rule of Subsection (1) protects. For example, contractual compensation is more appropriate if the lawyer's discharge or withdrawal occurred when the client could find replacement counsel without significant delay or risk.

d. The measure of compensation when a lawyer withdraws. A lawyer may properly withdraw on various grounds, for example because the client insists that the lawyer perform services in a manner that would violate a lawyer code or refuses to pay the lawyer's proper fees (see § 32). If the requirements of Subsection (2) are not met and there is no forfeiture, the withdrawing lawyer's compensation is limited to the lesser of the contractual fee for the services performed or the fair value of the lawyer's services. Were that not so, lawyers would be encouraged to withdraw before being discharged in order to avoid the rule of Subsection (1).

When the lawyer withdraws for reasons not attributable to misconduct of the lawyer, the lawyer has performed severable services, and allowing contractual compensation would not significantly burden the client's choice of counsel or ability to replace counsel (see Comment *c* hereto), the tribunal may in its discretion allow the lawyer to recover at the contractual rate under Subsection (2).

e. Forfeiture by a withdrawing or discharged lawyer. A lawyer who withdraws in violation of § 32 or commits misconduct before completing services, in some circumstances will forfeit the right to compensation for services already performed or to be performed (see § 37). On the scope of forfeiture, see § 37, Comment *e*.

A lawyer who withdraws has the burden of persuading the trier of fact that the withdrawal is not attributable to a clear and serious violation of the lawyer's duty (see § 16) to render loyal and competent service. See Restatement Second, Contracts §§ 237 and 241; compare Restatement Second, Agency § 456 (agent who wrongfully renounces contract or is properly discharged for breach loses all compensation except for services for which contract apportioned compensation, unless agent's breach was not willful and deliberate). For example, a lawyer who knowingly or recklessly undertakes to represent a client in a suit against another client of the lawyer's firm without the consent of both clients in violation of § 128(2) is subject to forfeiture of compensation even though the lawyer's withdrawal is compelled under § 32(2)(a). Withdrawal in violation of § 32 can similarly subject the lawyer to forfeiture.

On the other hand, forfeiture is inappropriate when the lawyer's withdrawal or discharge is not attributable to the lawyer's clear and serious violation of duty to the client. For example, the lawyer might have withdrawn or have been discharged because the client insisted that the lawyer violate professional rules. So also, a merger of a corporate client might have created a conflict of interest, requiring the lawyer to withdraw (see § 121, Comment *e(v)*). Similarly, forfeiture is inappropriate where termination is compelled by events beyond the lawyer's reasonable control, such as the lawyer's death or illness.

f. Compensation when there is no contract. When a lawyer and client have no fee contract meeting the requirements of § 18 and other applicable law, the lawyer is entitled to the fair value of the lawyer's services as set forth in § 39, except where forfeiture is warranted (see § 37).

Reporter's Note

*Comment a. Scope and cross-references.*On malpractice liability for improper withdrawal, see Delesdernier v. Porterie, 666 F.2d 116 (5th Cir.1982); Annot., 6 A.L.R.4th 342 (1981).

*Comment b. Measure of compensation when a client discharges a lawyer.*For the older rule allowing a lawyer discharged without cause to recover the contractual fee, see, e.g., Tonn v. Reuter, 95 N.W.2d 261 (Wis.1959); see In re Downs, 363 S.W.2d 679, 686 (Mo.1963) (lawyer may elect contractual fee or quantum meruit) (overruled in the *Plaza Shoe Store* case, cited below); Cohen v. Radio-Electronics Officers Union, 679 A.2d 1188 (N.J.1996) (when lawyer on continuing retainer negotiates notice-of-termination clause with sophisticated client in return for fee reduction and client discharges lawyer without cause or notice, lawyer receives one month's compensation at contractual rate); Atkins & O'Brien, L.L.P. v. ISS Int'l Serv. Sys. Inc., 678 N.Y.S.2d 596 (N.Y.App.Div.1998) (when inside legal counsel, at corporation's request, left employment and established firm with monthly fee contracts, firm can recover damages for discharge); 1 G. Palmer, The Law of Restitution § 4.4(f) (1978).

For the rule of this Section, limiting recovery to quantum meruit, see, e.g., Olsen & Brown v. Englewood, 889 P.2d 673 (Colo.1995) (applying rule to monthly fee contract); Fracasse v. Brent, 494 P.2d 9 (Cal.1972); Martin v. Camp, 114 N.E. 46 (N.Y.1916); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994) (over dissent); Annot., 42 A.L.R.3d 690 (1979). Cf. AFLAC Inc. v. Williams, 444 S.E.2d 314 (Ga.1994) (voiding attempt to contract around rule); Florida Bar v. Hollander, 607 So.2d 412 (Fla.1992) (discipline for similar attempt). But see Franklin & Marbin, P.A. v. Mascola, 711 So.2d 46 (Fla.Dist.Ct.App.1998) (rule inapplicable to hourly fee lawyer); Cheng v. Modansky Leasing Co., 539 N.E.2d 570 (N.Y.1989) (lawyer discharged without cause may claim share of successor lawyer's fee based either on quantum meruit or on proportionate share of work). For cases applying this rule when the client has paid in advance, see Federal Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.1988) (contract provided for nonrefundable engagement retainer); Florida Bar v. Grusmark, 544 So.2d 188 (Fla.1989) (lump-sum fee); Simon v. Auler, 508 N.E.2d 1102 (Ill.App.Ct.1987) (engagement retainer); § 38, Comment *g,* and Reporter's Note thereto.

For the requirement that this quantum meruit recovery may not exceed the contractual fee, see Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994); Rosenberg v. Levin, 409 So.2d 1016 (Fla.1982); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53 (Mo.1982); Moore v. Fellner, 325 P.2d 857 (Cal.1958). Contra, In re Montgomery's Estate, 6 N.E.2d 40 (N.Y.1936). For the denial of any recovery to a discharged contingent-fee lawyer until the contingency happens, see Fracasse v. Brent, supra; Rosenberg v. Levin, supra; Covington v. Rhodes, 247 S.E.2d 305 (N.C.Ct.App.1978).

*Comment c. Allowing a contractual fee.*Kaushiva v. Hutter, 454 A.2d 1373 (D.C.1983), cert. denied, 464 U.S. 820, 104 S.Ct. 83, 78 L.Ed.2d 93 (1983) (lawyer recovers contractual fee when discharged without cause after three-day arbitral hearing but before writing brief); In re Waller, 524 A.2d 748 (D.C.1987) (for recovery under previous case, lawyer must have performed valuable services and client must have received substantial benefits); Farrar v. Kelly, 440 So.2d 939 (La.Ct.App.1983) (lawyer discharged before judgment signed); Taylor v. Shigaki, 930 P.2d 340 (Wash.Ct.App.1997) (discharge just before settlement); see Estate of Falco v. Decker, 233 Cal.Rptr. 807 (Cal.Ct.App.1987) (no contractual recovery when settlement required lengthy negotiations after lawyer withdrew).

Dictum in several cases supports using the contractual fee as the measure of quantum meruit recovery when the client discharges the lawyer at the last moment. Henry, Walden & Davis v. Goodman, 741 S.W.2d 233 (Ark.1987); Fracasse v. Brent, 494 P.2d 9 (Cal.1972); Covington v. Rhodes, 247 S.E.2d 305 (N.C.Ct.App.1978). Many other cases allow the contractual fee to be introduced as evidence of the fair value of the lawyer's services. E.g., Booker v. Midpac Lumber Co., 649 P.2d 376 (Haw.1982); see Maksym v. Loesch, 937 F.2d 1237 (7th Cir.1991) (lawyer may recover hourly fees already earned).

Comment d. The measure of compensation when a lawyer withdraws. Ambrose v. Detroit Edison Co., 237 N.W.2d 520 (Mich.Ct.App.1975); Sargent v. N.Y. Central H.R.R., 103 N.E. 164 (N.Y.1913); see cases on permissible withdrawal in Reporter's Note to Comment *c* hereto.

Comment e. Forfeiture by a withdrawing or discharged lawyer. For examples of forfeiture of the fee of a lawyer who withdraws, see Woodbury v. Andrew, 61 F.2d 736 (2d Cir.), cert. denied, 289 U.S. 740, 53 S.Ct. 659, 77 L.Ed. 1487 (1933); Estate of Falco v. Decker, 233 Cal.Rptr. 807 (Cal.Ct.App.1987); Suffolk Roadways, Inc. v. Minuse, 287 N.Y.S.2d 965 (N.Y.Sup.Ct.1968) (client's hiring another lawyer did not warrant withdrawal); Royden v. Ardoin, 331 S.W.2d 206 (Tex.1960) (lawyer withdrew because of suspension from practice); 1 G. Palmer, The Law of Restitution § 5.13(b) (1978). A result similar to forfeiture also occurs when a lawyer under a contingent-fee contract withdraws from a representation prior to obtaining a successful result. E.g., Dinter v. Sears, Roebuck & Co., 651 A.2d 1033 (N.J.Super.Ct.1995) (contingent-fee lawyer who lost at trial level and withdrew from representation not entitled to quantum meruit recovery when successor lawyer obtained favorable settlement after reversal on appeal).

For examples of justified withdrawal without forfeiture, see Tranberg v. Tranberg, 456 F.2d 173 (3d Cir.1972) (court requested withdrawal when client was adjudicated incompetent and guardian was lawyer); Leighton v. New York, S. & W. Ry., 303 F.Supp. 599 (S.D.N.Y.1969), aff'd, 455 F.2d 389 (2d Cir.), cert. denied, 406 U.S. 920, 92 S.Ct. 1777, 32 L.Ed.2d 120 (1972) (contract provided that client would set fees, which it did not do in good faith); Carbonic Consultants Inc. v. Herzfeld & Rubin, Inc., 699 So.2d 321 (Fla.Dist.Ct.App.1997) (only qualified lawyer left firm); Ambrose v. Detroit Edison Co., 237 N.W.2d 520 (Mich.Ct.App.1975) (client entirely refused to cooperate); Annot., 88 A.L.R.3d 46 (1978). Cf. Estate of Falco v. Decker, 233 Cal.Rptr. 807 (Cal.Ct.App.1987) (discussing withdrawal compelled by professional standards); § 39, Comment *e,* and Reporter's Note thereto (lawyer's death or disability); see Pritt v. Suzuki Motor Co., 513 S.E.2d 161 (W.Va.1998) (when client's fraud forced withdrawal, client required to pay lawyer as sanction). A client's refusal to accept a lawyer's settlement advice does not warrant a lawyer's withdrawal without fee forfeiture. Estate of Falco v. Decker, supra; Suffolk Roadways, Inc. v. Minuse, 287 N.Y.S.2d 965 (N.Y.Sup.Ct.1968). But see May v. Seibert, 264 S.E.2d 643 (W.Va.1980) (no forfeiture when withdrawal did not harm client, who later accepted pending settlement offer).

A few jurisdictions hold a lawyer's fee forfeited whenever a client discharges the lawyer "for cause." E.g., Coclin Tobacco Co. v. Griswold, 408 F.2d 1338 (1st Cir.), cert. denied, 396 U.S. 940, 90 S.Ct. 373, 24 L.Ed.2d 241 (1969) (applying New York law); Teichner by Teichner v. W. & J. Holsteins, Inc., 478 N.E.2d 177 (N.Y.1985); Lampl v. Latkanich, 231 A.2d 890 (Pa.Super.Ct.1967). Others follow other rules. E.g., Tobias v. King, 406 N.E.2d 101 (Ill.App.Ct.1980); Henican, James & Cleveland v. Strate, 348 So.2d 689 (La.Ct.App.1977) (lawyer recovers value of services, but only to extent they benefited client); Somuah v. Flachs, 721 A.2d 680 (Md.1998) (while client had cause to discharge lawyer who failed to inform client at outset that lawyer was not admitted in jurisdiction where suit was to be filed, lawyer's default not serious, and lawyer is entitled to reasonable value of predischarge services); Crawford v. Logan, 656 S.W.2d 360 (Tenn.1983) (lawyer recovers lesser of quantum meruit and contractual fee, but forfeits fee if misconduct harmed client). Often those other jurisdictions give "discharge for cause" a broad reading. E.g., Fracasse v. Brent, 494 P.2d 9 (Cal.1972).

On the scope of forfeiture, see Moore v. Fellner, 325 P.2d 857 (Cal.1958) (lawyer discharged for demanding more pay on appeal can recover in quantum meruit for trial work); Odom v. Hilton, 124 S.E.2d 415 (Ga.Ct.App.1962) (contract providing that lawyer will press claims against two insurance companies severable); see § 37, Comment *e,* and Reporter's Note thereto.

Case Citations - by Jurisdiction

—

C.A.9
C.A.10

S.D.N.Y.
Colo.App.
Fla.App.
Mass.
Mass.App.
Mo.
N.J.
N.J.Super.
Tex.App.

C.A.9

C.A.9, 2008. Cit. in sup., cit. in case cit. in disc. Law firm that served as local counsel in environmental-contamination litigation before withdrawing from the lawsuit brought a breach-of-contract action against out-of-state law firm that had hired it, seeking additional payments allegedly owed to it on the lawsuit's termination by settlement. After the district court ruled on plaintiff's partial-summary-judgment motion that plaintiff had not forfeited the additional payments by withdrawing, it entered summary judgment holding that plaintiff was owed the additional payments. Affirming, this court held that payment of the additional fees was triggered by defendant's recovery of gross, rather than net, proceeds from the settlement, and that defendant presented no evidence that any burden was put on any client by plaintiff's withdrawal from the litigation. Brown & Bain, P.A. v. O'Quinn, 518 F.3d 1037, 1039, 1042.

C.A.10

C.A.10, 2002. Quot. in ftn. Clients sued their attorneys and attorneys' law firm, alleging RICO violations and state-law claims. District court granted defendants summary judgment. This court affirmed, holding that, since defendants' letter advising plaintiffs to accept offered plea bargain did not constitute extortion or mail fraud, and plaintiffs failed to prove legal malpractice or a basis for discharging defendants for cause, defendants' retention of their agreed-upon flat fee did not give rise to valid claim of unjust enrichment. The court stated that an attorney faithful to his trust did not assume risk of his client discharging him at will and paying only for services rendered up to time of discharge. It noted that courts in other states had adopted a different rule concerning fees on termination of client-lawyer relationship. Diaz v. Paul J. Kennedy Law Firm, 289 F.3d 671, 675.

S.D.N.Y.

S.D.N.Y.1998. Subsec. (2), com. (c), and illus. 2 cit. in disc. (citing § 52, Prop. Final Draft No. 1, 1996, which is now § 40). Attorney sued corporate client for breach of a three-year retainer agreement when defendant terminated the contract 14 months after its execution. Defendant moved to dismiss on the ground that the agreement violated New York public policy because, if enforced, plaintiff would recover payment for services he would never render. Denying the motion, the court held, in part, that the agreement at issue was a general retainer agreement, rather than a special retainer agreement, and that general agreements did not limit attorneys to recovery in quantum meruit; to the contrary, where general retainer agreements were involved, the attorney was entitled to claim the total contract price. Kelly v. MD Buyline, Inc., 2 F.Supp.2d 420, 451.

Colo.App.

Colo.App.2011. Com. (e) cit. in sup. Law firm that withdrew, with court approval, from its representation of clients pursuant to a contingent-fee agreement in an underlying action sued former co-counsel after the underlying action settled, seeking to recover in quantum meruit for the reasonable value of the services it provided before withdrawal. The trial court entered judgment on the pleadings in favor of defendants based on the statute of

limitations as measured from the time of withdrawal. Reversing and remanding, this court held that a withdrawing attorney's claim in quantum meruit against former co-counsel laboring under a contingent-fee agreement could not accrue earlier than when recovery occurred in the underlying action, because that was the earliest time when the unjustness of any retention of the benefit could be determined; thus, plaintiff's claim accrued when it knew or should have known of the recovery. While an attorney who withdrew without good cause forfeited the right to compensation for his or her services, and the existence of good cause was potentially relevant to an attorney's ultimate ability to recover on the merits, it was not relevant to a determination as to when a claim accrued. Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP, 293 P.3d 55, 61.

Fla.App.

Fla.App.1993. Quot. in part in ftn. in sup. (citing § 52, T.D. No. 4, 1991, which is now § 40). An attorney who represented, pursuant to a contingency fee agreement, a prevailing party sued to recover fees after the client discharged the attorney in postappeal settlement negotiations for alleged breach of fiduciary obligations in attempting to coerce the client to renegotiate the contingency fee arrangement after an acceptable settlement offer had been made. Reversing the trial court's ruling that the attorney's breach barred recovery and remanding with directions, this court held that, as the breach occurred after the attorney's essential duties were near their end and the attorney had successfully obtained a favorable jury verdict that was upheld on appeal, the failure of the trial court to consider the adequacy of legal remedies for the breach before ordering a fee forfeiture was error. Meting out appropriate punishment for the attorney, said the court, was the responsibility of the bar disciplinary process. Searcy, Denney, et al. v. Scheller, 629 So.2d 947, 952.

Mass.

Mass.2008. Subsec. (1) cit. in disc. Bar counsel filed a petition for discipline against attorney. A single justice dismissed the petition. On appeal, this court vacated the order of dismissal, and remanded to the county court with instructions that attorney be admonished for certain misconduct. The court, however, disagreed with bar counsel's claim that discipline should have been imposed because attorney's contingent-fee agreement contained a provision that potentially entitled him, on discharge by a client, to receive a fee that exceeded the fair value of his work; since attorney was not barred by the professional rules of conduct from negotiating such a term in his contingent-fee agreement, and the record did not indicate that he actually recovered a fee that exceeded a quantum meruit recovery from either of the clients who filed complaints against him, discipline would have been inappropriate. In re Discipline of an Attorney, 451 Mass. 131, 143, 884 N.E.2d 450, 460.

Mass.App.

Mass.App.2006.Com. (e) quot. in ftn. in sup. Attorney who was suspended by Board of Bar Overseers from the practice of law for engaging in unethical conduct in personal-injury action was required, as a result of suspension, to withdraw from representing the same client in wrongful-termination action. After replacement counsel settled the wrongful-termination action, attorney's firm moved to enforce a charging lien against the proceeds. The trial court, inter alia, denied firm's motion for summary judgment. Affirming, this court held that attorney's misconduct barred firm from recovering compensation. In making its decision, the court noted that a lawyer who withdrew from representation had the burden in seeking compensation of persuading the trier of fact that the withdrawal was not attributable to a clear and serious violation of the lawyer's duty to render loyal and competent service. Kourouvacilis v. American Federation of State, County and Municipal Employees, 65 Mass.App.Ct. 521, 535, 841 N.E.2d 1273, 1285.

Mo.

Mo.1992. Cit. in disc., com. (c) cit. in disc. (citing § 52, T.D. No. 4, 1991, which is now § 40). The trial court ordered a client to pay attorneys' fees to its former counsel. The intermediate appellate court reversed, holding that the attorneys were not entitled to recovery in quantum meruit since they withdrew their representation pursuant to the disciplinary rules due to insufficient resources to handle the case. Reversing, this court rejected the client's claim for complete forfeiture of the attorneys' fees, holding that there was no evidence of any clear and serious violation of a duty to the client that destroyed the lawyer-client relationship and thereby the justification for the attorneys' claim to compensation. The court remanded for a determination of the value of the benefits conferred on the client on a theory of quantum meruit. International Materials v. Sun Corp., 824 S.W.2d 890, 894, 895.

N.J.

N.J.1996. Cit. in disc., subsec. (2)(c) cit. in disc., com. (b) quot. in disc., illus. 2 quot. in disc. (citing § 59, P.F.D. No. 1, 1996, which is now § 40). Discharged attorney sued client to recover fees allegedly owed under the parties' retainer agreement. Client argued that the agreement, which required client to provide attorney with six months' notice of termination, was unenforceable as an unreasonable restriction of its right to discharge counsel. The trial court entered judgment for attorney, but the intermediate appellate court reversed and remanded. Affirming as modified, this court held that fair and reasonable attorney-client agreements, though usually construed against the attorney, were enforceable where they satisfied both general contracts and professional ethics requirements; that, while attorneys and clients were free to negotiate such innovative arrangements as the engagement retainer, the notice provision here was excessive; and that attorney could recover the fair value of his pretermination services. Cohen v. ROU, 146 N.J. 140, 679 A.2d 1188, 1196, 1198, 1200.

N.J.Super.

N.J.Super.1997. Cit. in disc. (citing § 59, Proposed Final Draft No. 1, 1996, which is now § 40). Attorneys who were discharged before the zoning application they had been hired to obtain was granted sued clients to recover attorneys' fees. Reversing the trial court's grant of summary judgment for defendants and remanding, this court held that the failure to enter into a written retainer agreement did not preclude recovery in quantum meruit. Vaccaro v. Estate of Gorovoy, 303 N.J.Super. 201, 207, 696 A.2d 724, 727.

Tex.App.

Tex.App.2004. Cit. in ftn., com. (b) cit. in ftn. After former client discharged law firm, hired new counsel, and settled his claims for $900,000, law firm sued former client to collect contingent fee of over $1.7 million. The trial court entered judgment on a jury verdict awarding law firm $900,000 in damages plus attorneys' fees. Reversing and rendering a take-nothing judgment, this court held that the fee charged by law firm was unconscionable as a matter of law. The court said that, because the fee charged was not based on the value of the work performed or tied to former client's actual recovery, allowing law firm to collect a fee equaling 63%-100% of its former client's recovery would violate public policy by penalizing client for discharging the firm. Walton v. Hoover, Bax & Slovacek, L.L.P., 149 S.W.3d 834, 843, vacated 2007 WL 416694 (Tex.App. El Paso 2007).

Restatement (Third) of the Law Governing Lawyers 3 3 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 3. Fee-Collection Procedures

Introductory Note

Introductory Note: This Topic considers improper fee-collection methods (see § 41), describes the forums and burdens of persuasion in fee disputes (see § 42), and defines limits on security arrangements such as liens (see § 43).

End of Document

Restatement (Third) of the Law Governing Lawyers § 41 (2000)

§ 41 Fee-Collection Methods

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

Comment:

a. *Scope and cross-references.* Disciplinary authorities sanction lawyers for abusive fee-collection methods. In appropriate circumstances, violations can give rise to forfeiture of a lawyer's right to compensation (see §§ 37 & 40), to the discharge of a lien (see § 43), or to a claim for damages (see Chapter 4). Courts enforce this Section in fee litigation between lawyers and clients. Lawyers are also subject to the restrictions on debt-collection methods provided by general law (see Comment *b* hereto). Both lawyers, with respect to fee claims in litigation against a client, and clients, with respect to counterclaims for malpractice, are subject to procedural rules requiring a nonfrivolous basis for claims (see § 110). On the requirement that a lawyer refund all unearned fees when a representation ends, see § 33(1). Although fee disputes usually involve past clients, this Section applies also to fee disputes with current clients (see §§ 18, 32, 37, & 40).

Lawyers can protect their right to compensation through suits and other means including charging liens (see § 43) and advance payment (see § 38, Comment *g*). Nevertheless, fee-collection methods offer potential for abuse.

b. *Fee-collection methods forbidden by law.* Lawyers are subject to general limitations on use of abusive tactics in seeking to collect claims (see Restatement Second, Torts § 46, Illustration 7 (tort liability for certain collection methods)). Various consumer-protection statutes may be applicable to activities of lawyers (see § 56, Comment

j). Lawyers are also subject to sanctions for abusive litigation tactics in fee suits (see § 110). When analyzing the applicability of those remedies, consideration should be given to the special duties that lawyers owe to clients and former clients.

c. Limitations on the use or disclosure of confidential client information. A lawyer's duty to preserve client information contains an exception for use or disclosure reasonably believed to be necessary to resolve a dispute with the client concerning compensation or reimbursement reasonably claimed by the lawyer (see § 65). For example, a lawyer may use confidential knowledge about a former client's assets when it is necessary for the lawyer to attach them as a necessary step in fee litigation. Likewise, if a client claims that a lawyer wasted time by needless work, the lawyer may testify to the client's confidential disclosures that persuaded the lawyer of the appropriateness of the work.

The lawyer may not disclose or threaten to disclose information to nonclients not involved in the suit in order to coerce the client into settling. The lawyer's fee claim must be advanced in good faith and with a reasonable basis. The client information must be relevant to the claim, for example because the client advances defenses that need to be rebutted by disclosure. Even then, the lawyer should not disclose the information until after exploring whether the harm can be limited by partial disclosure, stipulation with the client, or a protective order (see § 64, Comment *e,* & § 65, Comment *d*).

d. Tactics that harass a client. In collecting a fee a lawyer may use collection agencies or retain counsel. On the other hand, lawyers may not use or threaten tactics such as personal harassment or assert frivolous claims (see Comment *b* hereto). A lawyer has special duties to adhere to the law and to the legal process, to treat clients fairly, and not to secure unreasonably large fees (see § 34). Collection methods hence must preserve the client's right to contest the lawyer's position on its merits.

In the absence of a statute, rule, or other law providing to the contrary (see § 43, Comment *b*), a lawyer may not use possession of the client's funds or documents to compel a settlement, for example by retaining documents or unearned fees after the representation ends or otherwise denying the client funds the client is entitled to receive. See § 33(1); § 45, Comment *d;* § 46, Comment *d.* A lawyer may hold, but may not commingle, contested funds so long as they are segregated from other funds (see § 44, Comment *f*). Likewise, a lawyer may not take advantage of a client's belief in the lawyer's legal expertise by making misleading assertions to the client about the lawyer's fee claim.

Collection methods that unreasonably impede a decision on the merits of a fee claim are also improper. For example, a lawyer may not use a confession-of-judgment note to collect a fee if it would impede the client's ability to contest the reasonableness of the fee (see § 42).

Reporter's Note

*Comment a. Scope and cross-references.*For application of this Section in various procedural contexts, see Jenkins v. District Court, 676 P.2d 1201 (Colo.1984) (fee litigation); Stinson v. Feminist Women's Health Center, 416 So.2d 1183 (Fla.Dist.Ct.App.1982) (malpractice); Annot., 91 A.L.R.3d 583 (1979) (discipline).

*Comment b. Fee-collection methods forbidden by law.*For application of consumer-protection statutes to lawyers, see, e.g., Barnard v. Mecom, 650 S.W.2d 123 (Tex.Civ.App.1983); Short v. Demopolis, 691 P.2d 163 (Wash.1984); Porter v. Hill, 815 P.2d 1290 (Or.Ct.App.1991) (federal Truth in Lending Act). Contra, e.g., Frahm v. Urkovich, 447 N.E.2d 1007 (Ill.App.Ct.1983); see also Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (federal Fair Debt Collection Practice Act applies to lawyer who regularly collects client's debts through litigation).

*Comment c. Limitations on the use or disclosure of confidential client information.*Dixon v. State Bar, 653 P.2d 321 (Cal.1982) (lawyer inserted irrelevant and damaging disclosure in pleading); Lindenbaum v. State Bar, 160

P.2d 9 (Cal.1945) (lawyer tried to collect fee by inducing immigration officials to investigate client's spouse); Florida Bar v. Ball, 406 So.2d 459 (Fla.1981) (adoption lawyer tried to collect fee by telling adoption authorities of fee dispute as ground to investigate client's finances); Iowa Supreme Court Board of Professional Ethics v. Miller, 568 N.W.2d 665 (Iowa 1997) (lawyer threatened to disclose to SEC); Finch v. Hughes Aircraft, 469 A.2d 867 (Md.Ct.Spec.App.1984) (fraud liability for knowing overcharge); In re Nelson, 327 N.W.2d 576 (Minn.1982) (discharged lawyer made groundless accusations against client to tax officials); see Siedle v. Putnam Investments Inc., 147 F.3d 7 (1st Cir.1998) (court's power to protect confidences by sealing documents).

*Comment d. Tactics that harass a client.*For examples of abuse of a lawyer's access to the courts, see Lucky-Goldstar Int'l (America), Inc. v. Int'l Mfg. Sales Co., 636 F.Supp. 1059 (N.D.Ill.1986) (lawyer suing for fees may not rely on retaining lien to shield relevant documents from client); Jenkins v. District Court, 676 P.2d 1201 (Colo.1984) (same); Law Offices of Murphy L. Clark v. Altman, 680 P.2d 1125 (Alaska 1984) (lawyer's purchase of client's $750,000 property for $1,070 in fee-suit execution sale set aside for procedural irregularity and violation of fiduciary duties); In re Cairo, 338 N.W.2d 703 (Wis.1983) (harassing litigation); In re Wetzel, 574 P.2d 826 (Ariz.1978) (same). For examples of tactics impeding decision on the merits of a fee claim, see Hulland v. State Bar, 503 P.2d 608 (Cal.1972) (confession-of-judgment note); Stinson v. Feminist Women's Health Center, 416 So.2d 1183 (Fla.Dist.Ct.App.1982) (delaying tactics); Bluestein v. State Bar, 529 P.2d 599 (Cal.1974) (bringing criminal charges against client's spouse); Florida Bar v. Herzog, 521 So.2d 1118 (Fla.1988) (misrepresentations in bill); In re Complaint of Willer, 735 P.2d 594 (Or.1987) (same); In re Boelter, 985 P.2d 328 (Wash.1999) (suspension for false claim to possess secret tapes of confidential client information that lawyer would reveal to IRS and banks if client failed to pay bill).

Case Citations - by Jurisdiction

N.J.

N.J.2011. Cit. in ftn. In disciplinary proceedings brought against attorney for suing a current client to collect legal fees, the Disciplinary Review Board concluded that attorney's conduct created a conflict of interest and that a reprimand was warranted. This court ordered the imposition of a reprimand, holding that attorneys were not to sue a present or existing client during active representation, nor was an attorney to seek any remedy against a client that resulted in a conflict under the rules of professional conduct; in this case, by filing suit against client, attorney knowingly created an irreconcilable conflict of interest for the purpose of forcing his withdrawal from representation of client in the face of mounting unpaid fees, and such conduct could not be tolerated. The court noted that, while there was some authority allowing a lawyer to perfect a retaining or charging lien against a current client, it would not address those concepts, as they were not at issue here. In re Simon, 206 N.J. 306, 318, 20 A.3d 421, 429.

Restatement (Third) of the Law Governing Lawyers § 42 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 3. Fee-Collection Procedures

§ 42 Remedies and the Burden of Persuasion

(1) A fee dispute between a lawyer and a client may be adjudicated in any appropriate proceeding, including a suit by the lawyer to recover an unpaid fee, a suit for a refund by a client, an arbitration to which both parties consent unless applicable law renders the lawyer's consent unnecessary, or in the court's discretion a proceeding ancillary to a pending suit in which the lawyer performed the services in question.
(2) In any such proceeding the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.

Comment:

a. *Scope and cross-references.* This Section recognizes several remedies appropriate to client-lawyer fee disputes and states certain burdens of persuasion that lawyers must meet. The rules relevant in such adjudications include not only those in this Chapter but also others in this Restatement and in the law of contracts, procedure, and other subjects. Thus, §§ 34- 41 and 43 apply, regardless of the forum in which the fee is adjudicated.

The Section deals only with fee disputes between clients and lawyers. Comparable issues can arise in disciplinary or criminal proceedings against lawyers. This Section takes no position as to the burden of persuasion applicable in those contexts. On discipline, see § 5.

b(i). *Fee-determination proceedings—in general.* This Section mentions the most typical proceedings in which fee disputes are resolved, but the parties might resort to other remedies provided by law. A lawyer's choice of remedy

should not violate duties owed to a client. For example, a lawyer should not ask a court to exercise its ancillary jurisdiction to resolve a fee dispute when another forum is reasonably available and the ancillary proceeding would involve disclosure of confidential information which would harm the client in the principal suit (see §§ 41 & 65).

b(ii). Fee-determination proceedings—suit by a lawyer. Since the early 19th century, courts in the United States have recognized actions brought by lawyers to recover fees. Procedurally, such actions have been treated as contract suits, whether in quantum meruit or based on an explicit contract. Usually each party is entitled to trial by jury.

b(iii). Fee-determination proceedings—suit by a client. A client may sue a lawyer to recover excessive fees paid (see Restatement Second, Agency § 404A). In light of the power of the court to prevent overreaching by lawyers and under principles of restitution, a client's payment of a fee does not always preclude a later suit for a refund (see § 33(1) hereto and Restatement of Restitution §§ 18-21). However, when the client was informed of the facts needed to evaluate the fee's appropriateness and made payment upon completion of the lawyer's services, payment of a fee can constitute a contract enforceable by the lawyer under § 18, especially if the client was sophisticated in such matters.

b(iv). Fee-determination proceedings—alternative dispute resolution. In many jurisdictions, fee-arbitration procedures entitle any client to obtain arbitration; in others, both lawyer and client must consent. The procedures vary in the extent to which arbitration results are binding on one or both parties. Lawyers and clients might agree to arbitration under general arbitration statutes. An agreement to arbitrate should meet standards of fairness, particularly as regards designation of arbitrators. A client and lawyer may also resort to other forms of nonjudicial dispute resolution.

b(v). Fee-determination proceedings—ancillary jurisdiction. A court in which a case is pending may, in its discretion, resolve disputes between a lawyer and client concerning fees for services in that case. Such a determination ordinarily occurs at the end of the case if the client objects to the lawyer's bill or the lawyer claims a lien on the recovery (see § 43). It can occur during the case, as when a lawyer who has been replaced claims payment.

Ancillary jurisdiction derives historically from the authority of the courts to regulate lawyers who appear before them (see § 1, Comment *c*). The court might already be familiar with facts relating to the lawyer's services. Sometimes the court might itself raise a question concerning the size of a fee. Courts also assess the propriety of fees when the client is a minor or a class-action member or is otherwise unable to protect the client's own interest.

A court may decline to exercise jurisdiction to avoid interfering with the main case, for example when it will delay resolution of the client's claims on the merits or require going beyond consideration of the lawyer's services in the case before the court. A court may grant severance to prevent interference with the original case.

c. A lawyer's burden of persuasion. Whatever the forum or procedure, the lawyer must persuade the trier of fact of the existence and provisions of any fee contract, the making of required disclosures to the client, and the extent and value of the lawyer's services, when such matters are relevant and in dispute. The client does not lose the benefit of that allocation when the client is plaintiff, for example when the client sues for a refund or has agreed to arbitration. The customary rules of allocation apply to such matters of defense as the statute of limitations.

This Section deals only with the burden of persuasion—that is, how the case should be decided if the evidence is equally balanced. It does not regulate the burden of pleading; ordinarily the party who initiates a proceeding must set forth allegations showing it is entitled to relief. Nor does this Section regulate the burden of coming forward, that is, the rules stating what evidence a party must submit to avoid a directed verdict against it. However, the policies expressed in this Section might be relevant to allocating that burden.

This Section's allocation of the burden of persuasion applies whether the client or the lawyer initiates the proceeding. Any other rule would be an incentive to maneuver in which lawyers' knowledge and skills would often give them an unfair advantage. A lawyer, moreover, will usually have better access than a client to evidence about the lawyer's own services, the lawyer's terms of employment, and customary practices concerning fee arrangements.

Illustration:

1. Client and Lawyer agree that Lawyer will represent Client for a fee of $100 per hour and that Client will make a deposit of $5,000. When the representation has been concluded, the parties dispute what fee is due. Client sues to recover $2,000, alleging and introducing evidence tending to show that Lawyer devoted no more than 30 hours to the matter. Lawyer denies this and testifies to devoting 50 hours. If the conflicting evidence leaves the trier of fact in equipoise, it should find for Client.

Reporter's Note

*Comment b. Fee-determination proceedings (i-v).*On the evolution of fee suits by lawyers, see Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, 47 L. & Contemp. Probs. 9, 16 (1984). On fee-recovery suits by clients, see Sears Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10 (1st Cir.1997); Federal Savings & Loan Ins. Corp. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.1988); Newman v. Silver, 713 F.2d 14 (2d Cir.1983); Guenard v. Burke, 443 N.E.2d 892 (Mass.1982); American Nat'l Bank v. Clarke & Van Wagner, Inc., 692 P.2d 61 (Okla.Ct.App.1984); ABA Model Rules of Professional Conduct, Rule 1.16(d) (1983) (when representation ends, lawyer must refund "any advance payment of fee that has not been earned"); ABA Model Code of Professional Responsibility, DR 2-110(A)(3) (1969) (similar); § 38, Comment *g,* and Reporter's Note thereto; cf. 3 G. Palmer, The Law of Restitution §§ 14.5 & 14.8 (1978) (restitution of mistaken overpayment in other situations). For trial by jury in fee suits, see Simler v. Conner, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963) (lawyer suit); Cameron v. Sullivan, 360 N.E.2d 890 (Mass.1977) (client suit); 2 E. Thornton, A Treatise on Attorneys at Law 960-61 (1914). But see In re LiVolsi, 428 A.2d 1268 (N.J.1981) (equity jurisdiction to enjoin fee suit); § 43, Comment *g,* and Reporter's Note thereto (no jury in lien case).

On fee-arbitration procedure, see ABA Model Rules for Fee Arbitration (1995); Rau, Resolving Disputes Over Attorneys' Fees: The Role of ADR, 46 SMU L. Rev. 2005 (1993). For the requirement that the client give informed consent to arbitration, see, e.g., Marino v. Tagaris, 480 N.E.2d 286 (Mass.1985); Nisbet v. Faunce, 432 A.2d 779 (Me.1981); N.J. Rules of General Application, Rule 1:20A-3(a); cf. Alternative Sys. Inc. v. Carey, 79 Cal.Rptr.2d 567 (Cal.Ct.App.1998) (contractual arbitration clause invalid as interfering with client's right to bar-association fee arbitration).

On ancillary jurisdiction, see, e.g., Kalyawongsa v. Moffett, 105 F.3d 283 (6th Cir.1997); Rosquist v. Soo Line R.R., 692 F.2d 1107 (7th Cir.1982); Ohliger v. Carondelet St. Mary's Hospital, 845 P.2d 523 (Ariz.Ct.App.1992); Gagnon v. Shoblom, 565 N.E.2d 775 (Mass.1991) (dictum); Greenwald v. Scheinman, 463 N.Y.S.2d 303 (N.Y.App.Div.1983); Weatherly v. Longoria, 292 S.W.2d 139 (Tex.Civ.App.1956). For the court's power to exercise jurisdiction without the client's request, see Coffelt v. Shell, 577 F.2d 30 (8th Cir.1978); Hoffert v. General Motors Corp., 656 F.2d 161 (5th Cir.1981) (protection of minor); Dunn v. H.K. Porter Co., 602 F.2d 1105 (3d

Cir.1979) (protection of class members); see also, e.g., Zucker v. Occidental Petroleum Corp., 192 F.3d 1323 (9th Cir.1999), cert. denied, _ U.S. _, 120 S.Ct.1671, 146 L.Ed.2d 481 (2000) (even if no member of class has standing, court has ancillary jurisdiction to entertain challenge to fee of class counsel). For situations in which a court lacks or will not exercise ancillary jurisdiction, see Moore v. Telfon Communications Corp., 589 F.2d 959 (9th Cir.1978) (delay for opposing party); Jenkins v. Weinshienk, 670 F.2d 915 (10th Cir.1982) (fees in other proceedings); Taylor v. Kelsey, 666 F.2d 53 (4th Cir.1981) (quarrel between lawyers). Compare United States v. Vague, 697 F.2d 805 (7th Cir.1983) (no ancillary jurisdiction in criminal case), with United States v. Strawser, 800 F.2d 704 (7th Cir.), cert. denied, 480 U.S. 906, 107 S.Ct. 1350, 94 L.Ed.2d 521 (1987) (jurisdiction proper when it might avoid need to appoint government-paid counsel); see Annot., 92 A.L.R. Fed. 864 (1987).

Comment c. A lawyer's burden of persuasion. As to the lawyer's burden of showing the existence and terms of a fee contract, see Kirby v. Liska, 334 N.W.2d 179 (Neb.1983) (oral contingent-fee contract); Becnel v. Montz, 384 So.2d 1015 (La.Ct.App.1980) (oral contract); Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller, 326 S.E.2d 316 (N.C.Ct.App.1985). As to required disclosure, see Jacobson v. Sassower, 489 N.E.2d 1283 (N.Y.1985); Jenkins v. District Court, 676 P.2d 1201 (Colo.1984). There is much authority holding that a lawyer has the burden of showing the reasonableness of a fee contract made during the representation (see § 18). E.g., Terzis v. Estate of Whalen, 489 A.2d 608 (N.H.1985); Mercy Hospital, Inc. v. Johnson, 390 So.2d 103 (Fla.Dist.Ct.App.1980); see Randolph v. Schuyler, 201 S.E.2d 833 (N.C.1974) (contract after representation). Some courts follow a different rule for contracts made before the representation, e.g., Jacobs v. Holston, 434 N.E.2d 738 (Ohio Ct.App.1980), while others require the lawyer to show that the contract is reasonable. E.g., McKenzie Constr., Inc. v. Maynard, 758 F.2d 97 (3d Cir.1985); Nolan v. Foreman, 665 F.2d 738 (5th Cir.1982); Jacobson v. Sassower, 489 N.E.2d 1283 (N.Y.1985); see Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. Partnership, 480 S.E.2d 471 (Va.1997) (reasonableness of hours). See generally J. Shepherd, The Law of Fiduciaries 126-30 (1981) (discussing prevalence of burden-shifting rules and presumptions throughout fiduciary law); Cooter & Freedman, The Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U. L. Rev. 1045 (1991).

Case Citations - by Jurisdiction

—

Colo.App.
Md.Spec.App.
Neb.
Nev.
N.J.
N.J.Super.

Colo.App.

Colo.App. 2003. Com. (c) cit. in disc. Client sued attorney and his law firm to recover attorney fees paid on a contingent-fee contract. Trial court entered a directed verdict for defendants. This court affirmed, holding that, in light of the fact that there was a written fee agreement, plaintiff presented no evidence that attorney's fee was unreasonable, that his services were lacking, or that plaintiff had requested that he reduce the fee. The court stated that, even when the defendant had the ultimate burden of persuasion regarding the reasonableness of the fees, plaintiff was required to present evidence regarding each essential allegation of the complaint to demonstrate that there was some factual basis for relief before defendant would be required to present evidence. Monday v. Robert J. Anderson, P.C., 77 P.3d 855, 857.

Md.Spec.App.

Md.Spec.App.2009. Com. (b)(iv) quot. in ftn. and quot. in case cit. in disc. Attorney sued client for breach of contract, seeking unpaid legal fees; client counterclaimed to recover legal fees he had paid. The trial court denied plaintiff's petition to compel arbitration, concluding that the arbitration clause violated public policy because of the retainer agreement's apparent unfairness in allowing plaintiff to go to court to sue for his fees, while denying defendant any resort to a judicial forum. The trial court then entered judgment on a jury verdict for defendant, awarding him the return of his legal fees. Affirming, this court found it unnecessary to resolve the question of whether the arbitration clause was so one-sided as to violate public policy, holding instead that plaintiff waived his right to arbitration by his participation in the judicial forum. Abramson v. Wildman, 184 Md.App. 189, 964 A.2d 703, 708, 709.

Neb.

Neb.2020. Subsec. (2) quot. in case cit. in ftn. Employee who was injured on the job filed a claim for workers' compensation and was awarded permanent total disability benefits. The court of appeals affirmed, but denied employee's subsequent motion for attorney's fees. Reversing and remanding, this court held that employee had a right to the fees under a statute permitting such fees when an employer appealed from a workers' compensation decision and failed to obtain a reduction in the amount of the award. The court cited Restatement Third of the Law Governing Lawyers § 42 in noting that the affidavit employee's attorney submitted on employee's behalf contained sufficient justification of the extent and value of the attorney services provided on appeal to make a meaningful determination of the amount of "reasonable" attorney's fees to which employee was entitled. Sellers v. Reefer Systems, Inc., 943 N.W.2d 275, 281.

Neb.2007. Subsec. (2) quot. in sup., cit. in ftn., and cit. in ftn. to conc. op. Law firm sued former client to enforce an attorney lien. The trial court granted summary judgment for firm. Reversing and remanding, this court held that a genuine issue of material fact existed as to whether the claimed fee, computed pursuant to the contingent-fee agreement, was reasonable. The concurring justice, writing separately to discuss the parties' respective evidentiary burdens, explained that once a lawyer had established a prima facie case that the fee was reasonable, judgment as a matter of law was precluded only if the client produced specific evidence on factors relevant to the fee's reasonableness, thereby shifting the burden of proof back to the lawyer on the issue. Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Turco, 273 Neb. 924, 931, 933, 735 N.W.2d 368, 374, 375.

Nev.

Nev.2013. Com. (b)(v) cit. in ftn.(cit. as com. (b)). Law firm that represented client in divorce proceedings moved to adjudicate and enforce a charging lien for unpaid attorney's fees. The trial court granted law firm's motion and entered a personal judgment against client. Reversing, this court held that, because law firm perfected its lien eight months after the stipulated marital settlement agreement was entered and the property was distributed—which was well after the time that a lien could have attached to any of the property governed by the settlement—and there was no prospect of post-perfection recovery, the lien should not have been adjudicated under the applicable statute. In making its decision, the court noted that subject-matter jurisdiction was required in addition to in rem jurisdiction in order for a trial court to exercise a charging lien, and that courts without statutory authorization to adjudicate a charging lien in a client's litigation had nevertheless done so under their inherent power to supervise and regulate attorneys appearing before them, in cases where, among other things, the court was likely already familiar with the relevant facts relating to the attorney's performance and services in the case giving rise to the fee dispute. Leventhal v. Black & LoBello, 305 P.3d 907, 910.

N.J.

N.J.2011. Cit. in ftn. §§ 42-43. In disciplinary proceedings brought against attorney for suing a current client to collect legal fees, the Disciplinary Review Board concluded that attorney's conduct created a conflict of interest and that a reprimand was warranted. This court ordered the imposition of a reprimand, holding that attorneys

were not to sue a present or existing client during active representation, nor was an attorney to seek any remedy against a client that resulted in a conflict under the rules of professional conduct; in this case, by filing suit against client, attorney knowingly created an irreconcilable conflict of interest for the purpose of forcing his withdrawal from representation of client in the face of mounting unpaid fees, and such conduct could not be tolerated. The court noted that, while there was some authority allowing a lawyer to perfect a retaining or charging lien against a current client, it would not address those concepts, as they were not at issue here. In re Simon, 206 N.J. 306, 318, 20 A.3d 421, 429.

N.J.Super.

N.J.Super.2003. Com. (b)(iv) quot. in sup. After clients decided to retain new counsel, their former attorney filed petition to establish an attorney's lien, asserting that he was owed over $115,000 for legal services. Trial court granted attorney's motion to compel arbitration of the parties' dispute about legal fees. This court reversed and remanded, holding that, while a clause in a retainer agreement that mandated arbitration of a fee dispute was not against public policy and unenforceable, the record was unclear as to whether clients made an informed and voluntary waiver. The court noted New Jersey's strong policy favoring arbitration as a tool to resolve disputes, as well as the Restatement's comment that the agreement to arbitrate had to meet standards of fairness. Kamaratos v. Palias, 360 N.J.Super. 76, 82, 821 A.2d 531, 535.

Restatement (Third) of the Law Governing Lawyers § 43 (2000)

§ 43 Lawyer Liens

(1) Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of any document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.
(2) Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows:
(a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter;
(b) the lien becomes binding on a third party when the party has notice of the lien;
(c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and
(d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.
(3) A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the property to the client or lawyer, and grant such other relief as justice may require.
(4) With respect to property neither in the lawyer's possession nor recovered by the client through the lawyer's efforts, the lawyer may obtain a security interest on property of a client only as provided by other law and consistent with §§ 18 and 126. Acquisition of such a security interest is a business or financial transaction with a client within the meaning of § 126.

Comment:

a. *Scope and cross-references.* While § 41 addresses fee-collection methods and § 42 procedures for resolving fee disputes, this Section concerns methods by which lawyers may seek in advance to ensure payments of fees. The Section permits contractual charging liens on the proceeds of a matter to secure a lawyer's compensation for services rendered in that matter. It also permits certain security interests in property not in the lawyer's possession, such as a mortgage on the client's land, subject to other provisions of this Restatement (see Comment *h* hereto). For other circumstances in which a lawyer may retain possession of funds or other property, see § 45(2).

Under this Section a lawyer generally does not acquire a nonconsensual lien on property in the lawyer's possession or recovered by the client through the lawyer's efforts. The Section thus does not recognize retaining liens on the client's documents except as provided by statute or rule (see Comment *b* hereto), although a lawyer may retain possession of a document when the client has not paid the lawyer's fee for preparing the document (see Comment *c* hereto).

Security interests in property of nonclients, for example a mortgage on the house of a client's relative, are not as such subject to this Section. However, the nonclient might have a close relationship with the client, such as that of parent or spouse, and thus might be subject to similar pressures. Such security arrangements must meet the requirements of general law, which might treat such transactions as subject to obligations similar to those stated in this Section.

b. *Retaining liens on papers and property in a lawyer's possession.* A lawyer ordinarily may not retain a client's property or documents against the client's wishes (see §§ 45 & 46). Nevertheless, under the decisional law of all but a few jurisdictions, a lawyer may refuse to return to a client all papers and other property of the client in the lawyer's possession until the lawyer's fee has been paid (see Restatement Second, Agency § 464; Restatement of Security § 62(b)). That law is not followed in the Section; instead it adopts the law in what is currently the minority of jurisdictions.

While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim. The lawyer also can arrange other ways of securing the fee, such as payment in advance or a specific contract with the client providing security for the fee under Subsection (4). Because it is normally unpredictable at the start of a representation what client property will be in the lawyer's hands if a fee dispute arises, a retaining lien would give little advance assurance of payment. Thus, recognizing such a lien would not significantly help financially unreliable clients secure counsel. Moreover, the leverage of such a lien exacerbates the difficulties that clients often have in suing over fee charges (see § 41). Efforts in some jurisdictions to prevent abuse of retaining liens demonstrate their undesirability. Some authorities prohibit a lien on papers needed to defend against a criminal prosecution, for example. However the very point of a retaining lien, if accepted at all, is to coerce payment by withholding papers the client needs.

Retaining liens are therefore not recognized under this Section except as authorized by statute or rule and to the extent provided under Subsection (4). Under this Section, lawyers may secure fee payment through a consensual charging lien on the proceeds of a representation (Comments *c*-*f* hereto) and through contractual security interests in other assets of the client (Comment *h*) and other contractual arrangements such as a prepaid deposit. The lawyer may also withhold from the client documents prepared by the lawyer or at the lawyer's expense that have not been paid for (see Comment *c* hereto).

c. *A lawyer's right to retain unpaid-for documents.* A client who fails to pay for the lawyer's work in preparing particular documents (or in having them prepared at the lawyer's expense, for example by a retained expert)

ordinarily is not entitled to receive those documents. Whether a payment was due and whether it was for such a document depend on the contract between the client and the lawyer, as construed from the standpoint of a reasonable client (see §§ 18 & 38).

Illustrations:

1. Client retains Lawyer to prepare a series of memoranda for an agreed compensation of $100 per hour. Lawyer is to send bills every month. Client pays the first two bills and then stops paying. After five months, Client requests copies of all the memoranda. Lawyer must deliver all memoranda prepared during the first two months, but need not deliver those thereafter prepared until Client makes the payments.

2. The same facts as in Illustration 1, except that Client and Lawyer have agreed that Lawyer is to send bills every six months. After five months, Client requests copies of all the memoranda. Lawyer must deliver them all, because Client has not failed to pay any due bill. Had Client stated in advance that it would not pay the bill, the doctrine of anticipatory breach might allow Lawyer not to deliver. See Restatement Second, Contracts §§ 253, 256, and 257.

A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing (see § 32), but a lawyer who does not withdraw must continue to represent the client diligently (see § 16). A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work (see § 46, Comment *e*). Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effect of the document would be seriously compromised by the lawyer's retention of it.

d. Rationale for a charging lien on representation proceeds. Legislation in many states and judicial decisions in others allow a lawyer who has represented a successful claimant to retain out of the proceeds of the suit an amount sufficient to pay the lawyer's claimed fee and disbursements (see Restatement Second, Agency § 464(e)). With appropriate safeguards, such charging liens can secure proper payment for lawyers without the coercive effects of a retaining lien. If the client were given the disputed sum, the money might be dissipated before the lawyer could secure a remedy. Especially when the client has no other assets and the lawyer is receiving a contingent fee, the charging lien gives the lawyer important assurance that the fee and disbursements will actually be paid. It thus makes it easier for people to secure competent representation when they have small means and meritorious claims.

The provisions of this Section apply in the absence of a statute or rule providing otherwise. Not all safeguards required by the Section are required in all jurisdictions, many of which, for example, recognize a charging lien without a contract. Such charging liens apply in representations involving formal adjudication or in other representations such as those involving negotiation or arbitration. The charging lien is limited to the amount of the lawyer's good-faith claim for fees and disbursements; the lawyer must promptly pay the client the rest of the proceeds of the matter (see § 45). The disputed amount may not be mingled with the lawyer's own funds until the dispute is resolved (see § 44, Comment *f*).

e. Requirements for charging liens. Lien statutes and decisions differ in their requirements for making the lien effective against a third party. Two such general requirements apply in the absence of a contrary statutory arrangement.

First, the client and lawyer must contract in writing for the lien. That requirement ensures that the client has notice that the lawyer may detain part of any recovery and an opportunity to bargain for a different result (see § 38, Comment *b*). The requirement of a writing also permits third parties to verify the lien's existence and provisions. The lien contract need not specify the amount of the fee, which is often unknown in advance, and need not use the word "lien." However, it must make clear that the lawyer will be entitled to part of the proceeds of the action to pay the lawyer's fee.

Second, to be enforceable against a third party that person must have been afforded notice of the lien as required by law. Otherwise, that party could not fairly be held liable to the lawyer after making payment directly to the plaintiff (see Restatement Second, Agency § 464, Comment *n* (notice to opposing party or court)). If there are several third parties, the lien is binding only on those with notice. Absent waiver or estoppel or other law to the contrary, effective notice can be given at any time before the third party makes payment to the client.

If a consensual charging lien satisfies the two requirements described above, a nonclient who pays the sum in dispute to the client is nevertheless obliged to pay the lawyer the underlying fee claim (up to the amount of the lien). The nonclient thereupon may seek reimbursement from the client. The lawyer, however, may not prevent the client from settling the case or sue to enforce a judgment that the client leaves uncollected (see § 22; Restatement Second, Agency § 464, Comment *n*). The lien can be used only to collect a valid and enforceable fee claim. If, for example, the lawyer's fee claim has been forfeited (see §§ 37 & 40), the lien becomes unenforceable.

The third party can protect itself against double payment by applying to the court for a protective order, by an interpleader proceeding, or by satisfying the judgment or other obligation (as under a settlement contract) with an instrument requiring endorsement by both the claimant and the claimant's lawyer.

f. Priority of a charging lien over claims of other persons. A lawyer's charging lien ordinarily takes priority over security interests that the client grants to other persons after the lawyer's lien has been perfected. According priority to a lawyer's charging lien might raise at least three issues, on which there is mixed authority. One issue is what if any steps, such as filing a financing statement, a lawyer must take to perfect the lawyer's rights against other creditors of the client. A second issue is whether the lawyer's lien takes priority over security interests previously granted by the client. A third issue is whether the lawyer's lien takes priority over security interests such as tax liens that are not granted by the client. This Restatement takes no position on those issues.

g. Enforcing a charging lien; a tribunal's discretion. Pursuant to Subsection (3), if there is dispute as to what fee is due, and thus as to the appropriate scope of the lawyer's charging lien, the court may resolve it under ancillary jurisdiction (see § 42, Comment *b*). It can protect the funds in dispute while the controversy is adjudicated in another forum, for example by requiring their deposit in an interest-bearing account. The court can also refuse to enforce the lien because of compelling circumstances; some courts, for example, have concluded that no lien should attach to child-support payments.

h. A lawyer's duties in enforcing a lien. The fee claim with respect to which a lien is asserted must be advanced in good faith and with a reasonable basis in law and fact. The lawyer must not commingle with the lawyer's own funds any payments subject to the lien (see § 44). The lawyer must not unreasonably delay resolution of disputes concerning the lien and claimed fee.

One possible remedy for a lawyer's breach of the duties imposed by this Section is forfeiture of the lawyer's fee claim under § 37 or § 41. Alternatively or in addition to partial forfeiture, the tribunal may simply release the lien (see Comment *h* hereto). Thus a lawyer's inability to attend a prompt hearing on the fee by reason of previous

commitments would not warrant fee forfeiture but would be a circumstance in which the tribunal could release the lien.

i. Other security for attorney fees and disbursements. Under Subsection (4), a lawyer may obtain a consensual security interest in a client's property not otherwise involved in the representation, such as a mortgage on the client's land, a pledge of the client's stocks, or an escrow arrangement. This Section does not prohibit such security arrangements. They are typically created by a writing that informs the client of the obligations secured. Typically they are used when the client's ability or willingness to pay is questionable, and they thus aid such a client (for example, a criminal defendant with nonliquid assets but no money) to obtain counsel.

Subsection (4) recognizes, however, that consensual security interests on a client's property raise problems of fairness to the client. The client might not adequately understand the transaction and might as a result be treated unfairly. Enforcement of the security interest might involve harsh consequences, such as the client's dispossession, and places client and lawyer in a continuing financial relationship that involves differing interests for the lawyer.

Accordingly, a security interest for a lawyer is subject to the rules governing other business transactions between client and lawyer (see § 126 and the Comments thereto). Notice and consent must be in writing when required under lawyer disciplinary rules or the general law governing mortgage and security interests. When a lawyer obtains the security interest after commencing the representation, the arrangement is subject to close scrutiny under § 18.

Advance payment of fees (see § 38(3)(c) & Comment *g* thereto), payment of an engagement retainer (see § 34, Comment *d*), contracts for payment of interest on unpaid bills (see § 18, Illustration 1), and contracts requiring regular billing and payment do not create security interests or liens within the meaning of this Section and are not subject to the restrictions of § 126. For example, a lawyer who has required an advance payment may retain in the lawyer's trust account a sum sufficient to cover a disputed fee (see § 44, Comment *f,* & § 45(2)(d)). Such arrangements are not subject to close scrutiny under § 18 if agreed upon before the lawyer begins to perform legal services. However, such contracts must be reasonable in the circumstances (see § 34) and are construed as they would be by a reasonable client (see §§ 18 & 38).

Reporter's Note

*Comment b. Retaining liens on papers and property in a lawyer's possession.*Retaining liens have been recognized in almost all states. E.g., Pomerantz v. Schandler, 704 F.2d 681 (2d Cir.1983) (applying New York law); Marsh, Day & Calhoun v. Solomon, 529 A.2d 702 (Conn.1987); Wash. Rev. Code Ann. § 60.40.010. ABA Model Rules of Professional Conduct, Rules 1.8(j)(1), 1.15(b) (1983) and ABA Model Code of Professional Responsibility, DR 5-103(A)(1), 9-102(B)(4) (1969), do not authorize attorney liens but allow lawyers to assert liens authorized by other law.

The Section follows the approach of authorities in California, Minnesota, and Missouri, which have declared retaining liens invalid. Academy of California Optometrists, Inc. v. Superior Court, 124 Cal.Rptr. 668 (Cal.Ct.App.1975); Kallen v. Delug, 203 Cal.Rptr. 879 (Cal.Ct.App.1984); Minn. Stat. Ann. § 481.13 (as amended by L.1976, c.304 to remove authorization for retaining liens); Op. 11, Minn. Prof. Resp. Bd., Minn. Bench and Bar (Feb.1981), at 55; Mo. Formal Opin. 115 (1979) (unclear if Missouri law recognizes lien, but in any case lawyer may not ethically assert one). See also Commission on Professional Responsibility, Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, Rule 5.5 (1980) (forbids retaining liens, but allows lawyers to withhold unpaid-for work product). In Kentucky, New Hampshire, North Carolina, and Rhode Island, there is no case or statutory authority recognizing retaining liens, and authority in some other states is sparse. See also Nat'l Sales & Service Co. v. Superior Court, 667 P.2d 738 (Ariz.1983) (recognizing retaining lien by 3-2 vote, but holding it does not cover documents given to lawyer for trial preparation or trial use); In re Anonymous Member of South Carolina Bar, 335 S.E.2d 803 (S.C.1985) (improper to assert retaining lien on litigation files when unnecessary to prevent client's fraud or gross imposition); D.C. Rules of Prof. Conduct, Rule 1.8(I) (no lien on client files, except unpaid-for work product; no lien if client unable to pay or withholding would

significantly harm client); Mass. Rules of Professional Conduct, Rule 1.16(e) (limiting lien on documents along lines of this Section).

Cases seeking to limit oppressive use of retaining liens include Miller v. Paul, 615 P.2d 615 (Alaska 1980) (lawyer must return vitally important files when client's resources are limited); Jenkins v. Eighth Judicial Dist. Court, 676 P.2d 1201 (Colo.1984) (lawyer who sues for fees may not use lien to bar discovery); In re Palmer, 956 P.2d 1333 (Kan.1998) (despite retaining lien, improper to fail to turn over the client papers needed to continue case); People v. Altvater, 355 N.Y.S.2d 736 (N.Y.Sup.Ct.1974) (lawyer required to turn over murder defendant's file to replacement counsel); Frenkel v. Frenkel, 599 A.2d 595 (N.J.Super.Ct.App.Div.1991) (court may require lawyer to turn over photocopy of litigant's file); Annot., 70 A.L.R.4th 827, 837-50 (1989) (no lien when property delivered to lawyer for purposes incompatible with lien). For the coercive rationale of the retaining lien, see Pomerantz v. Schandler, 704 F.2d 681 (2d Cir.1983); Brauer v. Hotel Associates, Inc., 192 A.2d 831 (N.J.1963).

*Comment c. A lawyer's right to retain unpaid-for documents.*National Sales & Service Co. v. Superior Court, 667 P.2d 738 (Ariz.1983) (retaining lien covers work product, which remains lawyer's property, at least until payment); Marco v. Sachs, 109 N.Y.S.2d 224 (N.Y.Sup.Ct.1951) (lawyer's work product, memo to guide lawyer at closing, is not in client's control); Commission on Professional Responsibility, Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, Rule 5.5 (1980) (lawyer may retain unpaid-for work product); 1 Hazard & Hodes, The Law of Lawyering 486 (2d ed. 1990). For the limitations on the right to retain, compare Reporter's Note to Comment *b* hereto (cases limiting use of retaining liens).

*Comment d. Rationale for a charging lien on representation proceeds.*For charging-lien statutes, see, e.g., Colo. Rev. Stat. § 12-5-119; N.Y. Judiciary Law § 475. Although most jurisdictions recognize charging liens only when a statute authorizes them, some allow contractual liens without a statute. Cetenko v. United California Bank, 638 P.2d 1299 (Cal.1982).

*Comment e. Requirements for charging liens.*For the requirement of a client-lawyer contract creating a lien expressly or by implication, see Rev. Stat. Mo. § 484.140; Wis. Stat. Ann. § 757.36; Cetenko v. United Calif. Bank, 638 P.2d 1299 (Cal.1982); Kleager v. Schaneman, 322 N.W.2d 659 (Neb.1982). Some statutes do not require such a contractual provision for a lien. E.g., Mass. G.L. Ann. c.221, § 50; see In re Marriage of Rosenberg, 690 P.2d 1293 (Colo.Ct.App.1984) (contractual waiver of lien).

On the requirement of notice to an opposing party who is to be bound, see Ill. Rev. Stat. ch. 13, § 4; Gen. L. R.I. § 9-3-2; Passer v. United States Fidelity & Guaranty Co., 577 S.W.2d 639 (Mo.1979) (notice of lawyer's retention not enough); Goldman v. Home Mut. Ins. Co., 126 N.W.2d 1 (Wis.1964) (similar). Compare Wash. Rev. Code Ann. § 60.40.010 (filing in court).

On the requirement that an action must have been commenced, see N.J. Stat. § 2A:13-5; Mass. G.L. Ann. ch.221, § 50. Compare Ill. Rev. Stat. ch. 13, § 14 (suit need not have been commenced); Ind. Code § 33-1-3-1 (suit must have gone to judgment). For limitation of the lien to fees for services in the suit in question, see Crolley v. O'Hare Int'l Bank, 346 N.W.2d 156 (Minn.1984); Annot., 23 A.L.R.4th 336 (1983).

For enforcement of the lien against an opposing party with notice who disburses to the client funds covered by the lien, see, e.g., Rev. Stat. Mo. § 484.140; Va. Code § 54-70; Kleager v. Schaneman, 322 N.W.2d 659 (Neb.1982); Fischer-Hansen v. Brooklyn Heights R.R., 66 N.E. 395 (N.Y.1903). Cf. Hafter v. Farkas, 498 F.2d 587 (2d Cir.1974) (opposing party may satisfy judgment with check requiring endorsement by both plaintiff and plaintiff's lawyer).

*Comment f. Priority of a charging lien over claims of other persons.*For priority of a charging lien over security interests subsequently granted by the client, see Hanna Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb, 298 F.2d 371 (10th Cir.1962); Leigh v. Western Fire Ins. Co., 575 F.Supp. 1192 (W.D.Mo.1983). For cases dealing with other priority issues, see Note, The Ranking of Attorney's Liens Against Other Liens in the United States, 7

J. Leg. Prof.193 (1982); Annot., 34 A.L.R.4th 665 (1984). For examples of filing requirements, see Minn. Stats. Ann. § 481.13(4) (attorney lien on plaintiff's interest in personal property must be filed as would be done for a security interest); Wash. Rev. Code Ann. § 60.40.010 (filing in court).

*Comment g. Enforcing a charging lien; a tribunal's discretion.*For the court's jurisdiction to hear lien claims by lawyers and clients, see, e.g., Ill. Rev. Stat. ch. 13, § 14; N.Y. Jud. Law § 475; Gee v. Crabtree, 560 P.2d 835 (Colo.1977). On the court's discretion, see, e.g., Wash. Rev. Code Ann. § 60.40.030 (court may require security); Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir.1983) (court may release papers held under retaining lien because of client's need for them and inability to pay fee). For protection of child-support payments from liens, see, e.g., Brake v. Sanchez-Lopez, 452 So.2d 1071 (Fla.Dist.Ct.App.1984); Fuqua v. Fuqua, 558 P.2d 801 (Wash.1977). On determination of lien disputes by judge, not jury, see, e.g., In re Rosenman & Colin, 850 F.2d 57 (2d Cir.1988); In re Marriage of Rosenberg, 690 P.2d 1293 (Colo.Ct.App.1984); Kleager v. Schaneman, 322 N.W.2d 659 (Neb.1982); compare § 42, Comment *b,* and Reporter's Note thereto.

*Comment h. A lawyer's duties in enforcing a lien.*McCarthy v. Philippine Nat'l Bank, 690 F.Supp. 1323 (S.D.N.Y.1988) (lawyer liable for failing to deposit check on which lawyer claimed lien in interest-bearing account at client's request); Zack v. City of Minneapolis, 601 F.Supp. 117 (D.Minn.1985) (lawyer forfeits lien by failing to seek attorney-fee award from opposing party); Marrero v. Christiano, 575 F.Supp. 837 (S.D.N.Y.1983) (lawyer forfeits retaining lien by withdrawing or threatening to withdraw without good cause); In re Fidelity Standard Mortgage Corp., 43 B.R. 654 (Bankr.S.D.Fla.1984) (lawyer's failure to enforce lien waives it as against good-faith purchaser of fruits of judgment); Hensel v. Cohen, 202 Cal.Rptr. 85 (Cal.Ct.App.1984) (lawyer's withdrawal without good cause forfeits lien); People ex rel. Goldberg v. Gordon, 607 P.2d 995 (Colo.1980) (discipline for asserting retaining lien when no fee still due); Haskins v. Bell, 129 N.W.2d 390 (Mich.1964) (lawyer forfeits all but undisputed fee by keeping for 6 years amount greater than fee claimed without starting proceedings to determine proper amount of lien); Kaplan v. Reuss, 497 N.E.2d 671 (N.Y.1986) (lawyer's failure to assert lien promptly waives it); see Lucky-Goldstar v. Int'l Mfg. Sales Co., 636 F.Supp. 1059, 1063-64 (N.D.Ill.1986) (lawyer must balance relevant interests before asserting retaining lien); Ross v. Scannell, 647 P.2d 1004 (Wash.1982) (discussing danger of lawyer over-claiming). On commingling of disputed funds with the lawyer's own funds, see § 44, Comment *f,* and Reporter's Note thereto. On forfeiture of the lien but not the underlying claim, see People ex rel. MacFarlane v. Harthun, 581 P.2d 716 (Colo.1978) (suspended lawyer loses retaining lien but may sue for fees); Northern Pueblos Enters. v. Montgomery, 644 P.2d 1036 (N.M.1982) (court may limit lien to reasonable fee to protect competing lienor, leaving lawyer free to sue client for claimed higher contractual fee); In re Dunn, 98 N.E. 914 (N.Y.1912) (lawyer who withdraws or is discharged for misconduct loses lien); see also Adams, George, Lee, Schulte & Ward P.A. v. Westinghouse Elec. Corp., 597 F.2d 570 (5th Cir.1979) (lawyer must pay interest on funds held under invalid lien claim).

*Comment i. Other security for attorney fees and disbursements.*E.g., Hawk v. State Bar, 754 P.2d 1096 (Cal.1988) (promissory note for fee secured by deed of trust improper unless lawyer explains it to client and gives client copy, offers fair terms, and affords opportunity to obtain independent advice); Office of Disciplinary Counsel v. Levin, 517 N.E.2d 892 (Ohio 1988) (discipline for obtaining from uninformed client security interest in client's home having value greater than that of fees it secured); Note, An Attorney's Acceptance of Assignment of Property as Security for Fee, 4 J. Leg. Prof. 263 (1979); see In re Martin, 817 F.2d 175 (1st Cir.1987) (considering validity under bankruptcy law of debtor's mortgage to lawyer to secure fees). ABA Model Rules of Professional Conduct, Rule 1.8(a) (1983), forbids a lawyer to knowingly acquire a "security … interest adverse to a client" unless the terms are fair and reasonable to the client and are fully and comprehensibly disclosed to the client in writing, the client is given an opportunity to seek independent advice, and the client consents in writing. See generally § 126, Comments, and Reporter's Notes thereto.

Case Citations - by Jurisdiction

C.A.6, Bkrtcy.App.
C.A.7,
N.D.Ohio Bkrtcy.Ct.
Cal.
Cal.App.
Del.Ch.
N.H.
N.J.
Ohio App.

C.A.6, Bkrtcy.App.

C.A.6, Bkrtcy.App.2004. Cit. in disc., com. (d) quot. in disc. and quot. in ftn., com. (e) quot. in disc. Bankruptcy trustee brought suit against law firm that allegedly received prepetition avoidable preferential transfer for its asserted attorney's charging lien against arbitration award that firm secured on behalf of debtor. The bankruptcy court found the lien invalid because it was never put into writing, and thus constituted a preferential transfer under the Bankruptcy Code. Reversing and remanding, this court held, inter alia, that firm was entitled to payment for services rendered, and affidavits submitted sufficiently established that opposing counsel in the arbitration, as well as debtor, were told prior to negotiation that firm intended to assert an attorney's lien against any arbitration award secured as payment for its services. In re Simms Construction Services Co., Inc., 311 B.R. 479, 484, 487, 488.

C.A.7,

C.A.7, 2013. Com. (h) quot. in sup. After former client, acting pro se, filed suit against his former employer and obtained a settlement for approximately $1.3 million, client's former attorney, who had previously represented client during mediation sessions with employer pursuant to a 10% contingent-fee agreement, demanded payment of attorney's fees from the settlement based on an alleged attorney's-fee lien. The district court issued an order quashing the lien. This court concluded that attorney's assertion of the lien was entirely unjustified, and ordered him to pay sanctions to client, and that the matter be referred to the state attorney registration and disciplinary commission. The court pointed out that attorney asserted the lien in the amount of $70,000 months before any settlement offer had been made, and that, even though attorney later secured a $375,000 settlement offer for client from employer, client rejected that offer, and the most that attorney could have claimed under a lien if client had accepted that offer was $29,383. Goyal v. Gas Technology Institute, 732 F.3d 821, 826.

C.A.7, 2013. Com. (h) quot. in sup. After former employee, acting without the aid of legal representation, reached a $1.3 million settlement of his lawsuit alleging retaliation for whistleblowing against former employer, he moved to quash a lien for unpaid fees that his former attorney, who had briefly represented him during settlement negotiations prior to the filing of the lawsuit, had filed on any settlement or judgment that was recovered resulting from his claims. The district court granted employee's motion to quash. Affirming, this court held that attorney was not entitled to an equitable lien on employee's settlement funds. While attorney had previously obtained a settlement offer for employee from employer in the amount of $375,000, employee had rejected that offer, and, thus, because it was a fundamental principle of contract law that there was no contract (and no settlement) without both offer and acceptance, employer's offer, alone, in no way "secured" funds for employee, and thus no funds were "secured" by attorney, as required in order for a lien to be properly asserted under the retainer agreement. The court noted that the rules of professional conduct on attorney's fees included an implicit requirement that an attorney not assert unreasonable or baseless demands for attorney's fees contrary to his fee agreement, including asserting a lien. Goyal v. Gas Technology Institute, 718 F.3d 713, 720-721.

N.D.Ohio Bkrtcy.Ct.

N.D.Ohio Bkrtcy.Ct.2015. Com. (d) quot. in ftn. Chapter 7 trustee brought an adversary proceeding against attorney that had represented debtor in various personal and business matters, seeking to recover two vehicles that debtor had transferred to defendant three days before he filed his bankruptcy petition or their value as property of the estate. This court granted plaintiff's motion for summary judgment, holding that there were no genuine issues of material fact. Citing Restatement Third of the Law Governing Lawyers § 43, Comment *d*, the court rejected defendant's argument that he had an attorney's lien on the vehicles because they were given in exchange for washing out debtor's unpaid legal fees, and explained that defendant did not obtain an attorney's charging lien, because he did not have a lien upon a judgment or other proceeds awarded to a client or former client. In re Hadley, 541 B.R. 829, 838.

Cal.

Cal.2004. Subsec. (2)(a) and com. (e) quot. in sup. Attorney brought action against various parties seeking to enforce charging lien against former client. Trial court sustained defendants' demurrers. Court of appeal reversed. Reversing, this court held that attorney who secured payment of hourly fee by acquiring charging lien on client's future judgment or recovery had interest adverse to client, and exercise of such adverse interest required the client's informed written consent pursuant to rules of professional conduct; because written consent was not obtained in this matter, charging lien was not enforceable. Fletcher v. Davis, 33 Cal.4th 61, 70, 14 Cal.Rptr.3d 58, 65, 90 P.3d 1216, 1222.

Cal.App.

Cal.App.2003. Subsec. (2)(a) cit. in ftn. and cit. generally in disc. Attorney sued former client to recover legal fees and expenses, alleging that he had contractual lien on judgment obtained by former client, and that former client and third-party defendants converted proceeds of judgment to their own use, thereby depriving him of his rightful share. Trial court dismissed, ruling that plaintiff could not state cause of action against third-party defendants, since his purported lien for fees and costs was based on oral agreement with former client. This court reversed in part, holding that a client's agreement to a lien for attorneys' fees on prospective recovery need not be in writing to be enforceable. Fletcher v. Davis, 106 Cal.App.4th 398, 130 Cal.Rptr.2d 696, 700, review granted and opinion superseded 134 Cal.Rptr.2d 50, 68 P.3d 343 (2003), judgment reversed in part 33 Cal.4th 61, 14 Cal.Rptr.3d 58, 90 P.3d 1216 (2004).

Del.Ch.

Del.Ch.2011. Subsec. (1) and com. (a) quot. in ftn. Shareholder who had commenced litigation against corporation moved to compel production of certain documents from former counsel who asserted a retaining lien over the documents arising from alleged unpaid bills. This court granted shareholder's motion to compel and required counsel to release its lien conditioned on shareholder posting adequate security. The court concluded that the disputed documents were discovery materials that came into counsel's possession by virtue of its rendering legal services to shareholder; counsel therefore had a protectable interest in the materials, and that interest had to be balanced against the competing interests of shareholder and the judicial system in having access to the documents for purposes of the ongoing litigation. Judy v. Preferred Communication Systems, Inc., 29 A.3d 248, 255.

N.H.

N.H.1998. Cit. in disc. (citing § 55, Prop. Final Draft No. 1, 1996, which is now § 43). Lawyer filed notice of lien claiming attorney's fees for legal services in underlying action that was settled. The trial court denied former client's motion for a jury determination of the attorney's fees owed, and awarded attorney's fees to lawyer. Reversing in part and remanding, this court held, inter alia, that former client was entitled to a jury trial on the fee issue. Although the trial court could determine whether an attorney had a valid claim to proceeds from a settlement or

judgment for fees and expenses, and enforce the attorney's lien by prohibiting the client from dissipating those proceeds, once the lien had been perfected and the necessary funds secured, legal disputes regarding amounts due were resolved in the same manner as any other contract or tort action and, provided a timely request was made, could be tried before a jury. Taylor-Boren v. Isaac, 143 N.H. 261, 723 A.2d 577, 580.

N.J.

N.J.2011. Cit. in ftn. §§ 42-43. In disciplinary proceedings brought against attorney for suing a current client to collect legal fees, the Disciplinary Review Board concluded that attorney's conduct created a conflict of interest and that a reprimand was warranted. This court ordered the imposition of a reprimand, holding that attorneys were not to sue a present or existing client during active representation, nor was an attorney to seek any remedy against a client that resulted in a conflict under the rules of professional conduct; in this case, by filing suit against client, attorney knowingly created an irreconcilable conflict of interest for the purpose of forcing his withdrawal from representation of client in the face of mounting unpaid fees, and such conduct could not be tolerated. The court noted that, while there was some authority allowing a lawyer to perfect a retaining or charging lien against a current client, it would not address those concepts, as they were not at issue here. In re Simon, 206 N.J. 306, 318, 20 A.3d 421, 429.

Ohio App.

Ohio App.2018. Subsec. (2)(b) quot. in sup. and quot. in case quot. in sup. Law firm that had entered into a contingent-fee agreement with client that gave firm a charging lien on the proceeds of any insurance settlement it obtained on client's behalf in connection with a car accident sued client, opposing party, and opposing party's insurer, seeking payment of its legal fees and expenses after insurer settled directly with client. The trial court granted summary judgment for firm, finding that insurer was liable to firm for the quantum meruit value of its legal services, including litigation expenses. Affirming, this court held that firm's charging lien was enforceable against insurer, because insurer had knowledge of the lien before it settled client's claim and, despite this knowledge, distributed the settlement proceeds solely to client. The court explained that, under Restatement Third of the Law Governing Lawyers § 43, a charging lien became binding on a third party when the party had notice of the lien. Kisling, Nestico & Redick, L.L.C. v. Progressive Max Insurance Company, 110 N.E.3d 681, 686-688.

Ohio App.2017. Subsec. (2)(b) quot. in case quot. in sup. Law firm that entered into a contingent-fee agreement with client, which granted it a charging lien on proceeds obtained in connection with injuries client sustained in a car accident, sued, among others, insurer of motorist who allegedly caused the accident, seeking to enforce the charging lien after client declined a settlement offer obtained on his behalf by firm and negotiated a settlement directly with insurer. This court granted summary judgment for firm. Affirming, this court held that firm's charging lien was enforceable against insurer, because insurer had knowledge of the charging lien before it settled client's claim and, despite this knowledge, distributed the settlement proceeds to client solely. The court cited Restatement Second of Agency § 464 and Restatement Third of the Law Governing Lawyers § 43 in explaining that an attorney to whom an interest in the proceeds of a judgment was assigned could enforce his or her interest against the judgment debtor if the attorney had notified the judgment debtor of the interest. Kisling, Nestico & Redick, L.L.C. v. Progressive Max Insurance Company, 98 N.E.3d 1166, 1170, 1172.

Ohio App.2012. Quot. in case quot. in sup. Attorney sought a charging lien over any settlement or judgment proceeds obtained by its former client in an appropriation action. The probate court denied attorney's request. Reversing and remanding, this court held that the probate court erred in failing to grant attorney the opportunity to be heard on the matter of his charging lien and to demonstrate the extent to which his efforts helped produce the proceeds that the probate court distributed to client's mortgagee. The court reasoned that, although attorney was forced to withdraw from representation after the first day of trial, based upon an ethical imperative, his efforts contributed to the ultimate judgment rendered in favor of client; in addition, attorney provided notice of his charging lien to client's mortgagee, and it was clear that, under Ohio law, a proper charging lien took priority

over the claims of such creditors. Cuyahoga Cty. Bd. of Commrs. v. Maloof Properties, Ltd., 197 Ohio App.3d 712, 716, 2012-Ohio-470, 968 N.E.2d 602, 605.

Restatement (Third) of the Law Governing Lawyers 3 4 Intro. Note (2000)

Introductory Note

Introductory Note: This Topic considers a lawyer's duties concerning a client's or nonclient's property and documents in the lawyer's possession. Those include: the lawyer's duty to safeguard the property and hold it separately from that of the lawyer (see § 44); the circumstances in which the lawyer has a duty to deliver such property to the client or nonclient (see § 45); and the special obligations that protect the client's access to documents (see § 46).

Restatement (Third) of the Law Governing Lawyers § 44 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 4. Property and Documents of Clients and Others

§ 44 Safeguarding and Segregating Property

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

Comment:

a. Scope and cross-references. This Section sets forth a lawyer's duty to safeguard money and other property in the lawyer's possession and not to commingle it with the lawyer's own property. Section 45 prescribes when the lawyer must deliver the property to its owner; § 46 concerns documents relating to a representation.

The requirement of Subsection (1) with respect to property of a third person states the rule of law applicable in proceedings seeking remedies other than professional discipline. In disciplinary proceedings, the lawyer codes typically provide rules for property of third persons as strict as those for clients and which may be more demanding than required for other remedies.

b. *Rationale.* A lawyer often takes temporary possession of a client's property in the course of representing the client, for example as part of administering an estate, paying or collecting a judgment, or exchanging valuable documents at a closing. Precautions are required to assure safety of the property (see Restatement Second, Agency § 427). Requiring the property to be clearly identified and held separately reduces the danger of conversion, negligent misappropriation, or loss and protects the property from seizure by creditors of the lawyer or of other clients (see Restatement Second, Agency § 398). Notice to the client enables the client to obtain the property or to keep track of it while in the lawyer's possession (see Restatement Second, Agency § 382 & § 427, Comment *c*).

Those precautions are also generally appropriate for property belonging to a third person that comes into a lawyer's possession in the course of a representation. Thus, a lawyer must safeguard a deed of a client's spouse, as well as property received in the lawyer's capacity as a trustee, executor, escrow agent, or the like, unless that capacity is unrelated to a representation. Receiving property in such a capacity may also give rise to additional duties under law governing that capacity. This Section does not apply to property received otherwise than in connection with a representation, such as office equipment rented by a lawyer under a commercial lease or property the lawyer stores for a friend.

c. *Regulatory requirements and sanctions.* All jurisdictions have rules concerning a lawyer's responsibilities for client property, enforceable by disciplinary sanctions. Strong sanctions including disbarment have been imposed for converting or even commingling client funds. The rules often specify where the lawyer's bank account must be located, the records the lawyer must keep, and other matters. Many states provide for random audits of lawyer trust accounts, notification of bar authorities by banks when trust accounts are overdrawn, and client security funds to compensate clients injured by misappropriating lawyers.

A lawyer who violates this Section can be subject to civil liability as well as disciplinary sanctions. A lawyer who converts the property of another is of course liable as is one who negligently fails to safeguard against the conversion or loss of property entrusted to the lawyer. Under agency principles, the lawyer is subject to liability for failure to segregate client property and keep proper records and must account for any profits resulting from the lawyer's misuse of the property (see Restatement Second, Agency §§ 382, 398, 402-404, & 427). Criminal conviction for embezzlement or similar offenses is also possible (see Model Penal Code § 223.8).

d. *Safeguarding funds: bank accounts and interest.* A lawyer must deposit funds of a client or a third person in an account, usually a trust or client account, separate from the lawyer's own funds, and including those of the lawyer's law practice. The trust account may contain funds of more than one person, but the records must adequately identify the share of each person. The lawyer may not receive interest on such funds. Most states now have arrangements under which certain client funds (usually small amounts) may or must be pooled in accounts, the interest from which is paid to a regulatory authority to fund legal services for the indigent and other similar activities. When trust accounts may bear interest for the benefit of an individual client and the amount and probable duration of the deposit justify the effort and expense involved, the lawyer should arrange for an interest-bearing account, with the interest to be transmitted to the clients. A lawyer holding client funds as a trustee or in other capacities may be required to invest them. See Restatement Third, Trusts (Prudent Investor Rule) §§ 227-229.

e. *Scope of the duty to safeguard.* This Section applies to all valuable objects including cash, jewelry, and the like, negotiable instruments, deeds, stock certificates, and other papers evidencing title. See also § 46, discussing documents in the lawyer's possession. This Section requires a lawyer to use reasonable measures for safekeeping such objects, for example by placing them in a safe-deposit box or office safe. The reasonableness of measures depends on the circumstances, including the market value of the property, its special value to the client or third person, and special difficulties that would be required to replace it if known to the lawyer, its transferability or convertibility, its susceptibility to loss or other damage, the reasonable customs of lawyers in the community, and the availability and cost of alternative methods of safekeeping.

The terms of an agreement under which the lawyer receives property can modify the obligations imposed by this Section. For example, an escrow contract might require the lawyer serving as escrowee to pay out the escrow funds upon the occurrence of a stated event. A lawyer's obligation to safeguard property may be relaxed by a contract

only if any client or third person whose interests are affected gives informed consent, on terms that serve some purpose other than the convenience or profit of the lawyer (see § 19). On business dealing with a client, see § 126.

f. Property belonging to a lawyer. This Section does not apply to property indisputably owned by a lawyer. Thus, when a client does not dispute a lawyer's good-faith claim to a certain amount as a fee then owing, the lawyer may transfer that amount into the lawyer's personal account. See also § 21, Comment *e*, discussing when a lawyer may validly endorse a check on which the client is payee. Similarly, if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer (see § 38, Comment *g*). A lawyer holding client funds as an advance fee payment may withdraw them for fees as earned, so long as there is no existing dispute about the lawyer's right to do so. In such instances, the lawyer acts rightly in retaining the money even though, for example, the client might later claim that the fee was unreasonable (see §§ 34 & 42) or the advance payment becomes unreasonable in light of later developments (see § 38, Comment *g*; § 34, Comment *d*; & § 40).

When a lawyer asserts a lien on the client's property (see § 43), the lawyer must hold the client's property separate from the lawyer's personal or office funds and property as provided in § 44(1). Similarly, in most jurisdictions a lawyer must keep separate the disputed portion of any fund claimed both by the lawyer and a client or third person.

g. Claims of third persons against a client or a lawyer. A lawyer might be in possession of property claimed both by the lawyer's client and by a third person, for example a creditor claiming an interest in the client's property, a previous lawyer of the client claiming a lien on the client's recovery (see §§ 40 & 43), or a person claiming that property deposited with the lawyer by the client was taken or withheld unlawfully from that person. In such circumstances, this Section requires the lawyer to safeguard the contested property until the dispute has been resolved (see § 45, Comments *d* & *e*), but does not prescribe the rules for resolving it. Those rules are to be found in other law. Thus, if a third person claims that property stolen from that person has been used by the client to pay the lawyer's fee, the lawyer's right to keep the payment depends on the law generally applicable to transfers of stolen property. The result might turn on whether the lawyer was a bona fide purchaser for value without notice of the theft, on whether the property was negotiable, or on other circumstances. It might also be affected by statutes providing for the forfeiture of property to the government, to the extent that such statutes validly apply to property used to pay lawyer's fees (see § 45, Comment *f*).

h. A lawyer's duty to notify and account. A lawyer who receives property claimed by a client or third person to whom the lawyer owes a duty of safekeeping must inform the owner or claimant so that the latter can protect his or her rights (see § 20). Likewise, the lawyer must render account of the property of others in the lawyer's possession when requested. See Restatement Second, Agency § 382; Restatement Second, Trusts §§ 172-173.

When the claimant is a third person whose interests conflict with those of the lawyer's client but to whom the lawyer owes a duty of safekeeping or notification, the lawyer must notify that person of the lawyer's receipt of the property. That situation could exist, for example, where the lawyer is an executor and the third person a legatee, where the law designates the lawyer a constructive trustee for the person because the property has been converted (see § 45, Comment *f*), or where other law imposes a duty on the lawyer to turn over property or funds directly to the third person. The lawyer's duties of confidentiality to the client do not bar such notice because the lawyer may not assist the client to conceal the property from the third person to whom the lawyer owes the duty of safekeeping (see § 45). Moreover, the arrangement under which the lawyer receives property of a third person of adverse interest—for example, an escrow arrangement—can imply that the client and third person have agreed that the lawyer is to protect the third person's interests.

Reporter's Note

The ABA Model Rules of Professional Conduct (1983) provide in Rule 1.15:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The ABA Model Code of Professional Responsibility (1969) provides in DR 9-102:

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

*Comment b. Rationale.*For application of the principles of this Section to property of third persons, see, e.g., Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Idaho Ct.App.1983) (person to whom client assigned part of recovery); In re Young, 488 N.E.2d 1014 (Ill.1986) (earnest-money check of person buying from client); New Orleans Pub. Serv., Inc. v. Vanzant, 580 So.2d 533 (La.Ct.App.1991) (opposing party's overpayment of judgment); Disciplinary Bd. v. Banks, 641 S.W.2d 501 (Tenn.1982) (person placing funds with lawyer for investment); see Comment *e* hereto and Reporter's Note thereto.

*Comment c. Regulatory requirements and sanctions.*Requirements imposed by regulatory authorities are discussed in C. Wolfram, Modern Legal Ethics 179-83 (1986); Note, Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility, 10 U. Mich. J. L. Ref. 415 (1977). For instances of disciplinary sanctions, see

Annot., 94 A.L.R.3d 846 (1979). For civil liability, see, e.g., Blackmon v. Hale, 463 P.2d 418 (Cal.1970) (liability of lawyer who transferred funds from trust account to another trust account controlled by former partner, who converted funds); Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Idaho Ct.App.1983) (liability of lawyer who paid judgment proceeds to client on client's request after client had assigned them to another); Lurz v. Panek, 527 N.E.2d 663 (Ill.App.Ct.1988) (liability of lawyer who delayed paying client for almost 8 months; compensatory and punitive damages); Leon v. Martinez, 638 N.E.2d 511 (N.Y.1994) (liability of lawyer for paying to client proceeds that client had validly assigned to another); Eaton v. Calig, 446 N.E.2d 218 (Ohio Ct.App.1982) (liability of lawyer for mistakenly paying escrow fund to wrong person); 2 R. Mallen & J. Smith, Legal Malpractice § 19.6 (3d ed.1989). But see Farmers Ins. Exchange v. Zerin, 61 Cal.Rptr.2d 707 (Cal.Ct.App.1997) (lawyer not liable for paying client funds when client owed money to insurer but insurer had no lien).

*Comment d. Safeguarding funds: bank accounts and interest.*An example of the requirements for safeguarding funds is Rules Regulating the Florida Bar, ch. 5 (1986). For the requirement that funds be placed in an interest-bearing account when practical, see Greenbaum v. State Bar, 544 P.2d 921 (Cal.1976); State v. Pringle, 667 P.2d 283 (Kan.1983); In re Petition of Minnesota State Bar Ass'n, 332 N.W.2d 151 (Minn.1982); see also McCarthy v. Philippine Nat'l Bank, 690 F.Supp. 1323 (S.D.N.Y.1988). Courts have declined to hold that the client's assent relaxes the requirements stated in this Section. E.g., State v. Pringle, 667 P.2d 283 (Kan.1983); Archer v. State, 548 S.W.2d 71 (Tex.Civ.App.1977). But cf. ABA Model Rules of Professional Conduct, Rule 1.15(a) (1983) (client can agree to have funds placed in bank out of state in which lawyer has office).

For the use of interest from pooled funds to finance legal services for the poor, see, e.g., Calif. Bus. & Prof. Code §§ 6210-28; Phillips v. Washington Legal Found., 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998); Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962 (1st. Cir.1993); Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir.1987); Carroll v. State Bar, 213 Cal.Rptr. 305 (Cal.Ct.App.), cert. denied, 474 U.S. 848, 106 S.Ct. 142, 88 L.Ed.2d 118 (1985). Such arrangements vary from state to state. On client security funds, see generally ABA Model Rules for Lawyers' Funds for Client Protection (1989).

*Comment e. Scope of the duty to safeguard.*E.g., Florida Bar v. Ward, 366 So.2d 405 (Fla.1978) (life-insurance policies); Attorney Grievance Comm'n v. Pollack, 425 A.2d 1352 (Md.1981) (deed); In re Grubb, 663 P.2d 1346 (Wash.1983) (ring). For the application of the principles of this Section where the lawyer did not receive property in the capacity of lawyer, see, e.g., In re Lurie, 546 P.2d 1126 (Ariz.1976) (corporate secretary-treasurer); Worth v. State Bar, 551 P.2d 16 (Cal.1976) (business partner); In re Wiseman, 486 N.Y.S.2d 177 (N.Y.App.Div.1985) (escrow agent); C. Wolfram, Modern Legal Ethics 178 (1986).

*Comment f. Property belonging to a lawyer.*For the lawyer's right to transfer funds into the lawyer's personal account to pay a fee of a client who has agreed to the amount and time of payment, see In re Stein, 483 A.2d 109 (N.J.1984); In re Marine, 264 N.W.2d 285 (Wis.1978). For the lawyer's right to place in a personal account a fee payment that is not a deposit, see In re Stern, 458 A.2d 1279 (N.J.1983); cf. Baranowski v. State Bar, 593 P.2d 613 (Cal.1979). For deposits, see Brickman, The Advance Fee Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account?, 10 Cardozo L. Rev. 647 (1989).

On segregating disputed funds from the lawyer's own funds, see, e.g., Most v. State Bar, 432 P.2d 953 (Cal.1967); In re Kramer, 442 N.E.2d 171 (Ill.1982); Att'y Grievance Committee v. McIntire, 405 A.2d 273 (Md.1979); Committee on Legal Ethics v. Tatterson, 319 S.E.2d 381 (W.Va.1984); ABA Model Rules of Professional Conduct, Rule 1.15(c) (1983). Compare ABA Model Code of Professional Responsibility, DR 9-101(A)(2) (1969) (disputed funds must be retained in lawyer's trust account).

*Comment g. Claims of third persons against a client or a lawyer.*See § 45, Comments *d, e,* and *f,* and Reporter's Notes thereto. For examples of recourse to the substantive law to determine the lawyer's duties, see State v. Blawie, 334 A.2d 484 (Conn.App.Ct.1974), app. denied, 333 A.2d 70 (Conn.1975) (construing statute to grant state agency lien on cause of action of welfare beneficiary); Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Idaho Ct.App.1983) (client's assignment of rights in judgment prevailed over client's later request that lawyer pay judgment to client).

*Comment h. A lawyer's duty to notify and account.*On the duty to notify of the receipt of property, see, e.g., In re Baldwin, 271 L.E.2d 626 (Ga.1980); In re Walton, 427 N.E.2d 654 (1981), 431 N.E.2d 474 (Ind.1982); Office of Disciplinary Counsel v. Kissel, 442 A.2d 217 (Pa.1982). On the duty to account, see, e.g., People v. Lanza, 660 P.2d 881 (Colo.1983); Amsler v. American Home Assurance Co., 348 So.2d 68 (Fla.Dist.Ct.App.1977); In re Fling, 316 N.W.2d 556 (Minn.1982). See also Director Door Corp. v. Marchese & Sallah, P.C., 511 N.Y.S.2d 930 (N.Y.App.Div.1987) (lawyer escrow agent must tell nonclient that client's check bounced).

Case Citations - by Jurisdiction

—

C.A.1
D.Alaska Bkrtcy.Ct.
Colo.
N.J.Super.App.Div.
Wash.
Wis.
Wis.App.

C.A.1

C.A.1, 1997. Subsec. (2) cit. in disc., com. (c) quot. in disc. (citing § 56, Proposed Final Draft No. 1, 1996, which is now § 44). After an attorney formed a law firm to purchase the practice of a deceased collection attorney, the law firm billed a retail store in excess of $1 million for past work the deceased attorney allegedly had performed on the store's cases. The store at first paid the bills, but eventually sued the law firm, seeking an accounting and bringing claims for breach of contract, breach of fiduciary duty, and unfair and deceptive trade practices under Massachusetts law. The law firm counterclaimed for the unpaid balance. The district court granted the store summary judgment, awarding the entire amount of the store's payments on the disputed bills and attorney's fees. This court affirmed, holding that the law firm had not met its burden of substantiating its bills under Massachusetts law, and that the store had met its burden of showing unfair and deceptive practices. The court noted that Massachusetts had established that a lawyer always bore the burden of proof in any proceeding to resolve a billing dispute, regardless of whether the lawyer appeared as a plaintiff seeking to recover a fee or as a defendant in a suit for a refund. Sears, Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10, 17.

D.Alaska Bkrtcy.Ct.

D.Alaska Bkrtcy.Ct.2011. Com. (g) quot. in ftn. Chapter 7 trustee and successor to debtor's corporation through a confirmed Chapter 11 plan brought an adversary proceeding against law firm that corporation hired to defend debtor and a nonparty in a criminal action, alleging that firm wrongfully converted funds remaining in corporation's client trust account after the criminal trial by paying the nonparty certain funds and paying its own legal bills for work it performed that was unrelated to the criminal trial. While granting partial summary judgment for plaintiffs on their conversion claim, this court held that firm's prepetition transfer of funds from the account did not interfere with corporation's future possessory interest in those funds to the extent that firm had a valid attorney's lien for fees earned or expenses incurred representing debtor or the nonparty. In re Avery, 461 B.R. 798, 813.

Colo.

Colo.2000. Com. (b) cit. in disc. (citing § 56, Prop. Final Draft No. 1, 1996, which is now § 44). In attorney regulation proceeding, hearing board suspended attorney from the practice of law for, among other things, failing

to deposit flat fee paid by client into a trust account until the fees were earned. Disagreeing with the length of the suspension but agreeing that attorney had violated various Colorado rules of professional conduct, the court held, in part, that an attorney earned fees only when he conferred a benefit on or provided a service for a client, and that, under the rules of professional conduct, an attorney was required to hold all client funds, including but not limited to engagement retainers, advance fees, flat fees, and lump-sum fees, in trust until there was some basis on which to conclude that the fees had been earned. In re Sather, 3 P.3d 403, 409.

N.J.Super.App.Div.

N.J.Super.App.Div.2021. Com. (b) quot. in case quot. in sup. Former in-house counsel sued school board, alleging that it breached the parties' contract by terminating his employment when he was indicted on charges related to an investigation into board's administration of the National School Lunch Program, because he was later acquitted of all charges. After a bench trial, the trial court found in favor of plaintiff. Affirming in part, this court held that a discharged in-house counsel like plaintiff, who did not seek reinstatement to his former position, was not precluded from pursuing damages stemming from a defendant employer's breach of contract by Restatement Third of the Law Governing Lawyers § 44, which provided that a client could always discharge a lawyer regardless of cause and regardless of any agreement between them. Nelson v. Elizabeth Board of Education, 246 A.3d 802, 809.

Wash.

Wash.2013. Com. (b) quot. in sup. In disciplinary proceedings, state bar association charged attorney with, among other things, using his trust account to hide assets from his and his wife's creditors in violation of federal law and Washington's Rules of Professional Conduct. After a hearing officer found, inter alia, that attorney commingled personal and client funds in his trust account, the disciplinary board unanimously recommended disbarment. Accepting the board's recommendation, this court affirmed the hearing officer's conclusion that attorney's deposits of funds that belonged in part to his wife and his wife's corporations violated the rules of professional conduct, even though his wife and her corporations were his clients, because the funds in question were unconnected to any specific representation. The court explained that the exception to the rule against commingling funds that belonged in part to a client applied only to client funds that were directly connected with a specific and actual representation; reading the rule otherwise would be inconsistent with the plain meaning of the rule and would undermine its narrow purpose of safeguarding a client's property against the dangers of conversion, negligent misappropriation, or loss. In re Disciplinary Proceeding Against McGrath, 308 P.3d 615, 626.

Wis.

Wis.2007. Cit. in ftn. to conc. op. §§ 44-45. In an attorney-disciplinary proceeding, this court, adopting the referee's factual findings and legal conclusions, ordered that attorney's license to practice law in Wisconsin be suspended for 60 days for, in part, misrepresenting to the Office of Lawyer Regulation that he maintained funds in trust to cover another attorney's statutory lien for payment of that attorney's fee. The concurring opinion argued that a prior decision of this court relied upon by the dissent for the proposition that it was permissible for an attorney to fail to hold settlement proceeds in a trust account when the attorney knew there was a claim by another person to those proceeds was clearly distinguishable, because that decision resolved a civil-liability small-claims action against a lawyer by a chiropractor seeking payment for services to lawyer's client, and did not involve attorney discipline at all. In re Disciplinary Proceedings Against Barrock, 299 Wis.2d 207, 727 N.W.2d 833, 841.

Wis.App.

Wis.App.2008. Cit. and quot. in sup., com. (c) quot. in sup. and cit. in ftn. Terminated attorney sued replacement attorney, alleging that defendant improperly disbursed settlement proceeds from a personal-injury suit to the client without retaining a sufficient amount to satisfy plaintiff's attorney's lien. The trial court granted summary judgment

for defendant. Affirming, this court held, inter alia, that any misconduct by defendant in failing to hold funds in trust for plaintiff was not a basis for a civil action, because plaintiff did not have a valid property interest in the proceeds giving rise to an independent cause of action; plaintiff did not have an enforceable lien on the proceeds, because he breached his contingency-fee agreement with client when his representation fell below the standard of care of an attorney. Lorge v. Rabl, 2008 WI App 141, 314 Wis.2d 162, 758 N.W.2d 798, 803.

End of Document

Restatement (Third) of the Law Governing Lawyers § 45 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

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

Topic 4. Property and Documents of Clients and Others

§ 45 Surrendering Possession of Property

(1) Except as provided in Subsection (2), a lawyer must promptly deliver, to the client or nonclient so entitled, funds or other property in the lawyer's possession belonging to a client or nonclient.
(2) A lawyer may retain possession of funds or other property of a client or nonclient if:
(a) the client or nonclient consents;
(b) the lawyer's client is entitled to the property, the lawyer appropriately possesses the property for purposes of the representation, and the client has not asked for delivery of the property;
(c) the lawyer has a valid lien on the property (see § 43);
(d) there are substantial grounds for dispute as to the person entitled to the property; or
(e) delivering the property to the client or nonclient would violate a court order or other legal obligation of the lawyer.

Comment:

a. *Scope and cross-references.* The provisions of this Section complement those in § 44. For special rules applicable to documents of a client, see § 46. For situations in which a lawyer may retain property pursuant to a lien, see § 43 The duties of a lawyer who possesses property that is evidence of a crime are considered in § 119. See also Comment *f* hereto.

b. *Prompt delivery.* A lawyer's basic obligation under this Section is to deliver property of a client or nonclient promptly to that client or person unless an exception stated in Subsection (2) applies. The obligation covers all kinds of property. For example, a lawyer who has received a deposit against future fee bills must return the unearned portion of the deposit when the representation ends (see § 33(1)).

How soon the delivery must occur depends on the circumstances (see Restatement Second, Agency § 427, Comment *d*). When the owner asks for delivery of the property, the lawyer must comply with the request. If the lawyer knows that the owner has need to possess the property by a given time, the lawyer should if reasonably possible deliver it by that time. The lawyer ordinarily should not delay longer than necessary to record and transmit the funds (see also § 44, Comment *d*). A client entitled to proceeds of a judgment normally should not have to wait more than a few days to receive the property from the client's lawyer. When the representation ends, moreover, any delay in delivering the client's property can hamper the client's affairs (compare § 43, Comment *b*). On the other hand, during the representation a lawyer is not required, in the absence of client request, to deliver items that might turn out to be needed for the representation (see Comment *c* hereto).

c. A client's express or implied consent to continued possession by a lawyer. Clients and others often ask a lawyer to retain possession of property. No formal contract is required. Most clients would expect that during a representation the lawyer would keep property needed for further steps in the representation, unless the client indicates to the contrary. Thus, during the representation a lawyer need not return documents or court exhibits unless the client so requests. For treatment of documents after the representation ends, see § 46. In some circumstances, for example, when the client agrees that the lawyer will invest client funds, the arrangement constitutes a business transaction with the client subject to the requirements of § 126.

d. Disputed ownership. When it is unclear who is entitled to property in the lawyer's possession, the lawyer is not required to deliver the disputed property to either claimant; indeed, if the lawyer delivers the property to one claimant, the lawyer can later be held liable to the other. The lawyer should therefore safeguard the property until the disputants resolve it by contract or an appropriate procedure (see § 44, Comment *g*). If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs. If a lawyer holds funds as an advance fee payment, the lawyer is not obliged to deliver those funds to the client when the client disputes the lawyer's good-faith claim that the sum withheld is due to the lawyer, but the lawyer may not transfer the disputed funds to the lawyer's personal account (see § 44, Comment *f*).

e. A court order or other legal bar to delivery. A court may order a lawyer to deposit property in court or in an interest-bearing account pending further court orders. A court might also require a lawyer to surrender an object to another party or allow its inspection at the lawyer's office, regardless of the wishes of the lawyer's client. Such a court order ordinarily binds a client's lawyer even if only the client is named in the order. A lawyer might also be constrained by a legal obligation not arising from a court order, for example a lien asserted by a third party. A lawyer is not required by any supposed duty to a client to deliver property to a claimant when doing so would cause the lawyer to violate a court order or other legal obligation.

f. Stolen goods. The lawyer's duties of confidentiality do not prevent a lawyer from complying with the requirement of this Section to return promptly to its owner property that a client has stolen and placed in the lawyer's possession. The client's transfer of the property as such is ordinarily not a communication subject to the attorney-client privilege (see § 69, Comment *d*). Although the lawyer's knowledge that the goods are stolen from a given person will usually derive from confidential client information (see § 60(1)), a lawyer who knowingly retains stolen goods is helping the thief conceal them from their proper owner, which is a crime. The same would be true were the lawyer, once having taken possession of the goods, to return them to the thief. By asking the lawyer to possess stolen goods, moreover, the client has lost the protection of the attorney-client privilege for any accompanying communications (see § 82).

Although the lawyer must return the goods, there is no requirement that the lawyer explain their provenance or name the thief. To do so voluntarily might well violate the lawyer's duties of confidentiality (see § 60(1)), even though a tribunal might be able to require disclosure (see § 69, Comment *g,* & § 82). In representing the client in defending against a charge of crime, the lawyer may retain the goods long enough to test or inspect them in preparation for the client's defense, though this does not authorize keeping them secret until the trial. (On accepting objects belonging to a client but constituting evidence of crime, see § 119.)

Finally, if a genuine dispute exists as to ownership of the property, the lawyer need not deliver it (see Comment *d* hereto), but must then notify each person having a substantial claim of the lawyer's possession (see § 44, Comment *h*) so that the lawyer's possession does not conceal the property from its owner.

Reporter's Note

Relevant portions of the ABA Model Rules of Professional Conduct (1983) and the ABA Model Code of Professional Responsibility (1969) appear at the beginning of § 44, Reporter's Note.

*Comment b. Prompt delivery.*For the lawyer's duty to return unearned fees when the representation ends, see, e.g., ABA Model Rules of Professional Conduct, Rule 1.16(d) (1983); ABA Model Code of Professional Responsibility, DR 2-110(A)(3) (1969); People v. Johnson, 612 P.2d 1097 (Colo.1980); In re Burr, 228 S.E.2d 678 (S.C.1976); State v. Scott, 639 P.2d 1131 (Kan.1982). For examples of delivery held not to be prompt, see Doyle v. State Bar, 648 P.2d 942 (Cal.1982) (payment of settlement proceeds 4 months after third party's liens removed); Lurz v. Panek, 527 N.E.2d 663 (Ill.App.Ct.1988) (8-month delay in paying judgment proceeds; compensatory and punitive damages); In re Rabb, 374 A.2d 461 (N.J.1977) (2-to-7-month delays in making payments out of escrow fund); In re Lee, 283 N.W.2d 179 (N.D.1979) (50-day delay in paying client's former wife, at client's request, under court-approved settlement because lawyer's check bounced).

*Comment c. A client's express or implied consent to continued possession by a lawyer.*ABA Model Rules of Professional Conduct, Rule 1.15(b) (1983); In re Langfur, 238 N.Y. Supp. 498 (N.Y.App.Div.1930); see § 23, Reporter's Note; § 26, Reporter's Note. Compare § 33, Comment *e,* and Reporter's Note thereto.

*Comment d. Disputed ownership.*E.g., Miller v. Rau, 30 Cal.Rptr. 612 (Cal.Ct.App.1963) (lawyer liable for paying funds to client during pendency of suit that ultimately held them due to another); Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Idaho Ct.App.1983) (lawyer liable for paying judgment proceeds to client at client's directions despite client's assignment to another, later held valid); In re Cassidy, 432 N.E.2d 274 (Ill.1982) (lawyer properly did not pay funds to client until settling claim of adverse lienor); Leon v. Martinez, 638 N.E.2d 511 (N.Y.1994) (similar); see 1 G. Hazard & W. Hodes, The Law of Lawyering 459-60 (2d ed.1990) (that third party has claim not reduced to judgment against client does not warrant lawyer's refusal to deliver funds to client); Klancke v. Smith, 829 P.2d 464 (Colo.Ct.App.1991) (similar); Blue Cross of Massachusetts, Inc. v. Travaline, 499 N.E.2d 1195 (Mass.1986) (lawyer not liable for failing to pay money to insurer with subrogation claim against client). On the impropriety of a lawyer's retaining the client's funds during a fee dispute without a valid lien for a fee reasonably claimed, see Adams, George, Lee, Schulte & Ward, P.A. v. Westinghouse Elec. Corp., 597 F.2d 570 (5th Cir.1979) (damages for over-withholding); Jackson v. State Bar, 600 P.2d 1326 (Cal.1979) (discipline for keeping funds without lien); Avila v. Havana Painting Co., 761 S.W.2d 398 (Tex.Civ.App.1988) (compensatory and punitive damages). But see In re Fraser, 523 P.2d 921 (Wash.1974) (discipline inappropriate when good-faith dispute exists as to lawyer's right to withhold).

*Comment e. A court order or other legal bar to delivery.*For court orders requiring lawyers to deliver property, see, e.g., Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (discussing discovery of lawyer documents in civil action); In re January 1976 Grand Jury, 534 F.2d 719 (7th Cir.1976) (upholding contempt finding against lawyer who disobeyed subpoena for money received from clients); State v. Olwell, 394 P.2d 681 (Wash.1964) (vacating contempt finding, but upholding power to subpoena lawyer for weapon received from client). For a lawyer's obligation under a third party's lien, see, e.g., Unigard Ins. Co. v. Tremont, 430 A.2d 30 (Conn. Super. Ct.1981); In re Cassidy, 432 N.E.2d 274 (Ill.1982).

*Comment f. Stolen goods.*On the prohibition against a lawyer's keeping property entrusted to the lawyer by a client when the lawyer knows that it belongs to another, see United States v. Scruggs, 549 F.2d 1097 (6th Cir.1977) (conviction for knowingly receiving stolen funds as fee); In re Ryder, 263 F.Supp. 360 (E.D.Va.), aff'd, 381 F.2d 713 (4th Cir.1967) (discipline for knowingly taking possession of stolen money and thus helping conceal it); People

v. Auld, 788 P.2d 1275 (Colo.1990) (discipline for knowingly accepting stolen gun as collateral for fee obligation); In re Prescott, 271 N.W.2d 822 (Minn.1978) (discipline for knowingly accepting stolen funds); see Rosenthal Toyota, Inc. v. Thorpe, 824 F.2d 897 (11th Cir.1987) (lawyer liable for depositing check to clients in lawyer's trust account and paying some of proceeds to clients with knowledge clients would not deliver to buyer goods for which check was payment). See also In re January 1976 Grand Jury, 534 F.2d 719 (7th Cir.1976) (lawyer subpoenaed to produce robbery proceeds received from client); State v. Dillon, 471 P.2d 553 (Idaho 1970) (similar).

Case Citations - by Jurisdiction

—

D.Alaska Bkrtcy.Ct.
Ariz.App.
Wis.

D.Alaska Bkrtcy.Ct.

D.Alaska Bkrtcy.Ct.2011. Subsec. (1) quot. in ftn., subsecs. (2)(a) and (2)(c) cit. in ftn. Chapter 7 trustee and successor to debtor's corporation through a confirmed Chapter 11 plan brought an adversary proceeding against law firm that corporation hired to defend debtor and a nonparty in a criminal action, alleging that firm wrongfully converted funds remaining in corporation's client trust account after the criminal trial by paying the nonparty certain funds and paying its own legal bills for work it performed that was unrelated to the criminal trial. While granting partial summary judgment for plaintiffs on their conversion claim, this court held that firm's prepetition transfer of funds from the account did not interfere with corporation's future possessory interest in those funds to the extent that firm had a valid attorney's lien for fees earned or expenses incurred representing debtor or the nonparty. In re Avery, 461 B.R. 798, 813, 818.

Ariz.App.

Ariz.App.2006. Subsec. (2)(d) cit. in ftn. Law firm that obtained jury verdict for husband of victim in a wrongful death action sued law firm that represented mother of victim, seeking, inter alia, a declaratory judgment that mother's share of the proceeds was subject to a pro rata share of the attorney's fees incurred in obtaining the proceeds; defendant counterclaimed for conversion and unjust enrichment after plaintiff withheld the disputed funds. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that the common-fund doctrine did not apply. The court noted, however, in regard to defendant's conversion claim that was still pending in the trial court, that plaintiff had had a good-faith legal basis to assert that the common-fund theory applied, and that maintaining funds in a trust account as attorney did, was appropriate. Valder Law Offices v. Keenan Law Firm, 212 Ariz. 244, 253, 129 P.3d 966, 975.

Wis.

Wis.2007. Cit. in ftn. to conc. op. §§ 44-45. In an attorney-disciplinary proceeding, this court, adopting the referee's factual findings and legal conclusions, ordered that attorney's license to practice law in Wisconsin be suspended for 60 days for, in part, misrepresenting to the Office of Lawyer Regulation that he maintained funds in trust to cover another attorney's statutory lien for payment of that attorney's fee. The concurring opinion argued that a prior decision of this court relied upon by the dissent for the proposition that it was permissible for an attorney to fail to hold settlement proceeds in a trust account when the attorney knew there was a claim by another person to those proceeds was clearly distinguishable, because that decision resolved a civil-liability small-claims action against a lawyer by a chiropractor seeking payment for services to lawyer's client, and did not involve attorney discipline at all. In re Disciplinary Proceedings Against Barrock, 299 Wis.2d 207, 727 N.W.2d 833, 841.

End of Document

Restatement (Third) of the Law Governing Lawyers § 46 (2000)

§ 46 Documents Relating to a Representation

(1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.
(2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
(3) Unless a client or former client consents to nondelivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.
(4) Notwithstanding Subsections (2) and (3), a lawyer may decline to deliver to a client or former client an original or copy of any document under circumstances permitted by § 43(1).

Comment:

a. Scope and cross-references. For purposes of this Section, a document includes a writing, drawing, graph, chart, photograph, phono-record, tape, disc, or other form of data compilation. The Section does not embrace writings that qualify as property under §§ 44 and 45 because of their value, for example cash, negotiable instruments, stock certificates and other writings constituting presumptive proof of title, and collectors' items such as literary manuscripts. With respect to a lawyer's duty to safeguard the contents of documents containing confidential client information, see generally Chapter 5.

b. A lawyer's duty to safeguard documents. The duty recognized by § 46(1) is similar to the duty to safeguard property recognized in § 44. Usually a lawyer must maintain an orderly filing system, with each client's documents

separated and with reasonable measures to limit access to authorized firm personnel. With regard to a lawyer's duty to supervise firm employees, see § 11.

A lawyer's duty to safeguard client documents does not end with the representation (see § 33). It continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, declines to receive such copies and originals from the lawyer, or consents to disposal of the documents.

The lawyer need take only reasonable steps to preserve the documents. For example, a law firm is not required to preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence. Similarly, a lawyer who leaves a firm may leave with that firm the documents of clients the lawyer represented while with the firm, provided that the lawyer reasonably believes that the firm has appropriate safeguarding arrangements. So long as a lawyer has custody of documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them. If the jurisdiction allows a lawyer's practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale. If a firm dissolves, its members must take reasonable steps to safeguard documents continuing to require confidentiality, for example by entrusting them to a person or depository bound by appropriate restrictions.

c. A client's right to retrieve, inspect, and copy documents. As stated in Subsection (3), a client is entitled to retrieve documents in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer, subject to the right to retain property under a valid lien (see § 43) and to other justifiable grounds as discussed hereafter.

A client is ordinarily entitled to inspect and copy at reasonable times any document relating to the representation in the possession of the client's lawyer (see Restatement Second, Trusts § 173; cf. Restatement Second, Agency § 381). A client's failure to assert the right to inspect and copy files during the representation does not bar later enforcement of that right, so long as the lawyer has properly not disposed of the documents (see Comment *b*).

A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another (see Restatement Second, Agency § 381). That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime (see § 21). Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Under conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report (see § 20, Comments *c* & *d*; § 24, Comment *c*). Ordinarily, however, what will be useful to the client is for the client to decide.

A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide. The lawyer's duty to inform the client (see § 20) can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed.

d. Documents that a lawyer must furnish without request. Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies of such documents as a client reasonably needs in the circumstances. In complying with that standard, the lawyer should consider such matters as the client's expressed concerns, the client's possible needs, customary practice, the number of documents, the client's storage facilities,

and whether the documents originally came from the client. The client should have an original of documents such as contracts, while a copy will suffice for such documents as legal memoranda and court opinions. Except under extraordinary circumstances—for example, when a client retained a lawyer to recover and destroy a confidential letter—a lawyer may keep copies of documents when furnished to a client.

If not made before, delivery must be made promptly after the representation ends. The lawyer may withhold documents to induce the client to pay a bill only as stated in § 43. During the representation, the lawyer should deliver documents when the client needs or requests them. The lawyer need not deliver documents when the client agrees that the lawyer may keep them or where there is a genuine dispute about who is entitled to receive them (see § 45(2)(c) & Comment *c* hereto).

e. *Payment for expenses of delivering documents.* Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment *e* thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Reporter's Note

*Comment b. A lawyer's duty to safeguard documents.*See § 44, Comment *e*, and Reporter's Note thereto. E.g., Florida Bar v. Penrose, 413 So.2d 15 (Fla.1982) (discipline for abandoning practice, leaving files unattended in nonlawyer's possession); Florida Bar v. Ward, 366 So.2d 405 (Fla.1978) (discipline for losing client's insurance policy); Attorney Grievance Committee v. Pollack, 425 A.2d 1352 (Md.1981) (discipline for mislaying deed for 7 months); In re Peters, 332 N.W.2d 10 (Minn.1983) (discipline of lawyer who failed to remove files when evicted from office); In re Laubenheimer, 335 N.W.2d 624 (Wis.1983) (discipline for transferring files to another lawyer without notice to clients).

*Comment c. A client's right to retrieve, inspect, and copy documents.*Lippe v. Bairnco Corp., 1998 WL 901741 (S.D.N.Y.1998) (internal research notes and conflict-checking memorandums fall outside general rule requiring turnover of client file); Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647 (N.D.Tex.1989) (client's conservator entitled to possess all of lawyer's client file); Federal Land Bank of Jackson v. Federal Intermediate Credit Bank, 128 F.R.D. 182 (S.D.Miss.1989) (dictum) (client not entitled to inspect preliminary drafts or notes and memoranda prepared for firm's own use); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W.2d 92 (Mo.Ct.App.1992) (client's wife claiming under his will not entitled to lawyer's nonfinal documents); Crawford v. Logan, 656 S.W.2d 360 (Tenn.1983) (lawyer may not withhold from client tape in which potential witness admitted affair with client's spouse); Florida Bar v. Lee, 396 So.2d 169 (Fla.1981) (discipline for nondelivery of will to client); Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879 (N.Y.1997) (client entitled to see and copy file unless lawyer shows substantial grounds for denial); ABA Model Rules of Professional Conduct, Rule 1.4, Comment ¶ [4] (1983) (lawyer may withhold psychiatric diagnosis of client when psychiatrist says disclosure will harm client); Calif. Code Civ. P. § 2018 (lawyer's work product may be discovered by client or former client suing for malpractice).

There is much authority for a lawyer's duty to return client papers when the representation ends. E.g., Nolan v. Foreman, 665 F.2d 738 (5th Cir.1982) (tort liability); Goldsmith v. Pyramid Communications, Inc., 362 F.Supp. 694 (S.D.N.Y.1973) (order permitting lawyer's withdrawal conditioned on delivery of copies of papers to successor counsel); Academy of California Optometrists, Inc. v. Superior Court, 124 Cal.Rptr. 668 (Cal.Ct.App.1975) (lawyer ordered to deliver papers); In re Palmer, 956 P.2d 1333 (Kan.1998) (lawyer should have turned over to client papers needed to continue case, despite retaining lien); In re Lindberg, 307 N.W.2d 301 (Wis.1981) (discipline for failure to return file); In re Kaufman, 567 P.2d 957 (Nev.1977) (discipline for keeping file in order to get favorable fee allocation with new lawyer); Reid, Johnson, Downes, Andrachik & Webster v. Lansberry, 629 N.E.2d 431 (Ohio 1994) (voiding fee-payment guaranty client signed in exchange for file release).

*Comment d. Documents that a lawyer must furnish without request.*See authorities cited in Reporter's Note to Comment *c* hereto.

*Comment e. Payment for expenses of delivering documents.*Resolution Trust Corp. v. H—, P.C., 128 F.R.D. 647 (N.D.Tex.1989) (lawyer may turn over files or copy them for client at its own expense); In re Van Baalen, 597 P.2d 985 (Ariz.1979) (lawyer disciplined for refusing to turn over files without $30 copying fee); McKim v. State, 528 N.E.2d 484 (Ind.Ct.App.1988) (court may not condition order requiring appointed counsel to deliver documents to convicted client for postconviction proceedings on client's payment of copying charges).

Case Citations - by Jurisdiction

—

C.A.7,
C.A.7
N.D.Ill.
D.Kan.
E.D.Ky.
E.D.Pa.
E.D.Wis.
Ark.
Colo.
Ga.App.
N.Y.
N.Y.Sup.Ct.App.Div.
Tex.
Vt.

C.A.7,

C.A.7, 2014. Subsecs. (1) and (3) cit. in sup. Corporate debtor's bankruptcy estate sued debtor's former outside counsel, alleging that defendants were complicit in an insider conspiracy to bankrupt debtor. The district court granted summary judgment for defendants based on the statute of limitations. This court affirmed, holding that defendants were not estopped from asserting a statute-of-limitations defense based on their failure to produce several key documents until years after the initial production of the client file. While, under Restatement Third of the Law Governing Lawyers § 46, plaintiff, as a former client, was entitled to defendants' prompt and accurate delivery of documents relating to defendants' representation, the court did not reach the question of whether defendants deliberately or fraudulently withheld the documents, because it was clear that plaintiff had knowledge of its cause of action against defendants within the statutory period, and thus defendants' behavior had no causal significance. KDC Foods, Inc. v. Gray, Plant, Mooty, Mooty & Bennett, PA, 763 F.3d 743, 754.

C.A.7

C.A.7, 2006. Subsec. (2) quot. in ftn. Former convict, who had served 16 years on death row before being pardoned, brought a § 1983 action against city, former city police officer, and others, for torturing him and framing him for a crime he did not commit, seeking, inter alia, discovery of documents that had been used in a separate action against officer from city's former law firm. The magistrate judge found that firm had improperly withheld the documents without proper notice of work-product privilege and the district court affirmed the magistrate judge's order that the documents be produced. Upon interlocutory appeal, this court vacated the order, holding, inter alia, that law firm, which was not a party to this case and was not asked by city to produce the documents, was not dilatory

toward discovery requests it never received. The court declined to address firm's more ambitious argument that the documents were its exclusive property. Hobley v. Burge, 433 F.3d 946, 950, order vacated 433 F.3d 946 (7th Cir.2006).

N.D.Ill.

N.D.Ill.2005. Subsecs. (2) and (3) cit. in disc. In lawsuit brought against city by former police commander, city was ordered by district court to produce "police board" documents from an earlier lawsuit. Law firm representing city and in possession of those documents asserted work-product privilege and filed motion for reconsideration. Denying the motion, this court held, inter alia, that although the documents were always in the law firm's custody, they were still subject to the court's jurisdiction because the city maintained control over the documents by invoking its right to have certain files transferred to another law firm. Hobley v. Burge, 226 F.R.D. 312, 320.

D.Kan.

D.Kan.2011. Subsec. (2) quot. in sup. In an SEC enforcement action, receiver moved to compel production by law firm of certain documents related to its representation of defendants. The magistrate judge granted the motion to compel. This court denied defendants' and law firm's motions for review, holding, inter alia, that the entire-file approach, under which a client had access to an attorney's entire file on a matter, rather than the end-product approach, in which a client was not entitled to preliminary documents used by the attorney to reach the end product, applied in this case where the magistrate judge correctly concluded that law firm could not independently assert work-product protection when defendants had waived that protection. S.E.C. v. McNaul, 277 F.R.D. 439, 445.

D.Kan.2010. Subsec. (2) quot. in case quot. in sup. and cit. in ftn., com. (c) cit. in case quot. in sup. (citing § 58 of Prop. Final Draft No. 1, 1996, which is § 46 of the Official Text); com. (c) cit. in sup. In an action by the Securities and Exchange Commission against individual and corporate defendants, receiver appointed as successor-in-interest to corporate defendants moved to compel defendants' former law firm to produce certain documents related to its representation of individual defendants, who had asserted in their defense that they were following law firm's recommendations and instructions; law firm refused to produce the documents on grounds, in part, that they were privileged under the work-product doctrine. Granting the motion, this court held that, under the "entire file approach," a client could waive a law firm's work-product privilege, and that a law firm did not have an independent right to prevent production of its work product, even opinion work product, where, as here, the interests of the law firm and its former client were not aligned, and the interests of the former client showed a compelling need for production of the information. S.E.C. v. McNaul, 271 F.R.D. 661, 665-668.

E.D.Ky.

E.D.Ky.2014. Com. (c) quot. in sup. Trustee of unsecured-creditors' trust, which was created under the bankruptcy plan of Chapter 11 debtor/mining company to liquidate some of debtor's assets, brought an action against debtor's former officers, alleging that they mismanaged the company. This court granted trustee's renewed motion for turnover of records of debtor's law firm related to its representation of debtor during company's Chapter 11 restructuring, holding that the federal common law of privilege did not block trustee's right to turnover of firm's internal documents under the Bankruptcy Code. The court noted that the interests served by a new privilege for internal law-firm documents were simply not sufficiently important to overcome the public's strong interest in the search for truth, pointing out that the Restatement Third of the Law Governing Lawyers § 46, Comment *c*, provided that, while lawyers could refuse to disclose to clients certain internal firm documents, courts could properly order discovery of such documents when discovery rules so provided. In re Black Diamond Min. Co., LLC, 507 B.R. 209, 219.

E.D.Pa.

E.D.Pa.2005. Cit. in sup. Attorney who had provided former client legal services in a divorce matter sued lawyer and law firm representing client, alleging that defendants assisted client in concealing his assets to defraud creditors like plaintiff. Denying defendants' motion to dismiss plaintiff's civil-conspiracy claim, this court held, inter alia, that, because plaintiff's allegations asserted that lawyer's representation of client assisted with furthering and participating in a fraudulent conveyance, the actions alleged fell outside the scope of legitimate representation, and lawyer could be liable to the extent that a nonlawyer would be in the same situation. The court noted that it was reasonable for it to look to the Restatement Third of the Law Governing Lawyers for guidance because various Commonwealth courts had relied on particular sections of that Restatement. Marshall v. Fenstermacher, 388 F.Supp.2d 536, 553.

E.D.Wis.

E.D.Wis.2003. Cit. in sup., subsec. (2) quot. in sup., com. (e) cit. in sup. Chapter 7 trustee and creditor-pension fund, which had filed an unsecured proof of claim against bankruptcy estate based on withdrawal liability after debtor-corporation ceased making contributions to employee pension fund, and was investigating whether third party might be jointly and severally liable for that claim, filed joint motion seeking approval of trustee's waiver of debtor-corporation's work-product privilege in order to assist creditor's investigation. Bankruptcy court granted motion, and law firms that previously represented debtor appealed. Affirming and remanding, this court held, inter alia, that law firms owed trustee same duty they would have owed to former client, and trustee was entitled to documents under either majority or minority rule governing right of former client to access to attorney's files. In re ANR Advance Transp. Co., Inc., 302 B.R. 607, 614, 615.

Ark.

Ark.2010. Cit. in sup., subsec. (2) quot. in sup., com. (c) quot. in sup. State supreme court committee on professional conduct filed a formal disciplinary complaint against attorney, alleging that he violated the state rules of professional conduct by failing to surrender papers and property to which client was entitled after their professional relationship was terminated. A panel of the committee found attorney in violation of the rules, reprimanded him, and ordered him to pay costs and a fine. This court affirmed, holding that attorney not only violated the “entire file” majority approach, but also the “end product” minority approach, as to what papers and property a client was entitled to after termination of representation, because he failed to provide client with even the end product of his representation and argued in his defense that because he provided the documents once during the course of his representation, he no longer had a duty to provide duplicates. Travis v. Supreme Court Committee on Professional Conduct, 2009 Ark. 188, 306 S.W.3d 3, 7.

Colo.

Colo.2020. Com. (a) quot. in sup. After former wife of decedent filed a claim against decedent's estate, seeking repayment of loans made to decedent, personal representative of the estate subpoenaed decedent's former attorney for information pertaining to the formation of the promissory notes payable to former wife, alleging that the estate was entitled to all of decedent's legal files. The trial court granted attorney's motion to quash. The court of appeals affirmed in part and reversed in part. This court reversed in part and remanded, holding that state probate statutes did not give personal representative the power to take possession of decedent's complete legal files. The court explained that, under Restatement Third of the Law Governing Lawyers § 46, Comment a, client files, except items of pecuniary value such as stock certificates, writings constituting presumptive proof of title, cash, and collectors' items, were property belonging to lawyers, and any obligation by attorney to return such files upon the termination of the attorney–client relationship arose from ethical obligations and not from decedent's ownership over them. In re Estate of Rabin, 474 P.3d 1211, 1217.

Ga.App.

Ga.App.2002. Cit. in ftn. Appellate court granted interlocutory appeal to consider contradictory rulings by two trial courts regarding discoverability of an attorney's memorandum summarizing conversations he had with opposing counsel. Both cases involved the same memorandum and parties. Affirming in part and reversing in part, this court held that no work-product privilege shielded memorandum from discovery. The court noted that it need not decide whether under Georgia law the client owned his attorney's work product or whether under "end product" standard a lawyer could shield certain documents from his current or former client. The rational supporting "end product" standard did not apply to this memorandum. Henry v. Swift, Currie, McGhee & Hiers, LLP, 254 Ga.App. 817, 563 S.E.2d 899, 901, affirmed on other grounds 276 Ga. 571, 581 S.E.2d 37 (2003).

N.Y.

N.Y.1997. Cit. generally in sup., subsecs. (2) and (3) quot. in sup., coms. (c) and (d) cit. in sup. (citing § 58, Proposed Final Draft No. 1, 1996, which is now § 46). Former client brought action against former law firm, seeking discovery of certain documents concerning a $175 million mortgage financing deal on which defendant was representing plaintiff before the parties had a falling out and plaintiff retained new counsel. The trial court denied the request and the intermediate appellate court affirmed, finding that the documents sought were defendant's private property and did not have to be furnished to plaintiff absent proof of a particularized need. Reversing, this court held that, generally, a former client was entitled to access to inspect and copy any documents held by its former firm where the documents related to the representation; however, a former firm was not required to disclose documents that might violate a duty of nondisclosure owed to a third party. In this case, basic rules of agency law also mandated that defendant supply the documents requested by plaintiff, its one-time principal. Sage Realty v. Proskauer Rose Goetz, 91 N.Y.2d 30, 34-38, 666 N.Y.S.2d 985, 987-989, 689 N.E.2d 879, 881-883.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.2016. Com. (c) quot. in ftn. Former client brought a malpractice claim against attorney and law firm that represented him in negotiating a separation agreement with his former employer, alleging that defendants failed to advise him that his termination would accelerate the expiration of his vested stock options under employer's long-term incentive plan. The trial court granted plaintiff's motion to compel defendants to disclose communications in which attorney, upon learning that the plan administrator intended to call her to testify as a fact witness in its arbitration with plaintiff, sought advice from law firm's in-house counsel on her ethical obligations. Reversing, this court held that the communications were not subject to disclosure under the fiduciary exception to attorney—client privilege, because attorney and law firm were the "real clients" for purposes of their consultation with law firm's in-house counsel, whose time spent on the consultation was not billed to plaintiff and who never worked on any matter for plaintiff. The court noted that Restatement Third of the Law Governing Lawyers § 46 had implicitly rejected the current-client exception. Stock v. Schnader Harrison Segal & Lewis, LLP, 35 N.Y.S. 3d 31, 39, 44.

N.Y.Sup.Ct.App.Div.2007. Com. (c) quot. in case quot. in ftn. (citing § 58, T.D. No. 4, 1991, which is now § 46 of the Official Text). After consolidated class actions were settled, absent class member commenced a special proceeding against law firms that served as class counsel, seeking discovery of the files generated in the actions, including documents containing attorney work product. The trial court granted class member's petition. Reversing, this court held, inter alia, that class member had no right to, among other things, participate in discovery. The court noted that New York's highest court had permitted nonaccess to firm documents intended for internal law office review and use, because the need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warranted keeping such documents secret from the client. Wyly v. Milberg Weiss Bershad & Schulman, LLP, 49 A.D.3d 85, 850 N.Y.S.2d 14, 17.

Tex.

Tex.2010. Quot. in case quot. in sup. (citing § 49, Prop. Final Draft No. 1, 1996, which is now § 37 of the Official Text). Consulting company and its shareholder sued former business partner for breach of fiduciary duty in connection with plaintiffs' buyout of defendant's interest in company. The trial court entered judgment for plaintiffs; the court of appeals reversed. Affirming in part and reversing in part, this court held that, when a partner in a business breached his fiduciary duty by fraudulently inducing another partner to buy out his interest, the consideration received by the breaching party for his interest in the business was subject to equitable forfeiture as a remedy for the breach. The court noted that several factors relevant to equitable-forfeiture remedies in the context of attorney-client relationships and breaches of trust were applicable in this case: the gravity and timing of the breach of duty, the level of intent or fault, whether the principal received any benefit from the fiduciary despite the breach, the centrality of the breach to the fiduciary relationship, and any threatened or actual harm to the principal. ERI Consulting Engineers, Inc. v. Swinnea, 318 S.W.3d 867, 874.

Vt.

Vt.2021. Cit. in sup.; subsec. (3) quot. in sup. and in conc. and diss. op.; com. (c) quot. in sup. and in conc. and diss. op.; com. (d) cit. and quot. in sup. Client filed a claim for conversion against attorney who formerly defended him in a criminal matter, after attorney failed to turn over certain discovery materials related to his case. The trial court granted summary judgment for attorney, finding that attorney had previously provided copies, some paper and some digital, of the materials, and client had not demonstrated that there were any original documents, such as a will or deed, that he reasonably needed. This court vacated in part and remanded for the trial court to determine whether client was entitled to have a paper copy of the materials under Restatement Third of the Law Governing Lawyers § 46, given client's assertion that attorney had created a paper copy of the entire discovery file, and that client needed a paper copy of those materials due to his incarceration, which made it difficult or impossible for him to access the materials in digital form. The concurring and dissenting opinion noted that, under § 46, a lawyer was generally required to return to a client those documents that the client reasonably needed, unless substantial grounds existed for refusing to do so. Aguiar v. Williams, 252 A.3d 776, 781-784, 787.

End of Document

Restatement (Third) of the Law Governing Lawyers 3 5 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Introductory Note

Introductory Note: This Topic considers arrangements under which lawyers divide fees received from their clients with other lawyers. A common setting in which lawyers have traditionally split a fee is when one lawyer refers a case to another. Such arrangements can affect the quality and price of legal services both helpfully and harmfully and have hence traditionally been regulated. Regulation has also sometimes sought to limit fee-splitting because of concern that a practice will develop of lawyers paying kickbacks to lawyers referring cases to them as a means of obtaining legal business. For the rule on fee-splitting with nonlawyers and its corollaries and implications, see § 10(3).

Restatement (Third) of the Law Governing Lawyers § 47 (2000)

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

A division of fees between lawyers who are not in the same firm may be made only if:
(1) (a) the division is in proportion to the services performed by each lawyer or (b) by agreement with the client, the lawyers assume joint responsibility for the representation;
(2) the client is informed of and does not object to the fact of division, the terms of the division, and the participation of the lawyers involved; and
(3) the total fee is reasonable (see § 34).

Comment:

a. *Scope and cross-references.* This Section addresses the extent to which lawyers not practicing in the same firm may divide fees from a single representation. On the general requirement that the total fee paid by the client be reasonable, see § 34. On fee-splitting with nonlawyers, see § 10. With respect to the limitation of the rule of this Section to lawyers not in the same firm, see Comment *g*.

The Section does not apply when several firms or lawyers practicing separately submit bills for their own services on the same matter to the same client and none divides the resulting fees with another. Such a firm or lawyer may agree with the client, subject to § 19, to limit the scope of its employment.

b. *Rationale.* The traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than that lawyer's qualifications. The prohibition has also been defended as preventing overcharging that may otherwise result when a client pays two lawyers and only one performs services. Beyond that, the prohibition reflects a general hostility to commercial methods of obtaining clients.

Those grounds do not warrant a complete ban on fee-splitting between lawyers. It is often desirable for one lawyer to refer a client to another, either because the services of two are appropriate or because the second lawyer is more qualified for the work in question. Allowing the referring lawyer to receive reasonable compensation encourages such desirable referrals. Lawyers are more able than other referral sources to identify other lawyers who will best serve their client. Even if a referring lawyer is compensated for the referral, that lawyer has several reasons to refer the client to a good lawyer rather than a bad one offering more pay. The referring lawyer will wish to satisfy the client, will to an extent remain responsible for the work of the second lawyer (see Subsection (1) & Comment *c* hereto), and, because fee-splitting arrangements most commonly occur in representations in which only a contingent fee is charged, will usually receive no fee at all unless the second lawyer helps the client to prevail. The reasonable-fee requirement of Subsection (3), moreover, reduces the likelihood that fee-splitting will lead to client overcharging. The balance between the dangers and advantages of fee-splitting is sufficiently close that informed clients should be able to agree to it, provided the safeguards specified in this Section are followed.

One corollary of the justification for fee division is that a lawyer who may not represent clients, for example because of disbarment or conflict of interest, also may not receive part of the fee.

c. *Division proportional to services performed.* There are two bases on which fee division is permissible. The division recognized by Subsection (1)(a) requires that each lawyer who participates in the fee have performed services beyond those involved in initially being engaged by the client. The lawyers' own agreed allocation of the fee at the outset of the representation will be upheld if it reasonably forecasts the amount and value of effort that each would expend. If allocation is not made until the end of the representation, it must reasonably correspond to services actually performed.

d. *Division pursuant to joint responsibility.* The second basis for fee-splitting, under Subsection (1)(b), allows fee-splitting between lawyers in any agreed proportion when each agrees with the client to assume responsibility for the representation. (Some jurisdictions may impose an upper limit on the total fee, absent explicit client consent.) That means that each lawyer can be held liable in a malpractice suit and before disciplinary authorities for the others' acts to the same extent as could partners in the same traditional partnership participating in the representation (see § 58). Such assumption of responsibility discourages lawyers from referring clients to careless lawyers in return for a large share of the fee.

e. *Informed consent.* Because of the hazards of fee-splitting arrangements, they are not permissible unless the client consents as provided in subsection (1)(a) to joint responsibility of the lawyers when the division is not in proportion to the services each lawyer performs, and unless the client is informed and does not object to the fact and terms of the division and the participation of the lawyers involved as provided in Subsection (2). On the lawyer's duty to respond to client inquiries, see § 20. If disclosure and client consent do not occur at the outset of the representation, a fee-splitting arrangement constitutes a mid-representation fee agreement subject to § 18(1)(a).

f. *Limitation to a reasonable total fee.* Under § 34, a lawyer's compensation for any representation must be reasonable. Under this Section, the total fee for all lawyers involved in a fee-splitting arrangement, not just the individual fee of each lawyer, must be reasonable. That requirement discourages fee-splitting arrangements that increase what the client must pay. It follows that what is a reasonable fee should be determined without reference to the value of the referring lawyer's services as a broker. Time devoted to conferences between the lawyers may be taken into account to the extent the case reasonably required the consultation. Even after applying those safeguards, it is still possible that the total fee under a fee-splitting arrangement will be larger than what the client might have had to pay to a single lawyer handling the same matter, since there will usually be a range of total fees satisfying the reasonableness requirements of § 34 and this Section. The remedy of the client, who must be informed of fee-

splitting arrangements (see Comment *d*), lies in rejecting the arrangement and retaining a single lawyer at a lower fee. As with other fee arrangements, fees agreed to by clients sophisticated in entering into such arrangements should almost invariably be found reasonable (see § 34, Comment *c*).

g. *Lawyers in the same firm.* This Section does not prevent a law firm, of whatever form, from dividing income among its lawyers (including lawyers who are of counsel and temporarily employed) in any lawful way provided in the firm agreement or by an ad hoc arrangement. Principals of a partnership take responsibility for matters handled by any lawyer in it (see § 58), and the firm's fee must, of course, be reasonable (see § 34). Clients dealing with a firm usually know that the work and payment will probably be divided. In some firms, much of the fee will go to the lawyer who secures the case rather than to the lawyers doing the work. Under this Section, law-firm members may also share fees in making payments to former partners or associates under a separation or retirement agreement and may distribute fees among members of a dissolved firm for postdissolution work arising from matters entrusted to the firm before its dissolution (see § 9, Comment *j*).

h. *Borderline arrangements*. Many arrangements between lawyers are similar to but diverge to some extent from the usual fee-splitting arrangement. Whether this Section applies to them depends on whether they pose the dangers that the Section is meant to address. When a client discharges one lawyer and retains another who is not recommended by the first, the danger of biased referral is absent, and any danger of excessive fees results from the substitution rather than from any referral agreement between the lawyers. An agreement in which the lawyers settle what part of the client's fee each will receive is therefore not forbidden by this Section, and may serve the useful purpose of resolving fee disputes between them that could delay and burden the client. The client is entitled to disclosure of such agreements between past and present counsel (see § 20), and the client's own liability for legal fees cannot be increased by an agreement to which the client is not a party. (For the effects of termination on fee claims, see § 37.)

In class actions, a court usually awards attorney fees and other expenses to the prevailing plaintiff class. When lawyers from different firms work together to represent the interests of the class, those lawyers often agree who will perform certain services or advance required funds, subject to payment if the action succeeds. Such arrangements ordinarily do not violate this Section. Likewise, agreements governing how any fee award will be divided ordinarily do not violate this Section, provided that the division is in proportion to the services performed by each firm or each firm assumes joint responsibility for the representation. When an agreement provides for payments that are disproportionate to the services performed or funds advanced, or for a distribution differing from the tribunal's award, it should be disclosed to the tribunal, which may invalidate it in whole or in part if it undermines the proper representation of the class and its members. A tribunal considering whether to do so should consider the justifications for the arrangement, the probable effects on the independent professional judgment of the lawyers involved, and the timeliness of disclosure to the tribunal.

i. *Sanctions; questions of the enforceability of improper agreements.* A fee-splitting agreement that violates this Section renders the participating lawyers subject to professional discipline (see § 5). It also cannot be enforced against the client, may lead to partial or total forfeiture of the lawyers' fee claim (see § 37), and may form the basis for a claim by the client of restitution of the portion of the fee paid to the forwarding lawyer (see § 6, Comment *d*). Some urge that lawyers who enter into an improper fee-splitting arrangement should be able to enforce it against each other, reasoning that neither may charge the other with an impropriety to which both agreed, and that the prohibition on fee-splitting protects clients rather than lawyers. Enforcement, however, encourages lawyers to continue entering into improper fee-splitting agreements. Accordingly, a lawyer who has violated a regulatory rule or statute by entering into an improper fee-splitting arrangement should not obtain a tribunal's aid to enforce that arrangement, unless the other lawyer is the one responsible for the impropriety. On the other hand, although most lawyer codes on the subject require that a fee-splitting agreement be in writing (and the absence of a writing is a disciplinary violation), when the fact of such agreement is clearly established, the absence of a writing by itself should not affect the rights of the lawyers between themselves.

It is appropriate for the tribunal in which is pending either a separate suit between the lawyers or a suit to which the fee dispute is ancillary (see § 42) to require notification to the client so that the client, if so disposed, may assert a claim to a refund of all or part of the fee.

Reporter's Note

*Comment b. Rationale.*See generally 1 G. Hazard & W. Hodes, Law of Lawyering § 1.5:601 (1993 Supp.); C. Wolfram, Modern Legal Ethics § 9.2.4, at 510-13 (1986). E.g., McCroskey, Feldman, Cochrane & Brock, P.C. v. Waters, 494 N.W.2d 826, 828 (Mich.Ct.App.1992), appeal denied, 503 N.W.2d 446 (Mich.1993) (rule restricting fee-splitting among lawyers "is designed to prohibit brokering, to protect a client from clandestine payment and employment, and to prohibit aggrandizement of fees….").

Fee-splitting among lawyers is regulated in the lawyer codes in significantly different ways. The ABA Model Code of Professional Responsibility (1969) in DR 2-107(A) required: (1) client consent to the employment of the other lawyer after full disclosure of the fact of fee division; (2) division of the fee "in proportion to the services performed and responsibility assumed" by each lawyer; and (3) a total fee that was reasonable compensation for all services rendered. In contrast, the ABA Model Rules of Professional Conduct (1983) require in Rule 1.5(e) that: "(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable." Many states have rules that differ significantly from either of the ABA models. See ABA/BNA Law. Manual Prof. Conduct § 41:702-704 (1991).

*Comment c. Division proportional to services performed.*In the large majority of jurisdictions permitting, as an alternative method of validating a fee-splitting arrangement, that the lawyers allocate the fee in proportion to the services each provides, a much-litigated issue is the extent of proportionality required and the means of testing it. See ABA/BNA Law. Manual Prof. Conduct § 41:706-08 (1991). Apparently the majority of courts that have decided the issue permit the lawyers' agreed allocation to control where there is a substantial and good-faith division of services or responsibility. E.g., Macurdy v. Sikov & Love, P.A., 894 F.2d 818 (6th Cir.1990) (where "substantial division of services or responsibility" is found, agreed division of fee controls); McNeary v. American Cyanamid Co., 712 P.2d 845, 848 (Wash.1986) (en banc) (similar to *Macurdy*, supra); Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo.Ct.App.1993) (agreement enforced where lawyer substantially performed and no indication of bad-faith division of fees). Under the majority approach, an agreement is not enforceable on its terms where the claiming lawyer's actual work on a matter did not "remotely approach" the agreed-upon division. See Dragelevich v. Kohn, Milstein, Cohen & Hausfeld, 755 F.Supp. 189, 193 (N.D.Ohio 1990) (reviewing authorities); e.g., In re Potts, 718 P.2d 1363, 1369 (Or.1986) ("… There must be a reasonable correlation between the amount of services rendered and responsibility assumed and the share of the fee received…."). New York courts follow a lesser standard, enforcing an agreed-upon division of fees provided only that the lawyer contributed some work, labor, or service toward the earning of the fee. E.g., Alderman v. Pan Am World Airways, 169 F.3d 99 (2d Cir.1999).

*Comment d. Division pursuant to joint responsibility.*Almost every jurisdiction permits assumption of joint responsibility as an alternative basis on which a permissible fee-splitting arrangement can be made with another lawyer. See Reporter's Note to Comment *b*. Some jurisdictions do not require either assumption of joint responsibility or proportionality to services. E.g., Calif. Rules of Professional Conduct, Rule 2.200(A); Mich. Disciplinary Rules of Professional Conduct, DR 2-107(A); Pa. Rules of Professional Conduct, Rule 1.5(e); Ryder v. Farmland Mut. Ins. Co., 807 P.2d 109, 116 (Kan.1991). Texas requires proportionality of the fee but does not permit fee-splitting on the basis (only) of assumption of joint responsibility. Texas Disciplinary Rules of Professional Conduct, Rule 1.04(f). For discussion of what joint responsibility entails, see Noris v. Silver, 701 So.2d 1238 (Fla. Dist. Ct. App.1997); ABA Model Rules of Professional Conduct, Rule 1.5, Comment ¶ [4] (1983); ABA Informal Op. 85-1514 (1985).

*Comment e. Informed consent.*On the lawyer-code provisions, see Reporter's Note to Comment *b*; ABA/BNA Law. Manual Prof. Conduct § 41:705-706 (1991). On the requirement of client consent, see, e.g., Scolinos

v. Kolts, 44 Cal.Rptr.2d 31, 33 (Cal.Ct.App.1995) (unenforceability of oral fee-splitting agreement); In re Kerlinsky, 546 N.E.2d 150 (Mass.1989), cert. denied, 498 U.S. 1027, 111 S.Ct. 678, 112 L.Ed.2d 670 (1991) (discipline for violation of requirement of informing client); Excelsior 57th Corp. v. Lerner, 553 N.Y.S.2d 763 (N.Y.App.Div.1990) (fraudulent concealment found based on secret receipt of forwarding fee); Booher v. Frue, 358 S.E.2d 127 (N.C.Ct.App.1987), aff'd, 364 S.E.2d 141 (N.C.1988) (actionable claim for restitution and constructive fraud in allegation of secret agreement to split fees); Lemond v. Jamail, 763 S.W.2d 910, 914 (Tex.Ct.App.1988) (agreement unenforceable when client never informed and did not consent).

A substantial majority of jurisdictions, following the ABA Model Rules of Professional Conduct (1983), require disclosure to the client only of the participation of all the lawyers involved. A number of jurisdictions, like the ABA Model Code of Professional Responsibility (1969), also require disclosure that the fee will be divided. Ga. Code Prof. Resp., DR 2-107(A)(1); Iowa Code Prof. Resp., DR 2-107(a)(1); Neb. Code Prof. Resp., DR 2-107(A)(1); N.H. R. Prof. Conduct, rule 1.5(f)(1); Tenn. S. Ct. R. 8, DR 2-107(A)(1). A number of other jurisdictions, in accord with this Section, require the lawyer to disclose the terms of the division. Cal. R. Prof. Conduct 2-200(A)(1); Colo. R. Prof. Conduct, rule 1.5(d); Rules Regulating the Fla. Bar 4-1.5(g); Ill. R. Prof. Conduct, rule 1.5(g); Maine Bar R. 3.3(d); Minn. R. Prof. Conduct, rule 1.5(e)(2); Va. Code Prof. Resp., DR 2-105(D); King v. Housel, 556 N.E.2d 501 (Ohio 1990).

*Comment f. Limitation to a reasonable total fee.*On the lawyer-code provisions, see Reporter's Note to Comment *b*. E.g., ABA/BNA Law. Manual Prof. Conduct § 41:704-705 (1991). E.g., In re Potts, 718 P.2d 1363, 1369-71 (Or.1986) (discipline for charging excessive forwarding fee).

*Comment g. Lawyers in the same firm.*E.g., Tomar, Seliger, Simonoff, Adourian & O'Brien, P.C. v. Snyder, 601 A.2d 1056, 1059 (Del.Super.Ct.1990) ("same-firm" rule applies to agreement between firm and departing lawyer); Heninger & Heninger, P.C. v. Davenport Bank & Trust Co., 341 N.W.2d 43, 48-49 (Iowa 1983) (permissible for senior partner to delegate work on matter to junior partners and associates and share fee with them); Baron v. Mullinax, Wells, Mauzy & Baab, Inc., 623 S.W.2d 457, 461-62 (Tex.Ct.App.1981) (agreement with departing lawyer); see also, e.g., McCroskey, Feldman, Cochrane & Brock, P.C. v. Waters, 494 N.W.2d 826 (Mich.Ct.App.1992), appeal denied, 503 N.W.2d 446 (Mich.1993) (permissible for firm to provide in employment agreement with lawyer how fees would be divided in event lawyer left firm); compare, e.g., Duff v. Gary, 622 N.E.2d 727 (Ohio Ct.App.1993) (lawyers in "shared office" arrangement not "associated in a law office" within rule permitting same-firm fee-splitting); In re Bass, 227 B.R. 103 (Bank. E.D. Mich.1998) (payment of nonlawyer assistant may not be based on number of cases firm files). See generally ABA/BNA Law. Manual Prof. Conduct §§ 41:710-12 & 41:714-715 (1991-92); C. Wolfram, Modern Legal Ethics 511 (1986); Gilson & Mnookin, Sharing Among the Human Capitalists: An Inquiry Into the Corporate Law Firm and How Partners Split Profits, 37 Stan. L. Rev. 313 (1985).

*Comment h. Borderline arrangements.*On the enforceability of agreements between successor and replaced counsel when the succession follows client-initiated discharge of the original lawyer, see, e.g., Paul v. Neely, 508 N.E.2d 401 (Ill.App.Ct.1987) (enforcing agreement between successor and replaced counsel); Vogelhut v. Kandel, 517 A.2d 1092 (Md.1986) (explicitly rejecting application of anti-splitting rules); Krajewski v. Klawon, 270 N.W.2d 9 (Mich.Ct.App.1978) (same); cf., e.g., Bershtein, Bershtein & Bershtein, P.C. v. Nemeth, 603 A.2d 389 (Conn.1992) (in absence of accounting by replaced counsel and prompt delivery of case file, no basis for equitable claim by replaced counsel against successor counsel for value of work done for client); Lai Ling Cheng v. Modansky Leasing Co., 539 N.E.2d 570 (N.Y.1989) (in disputes between replaced and successor counsel, in absence of agreement, outgoing lawyer may elect compensation on basis of either present fixed-dollar amount reflecting quantum meruit or contingent percentage fee based on proportionate share of work performed on entire case); but see, e.g., Albert Brooks Friedman, Ltd. v. Malevitis, 710 N.E.2d 843 (Ill.App.Ct.1999) (agreement unenforceable without client's written consent).

On fee-splitting arrangements in class actions, see, e.g., In re FPI/Agretech Secs. Litigation, 105 F.3d 469 (9th Cir.1997) (upholding court's power to set aside agreement between counsel); Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir.1996) (upholding in camera disclosure of agreement in circumstances); In re "Agent Orange" Product

Liability Litigation, 818 F.2d 216 (2d Cir.), cert. denied, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987) (invalidating agreement under which members of management committee of plaintiff class counsel advanced funds for litigation expenses in return for threefold return out of fee settlement); Lewis v. Teleprompter Corp., 88 F.R.D. 11 (S.D.N.Y.1980) (refusing to enforce agreement under which lawyer elected as lead counsel agreed to provide lawyers supporting election with designated percentage of fee award); cf., e.g., Phillips v. Joyce, 523 N.E.2d 933 (Ill.App.Ct.1988) (fee-splitting arrangement among class-action lawyers with respect to fees, entered into with consent of clients to joint representation, not per se invalid; ultimate validity depends on full development of facts); Johnson, Ethical Limitations on Creative Financing of Mass Tort Class Actions, 54 Brook. L. Rev. 539, 553-61 (1988) (assessment of Agent Orange litigation fee-sharing arrangement); Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 901-04, 934-35 (1987). Jurisdictions that allow fee-splitting only in proportion to the work performed apply the same rule in class actions. See Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir.1977); Kronfeld v. Transworld Airlines, 129 F.R.D. 598 (S.D.N.Y.1990).

*Comment i. Sanctions; questions of the enforceability of improper agreements.*On discipline for entering into an improper fee-splitting arrangement with another lawyer, see, e.g., In re Kerlinsky, 546 N.E.2d 150 (Mass.1989), cert. denied, 498 U.S. 1027, 111 S.Ct. 678, 112 L.Ed.2d 670 (1991); Ohio St. Bar Ass'n v. Kanter, 715 N.E.2d 1140 (Ohio 1999) (illegal kickback arrangement with inside legal counsel of corporate client); In re Netchert, 396 A.2d 1118 (N.J.1979); In re Potts, 718 P.2d 1363 (Or.1986); Annot., 6 A.L.R.3d 1446 (1966). On awarding unjust-enrichment relief to a client who is not informed of the fee-splitting, see Booher v. Frue, 358 S.E.2d 127 (N.C.Ct.App.1987), aff'd, 364 S.E.2d 141 (N.C.1988) (against forwardee lawyer). Decisions denying relief to a lawyer who has improperly entered such an arrangement include Kaplan v. Pavalon & Gifford, 12 F.3d 87 (7th Cir.1993); Holstein v. Grossman, 616 N.E.2d 1224 (Ill.App.Ct.), cert. denied, 622 N.E.2d 1206 (Ill.1993); Christensen v. Eggen, 577 N.W.2d 221 (Minn.1998); Londoff v. Vuylsteke, 996 S.W.2d 553 (Mo.Ct.App.1999); Lemond v. Jamail, 763 S.W.2d 910 (Tex.Ct.App.1988); Belli v. Shaw, 657 P.2d 315 (Wash.1983); but cf., e.g., Cunningham v. Langston, Frazer, Sweet & Freese, P.A., 727 So.2d 800 (Ala.1999) (fee-splitting agreement with out-of-state lawyer enforceable; prohibition against unauthorized practice does not extend to fee-splitting). Tribunals have occasionally allowed a plaintiff who is not believed to have substantially infringed professional rules to enforce an improper fee-splitting arrangement. See Freeman v. Mayer, 95 F.3d 569 (7th Cir.1996) (referring lawyer may recover from lawyer who violated his own state's rule); Potter v. Peirce, 688 A.2d 894 (Del.1997) (lawyer may recover from referring lawyer who violated his own state's rule); King v. Housel, 556 N.E.2d 501 (Ohio 1990) (lawyer may recover from another lawyer whose duty it was to obtain client consent); Chachere v. Drake, 941 S.W.2d 193 (Tex.Ct.App.1996) (similar); Davies v. Grauer, 684 N.E.2d 924 (Ill.App.Ct.1997) (similar); Watson v. Pietranton, 364 S.E.2d 812 (W.Va.1987) (estate of referring lawyer may recover; other lawyer could have sought client consent after referring lawyer's death); Post v. Bregman, 707 A.2d 806 (Md.1998) (technical violation would not bar recovery); cf. ABA Informal Opin. 870 (1965) (despite client's objection to forwarding lawyer receiving any fee beyond quantum meruit, forwardee firm should not interpose ethical violation involved in agreed-upon one-third/two-thirds sharing of fee even where forwarding lawyer performed no more than 2% of work). An invalid agreement does not, of course, affect the rights of the client. E.g., Oklahoma Turnpike Authority v. Horn, 861 P.2d 304, 307-08 (Okla.1993) (nonprevailing party cannot defend opposing party's fee-shifting claim on assertion that prevailing party's subsequent payment to lawyer would be split with another under agreement that violated lawyer code).

Case Citations - by Jurisdiction

—

D.Mass.
Colo.App.
Ind.App.
Iowa
Md.

Mich.
Okl.App.
Wis.App.

D.Mass.

D.Mass.2002. Com. (e) cit. in disc. After law firm allegedly utilized law professor's expertise on tobacco litigation to win massive settlements for its clients against the tobacco industry, law professor sued law firm to enforce an oral fee-splitting agreement. Denying defendant's motion for summary judgment, the court held, inter alia, that, even though the oral fee-splitting agreement was made in contravention of the rules of professional conduct, it was nonetheless enforceable. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 188 F.Supp.2d 115, 130, reversed 290 F.3d 42 (1st Cir.2002).

D.Mass.2001. Com. (i) cit. in disc. Massachusetts law professor, licensed to practice in New York, sought to enforce oral fee-splitting agreement allegedly formed in Illinois with law firms from South Carolina and Mississippi that profited from tobacco industry's settlement of numerous lawsuits. This court denied in part South Carolina defendants' motion for summary judgment, but it took motion under advisement as to enforceability of fee-splitting agreement, inviting parties to brief issue of which state's disciplinary rules were applicable where plaintiff and defendants were subject to different rules. Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 178 F.Supp.2d 9, 26-27.

Colo.App.

Colo.App.2004. Com. (g) cit. in disc. Law firm brought suit for breach of contract against attorney who had left firm, after attorney refused to pay firm the agreed-upon portion of attorney's fees generated in several cases he took with him. The trial court ruled on a pretrial motion that the contract to apportion attorney's fees on attorney's departure from the firm was enforceable in accordance with its terms and was not contrary to public policy. Affirming, this court held, inter alia, that state rule of professional conduct barring division of a fee between lawyers not in the same firm did not apply to an agreement to apportion fees on departure of an attorney from a law firm. Moreover, the rule did not apply to division of fees within a firm, and the apportionment agreement here was accomplished while attorney was still employed by firm. Norton Frickey, P.C. v. Turner, 94 P.3d 1266, 1268, 1269.

Ind.App.

Ind.App.2012. Cit. in case quot. in sup., subsec. (c) cit. in sup. Attorney sued another attorney that had transferred a contingency-fee case to plaintiff under an agreement that the parties would share equally in any fee recovered, alleging that defendant fraudulently induced him to accept the case by intentionally misrepresenting that he had already done "considerable," "significant," or "a lot" of the work on the case. The trial court entered judgment in favor of defendant, but denied defendant's motions for prejudgment interest and to correct errors. Affirming, this court held that the trial court's findings of fact were sufficient to support its denial of prejudgment interest. The court explained that the award of prejudgment interest was considered proper when the trier of fact did not have to exercise judgment in order to assess the amount of damages, and pointed out that the parties had an agreement that allocated the fee at the beginning of the representation, and that the trial court specifically found that the fee division was proportionate and reasonable based on the parties' forecast of the amount of work each would do. Kummerer v. Marshall, 971 N.E.2d 198, 202, 203.

Iowa

Iowa, 2004. Com. (g) quot. in sup. Attorney sued for declaratory judgment, asking the court to void terms of a settlement agreement reached with another attorney who worked together with plaintiff on contingency-fee cases at their old law firm. Trial court granted defendant summary judgment. This court affirmed, holding that settlement

agreement was enforceable because it did not violate Iowa Code of Professional Responsibility for Lawyers and did not violate public policy. The agreement did not contravene rule banning referral fees because plaintiff and defendant were members of the same firm when agreement was signed during process of plaintiff's separation from firm. Division of fees without client consent and strict proportionality was allowed when division occurred between partners or was part of separation agreement. Walker v. Gribble, 689 N.W.2d 104, 113.

Md.

Md.2001. Cit. in sup., quot. in ftn., com. (b) quot. in sup. State attorney-grievance commission petitioned for disciplinary action against attorney for professional misconduct. After trial court entered findings of misconduct on attorney's part, attorney filed exceptions. This court held that the appropriate sanction was indefinite suspension. The court sustained, however, attorney's exception to the charge of fee-splitting, holding that attorney had not violated the rule against fee-splitting by evenly dividing the fee in an underlying fall-down case with his local cocounsel instead of sharing it in proportion to the services performed by each lawyer, since that case had resulted in a loss situation for plaintiff and his lawyers, and it would have been unprofessional for attorney to attempt to foist a larger share of the loss on cocounsel. Attorney Grievance Com'n of Maryland v. Chasnoff, 366 Md. 250, 264, 783 A.2d 224, 232.

Mich.

Mich.2021. Quot. but not fol.; com. (d) quot. in ftn. Law office sued law firm and clients of law firm, alleging that defendants breached the terms of a referral agreement entered into between the parties, under which defendants would pay a portion of an underlying personal-injury judgment to plaintiff as compensation for plaintiff referring law firm to clients. The trial court entered judgment in part for plaintiff. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. This court affirmed in part, reversed in part, vacated in part, and remanded, holding, inter alia, that the referral agreement was invalid if plaintiff did not have a professional relationship with clients at the time the agreement was created. The court noted that its rule was distinct from that set forth in Restatement Third of the Law Governing Lawyers § 47, under which attorneys had to continue providing legal services to their clients or assume responsibility for representing them to qualify for referral payments. Law Offices of Jeffrey Sherbow, PC v. Fieger & Fieger, PC, 968 N.W.2d 367, 377.

Okl.App.

Okl.App.2005. Com. (g) cit. in disc. and quot. in ftn. Law firm sued former partner for breach of contract, deceit, and fraud. The trial court entered judgment on a jury verdict for plaintiff. This court affirmed, holding, inter alia, that defendant was liable for breach of the parties' partnership agreement, because the fee-division provision of the partnership agreement was valid, enforceable, and neither illegal nor contrary to the public interests promoting Oklahoma Rule of Professional Conduct 1.5(e). The court determined that Rule 1.5(e), concerning fee splitting between lawyers not in the same firm, did not prohibit a law firm from sharing fees with a former partner under a separation agreement for work arising from matters that were entrusted to the firm before the partner's departure. Frasier, Frasier & Hickman, L.L.P. v. Flynn, 2005 OK CIV APP 33, 114 P.3d 1095, 1100, 1101.

Wis.App.

Wis.App.2004. Cit. in ftn., com. (b) quot. in disc., com. (g) quot. in ftn. Law firm, which, pursuant to alleged agreement, had received 50% of fee earned for certain cases by personal-injury attorney who left firm, sued attorney for 50% of particularly large fee received by attorney. Trial court granted summary judgment to law firm. Affirming, this court held, inter alia, that there was no public-policy issue where fees were split between attorneys who were in the same firm when representation was initiated; this did not constitute the prohibited fee division

between lawyers not in the same firm. Piaskoski & Associates v. Ricciardi, 275 Wis.2d 650, 686 N.W.2d 675, 684, 686.

End of Document

Restatement (Third) of the Law Governing Lawyers 4 Case Notes

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

General Case Citations

D.Mass.

D.Mass.1998. Cit. generally in disc. (citing generally Ch. 4 of T.D. No. 8, 1997, which is now Ch. 4 of the Official Text). An umbrella liability insurer brought an action for damages against the primary liability insurer for the owner of an apartment complex where a child was seriously injured in a fall, after defendant failed to settle the child's claim within the primary liability insurance policy limit of $1 million. Entering judgment for defendant, the court held, inter alia, that defendant's substandard performance in handling the claim was neither a cause-in-fact nor a legal cause of plaintiff's expenditure of $1 million in addition to the $1 million contributed by defendant to settlement of the claim. The court noted that the evolution of relevant legal doctrine regarding liability insurance relationships, ongoing at a modest pace since mid-century and at an accelerated pace more recently, extended to professional responsibility issues. RLI Ins. Co. v. General Star Indem. Co., 997 F.Supp. 140, 144.

Restatement (Third) of the Law Governing Lawyers 4 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Introductory Note

Introductory Note: This Chapter concerns the circumstances and extent to which lawyers are liable in damages and subject to other civil remedies. Civil remedies that lawyers can invoke against others are discussed elsewhere in this Restatement (see, for example, § 17), as are such remedies against lawyers as professional discipline (see § 5) and litigation sanctions (see § 110). See also § 6 (array of remedies against lawyer). The law considered here seeks to ensure that lawyers will perform their legal duties and to provide a remedy to a beneficiary injured by breach of such a duty. The law also seeks to avoid penalizing lawyers for appropriate conduct or discouraging lawyers from acting properly because of the threat of liability.

Actions under this Chapter are ordinarily referred to as based on a lawyer's "malpractice." That term can refer to various specific grounds of liability. As used in this Chapter, "legal malpractice" or "malpractice" of a lawyer refers to theories of both professional negligence (§ 48) and violation of a fiduciary duty (§ 49).

Restatement (Third) of the Law Governing Lawyers 4 1 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

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

Introductory Note

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.

End of Document

Restatement (Third) of the Law Governing Lawyers § 48 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

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

§ 48 Professional Negligence—Elements and Defenses Generally

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

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 malpractice 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. Chicago 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.

Case Citations - by Jurisdiction

—

Colo.
Iowa
Wis.
Wyo.

Colo.

Colo.2011. Cit. in disc. Prospective clients brought an action for legal malpractice and negligent misrepresentation against attorney and her law firm, alleging that attorney provided them with incorrect information regarding a statute of limitations, causing them to miss a filing deadline. The trial court granted defendants' motion to dismiss. The court of appeals reversed as to plaintiffs' negligent-misrepresentation claim. Reversing and remanding, this court held, among other things, that the court of appeals erred in relying on Restatement Third of the Law Governing Lawyers § 15(1)(c) as a basis for establishing a duty of care owed by an attorney to a nonclient; under Colorado law, attorneys did not owe a duty of reasonable care to nonclients, and to hold that the tort of negligent misrepresentation might be based on an attorney's duty of reasonable care to prospective clients would diminish the requirement that a plaintiff establish an attorney-client relationship in order to state a claim of malpractice. Allen v. Steele, 252 P.3d 476, 485.

Iowa

Iowa, 2003. Quot. in ftn. Deceased's estate sued attorney who served as deceased's guardian ad litem in an involuntary conservatorship proceeding and attorney who represented deceased's conservator, alleging that deceased and his conservator received bad advice from defendants concerning the redemption of deceased's farmland that had been sold to satisfy his delinquent tax obligation. Trial court granted defendants summary judgment. This court affirmed as to the attorney who served as guardian ad litem, but reversed in part as to the attorney who represented the conservator. The court held that deceased was a third-party beneficiary of the contract between conservator and attorney with respect to the preservation and management of deceased's assets. Estate of Leonard, ex rel., Palmer v. Swift, 656 N.W.2d 132, 146.

Wis.

Wis.2019. Quot. in ftn. Children of testator brought a claim for legal malpractice against law firm that administered testator's estate, alleging that its negligent administration of the estate caused testator's wife's estate to incur avoidable federal estate taxes and probate expenses. The trial court granted summary judgment for law firm, and the court of appeals affirmed. Affirming, this court held that the claim was properly dismissed under Restatement Third of the Law Governing Lawyers §§ 48 and 52, because law firm's alleged negligence did not thwart testator's clear testamentary intent. The court rejected children's invitation to adopt Restatement Third of the Law Governing Lawyers § 51, which would eliminate the requirement that a third-party beneficiary demonstrate that the testator's clear intent was thwarted in order to proceed with a legal-malpractice claim, noting that it would significantly change Wisconsin's general rule of attorney non-liability to non-clients. MacLeish v. Boardman & Clark LLP, 924 N.W.2d 799, 805.

Wyo.

Wyo.2020. Cit. in sup. After a jury convicted him of kidnapping, unlawful entry, misdemeanor theft, property destruction, interference with an emergency call, and domestic battery, client filed a claim for legal malpractice

against state public defender's office and individual public defenders who represented him. The trial court granted defendants' motion to dismiss with prejudice, finding that defendants were immune from suit under the Wyoming Governmental Claims Act. While reversing in part and remanding on other grounds, this court cited Restatement Third of the Law Governing Lawyers § 48 in holding that client's malpractice claim did not fall within the Act's contract exception, because it sounded in tort, rather than in contract. The court pointed out that client alleged a general breach of the duty owed by an attorney to a client, rather than a violation of a specific contract term unrelated to his attorney–client relationship with defendants. Dockter v. Lozano, 472 P.3d 362, 365.

Wyo.2002. Cit. in sup. Divorced wife sued her attorney for malpractice, alleging that he did no meaningful work for her, gave bad advice that complicated her legal problems, pursued hopeless claims, and made false promises of success. Plaintiff sought damages for the emotional upheaval attending her eviction from ex-husband's home and loss of child custody. Answering certified questions from the trial court, this court determined that damages for emotional suffering were not available in a legal malpractice case that alleged mere negligence. Long-Russell v. Hampe, 2002 WY 16, 39 P.3d 1015, 1020.

Restatement (Third) of the Law Governing Lawyers § 49 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

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

§ 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 applicable 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 system 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. Corriea, 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).

Case Citations - by Jurisdiction

—

D.Ariz.
N.D.Cal.
D.Minn.Bkrtcy.Ct.
S.D.N.Y.Bkrtcy.Ct.
D.N.Mar.I.
S.D.Tex.
Cal.App.
Iowa,
Tex.App.
Utah

D.Ariz.

D.Ariz.2007. Cit. in disc. Client brought legal-malpractice action against attorney and law firm that represented her in her unsuccessful sexual-harassment suit, alleging, among other things, that attorney engaged in nonconsensual sexual contact with her on multiple occasions as a condition to performing legal services for her. This court granted summary judgment for defendants, holding, inter alia, that, while an attorney could be liable for legal malpractice under Arizona law for departing from the standard of conduct by breaching fiduciary duties owed to a client, plaintiff failed to show that attorney's alleged breaches of loyalty and confidentiality interfered with or adversely affected his representation of her. Cecala v. Newman, 532 F.Supp.2d 1118, 1134.

N.D.Cal.

N.D.Cal.2013. Quot. in sup. Former client brought a legal-malpractice action against attorney, asserting, inter alia, claims for professional negligence and breach of fiduciary duty arising from attorney's alleged misappropriation of settlement funds that belonged to him. Granting client's motion for partial summary judgment, this court held that, by deriving her 40% fee from the total settlement amount, and collecting her fee in full from the installment payments that were only partially made by the defendant in the underlying case before distributing any settlement proceeds to client, attorney unlawfully misappropriated funds to which client was entitled, in breach of her fiduciary duty and duty of loyalty to him, and in breach of the tort law duty that she owed him as his attorney. The

court rejected attorney's argument that she was not liable because her actions were taken in good faith, concluding that, based on the well-established objective negligence standard, rather than on attorney's subjective state of mind, attorney's conduct was unreasonable as a matter of law. Knight v. Aqui, 966 F.Supp.2d 989, 996.

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Cit. in sup. In one of two consolidated adversary proceedings, Chapter 7 trustee of estate of loan-placement agent brought claim for breach of fiduciary duty against law firm that agent hired to prepare loan documents for a multimillion-dollar casino loan that agent arranged. This court held, inter alia, that law firm violated its duty to disclose and its duty of loyalty to agent, because, although participant lenders for the casino loan were the actual clients represented by firm in an action against a third party in which agent was the named plaintiff, firm agreed to represent agent in a closely related action by one loan participant against agent without seeking informed consent from either agent or that participant. The court further concluded that firm's actions constituted a blatant conflict of interest for which disgorgement of law firm's fees was the appropriate remedy. In re SRC Holding Corp., 352 B.R. 103, 189, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2008. Com. (c) quot. in ftn. Chapter 11 trustee brought adversary complaint against former counsel for debtors in possession, alleging, in part, counsel's breach of fiduciary duty for failure to disclose the absence of a bidder-registration form for stalking-horse bidder's bid for debtors' assets at auction, which form was to have provided required certification that certain principals of debtors were not involved in the bid. Denying in part defendants' motion to dismiss, this court rejected as meritless defendants' argument that they owed no fiduciary duty to debtors in possession as their clients; every lawyer owed its client a fiduciary duty to act with reasonable competence and diligence. The court noted the often substantial overlap between claims made against lawyers for breach of fiduciary duty and those asserting negligence. In re Food Management Group, LLC, 380 B.R. 677, 706.

D.N.Mar.I.

D.N.Mar.I.2011. Cit. and quot. in sup., com. (e) quot. in sup. Lessee who prepaid the rent for the entirety of a 55-year lease of real property sued lessors, alleging that defendants wrongfully attempted to terminate the lease after only two years. Denying the parties' cross motions for summary judgment on plaintiff's claim for breach of fiduciary duty against one defendant who was also an attorney, this court held that genuine issues of material fact remained as to whether that defendant fully disclosed and transmitted the terms of the transaction in a manner that could be reasonably understood by plaintiff, whether plaintiff reasonably understood defendant's attempts to do so, and whether plaintiff gave informed consent not just to the terms of the transaction but also to defendant's role in the transaction, including whether defendant was representing plaintiff in the transaction. Sin Ho Nam v. Quichocho, 841 F.Supp.2d 1152, 1175, 1177.

S.D.Tex.

S.D.Tex.2008. Cit. in disc. Chapter 11 trustee of debtor oil and gas company that went bankrupt after its directors decided to pursue a high-risk venture that failed sued, among others, debtor's attorneys, alleging that attorneys failed to fully inform debtor of numerous conflicts of interest, provided legal advice to debtor while conflicted, and failed to withdraw based on the conflicts. Denying without prejudice summary judgment for attorneys on trustee's claims asserting intentional or negligent breach of fiduciary duty, this court held, inter alia, that questions of fact remained as to the extent of attorneys' conflicts. The court noted that, where, as here, a plaintiff sought fee forfeiture as an equitable remedy for breach of fiduciary duty, there was no requirement that the plaintiff prove causation or damages under Texas law. Floyd v. Hefner, 556 F.Supp.2d 617, 661.

Cal.App.

Cal.App.2018. Com. (e) quot. in sup. Client brought claims for fraudulent concealment and intentional breach of fiduciary duty against attorney who represented her in a dispute with a swimming organization that had orally promised to support her training as a professional swimmer, alleging that attorney failed to disclose his personal and professional relationships with the organization. After the jury found in favor of client, the trial court granted attorney's motion for a new trial on grounds, in part, that client failed to prove causation. This court reversed and reinstated the jury's verdict, holding that client's claims of fraudulent concealment and intentional breach of fiduciary duty were subject to the "substantial factor" causation standard, rather than the "but for" or "trial within a trial" causation standard employed in cases of legal malpractice based on negligence. The court explained that, according to Restatement Third of the Law Governing Lawyers § 49, causation for intentional breach of fiduciary duty could be treated differently from negligent breach. Knutson v. Foster, 236 Cal.Rptr.3d 473, 486.

Iowa,

Iowa, 2017. Cit. and quot. in sup.; com. (b) quot. in sup., cit. in diss. op. Client brought an action for legal malpractice, assault, and battery against her former attorney with whom she had had a sexual relationship that ultimately turned violent. The trial court directed a verdict for defendant on two malpractice claims; a jury returned a verdict for defendant on plaintiff's remaining malpractice claims and found for plaintiff on her assault and battery claims. This court affirmed, holding that a sexual relationship alone did not give rise to claims for legal malpractice or breach of fiduciary duty without evidence that the provided legal services were also deficient. The court noted its decision was consistent with the requirement set forth in Restatement Third of the Law Governing Lawyers § 49 that a causal nexus had to exist between any breach of fiduciary duty and the scope of a lawyer's professional representation, and that, given the limitation of fiduciary duties set forth in § 16, where a sexual relationship was the basis for an alleged breach, it had to be demonstrated that the relationship adversely affected the representation and caused breach of a fiduciary duty. Stender v. Blessum, 897 N.W.2d 491, 508, 509, 521.

Tex.App.

Tex.App.2011. Adopted in case, cit. in disc. After state district court approved a settlement between child injured in an accident and tire company, child and automobile manufacturer reached an agreement to settle their related case and sought court approval. The pretrial judge reduced the attorney's fees awarded in the previously approved settlement between child and tire manufacturer. Reversing, this court held that the pretrial judge abused his discretion when he failed to honor all of the terms of the earlier settlement. The court reasoned that, given the finality accorded to court-approved settlements, and in the absence of pleadings of avoidance as well as sufficient evidence to prove a ground to avoid the effect of the court-approved settlement, such as a breach of fiduciary duty by child's attorney in handling the settlement, the pretrial judge was required to honor the state district court judge's approval of the settlement. Stewart, Cox and Hatcher, P.C. v. Ford Motor Co., 350 S.W.3d 369, 375.

Tex.App.2008. Com. (b) quot. in case quot. in sup. After state disciplinary commission obtained a civil district-court judgment ordering that attorney be disbarred and pay restitution to one of his clients, a grand jury indicted attorney for misapplication of fiduciary property. Shortly prior to attorney's criminal trial, the trial court denied attorney's application for writ of habeas corpus contending that his right against double jeopardy precluded his prosecution. Affirming, this court held, inter alia, that there was no proof that the disciplinary action and resulting sanctions against attorney imposed criminal punishment. The court rejected attorney's argument that the award of restitution was punitive because it failed to take into account attorney's contingent-fee interest, reasoning that the civil district court could reasonably have concluded that attorney's breach of his fiduciary duties to client destroyed the attorney-client relationship and therefore attorney was simply not entitled to any fee. Capps v. State, 265 S.W.3d 44, 51.

Tex.App.2001. Quot. in sup. Client sued attorney and law firm for malpractice and breach of fiduciary duty in connection with failure to disclose conflict of interest based on attorney's status as city council member. The trial court granted defendants summary judgment. Reversing and remanding, this court held, inter alia, that fact issues existed as to whether defendants' actions created conflict of interest and breached duty of loyalty to client. Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 906, judgment reversed 145 S.W.3d 150 (Tex.2004).

Utah

Utah, 2008. Cit. in disc., com. (c) quot. in disc. After a bad-faith claim against automobile insurer was adjudicated in favor of insured and insured's judgment creditors, lead counsel for insured and creditors filed a declaratory-judgment action seeking a determination regarding the division of attorney's fees earned in that action; one judgment creditor counterclaimed, asserting, among other things, legal malpractice based on negligence and breach of fiduciary duty. The trial court granted summary judgment for lead counsel on the legal-malpractice counterclaims. Noting that the elements required to prove legal malpractice based on negligence and on breach of fiduciary duty were substantially the same, this court affirmed, holding, inter alia, that there was no issue of fact as to causation and that creditor failed to show that lead counsel's actions caused him to suffer any damages. Christensen & Jensen, P.C. v. Barrett & Daines, 2008 UT 64, 194 P.3d 931, 938.

Utah, 2003. Com. (c) quot. in ftn. Corporation's minority shareholder sued law firms and several of firms' partners for, in part, legal malpractice through breach of fiduciary duty. Trial court granted defendants' motion to dismiss the legal-malpractice claim. This court affirmed, holding, inter alia, that plaintiff could not show that he was damaged, that is, placed in a worse position as a result of defendants' alleged conduct. The court noted that, regardless of whether it classified the cause of action as one for professional negligence or breach of fiduciary duty or both, the result of the court's analysis was the same. Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17, 27.

End of Document

Restatement (Third) of the Law Governing Lawyers § 50 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

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

§ 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 receiver 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. Mmahat, 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 ss 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 notice 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 Note 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 to 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 be liable to client for recommending evasion of injunction).

Case Citations - by Jurisdiction

—

C.A.9
Ohio App.
Tex.
Wyo.

C.A.9

C.A.9, 1995. Cit. generally in ftn., com. (c) quot. in ftn. in sup. (citing § 72, T.D. No. 7, 1994, which is now § 50). Business seller brought legal malpractice action against attorney who represented him in the sale when, nine years after the transaction, the buyers retained attorney and he advised them to discontinue payments under the parties' stock purchase agreement. The district court granted defendant's motion for summary judgment, concluding that an attorney owed no duty to former clients beyond the duty of confidentiality. Reversing and remanding, this court held that where, as here, an attorney represented a new client whose interests were materially adverse to those of a former client in a matter substantially related to the matter for which the attorney was originally retained, the former client could bring an action for breach of the duty of loyalty. Like the duty of confidentiality, the duty of loyalty was continuous. Damron v. Herzog, 67 F.3d 211, 215.

Ohio App.

Ohio App.2012. Com. (d) quot. in sup. Elderly client brought a legal-malpractice action against attorney who had revised his will and drafted a new power of attorney for him, claiming, in part, that defendant was negligent in not monitoring two agents named in the power of attorney through receipt and review of the inventory and annual accountings provided for in the power of attorney. The trial court granted summary judgment for defendant, holding that defendant owed no duty to plaintiff. Reversing and remanding, this court held that defendant had a duty to follow up with plaintiff's agents regarding their obligations to complete an inventory and annual accountings and to encourage them to comply with those obligations. The court reasoned that, while an attorney only owed a duty to a client if the alleged deficiencies in his performance related to matters within the scope of representation, defendant in this case, by incorporating the inventory and accounting scheme into the power of attorney, expanded the scope of his representation of plaintiff beyond the mere drafting of legal documents, and assumed a responsibility to attempt to make the scheme work. Svaldi v. Holmes, 2012-Ohio-6161, 986 N.E.2d 443, 447.

Tex.

Tex.2004. Com. (d) cit. in sup. Client brought malpractice action against law firm and law-firm shareholder, who also served as a legislator on city council and who voted in favor of an ordinance that adversely affected client. The trial court granted law firm's motion for summary judgment, but the court of appeals reversed and remanded. This court reversed and rendered judgment for firm and shareholder, holding, inter alia, that an attorney was not liable for failing to act beyond the scope of his representation; because representing client before city council was not included in the scope of firm's representation here, firm had no duty to inform client of the city council meeting, which was also a matter of public record. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 159-160.

Wyo.

Wyo.2002. Cit. in sup. Divorced wife sued her attorney for malpractice, alleging that he did no meaningful work for her, gave bad advice that complicated her legal problems, pursued hopeless claims, and made false promises of success. Plaintiff sought damages for the emotional upheaval attending her eviction from ex-husband's home and loss of child custody. Answering certified questions from the trial court, this court determined that damages for emotional suffering were not available in a legal malpractice case that alleged mere negligence. Long-Russell v. Hampe, 2002 WY 16, 39 P.3d 1015, 1020.

Restatement (Third) of the Law Governing Lawyers § 51 (2000)

§ 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 to persons too remote from the lawyer.

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

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

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

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

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

Subsections (3) and (4), although related in their justifications, differ in application. In situations falling under Subsection (3), the client need not owe any preexisting duty to the intended beneficiary. The scope of the intended benefit depends on the client's intent and the lawyer's undertaking. On the other hand, the duty under Subsection

(4) typically arises when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law.

Illustrations:

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

3. Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses, but Nonclient later alleges that Lawyer negligently wrote the will to name someone other than Nonclient as the legatee. Client's intent to benefit Nonclient thus does not appear on the face of the will. Nonclient can establish the existence of a duty from Lawyer to Nonclient only by producing clear and convincing evidence that Client communicated to Lawyer Client's intent that Nonclient be the legatee. If Lawyer is held liable to Nonclient in situations such as this and the preceding Illustration, applicable principles of law may provide that Lawyer may recover from their unintended recipients the estate assets that should have gone to Nonclient.

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

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

such circumstances would give the lawyer an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer.

h. Duty based on knowledge of a breach of fiduciary duty owed by a client (Subsection (4)). A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules (see § 54(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* apply 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 liable 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. Abraham, 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 representative 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) (trustor'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 Protect 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 state permitted but did not require such disclosure. See § 66, Comment *b,* and Reporter's Note thereto.

Case Citations - by Jurisdiction

—

C.A.7,
D.Ariz.
M.D.Fla.
D.Minn.Bkrtcy.Ct.
S.D.N.Y.Bkrtcy.Ct.
S.D.Tex.
E.D.Va.
N.D.W.Va.
Alaska
Ariz.
Ariz.App.
Cal.App.
Colo.
Conn.
Conn.App.
Iowa,
Iowa
Ky.
Me.
Md.
Md.Spec.App.
Mass.
Mass.App.
Minn.App.
N.J.

N.J.Super.App.Div.
N.J.Super.
N.M.App.
Or.
Or.App.
R.I.
S.C.
S.D.
Tex.
Tex.App.
Va.
Wash.
Wis.

C.A.7,

C.A.7, 2015. Subsec. (2)(a) quot. in sup. Bond counsel to a transaction in which economic-development corporation for a federally recognized Indian tribe sold bonds to purchasers brought an action against tribe and corporation, seeking to enjoin defendants from proceeding in a tribal-court action to invalidate the bonds under tribal law. The district court denied plaintiff's motion for a preliminary injunction. This court reversed in part and remanded, holding that the district court erred in finding that plaintiff could not enforce the forum-selection clause contained in the bond documents. Citing Restatement Third of the Law Governing Lawyers § 51, the court explained that plaintiff had owed a duty to defendants during the transaction and was sufficiently affiliated with defendants, the transaction, and the bond documents to warrant invoking the clause. Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 807 F.3d 184, 213.

D.Ariz.

D.Ariz.2003. Quot. in ftn., subsecs. (2) and (3) cit. in case quot. in ftn. After son was killed at insureds' home, parents sued insureds for wrongful death and then obtained assignment of insureds' claims against insurer for bad faith and breach of policy. Insurer sought declaratory judgment that there was no coverage in wrongful-death suit, alleging that one insured breached cooperation clause by agreeing to entry of judgment against insureds in underlying suit and assigning their rights against insurer. Parents counterclaimed against insurer and brought third-party claim against insureds' law firm for tortiously interfering with assignment agreement by failing to forward signature pages to parents. This court granted firm summary judgment, holding that there was no tortious interference, since firm did not assume a duty to nonclient parents. American Family Mutual Ins. Co. v. Zavala, 302 F.Supp.2d 1108, 1119.

M.D.Fla.

M.D.Fla.2009. Com. (g) cit. in sup. Insurer sued attorney and law firm, seeking damages for legal malpractice in connection with plaintiff's retention of defendants to handle a demand letter from an individual who was injured in an accident with one of plaintiff's insureds. Denying defendants' motion to dismiss, this court held, inter alia, that plaintiff had standing to pursue its legal-malpractice claim against defendants. The court concluded that the Florida Supreme Court would likely embrace the majority view and recognize an attorney-client relationship between an insurer and the lawyer or law firm it retained to represent an insured or find that the insurer was an intended third-party beneficiary of the relationship between the attorney or law firm and the insured. Hartford Ins. Co. of Midwest v. Koeppel, 629 F.Supp.2d 1293, 1299.

D.Minn.Bkrtcy.Ct.

D.Minn.Bkrtcy.Ct.2006. Subsec. (3) cit. in case cit. in ftn., subsec. (3)(a) quot. in ftn. (citing § 73, T.D. No. 8, 1997, which is now § 51); com. (f) quot. in ftn. In one of two consolidated adversary proceedings, loan participant in a casino loan arranged by loan-placement agent for Native American Indian tribe borrowers brought malpractice suit against law firm that agent hired to prepare the loan documents. This court held, inter alia, that participant had standing to sue law firm as a third-party beneficiary of any retention agreement between agent and law firm, because, among other things, the evidence showed that law firm acted as though it owed a duty of care to loan participants, and the interests of loan participants and agent were not adverse. The court pointed out that both law firm and agent fully understood that agent was retaining law firm to represent loan participants, including plaintiff. In re SRC Holding Corp., 352 B.R. 103, 171, affirmed in part, reversed in part 364 B.R. 1 (D.Minn.2007).

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2008. Subsec. (4) quot. in sup. and adopted, com. (h) quot. in sup. Chapter 11 trustee brought adversary complaint against former counsel for debtors in possession, alleging, in part, counsel's breach of fiduciary duty for failure to disclose the absence of a bidder-registration form for stalking-horse bidder's bid for debtors' assets at auction, which form was to have provided required certification that certain principals of debtors were not involved in the bid. Denying in part defendants' motion to dismiss, this court held, inter alia, that, while defendants' fiduciary duties to the estate were narrower than their duties to their clients, if, as alleged, they ignored what was plainly evident—the missing certification—despite being aware of an "innuendo" of an improper relationship, they could be liable to the estate on this claim. In re Food Management Group, LLC, 380 B.R. 677, 708-710.

S.D.Tex.

S.D.Tex.2002. Subsec. (2) cit. in ftn.; cit. in disc. (citing § 73, T.D. No. 8, 1997, which is now § 51 of the official text). Buyers of corporation's publicly traded equity and debt securities brought class action for federal and state securities-law violations, alleging that accounting firms, law firms, and investment firms were liable for making false statements while selling securities or participating in scheme to defraud, in order to attract investors' funds into corporation. This court denied in part defendants' motions for summary judgment, holding, inter alia, that professionals, including lawyers and accountants, when they took affirmative step of speaking out, whether individually or as essentially an author or coauthor in a statement or report, whether identified or not, about their client's financial condition, had duty to third parties not in privity not to knowingly or with severe recklessness issue materially misleading statements on which they intended or had reason to expect that those third parties would rely. In re Enron Corp. Securities, Derivative & ERISA Litigation, 235 F.Supp.2d 549, 608.

E.D.Va.

E.D.Va.2005. Subsec. (3) quot. in sup. (erron. cit. as § 51(c)); com. (g) quot. in sup., cit. generally in ftn. in sup., cit. generally in disc., and cit. in ftn. Insurer through its attorney-in-fact brought a legal-malpractice action against law firm that it had retained to defend an insured in a personal-injury lawsuit arising out of an automobile accident. The court deferred in part law firm's motion to dismiss, holding, inter alia, that insurer could sue law firm for malpractice as a nonclient beneficiary of law firm's legal services. General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F.Supp.2d 951, 956-958.

N.D.W.Va.

N.D.W.Va.2007. Subsec. (3) quot. in sup.; com. (g) quot. in sup., cit. in case quot. in sup., and cit. in ftn. Insurer brought action for legal malpractice against attorney whom it hired to defend its insureds in connection with an

automobile accident, alleging that attorney's sub-par representation of insureds forced it to settle the underlying claims against insureds for amounts in excess of the claims' true value. Denying attorney's motion for judgment on the pleadings, this court held, inter alia, that, even absent the employer-employee relationship between insurer and attorney that gave rise to a duty, insurer had standing to bring an action against attorney for negligence, because attorney owed a duty to insurer as a nonclient beneficiary of attorney's services. The court discussed at length the policy behind recognizing an insurer's standing in such a case. State and County Mut. Fire Ins. Co. v. Young, 490 F.Supp.2d 741, 743-746.

Alaska

Alaska, 2006. Cit. generally in sup. and adopted, cit. in ftn., subsec. (4) cit. and quot. in sup. and cit. in ftn., subsecs. (4)(a)-(4)(d) cit. in sup., subsec. (4)(b)(i) cit. in ftn., com. (h) cit. in ftn., illus. 6 cit. and quot. but dist. Niece sued uncle and his attorney after uncle was convicted of stealing her assets while acting as her guardian. The trial court, inter alia, denied attorney's motion for summary judgment, ruling that attorney could be liable if he "knew or should have known" of the fraud. This court affirmed that portion of the decision, but on other grounds, holding that the correct standard was whether attorney had actual knowledge or "reason to know" of the fraud. The court concluded that a genuine issue of material fact remained as to attorney's liability in light of attorney's awareness of several warning signs of uncle's misconduct, including niece's therapist's allegations that uncle was living beyond his means, and suspicious financial statements provided to attorney by uncle. Pederson v. Barnes, 139 P.3d 552, 554, 557, 558, 560.

Ariz.

Ariz.2001. Subsec. (3) quot. in disc., com. (g) quot. in disc. Law firm sued professional liability insurer to recover fees for services firm rendered on behalf of insurer's insured. Insurer counterclaimed for breach of ethical duty, breach of fiduciary duty, breach of contract, and malpractice. Trial court granted firm summary judgment on all but one claim. Appellate court affirmed in part, reversed in part, and remanded. Vacating in part, reversing in part, and remanding, this court held, inter alia, that a lawyer may owe a duty to a nonclient. Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, 24 P.3d 593, 600.

Ariz.App.

Ariz.App.2002. Subsec. (3) quot. in case quot. in sup., subsecs. (3)(a)-(3)(c) and com. (a) cit. in disc., subsec. (4) cit. in sup. Surety for conservator of incapacitated person's estate sued conservator's attorney, among others, for damages arising out of attorney's alleged negligence in failing to act when conservator illegally used estate funds to make gifts and loans to her own children. Affirming the trial court's grant of attorney's motion to dismiss, this court held, inter alia, that surety did not have a direct cause of action against attorney, since an attorney for a conservator owed no fiduciary duty to the conservator's surety. Capitol Indem. Corp. v. Fleming, 203 Ariz. 589, 58 P.3d 965, 966, 968.

Ariz.App.2001. Cit. in case quot. in sup., cit. in sup., subsec. (2) cit. and quot. in sup. and in ftn., subsec. (3) cit. and quot. in sup., subsec. (2), com. (e) quot. in sup., subsec. (3), com. (f) cit. in sup. Holders of securities interests in healthcare corporation sued their attorneys and attorneys who represented corporation, alleging negligence and malpractice for failure to timely perfect security interests, resulting in corporation's avoidance of part of its payments under Chapter 11 bankruptcy. The trial court dismissed plaintiffs' complaint against corporation's attorneys. Reversing and remanding, this court held, inter alia, that corporation's attorneys owed a duty of care to nonclient holders, and complaint sufficiently alleged facts that attorneys breached their duty of care. Kremser v. Quarles & Brady, L.L.P., 201 Ariz. 413, 36 P.3d 761, 764-767.

Cal.App.

Cal.App.2004. Cit. in case cit. in sup., subsec. (3) quot. in sup., com. (f) quot. in sup. and quot. in case cit. in sup. Testator's caregiver, who was the executor and sole beneficiary under will, brought negligence action against drafting attorney after bequest failed because attorney did not take steps to ensure that caregiver would overcome statutory presumptive disqualification. Trial court sustained attorney's demurrer without leave to amend. Reversing, this court held that complaint could have been amended to state a claim for professional negligence; because attorney knew that client testator intended legal services to benefit nonclient caregiver, attorney owed a duty of care to caregiver, and it was an abuse of discretion for trial court not to grant leave to amend complaint. Osornio v. Weingarten, 124 Cal.App.4th 304, 337, 21 Cal.Rptr.3d 246, 269.

Cal.App.2003. Cit. and quot. in sup., coms. (b) and (f) quot. in sup., com. (f), illus. 4 cit. and quot. in sup., cit. in ftn. Testator's children sued testator's attorney and law firm for malpractice alleging that attorney failed evaluate and ascertain testator's capacity to amend estate-planning documents. Trial court sustained defendants' demurrer without leave to amend. Affirming, this court held, as a matter of first impression, that attorney preparing client's will owed no duty to will beneficiaries to ascertain and document client's testamentary capacity. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 109 Cal.App.4th 1287, 1301, 1302, 135 Cal.Rptr.2d 888, 897, 898.

Colo.

Colo.2011. Subsecs. (1) and (2) cit. in sup. Prospective clients brought an action for legal malpractice and negligent misrepresentation against attorney and her law firm, alleging that attorney provided them with incorrect information regarding a statute of limitations, causing them to miss a filing deadline. The trial court granted defendants' motion to dismiss. The court of appeals reversed as to plaintiffs' negligent-misrepresentation claim. Reversing and remanding, this court held, among other things, that the court of appeals erred in relying on Restatement Third of the Law Governing Lawyers § 15(1)(c) as a basis for establishing a duty of care owed by an attorney to a nonclient; under Colorado law, attorneys did not owe a duty of reasonable care to nonclients, and to hold that the tort of negligent misrepresentation might be based on an attorney's duty of reasonable care to prospective clients would diminish the requirement that a plaintiff establish an attorney-client relationship in order to state a claim of malpractice. Allen v. Steele, 252 P.3d 476, 485.

Conn.

Conn.2013. Cit. in ftn., cit. in conc. op. and in ftn. to conc. op. Former husband brought claims for fraud and intentional infliction of emotional distress against former wife and wife's former attorneys in connection with allegations that attorneys failed to disclose wife's true financial situation during postdissolution proceedings in which plaintiff sought modification of the alimony award. The trial court granted defendants' motions to strike plaintiff's claims on grounds of absolute immunity or privilege. The court of appeals affirmed. Affirming, this court held that defendants were protected by the litigation privilege against claims of fraud and intentional infliction of emotional distress for their conduct during judicial proceedings. The concurring opinion argued that there should not be a bright line rule of absolute immunity in cases of this nature, and that the privilege might not apply in cases where there was a finding of fraud, dishonesty, or similar misconduct by the attorney on a motion for sanctions or in a disciplinary proceeding against the attorney. Simms v. Seaman, 308 Conn. 523, 558, 576, 69 A.3d 880, 900, 901, 910.

Conn.App.

Conn.App.2011. Cit. in ftn., cit. in diss. op., subsec. (4)(b) cit. in ftn. and quot. in ftn. to diss. op., coms. (b), (c), and (f) quot. in ftn. Former husband brought claims for fraud and intentional infliction of emotional distress against ex-wife's attorneys, alleging that defendants intentionally concealed ex-wife's assets from him and the

court during alimony proceedings. The trial court entered judgment for defendants. Affirming, this court held that plaintiff's claims against defendants for conduct that occurred during judicial proceedings were barred by the doctrine of absolute immunity. The concurring and dissenting opinion argued that sound public policy did not support the notion that lawyers should be immune from the consequences of their fraudulent behavior. Simms v. Seaman, 129 Conn.App. 651, 661, 662, 678, 681, 23 A.3d 1, 6, 7, 16, 18.

Iowa,

Iowa, 2014. Subsec. (3) cit. in disc. Executor/beneficiary of estate brought a legal-malpractice action against estate counsel, alleging that counsel failed to advise her about potential legal challenges to another beneficiary's option to purchase, at a below-market-value price, farmland that was property of the estate. The trial court granted summary judgment for counsel. The court of appeals reversed. Vacating the decision of the court of appeals and affirming the judgment of the trial court, this court held that the creation of an attorney—fiduciary relationship between counsel and executor did not impose on counsel an independent duty to represent executor's personal interests. The court observed that executor's claim did not rest on counsel's duty to her as a third-party beneficiary of the estate, noting that the third-party-beneficiary doctrine set forth in Restatement Third of the Law Governing Lawyers § 51(3) identified an exception to the general rule that an attorney—client relationship was required to pursue an attorney-malpractice action. Sabin v. Ackerman, 846 N.W.2d 835, 840.

Iowa, 2013. Rptr's Note to com. (f) cit. and quot. in sup. Putative beneficiaries of decedent's will and charitable trust sued, among others, securities registered representative who had been retained by decedent to assist with estate planning and representative's employer, alleging that, because of representative's negligent performance of his agency responsibilities, plaintiffs failed to receive what they were supposed to under decedent's estate plan. The trial court granted summary judgment for defendants. Reversing in part and remanding, this court held that, when an agent negligently performed his duties to a principal, and, as a result of that negligence, a direct, intended, and specifically identifiable beneficiary of a written instrument executed by the principal did not receive the benefits set forth in the written instrument, the beneficiary was owed a duty by the agent and could have a cause of action against him. The court noted that, even if representative's alleged actions in developing and implementing an estate plan for decedent fell short of actually performing legal services, it saw no reason why a financial planner should be treated differently from attorneys or insurance agents who were potentially liable to beneficiaries for negligence towards clients. St. Malachy Roman Catholic Congregation of Geneseo v. Ingram, 841 N.W.2d 338, 349.

Iowa

Iowa, 2003. Subsec. (3) cit. and quot. in sup. Deceased's estate sued attorney who served as deceased's guardian ad litem in an involuntary conservatorship proceeding and attorney who represented deceased's conservator, alleging that deceased and his conservator received bad advice from defendants concerning the redemption of deceased's farmland that had been sold to satisfy his delinquent tax obligation. Trial court granted defendants summary judgment. This court affirmed as to the attorney who served as guardian ad litem, but reversed in part as to the attorney who represented the conservator. The court held that deceased was a third-party beneficiary of the contract between conservator and attorney with respect to the preservation and management of deceased's assets. Estate of Leonard, ex rel., Palmer v. Swift, 656 N.W.2d 132, 145-146.

Ky.

Ky.2010. Cit. but dist., quot. in ftn., and cit. in diss. op., subsec. (4) and com. (h) quot. in diss. op. Wife, as her incompetent husband's guardian, brought action for legal malpractice and breach of fiduciary duty against attorney, alleging that attorney dissipated funds from the settlement of a personal-injury suit filed by attorney on behalf of husband when he was a minor, by and through his mother as next friend. The trial court granted summary judgment for attorney. The court of appeals reversed. This court affirmed, holding that the attorney retained by an individual in the capacity of a minor's next friend or guardian established an attorney-client relationship with the

minor and owed the same professional duties to the minor that the attorney would owe to any other client. The dissent argued that minor was a non-client, third-party beneficiary, and thus attorney's duty to him was determined by Restatement Third of the Law Governing Lawyers § 51. Branham v. Stewart, 307 S.W.3d 94, 101, 102, 108.

Me.

Me.2014. Cit. in sup., subsecs. (3)(b) and (3)(c) cit. in sup. Decedent's son, as beneficiary and successor personal representative of decedent's estate, brought claims of professional negligence and breach of fiduciary duty against law firm that represented decedent's sister as prior personal representative in connection with probate of the estate, alleging that defendant gave sister improper advice concerning the reasonableness of her fees and the estate's obligations to pay taxes. The trial court granted summary judgment for defendant. Affirming, this court held that no attorney-client relationship existed between defendant and plaintiff in his role as successor personal representative of the estate, and that defendant did not owe any duty to plaintiff as a nonclient under Restatement Third of the Law Governing Lawyers § 51. The court pointed out that defendant represented sister only during the probate litigation, that defendant advised plaintiff that it represented sister only and not the estate, and that plaintiff had hired separate counsel to provide him with legal advice during the probate litigation. Estate of Cabatit v. Canders, 105 A.3d 439, 442, 445, 446.

Me.2012. Cit. in ftn. Borrowers under a commercial loan sued law firm that acted as the closing agent for the loan transaction, alleging that it negligently misrepresented the amount of the prepayment penalty for the loan; the amount listed in the promissory note, which they did not read during the closing, was much larger than the amount listed in a document entitled "Funding Instructions," which law firm's attorney went over with them during the closing. After a nonjury trial, the trial court entered judgment in favor of law firm. Affirming, this court declined to address borrowers' argument that an attorney who acted as a closing agent could be governed by Restatement Third of the Law Governing Lawyers §§ 51 and 56, because borrowers did not raise that argument at trial. St. Louis v. Wilkinson Law Offices, P.C., 2012 ME 116, 55 A.3d 443, 444.

Md.

Md.1998. Cit. and quot. in disc. (citing § 73, T.D. No. 8, 1997, which is now § 51). In two separate lawsuits, nonclient testamentary beneficiaries brought suit for attorney malpractice, alleging that the attorney either provided negligent estate planning advice to the testator, or negligently drafted the testator's will in a manner that resulted in significant avoidable estate and inheritance taxes. In both cases, the courts ruled that plaintiffs did not have standing to bring suit. This court affirmed, holding that the traditional rule of strict privity applied in these cases, and thus the plaintiffs could not maintain a malpractice action against the attorneys because no employment relationship existed between them. There was no evidence that either defendant attorney undertook representation of the testators for estate planning on the beneficiaries' behalf. Noble v. Bruce, 349 Md. 730, 709 A.2d 1264, 1275.

Md.Spec.App.

Md.Spec.App.2009. Quot. in but dist. Co-counsel under a fee-sharing agreement in clients' medical-malpractice case brought negligence and fraudulent-concealment claims, inter alia, against lead counsel, alleging that defendant had a duty to consult and communicate with him on clients' case, and that her failure to do so and her false representations to the clients that they had a possible legal-malpractice action against him caused him to suffer damages. The trial court granted summary judgment for defendant. Affirming, this court held that defendant owed no actionable duty to plaintiff in the conduct of their joint representation of the clients. The court concluded that Restatement Third of Law Governing Lawyers § 51 did not support plaintiff's position that a tort duty existed between co-counsel; for instance, an attorney did not invite co-counsel to rely on his opinion, and a client did not intend the lawyer's services to benefit co-counsel. Blondell v. Littlepage, 185 Md.App. 123, 968 A.2d 678, 688-689.

Mass.

Mass.1994. Com. (f) at 22 quot. in sup. (citing § 73, T.D. No. 7, 1994, which is now § 51). Daughters of deceased former wife sued deceased attorney father's estate for legal malpractice in negligently advising former wife during their annulment that his oral promise to leave two-thirds of his estate to his children was enforceable. The trial court awarded plaintiffs two-thirds of estate's value, holding that contract aspect of malpractice claim survived father's death. This court reversed and entered judgment for defendant, holding that defendant's motion for judgment n.o.v. should have been allowed, since testimony of one, uncorroborated, interested witness was not the strong, clear, and convincing evidence needed to support a verdict that in effect enforced deceased's otherwise unenforceable oral promise concerning disposing of his estate. Ryan v. Ryan, 419 Mass. 86, 92, 642 N.E.2d 1028, 1033.

Mass.App.

Mass.App.2000. Com. (f) quot. in ftn. (citing § 73, T.D. No. 7, 1994, which is now § 51 of the Official Draft). Testator's children by first marriage sued attorney for negligently failing to draft a will that carried out testator's alleged intention to exclude second wife and pass all his property to them. Trial court granted attorney summary judgment. This court affirmed, holding, inter alia, that children's malpractice claim failed, because there was no evidence that attorney was made aware of the supposed indicia of testator's intent to leave all to his children—the antenuptial agreement with second wife, the separate marital finances, and testator's various statements to his children. Rogers v. Regnante, 50 Mass.App.Ct. 149, 736 N.E.2d 391, 394.

Minn.App.

Minn.App.2011. Cit. in ftn. Formerly incapacitated person sued attorney who represented her former guardian, alleging, among other things, that defendant owed her a fiduciary duty as her guardian's attorney and that defendant breached that duty by disclosing certain confidential information about her to a newspaper and others. The trial court granted judgment on the pleadings in favor of defendant. Affirming, this court held that plaintiff could not hold defendant liable for disclosing confidential information about her based on defendant's role as guardian's agent. The court noted that, at oral argument, plaintiff's counsel withdrew arguments based on Restatement Third of the Law Governing Lawyers § 51 (addressing the relationship between a guardian's attorney and the ward). Greer v. Professional Fiduciary, Inc., 792 N.W.2d 120, 132.

Minn.App.1999. Subsec. (3) quot. in sup., com. (f) quot. in sup. (citing § 73, T.D. No. 8, 1997, which is now § 51). A woman sued an attorney and his law firm, alleging that the attorney committed legal malpractice when he drafted a series of wills for the woman's brother. The trial court dismissed. This court affirmed, holding that to maintain a legal malpractice action against an attorney, a nonclient must demonstrate that the nonclient was an intended third-party beneficiary of the attorney-client relationship. Here, plaintiff was not defendant's client and was not an intended third-party beneficiary of the attorney-client relationship. Francis v. Piper, 597 N.W.2d 922, 925.

Minn.App.1994. Com. (f) quot. in disc. and in sup. (citing § 73, T.D. No. 7, 1994, which is now § 51). Corporation sued law firm and lawyers for malpractice in their representation of corporation's agent. Affirming the trial court's grant of summary judgment for defendants, this court held that an undisclosed principal could not sue its agent's attorneys for malpractice and that an agent who suffered no damages could not sue its attorneys for malpractice to recover damages suffered by its undisclosed principal. The court noted, and plaintiff admitted, that plaintiff had no cause of action against defendants under a third-party beneficiary theory because plaintiff's interest in the transaction was undisclosed. CPJ Enterprises, Inc. v. Gernander, 521 N.W.2d 622, 624.

N.J.

N.J.2005. Cit. in ftn.; subsec. (2) quot. in case quot. in sup. (citing § 73, T.D. No. 7, 1994, which is now § 51 of the Official Draft). Bank sued borrower's attorney for negligent misrepresentation, alleging that attorney helped borrower transfer assets to defraud bank and wrote a misleading opinion letter on which bank relied. The trial court dismissed, and the appellate division affirmed in part. This court affirmed in part and reversed in part, holding that attorney had no duty to bank as to asset transfer, since attorney made no representations to bank seeking to induce reliance. Bank stated, however, a viable negligent-misrepresentation claim as to the opinion letter, since the letter allegedly contained misstatements of material facts on which attorney knew or should have known that bank as a third-party would rely. Banco Popular North America v. Gandi, 184 N.J. 161, 179-180, 876 A.2d 253, 264.

N.J.2000. Subsec. (3)(a) and com. (f) quot. in sup. After entry of judgment in probate proceedings directing trustee of testator's revocable trust to pay heir's pecuniary bequest from the trust, trust beneficiary sued testator's attorneys for legal malpractice, alleging that defendants were negligent in drafting the will-and-trust agreement because it did not reflect testator's intent to disinherit heir and leave the entire estate to beneficiary. The trial court dismissed the action, and the appellate division affirmed. Affirming, this court held that the appropriate burden of proof in this legal-malpractice suit brought by a nonclient was clear and convincing evidence. Pivnick v. Beck, 165 N.J. 670, 671, 762 A.2d 653, 654.

N.J.1995. Cit. in diss. op., subsec. (2) quot. in sup. and in diss. op., com. (b) cit. in disc. and quot. in diss. op., coms. (c) and (e) quot. in diss. op. (citing § 73, T.D. No. 7, 1994, which is now § 51). Potential buyer of real estate sued the seller's attorney for negligence, alleging that because of the attorney's negligence she received a misleading copy of a percolation-test report that induced her to sign a contract to purchase property. Trial court dismissed plaintiff's complaint, holding that defendant did not owe a duty to plaintiff to provide a complete and accurate report. Intermediate appellate court reversed, holding that attorney owed plaintiff a duty. This court affirmed, holding that the attorney had a duty not to misrepresent negligently the contents of a material document on which he knew others would rely to their financial detriment. Dissent argued that this case did not concern a lawyer's legal opinion or the performance of any legal services, and it did not concern a nonclient for whom an attorney had undertaken a specific legal task. Petrillo v. Bachenberg, 139 N.J. 472, 655 A.2d 1354, 1357, 1359, 1363-1365.

N.J.Super.App.Div.

N.J.Super.App.Div.2018. Com. (f) quot. in case quot. in disc. Trustee of a trust that left property to settlor's grandchildren sought a declaratory judgment that settlor did not consider the children of her daughter to be "grandchildren" because daughter was married outside their Orthodox Jewish faith. The trial court entered judgment for daughter's son, finding that he and his brother were trust beneficiaries under the plain meaning of "grandchildren." Reversing and remanding for trial, this court held that a trial court could look beyond the apparently plain language of the trust that seemed to benefit all grandchildren to determine whether settlor intended to benefit only some grandchildren. Noting that plaintiff's argument depended on interpretation of the trust's language or, in the alternative, reformation of the trust, the court quoted Restatement Third of the Law Governing Lawyers § 51, Comment *f*, in explaining that the "preponderance of the evidence" standard applied to resolve ambiguity in donative instruments, and the "clear and convincing evidence" standard applied to reform such instruments. Matter of Trust of Nelson, 184 A.3d 526, 531.

N.J.Super.App.Div.2007. Cit. in sup., subsecs. (2)-(4) cit. in sup. Daughter who was executor/cobeneficiary of her mother's estate brought, along with her cobeneficiary sisters and estate, action for legal malpractice against attorney and law firm for allegedly giving daughter tax advice that resulted in large tax liability for each of the individual plaintiffs. The trial court granted summary judgment for defendants. Affirming in part as to cobeneficiaries, this court held, inter alia, that defendants were not liable to cobeneficiaries because they were not clients of defendants. The court reasoned, in part, that cobeneficiaries did not allege any communications by defendants with, or directed to, cobeneficiaries, or any breach of fiduciary duty by daughter as a result of the advice she received from defendants. Estate of Albanese v. Lolio, 393 N.J.Super. 355, 375, 923 A.2d 325, 337, 338.

N.J.Super.

N.J.Super.1999. Cit. and quot. in disc., coms. (e) and (h) quot. in disc. (citing § 73, T.D. No. 8, 1997, which is now § 51). Father who guaranteed payment of legal fees incurred by daughter during her divorce proceedings sued daughter's attorneys for malpractice. The trial court entered summary judgment for defendants. Affirming, this court held that no attorney-client relationship was created between plaintiff and defendants, and that, as the guarantor of legal fees only, plaintiff was too remote a party to be considered a nonclient to whom defendants owed a duty of care. DeAngelis v. Rose, 320 N.J.Super. 263, 727 A.2d 61, 67-68, 69.

N.J.Super.1995. Cit. in case cit. in sup. (citing § 73, T.D. No. 7, 1994, which is now § 51). Purchasers of shares in a condominium that was represented in a public offering as suitable for use as a "condotel" in which units could be rented on a transient basis similar to a hotel brought a legal malpractice action against the vendor's attorney and his law firm after purchasers were fined on the basis that they lacked a mercantile license necessary to permit transient rentals of units. Trial court granted the law firm summary judgment. This court reversed and remanded, holding that the firm could be held liable for negligent misrepresentation because reliance by purchasers on the content of a public offering statement was foreseeable. If plaintiff's certification that the sellers were marketing this condominium as a "condotel" was correct, any known restriction that would prohibit its use as a "condotel" should have been included within the public offering statement. Atlantic Paradise v. Perskie, Nehmad, 284 N.J.Super. 678, 666 A.2d 211, 214.

N.M.App.

N.M.App.2007. Subsecs. (4) and (4)(d) cit. in sup., com. (b) quot. in sup., com. (h) cit. and quot. in sup. Insureds sued automobile insurer's attorney, alleging, in part, that defendant aided and abetted insurer's breach of fiduciary duty in handling the arbitration of their claim for uninsured-motorist benefits. The trial court dismissed. Affirming, this court held, inter alia, that plaintiffs failed to allege facts that would support a cause of action against defendant for aiding and abetting breach of fiduciary duty, since an adversarial relationship began between plaintiffs and insurer when plaintiffs demanded arbitration, and each of defendant's alleged acts took place within the scope of her employment as insurer's legal representative. The court concluded that defendant had no duty to plaintiffs as nonclient beneficiaries of insurer, since such a duty would potentially impair defendant's performance of her obligations to client/insurer. Durham v. Guest, 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756, 761, 762.

Or.

Or.2006. Com. (b) quot. in ftn. Investor in parcels of land sued joint venturer and her attorney in connection with implementation of a settlement agreement, alleging, in part, that attorney was jointly liable with venturer because he had aided and abetted venturer's breach of fiduciary duties and conversion of plaintiff's property. After plaintiff and venturer settled, the trial court granted summary judgment for attorney. The court of appeals reversed in part. This court reversed, holding, as a matter of first impression, that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship was protected by privilege and was not liable for assisting the client in conduct that breached the client's fiduciary duty to a third party. The court noted that a lawyer's need to protect him/herself from potential tort claims by third parties could conflict with and compromise vigorous representation of the client. Reynolds v. Schrock, 341 Or. 338, 351, 142 P.3d 1062, 1070.

Or.App.

Or.App.2021. Com. (f) quot. in sup. Spouse of deceased testator, on behalf of minor son, sued law firm, alleging, inter alia, that defendant negligently prepared decedent's estate plan by failing to update the terms of decedent's irrevocable trust to name minor son as sole residual beneficiary. On remand, the trial court granted defendant's motion for directed verdict. This court affirmed, holding that defendant did not owe minor son a duty to prepare

the trust in such a way so that he would receive all property held in trust upon testator's death. Quoting Restatement Third of the Law Governing Lawyers § 51, Comment *f*, the court reasoned that, according to the undisputed record, defendant did not specifically promise to testator that it would prepare the trust in a way to solely benefit son. Sherertz v. Brownstein, Rask, Sweeney, Kerr, Grim, Desylvia & Hay, LLP, 498 P.3d 850, 859.

R.I.

R.I.2009. Cit. in case cit. in ftn., subsecs. (2)(a) and (2)(b) quot. in ftn. Credit union sued closing attorney who embezzled funds entrusted to him during two residential mortgage refinancings through credit union, alleging malpractice/negligence and breach of contract, inter alia. The trial court granted summary judgment for credit union. Affirming, this court recognized that the liability of an attorney could extend to third-party beneficiaries of the attorney-client relationship if it was clear that the contracting parties intended to benefit the third party; in this case, credit union, if not actually a client, was at the very least an intended beneficiary of the contractual obligations between attorney and clients/borrowers, and, as such, attorney owed credit union a duty of care. The court noted that several jurisdictions had embraced a broader foreseeability approach to determine an attorney's duty of care to a nonclient, but expressed no opinion as to its vitality in this jurisdiction. Credit Union Cent. Falls v. Groff, 966 A.2d 1262, 1272.

S.C.

S.C.2019. Com. (b) quot. in diss. op. Insurer filed a legal-malpractice claim in federal court against lawyer and law firm that it hired to defend its insured in an automobile-accident case. Answering questions certified by the district court, this court held that an insurer could maintain a direct malpractice action against counsel hired to represent its insured where the insurer had a duty to defend, except that counsel could not be liable to the insurer if the interests of the insured client were inconsistent with those of the insurer. The dissent cited Restatement Third of the Law Governing Lawyers § 51 in arguing, among other things, that recognizing a cause of action in tort for an insurer against the insured's hired counsel could pose an undue burden to the attorney–client relationship by negatively affecting the duty of loyalty owed to the client. Sentry Select Insurance Company v. Maybank Law Firm, LLC, 826 S.E.2d 270, 278.

S.C.2014. Subsec. (3)(a) quot. in conc. and diss. op. Niece brought legal-malpractice and breach-of-contract claims against attorney and law firm, alleging that defendants made a drafting error in preparing a trust instrument for her late uncle and, as a result, she was effectively disinherited. The trial court granted defendants' motion to dismiss. Reversing and remanding, this court held, as a matter of first impression, that a third-party beneficiary, like plaintiff in this case, of an existing will or estate-planning document could bring a cause of action, in both tort and contract, against a lawyer whose drafting error defeated or diminished the client's intent. The concurring and dissenting opinion cited Restatement Third of the Law Governing Lawyers § 51(3)(a) in asserting that an attorney owed a duty only to a beneficiary named in an estate-planning instrument or identified as such by status in the instrument. Fabian v. Lindsay, 410 S.C. 475, 493, 765 S.E.2d 132, 142.

S.D.

S.D.2022. Com. (f) quot. in case quot. in sup. Former husband filed claims for invasion of privacy and aiding and abetting invasion of privacy against former wife and her attorney, alleging that, during their divorce, wife placed a hidden recording device in her husband's office and that attorney attempted to introduce two recordings from the device into evidence during the divorce trial. The trial court granted summary judgment for attorney. This court affirmed in part, holding that attorney's alleged failure to immediately advise wife to stop recording husband did not provide a legal basis for husband to sue attorney for invasion of privacy. The court cited Restatement Third of the Law Governing Lawyers § 51 in reasoning that husband's argument against attorney was akin to an allegation of legal malpractice, and, under the strict privity rule, husband could not bring such an action because he did not have an attorney–client relationship with attorney. Gantvoort v. Ranschau, 973 N.W.2d 225, 234.

S.D.2005. Subsec. (3) cit. and quot. in sup., com. (f) quot. in ftn. As intended beneficiaries under their father's will, father's children sued father's attorney for malpractice for failing to assure that the property identified in the will was titled in a way to give effect to the proposed disposition of that property. The trial court granted plaintiffs partial summary judgment. This court affirmed, holding, inter alia, that nonclient beneficiaries under a will could maintain a malpractice action against the attorney who drafted the will, when, as here, the attorney knew that the client intended as the primary objective that the services benefit the nonclients, such a duty would not significantly impair attorney's performance of his obligations to the client, and the absence of such a duty would make enforcement of those obligations unlikely. Friske v. Hogan, 2005 SD 70, 698 N.W.2d 526, 530, 531.

S.D.2002. Cit. in disc. and ftn., subsecs. (2) and (3) cit. and quot. in disc., subsec. (4) quot. in ftn., com. (f) quot. in disc. Investors in a corporation sued attorney who had prepared incorporation documents on behalf of former client, alleging fraud, conversion, malpractice, and breach of fiduciary duty. Trial court granted attorney summary judgment, holding that no privity of contract existed between anyone other than lawyer and his client. This court affirmed in part, holding, inter alia, that the record was insufficient to show a contractual arrangement wherein attorney agreed to represent anyone other than client and corporation. The court also determined that, even if it were to recognize the third-party-beneficiary exception, there was no evidence that the primary purpose for client's contacting an attorney to incorporate the business was to benefit plaintiffs. Chem-Age Industries, Inc. v. Glover, 2002 SD 122, 652 N.W.2d 756, 770, 772.

Tex.

Tex.2021. Com. (c) quot. in sup. After buyer of footwear brand sued seller, seller sued, among others, attorney and law firm that represented entity that sold footwear brand to seller, alleging that defendants misrepresented the validity of underlying patents. The trial court granted defendants' motion for summary judgment. The court of appeals reversed and remanded. This court reversed and remanded, holding, inter alia, that the court of appeals had to determine whether defendants' services rendered to their client included conduct that was not the kind of legal services that were protected by attorney immunity. Quoting Restatement Third of the Law Governing Lawyers § 51, Comment *c*, the court observed that certain aspects of defendants' services could be entitled to attorney immunity, because they arose from defendants' representation of their client in an adversarial context in which they did not owe a duty of care to plaintiff. Haynes and Boone, LLP v. NFTD, LLC, 631 S.W.3d 65, 80.

Tex.1999. Cit. in sup. and in ftn., subsec. (2) cit. and quot. in sup., com. (e) cit. and quot. in sup. (citing § 73, T.D. No. 8, 1997, which is now § 51). A joint venture partnership and its managing general partnership sued a law firm for negligent misrepresentation. Trial court rendered a take-nothing summary judgment for the law firm based on the lack of privity between the parties. Appellate court reversed and remanded, holding that a negligent misrepresentation claim is not the equivalent of a legal malpractice claim and is not barred by the privity rule. This court affirmed, holding, inter alia, that there was no reason to exempt lawyers from the operation of Restatement (Second) of Torts § 552 or to impose a privity requirement on a negligent misrepresentation claim under § 552. McCamish, Martin, etc. v. F.E. Appling, 991 S.W.2d 787, 791, 794-795.

Tex.1996. Subsec. (3) quot. in ftn. to diss. op., com. (f), illus. 2 cit. in ftn. to diss. op. (citing § 73, T.D. No. 7, 1994, which is now § 51). Intended remainder beneficiaries under a trust that was declared invalid brought a malpractice action against the attorney that drafted the trust agreement. The trial court granted summary judgment for defendant, and the court of appeals affirmed. Affirming, this court held that, since defendant never represented plaintiffs, he owed them no professional duty of care. A dissent argued that the majority's holding embraced a rule recognized in only four states, while rejecting the rule recognized in an overwhelming majority of jurisdictions. Barcelo v. Elliott, 923 S.W.2d 575, 580.

Tex.App.

Tex.App.2019. Cit. but dist. After buyer of business assets brought breach-of-contract claims against successor seller, successor seller asserted third-party claims against attorney and law firm that represented original seller in the sale of the business assets to successor seller, alleging that attorney and law firm failed to inform successor seller about deficiencies in the business's patents. The trial court granted third-party defendants' motion for summary judgment. This court reversed and remanded, holding, inter alia, that third-party defendants were not entitled to attorney immunity against successor's negligent-misrepresentation claims, because the immunity did not extend to attorney statements made during business transactions. The court acknowledged that Restatement Third of the Law Governing Lawyers § 51 did not differentiate between litigation and transactional practices, but explained that § 51 addressed attorneys' duty of care and not the applicability of immunity. NFTD, LLC v. Haynes & Boone, LLP, 591 S.W.3d 766, 775.

Va.

Va.2016. Cit. in ftn., cit. in ftn. to diss. op. Charitable organization filed a claim for breach of contract against attorney and law firm hired by testator to prepare testator's will, alleging that, due to a scrivener's error, the will left only testator's tangible estate, and not her real estate, to plaintiff, despite testator's clear intent to leave all of her property to plaintiff. After a bench trial, the trial court found in favor of plaintiff. Affirming, this court held that the trial court did not err in concluding that plaintiff had authority to proceed as a third-party beneficiary of the will contract between testator and defendants, even though it was not a party to that contract. The dissent argued that the majority's discussion and its citation to Restatement Third of the Law Governing Lawyers § 51 signaled an intent to abolish the requirement of privity in all legal-malpractice actions, including those that did not arise in the context of an action resulting from services provided in connection with a will. Thorsen v. Richmond Society for the Prevention of Cruelty to Animals, 786 S.E.2d 453, 462, 472.

Wash.

Wash.2013. Com. (g) quot. in ftn. but not fol. After construction company's claim of lien priority on certain real property was resolved against bank, bank's title insurer brought a suit for legal malpractice against law firm it had hired to defend bank in the underlying action, alleging that firm had improperly failed to raise the viable defense of equitable subrogation. The trial court granted summary judgment for firm. Affirming, this court held that firm did not owe a duty to insurer, because insurer was a nonclient third-party payor of bank's bills owed to firm, rather than firm's client. The court reasoned that the fact that insurer's interests happened to align in some respects with bank's did not by itself show that firm or bank intended insurer to benefit from firm's representation of bank such that firm could be liable for malpractice to insurer. Stewart Title Guar. Co. v. Sterling Sav. Bank, 311 P.3d 1, 4.

Wash.2006. Cit. in ftn. to diss. op., subsec. (2) and com. (b) quot. in diss. op. Following the settlement of client's malpractice action against two attorneys, one of whom had neglected to timely serve the complaint in client's underlying personal-injury case, the other attorney sued his cocounsel to recover, among other things, prospective fees. The trial court dismissed the claims on summary judgment, and the court of appeals affirmed in part. This court affirmed in part, holding, inter alia, that the imposition of any liability between attorneys for prospective fees created a fiduciary duty between attorneys, which could interfere with an attorney's duty of loyalty to the client. The dissent argued that defendant here breached the standard duty of due care that every professional owed to any foreseeable plaintiff, and that there was no remaining duty to the client to protect. Mazon v. Krafchick, 158 Wash.2d 440, 144 P.3d 1168, 1175, 1176.

Wis.

Wis.2019. Cit. and quot. but not fol., cit. in ftn., cit. in cases cit. in ftn. Children of testator brought a claim for legal malpractice against law firm that administered testator's estate, alleging that its negligent administration of the estate caused testator's wife's estate to incur avoidable federal estate taxes and probate expenses. The trial court granted summary judgment for law firm, and the court of appeals affirmed. Affirming, this court held that the

claim was properly dismissed, because law firm's alleged negligence did not thwart testator's clear testamentary intent. The court rejected children's invitation to adopt Restatement Third of the Law Governing Lawyers § 51, which would eliminate the requirement that a third-party beneficiary demonstrate that the testator's clear intent was thwarted in order to proceed with a legal-malpractice claim, noting that it would significantly change Wisconsin's general rule of attorney non-liability to non-clients. MacLeish v. Boardman & Clark LLP, 924 N.W.2d 799, 801, 804-807, 810.

End of Document

Restatement (Third) of the Law Governing Lawyers § 52 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

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

§ 52 The Standard of Care

(1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.
(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:
(a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;
(b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and
(c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) or § 49 to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

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) (criticizing 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); Klem 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 Krischbaum 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); Brammer 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. Carpenter, 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).

Case Citations - by Jurisdiction

N.D.Cal.
S.D.N.Y.Bkrtcy.Ct.
Conn.App.
Iowa
N.M.App.
S.D.
Tex.App.
Wash.
Wis.
Wyo.

N.D.Cal.

N.D.Cal. 2013. Com. (b) quot. in sup. Former client brought a legal-malpractice action against attorney, asserting, inter alia, claims for professional negligence and breach of fiduciary duty arising from attorney's alleged misappropriation of settlement funds that belonged to him. Granting client's motion for partial summary judgment, this court held that, by deriving her 40% fee from the total settlement amount, and collecting her fee in full from the installment payments that were only partially made by the defendant in the underlying case before distributing any settlement proceeds to client, attorney unlawfully misappropriated funds to which client was entitled, in breach of her fiduciary duty and duty of loyalty to him, and in breach of the tort law duty that she owed him as his attorney. The court rejected attorney's argument that she was not liable because her actions were taken in good faith, concluding that, based on the well-established objective negligence standard, rather than on attorney's subjective state of mind, attorney's conduct was unreasonable as a matter of law. Knight v. Aqui, 966 F.Supp.2d 989, 1000.

S.D.N.Y.Bkrtcy.Ct.

S.D.N.Y.Bkrtcy.Ct.2008. Subsecs. (2)(a) and (2)(c) quot. in sup. Chapter 11 trustee brought adversary complaint against former counsel for debtors in possession, alleging, in part, counsel's breach of fiduciary duty for failure to disclose the absence of a bidder-registration form for stalking-horse bidder's bid for debtors' assets at auction, including certification that certain principals of debtors were not involved in the bid. Denying in part defendants' motion to dismiss, this court held, inter alia, that defendants, in preparing and presenting the auction motion and bidding procedures to the court for approval, owed a fiduciary duty to the court and all of the debtors' constituencies to speak truthfully. The court noted that a violation of New York's disciplinary rules, while not creating civil liability, could be considered by the court in assessing civil liability for breach of fiduciary duty. In re Food Management Group, LLC, 380 B.R. 677, 711.

Conn.App.

Conn.App.2007. Com. (b) cit. and quot. in sup. Law firm sued client, seeking payment for services, and client counterclaimed, alleging legal malpractice. The trial court entered judgment on a jury verdict for law firm. Affirming, this court held, inter alia, that, although the trial court had improperly instructed the jury regarding local customs in defining the standard of professional care required of attorneys, because the same standard of care applied statewide, it was not reasonably probable that client suffered injustice as a result. The court explained that the instruction could have been detrimental to law firm, but not to client, because, while various local experts testified as to the courtroom practices of certain judges, none testified that knowledge of those judges' practices would diminish the required standard of professional care; thus, the net effect of the instruction was to heighten the standard of competence to include knowledge of local customs. Traystman, Coric and Keramidas v. Hundley, 102 Conn.App. 490, 925 A.2d 1161, 1164.

Iowa

Iowa, 2003. Cit. in ftn. Deceased's estate sued attorney who served as deceased's guardian ad litem in an involuntary conservatorship proceeding and attorney who represented deceased's conservator, alleging that deceased and his conservator received bad advice from defendants concerning the redemption of deceased's farmland that had been sold to satisfy his delinquent tax obligation. Trial court granted defendants summary judgment. This court affirmed as to the attorney who served as guardian ad litem, but reversed in part as to the attorney who represented the conservator. The court held that deceased was a third-party beneficiary of the contract between conservator and attorney with respect to the preservation and management of deceased's assets. Estate of Leonard, ex rel., Palmer v. Swift, 656 N.W.2d 132, 146.

N.M.App.

N.M.App.2008. Com. (b) quot. in sup. After law firm successfully defended sellers of land against an action by buyer, who claimed, 14 years after the sale, that he owned the water rights appurtenant to the land under the deed, sellers brought legal-malpractice action against law firm, alleging that it incorrectly advised them regarding the statute of limitations on their claim against attorney who prepared the deed. The trial court granted summary judgment for law firm. Affirming, this court held that the incorrect advice could not have harmed sellers, because the attorney who prepared the deed did not breach a duty of care owed to sellers; the deed was legally sufficient to convey the land without water rights, and sellers failed to provide any other evidence tending to show that an attorney exercising reasonable care would have expressly excluded water rights in preparing the deed. Bassett v. Sheehan, 2008-NMCA-072, 144 N.M. 178, 184 P.3d 1072, 1075.

S.D.

S.D.2014. Subsec. (1) quot. in ftn. Client sued lawyers and law firm that formerly defended him in an underlying civil dispute regarding the ownership of certain bee hives, alleging, among other things, that defendants committed legal malpractice by failing to properly investigate whether he had applicable insurance coverage. The trial court granted summary judgment for defendants. Reversing in part and remanding, this court held that the trial court erred in striking the testimony of plaintiff's expert regarding the reasonableness of defendants' conduct on the ground that it was based on a national standard of care rather than a local standard of care, because there was no showing that locality unique to the jurisdiction had any impact on the standard of care. The court noted that, while Restatement Third of the Law Governing Lawyers § 52 provided that a lawyer who owed a duty of care was required to exercise the competence and diligence normally exercised by lawyers in similar circumstances, the application of the locality rule was fact specific and was not an issue in every case. Hamilton v. Sommers, 855 N.W.2d 855, 862.

Tex.App.

Tex.App.2001. Cit. and quot. in sup. Client sued attorney and law firm for malpractice and breach of fiduciary duty in connection with failure to disclose conflict of interest based on attorney's status as city council member. The trial court granted defendants summary judgment. Reversing and remanding, this court held, inter alia, that fact issues precluded summary judgment for defendants, and trier of fact could consider rules of professional conduct in applying standard of care in malpractice or breach-of-fiduciary-duty cases. Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 905.

Wash.

Wash.2006. Quot. in diss. op. Following the settlement of client's malpractice action against two attorneys, one of whom had neglected to timely serve the complaint in client's underlying personal-injury case, the other attorney sued his cocounsel to recover, among other things, prospective fees. The trial court dismissed the claims on summary judgment, and the court of appeals affirmed in part. This court affirmed in part, holding, inter alia, that the imposition of any liability between attorneys for prospective fees created a fiduciary duty between attorneys, which could interfere with an attorney's duty of loyalty to the client. The dissent argued that defendant here breached the standard duty of due care that every professional owed to any foreseeable plaintiff, and that there was no remaining duty to the client to protect. Mazon v. Krafchick, 158 Wash.2d 440, 144 P.3d 1168, 1175.

Wis.

Wis.2019. Subsec. (1) quot. in ftn. Children of testator brought a claim for legal malpractice against law firm that administered testator's estate, alleging that its negligent administration of the estate caused testator's wife's estate to incur avoidable federal estate taxes and probate expenses. The trial court granted summary judgment for law firm, and the court of appeals affirmed. Affirming, this court held that the claim was properly dismissed under Restatement Third of the Law Governing Lawyers §§ 48 and 52, because law firm's alleged negligence did not thwart testator's clear testamentary intent. The court rejected children's invitation to adopt Restatement Third of the Law Governing Lawyers § 51, which would eliminate the requirement that a third-party beneficiary demonstrate that the testator's clear intent was thwarted in order to proceed with a legal-malpractice claim, noting that it would significantly change Wisconsin's general rule of attorney non-liability to non-clients. MacLeish v. Boardman & Clark LLP, 924 N.W.2d 799, 805.

Wyo.

Wyo.2002. Cit. in sup. Divorced wife sued her attorney for malpractice, alleging that he did no meaningful work for her, gave bad advice that complicated her legal problems, pursued hopeless claims, and made false promises of success. Plaintiff sought damages for the emotional upheaval attending her eviction from ex-husband's home

and loss of child custody. Answering certified questions from the trial court, this court determined that damages for emotional suffering were not available in a legal malpractice case that alleged mere negligence. Long-Russell v. Hampe, 2002 WY 16, 39 P.3d 1015, 1020.

End of Document

Restatement (Third) of the Law Governing Lawyers § 53 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

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

§ 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 attorney-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 submission 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); Krahn 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 defaulted, 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); Keister 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).

Case Citations - by Jurisdiction

—

C.A.6,
C.A.8,
D.D.C.
S.D.Ind.
D.Kan.
D.Nev.
Ariz.
Ark.
Cal.
Cal.App.
Colo.App.

Ill.
Ill.App.
Iowa
Iowa,
Iowa
Iowa,
Ky.
Me.
Md.
Mo.
N.J.
N.J.Super.App.Div.
Ohio App.
S.C.App.
Tex.
Vt.
Wash.
Wash.App.
Wyo.

C.A.6,

C.A.6, 2019. Com. (b) cit. in conc. op. Employee sued employer, seeking damages for injuries he allegedly sustained at work. The district court dismissed employee's complaint as a sanction for his and his attorney's conduct in refusing to answer questions at a court-ordered independent medical examination. Affirming, this court held that the record supported a finding that employee and his attorney both acted in bad faith and willfully violated the court's discovery order. The concurring opinion stressed that misconduct by a party was not a precondition to dismissing a case as a sanction for misconduct by the party's lawyer, because parties became bound by the actions of lawyers taken on their behalf with actual or apparent authority, and noted that a party whose action was dismissed with prejudice based on his lawyer's misconduct would potentially be entitled to bring a claim for malpractice against the lawyer under Restatement Third of the Law Governing Lawyers § 53. Mager v. Wisconsin Central Ltd., 924 F.3d 831, 842.

C.A.8,

C.A.8, 2022. Cit. in case cit. in sup., cit. in diss. op.; com. (a) quot. in sup.; com. (b) cit. and quot. in sup. Former client brought a legal-malpractice claim against former counsel and law firm, alleging that plaintiff was entitled to corrective fees resulting from defendants' numerous discovery mistakes made during their representation of plaintiff in an underlying action. The district court granted defendants' motion for summary judgment. This court reversed and remanded, finding that, under state law, plaintiff was not required to demonstrate that it would have prevailed in the underlying litigation but for defendants' negligence. The court reasoned that plaintiff was entitled to damages so long as it could prove that defendants' negligence led to plaintiff paying fees, because, under Restatement Third of the Law Governing Lawyers § 53, malpractice claims were subject to generally applicable principles of causation and damages. The dissent argued that there was no authority indicating that the state supreme court would adopt § 53. Gerber Products Company v. Mitchell Williams Selig Gates & Woodyard, PLLC, 28 F.4th 870, 872-875.

D.D.C.

D.D.C.2022. Com. (e) quot. in sup. Client filed an action for legal malpractice against attorney whom it had hired to file an application on its behalf for a Class A low-power television license, after the Federal Communications Commission denied the application on the ground that it was incomplete. This court denied attorney's motion seeking a declaration that Georgia law applied, holding that District of Columbia law governed the measure of client's alleged lost asset value damages. The court explained that lost asset value was an appropriate measure of damages attributable to attorney's malpractice under general malpractice principles, noting that, under Restatement Third of the Law Governing Lawyers § 53, generally applicable principles of causation and damages applied in malpractice actions arising out of a non-litigated matter. Atlanta Channel, Inc. v. Solomon, 583 F.Supp.3d 174, 199.

S.D.Ind.

S.D.Ind.2014. Com. (b) cit. and quot. in disc. but not fol. Law firm sued former clients, seeking to recover unpaid attorney's fees stemming from firm's representation of clients in an underlying action; clients counterclaimed for legal malpractice. This court granted summary judgment for law firm on clients' malpractice claim, holding that clients were not entitled to prove causation simply by showing that firm's negligence caused them to lose a chance to assert a claim in the underlying action or by showing that firm's negligence in failing to assert the claim made it more difficult for them to prove causation. The court noted that clients' alternative theories of causation were drawn from Restatement Third of the Law Governing Lawyers § 53, which had not been adopted or cited by any Indiana courts. Price Waicukauski & Riley, LLC v. Murray, 47 F.Supp.3d 810, 819-820, 823, 824.

D.Kan.

D.Kan.2014. Com. (b) cit. and quot. in sup. Former clients sued attorney who represented them and others in 240 underlying actions against drug companies, alleging that attorney committed negligence, fraud, and breach of fiduciary duty during the settlement of the actions by, among other things, failing to make adequate disclosures to clients. This court granted clients' motion seeking a ruling that there was no requirement under Missouri law that they try the issues of their underlying actions to a jury (or provide proof by the trial-within-a-trial method) in order to prove the elements of causation and damages from attorney's alleged misconduct. The court cited Restatement Third of the Law Governing Lawyers § 53 in reasoning that the result of a trial within a trial would provide an estimation of judgment value that was of limited utility in deciding the issues raised by clients, namely, the settlement value of the underlying actions, whether attorney's conduct caused a loss of settlement value to clients, and what kind of settlement the drug companies would have entered. Booth v. Davis, 57 F.Supp.3d 1319, 1322.

D.Nev.

D.Nev.2003. Subsec. (i) cit. and quot. in sup. Attorney sued former clients for unpaid attorney fees allegedly owed under contingent-fee agreement. After clients counterclaimed, alleging malpractice and breach of fiduciary duty, plaintiff filed third-party claim against client's current attorneys, seeking indemnity or contribution for any damage resulting from current attorneys' malpractice. Granting current attorneys' motion to dismiss, this court held that plaintiff could not file third-party complaint for contribution or indemnity against current attorneys in malpractice action where current attorneys had no duty to mitigate plaintiff's malpractice liability, did not breach specific duty of professional practice, and did not exacerbate damages allegedly caused by plaintiff's malpractice. Mirch v. Frank, 295 F.Supp.2d 1180, 1185.

Ariz.

Ariz.2004. Com. (d) quot. in sup., quot. in ftn. Client convicted in criminal matter sued his attorney; trial court dismissed based on statute of limitations. Appellate court reversed, and attorney petitioned for review. Vacating and remanding, this court held, in a matter of first impression, that cause of action for legal malpractice in criminal

case did not accrue, and statute of limitations did not begin to run, until criminal conviction was set aside in post-conviction proceedings. Glaze v. Larsen, 207 Ariz. 26, 83 P.3d 26, 31, 32.

Ark.

Ark.2003. Rptr's Note cit. in disc. Insurance companies brought legal-malpractice action against attorney, alleging that defendant failed to perfect an appeal in a negligence lawsuit against an insured. The trial court granted defendant's motion for summary judgment. Reversing, this court held, inter alia, that, although the trial court was correct to dispose of this matter through the vehicle of summary judgment, it erred in concluding that the court of appeals would have affirmed the judgment against insured, and that defendant's failure to perfect the appeal was not the proximate cause of plaintiffs' damages. The court remanded for a determination of what, if any, damages plaintiffs incurred as a result of defendant's malpractice. Southern Farm Bureau Casualty Ins. Co. v. Daggett, 354 Ark. 112, 118 S.W.3d 525, 529.

Cal.

Cal.2003. Com. (h) quot. in sup. In mass tort suit, class counsel stipulated to certification of a mandatory, non-opt-out class with respect to punitive damages. To settle suit, class counsel agreed to dismiss punitive-damages class claims with prejudice. Despite objections from some class members, trial court dismissed punitive damages claims and approved settlement. Two objectors sued law firm and its attorneys for punitive damages they allegedly would have recovered but for counsel's negligence, alleging legal malpractice. Trial court entered judgment for defendants, and appellate court affirmed. This court affirmed, holding that plaintiffs in a legal-malpractice suit could not recover as compensatory damages the punitive damages they allegedly lost due to their attorneys' negligence in underlying suit, since lost punitive damages were too speculative. Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 30 Cal.4th 1037, 135 Cal.Rptr.2d 46, 54, 69 P.3d 965, 972.

Cal.App.

Cal.App.2008. Com. (g) cit. in sup. Former prisoner whose felony convictions were vacated after police officers admitted to testifying falsely against him sued county and deputy public defender that represented him for legal malpractice. After a jury awarded substantial damages, the trial court granted defendants a new trial, finding that the jury's failure to apportion any fault to officers was against the weight of the evidence. This court affirmed, holding, inter alia, that a legal-malpractice action seeking primarily noneconomic damages for emotional distress and physical pain was an "action for personal injury" requiring the apportionment of fault under California law. The court noted that, in a criminal case, the primary interest at stake in the defendant's legal representation was the defendant's liberty, and an emotional injury resulting from the incarceration of an innocent defendant was plainly foreseeable. Ovando v. County of Los Angeles, 159 Cal.App.4th 42, 73, 71 Cal.Rptr.3d 415, 440.

Cal.App.1997. Com. (b) cit. in disc. (citing § 75, T.D. No. 7, 1994, which is now § 53). A subcontractor, whose federal civil rights action was voluntarily dismissed after the federal district court ordered the imposition of sanctions against it for document fabrication, brought a malpractice suit against the accounting firm it had hired to provide litigation support. On remand, the trial court entered judgment on a jury verdict awarding the subcontractor damages. Reversing in part and affirming in part, this court held, inter alia, that the trial court erred in ruling that the subcontractor was not required to establish that, absent the accounting firm's negligence, the subcontractor would have prevailed in the underlying case. Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal.App.4th 820, 60 Cal.Rptr.2d 780, 788.

Colo.App.

Colo.App.2017. Cit. in conc. and diss. op.; com. (b) quot. but not fol., quot. in conc. and diss. op. Client brought an action for legal malpractice against attorney in connection with his representation of her in a potential claim for medical malpractice against her physician. The trial court entered judgment on a jury verdict finding that physician was negligent, and that client was entitled to an award of damages from attorney. This court reversed and remanded, holding that there was no evidence as to whether any potential judgment in an underlying medical-malpractice action against physician would have been collectible, as required under Colorado law for client to prevail against attorney in her legal-malpractice action. The court noted that, in any trial on remand, attorney had to raise the issue of whether the judgment would have been collectible as an affirmative defense, and that attorney bore the burden of proving that the debt was not collectible. The concurring and dissenting opinion argued that, under Restatement Third of the Law Governing Lawyers § 53, client had the burden of persuading the jury as to the collectability of the judgment. Gallegos v. LeHouillier, 434 P.3d 698, 707, 712, 713.

Colo.App.2015. Coms. (b) and (e) quot. in sup. Real-estate developer sued law firm that formerly represented it, alleging that law firm gave it incorrect advice regarding its insurance, such that it incurred extensive losses by continuing to litigate certain claims for which there was no coverage. The trial court entered judgment on a jury verdict for developer. Affirming in part, this court held that developer was entitled to fees and expenses that it would not have incurred but for law firm's negligence. The court rejected law firm's argument that developer was required to prove that the underlying case or transaction otherwise would have turned out more favorably to it, explaining that, when, as here, the injury claimed did not depend on the merits of the underlying action or matter, a client did not need to prove a case within a case; rather, under Restatement Third of the Law Governing Lawyers § 53, the client had to prove that the attorney's negligence caused the client to suffer financial loss or harm under the generally applicable test for cause-in-fact in negligence actions, namely, that the client would not have suffered the harm but for the attorney's negligence. Boulders at Escalante LLC v. Otten Johnson Robinson Neff and Ragonetti PC, 412 P.3d 751, 761.

Ill.

Ill.2006. Com. (h) quot. in sup. Former client brought malpractice action against law firm for negligently prosecuting client's action against a bank. The trial court entered judgment on a jury verdict against defendant, awarding plaintiff both compensatory and punitive damages that it would have received from bank. The appellate court, inter alia, affirmed the award of lost punitive damages. Reversing that portion of the decision, this court held, as a matter of first impression, that lost punitive damages were not recoverable in a subsequent action for legal malpractice. The court reasoned that holding defendant liable for the intentional or willful and wanton misconduct of a third-party would not advance, and was not consonant with, the purpose of punitive damages—to punish the offender and to deter it and others from committing similar acts of wrongdoing in the future. Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill.2d 218, 305 Ill.Dec. 584, 856 N.E.2d 389, 416.

Ill.App.

Ill.App.2016. Com. (b) cit. in sup. Former client brought an action for legal malpractice against attorneys and law firm that represented her in an underlying action, alleging that defendants failed to argue in the underlying action that she could not be liable for attorney's fees because the fees were assessed for violation of a statute that she was never found to have violated. The trial court granted summary judgment for plaintiff. Reversing in part and remanding, this court held that, although plaintiff showed that the trial court should have ruled in her favor if defendants had made the specific objection at issue, she failed to present any evidence concerning the standard of care or evidence that the representation provided by defendants fell below that standard. The court noted that, under Restatement Third of the Law Governing Lawyers § 53, the objective in a legal-malpractice case was to consider what the result should have been, not what the particular underlying trial court would have done. Fox v. Seiden, 53 N.E.3d 1005, 1012.

Ill.App.2013. Com. (b) quot. in sup. Client brought a legal-malpractice action against law firm that had represented him in an underlying action concerning the terms of a stock-purchase agreement, alleging, among other things,

that firm had been negligent in failing to argue that the agreement was ambiguous. The trial court dismissed, finding, as a matter of law, that firm's actions constituted nonactionable errors of judgment, and not professional negligence. Reversing and remanding, this court held that it could not be said, as a matter of law, that client could prove no set of facts from which a jury could find that firm's negligence in failing to raise the additional available arguments was the proximate cause of client's damages. The court noted that the test for establishing causation in a legal-malpractice action was not what the specific judge in the underlying action would have done had a different argument been made; rather, the test was objective and the question was what a reasonable judge would have done. Nelson v. Quarles and Brady, LLP, 2013 IL App (1st) 123122, 997 N.E.2d 872, 895.

Ill.App.2007. Com. (b) quot. in sup. Guardian of minor's estate brought a legal-malpractice action against lawyer and law firm that unsuccessfully represented estate in underlying medical-malpractice action to recover damages for injuries minor suffered at birth, alleging that defendants failed to inform guardian of a $1 million settlement offer in the medical-malpractice case. The trial court entered judgment on a jury verdict awarding plaintiff $1 million. Affirming, this court held, as a matter of first impression, that the issue of whether the trial court in the underlying medical-malpractice case would have approved the settlement was not a question of fact for the jury but a question of law to be decided by the trial court in the legal-malpractice action; in the absence of such a ruling by that court, this court concluded, as a matter of law, that the trial court in the medical-malpractice action would have approved the settlement. First Nat. Bank of LaGrange v. Lowrey, 375 Ill.App.3d 181, 313 Ill.Dec. 464, 872 N.E.2d 447, 469.

Iowa

Iowa, 2021. Quot. in sup., cit. in case quot. in ftn. After elementary-school counselor successfully overturned his conviction for second-degree sexual abuse of a fifth-grade student in post-conviction-relief proceedings based in part on the ineffective assistance of his public defender, counselor filed a legal-malpractice claim against the state as the employer of his public defender. The trial court granted partial summary judgment for counselor. This court reversed and remanded on interlocutory appeal, holding that counselor could not use his ineffective-assistance-of-counsel claim to preclusively establish the breach element of his malpractice claim. The court cited Restatement Third of the Law Governing Lawyers § 53 in reasoning that an ineffective-assistance claim was between a criminal defendant and the state acting in its capacity as prosecutor, and thus issue preclusion did not apply as against a public defender who was not a party to the post-conviction-relief action. Clark v. State, 955 N.W.2d 459, 467.

Iowa,

Iowa, 2018. Adopted, cit. and quot. in sup., cit. in case cit. in sup.; com. (d) quot. in sup.; Rptr's Note cit. in sup. Convicted criminal brought a legal-malpractice action against defense attorney who had represented him in an appeal of a guilty plea, alleging that attorney had failed to ensure his discharge from supervised probation, which resulted in additional prison time when he violated a condition of his probation. The trial court granted summary judgment for attorney. The court of appeals reversed. Affirming the court of appeals, this court relied on Restatement Third of the Law Governing Lawyers § 53 in holding that a criminal defendant bringing a malpractice action over a sentencing issue against his attorney was not required to prove actual innocence before bringing the malpractice claim. The court explained that a criminal defendant had to have obtained post-conviction sentencing relief before suing his attorney and that, in this case, criminal had demonstrated sufficient relief from the alleged sentencing error to avoid summary judgment. Kraklio v. Simmons, 909 N.W.2d 427, 429, 438, 439, 441.

Iowa

Iowa, 2016. Com. (d) quot. in sup. and in diss. op. Client who was imprisoned for solicitation of a minor to engage in a sex act before obtaining postconviction relief filed a legal-malpractice claim against attorneys who represented him during the criminal proceedings, alleging that defendants improperly advised him to plead guilty to an offense for which there was no factual basis. The trial court granted summary judgment for defendants,

finding that plaintiff could not establish that he was innocent in the underlying criminal case. Reversing and remanding, this court adopted the minority view set forth in Restatement Third of the Law Governing Lawyers §§ 53 and 54 in holding that proof of actual innocence was not a prerequisite to recovery for legal malpractice against criminal-defense attorneys, but rather, one factor to be taken into account in determining whether the elements of such a claim had been established. The dissent argued that the Restatement's approach was not persuasive, and that a reasonable threshold showing of actual innocence should be a prerequisite to bringing a criminal malpractice claim. Barker v. Capotosto, 875 N.W.2d 157, 165, 166.

Iowa,

Iowa, 2013. Cit. in sup., com. (c) quot. in sup. Former client brought a legal-malpractice action against attorney, alleging that attorney had negligently represented her in her personal-injury suit against state and a volunteer driver for a state agency. The district court entered judgment on a jury verdict for client, and denied attorney's posttrial motion to offset the verdict by the amount of the contingent fee he would have taken had the underlying tort action been successful or, alternatively, the reasonable value of his legal services. Affirming the district court's ruling denying attorney's posttrial motion, this court held, as a matter of first impression, that the damages awarded by the jury to client in her legal-malpractice suit could not be reduced by attorney's contingent fee, because attorney never earned the fee, and client had to pay new counsel who prosecuted the malpractice action. The court reasoned that, to allow attorney a setoff for his contingent fee would leave client less than whole once she paid the fees of the counsel who won her recovery, and thus a fee setoff conflicted with Iowa cases providing that a plaintiff was to be made whole. Hook v. Trevino, 839 N.W.2d 434, 437, 446.

Iowa, 2013. Com. (g) cit. and quot. in ftn. to diss. op. Ecuadorian clients sued attorney for legal malpractice after their I-601 applications for permission to enter the United States were denied and they were barred from readmission to the country for 10 years. The trial court granted attorney's motion for a directed verdict on clients' claims for emotional-distress damages. The court of appeals reversed that portion of the decision and remanded. Affirming, this court held that clients' claim for emotional-distress damages was viable, because an attorney-client relationship in the immigration context was the type of relationship in which negligent conduct was especially likely to cause severe emotional distress. The dissent argued that there were sound policy reasons against opening the door wider to claims for negligently caused pure emotional harm, even when it was foreseeable, including avoiding fictitious or trivial claims, the difficulty of establishing or disproving the nature and extent of the alleged mental injury, and limiting liability. Miranda v. Said, 836 N.W.2d 8, 39.

Ky.

Ky.2012. Com. (b) quot. in sup. and cit. in ftn. Client brought a legal-malpractice action against attorney, alleging that attorney failed to file, before the applicable statute of limitations expired, a negligence suit on her behalf against pilot who crashed his airplane into her home. The trial court entered judgment on a jury verdict for plaintiff. The court of appeals affirmed in part. Reversing and remanding, this court held that the trial court committed prejudicial error by improperly instructing the jury as to the suit-within-a-suit method for litigating legal-malpractice claims under Kentucky law. While the trial court properly instructed the jury on the standard for legal malpractice to be applied to attorney, it failed to instruct the jury at all on the underlying negligence case against pilot; thus, lacking a jury determination as to whether pilot was negligent, client failed to establish that attorney's malpractice proximately caused her loss. Osborne v. Keeney, 399 S.W.3d 1, 10.

Me.

Me.2009. Com. (g) cit. in sup. Clients brought legal-malpractice action against attorney in connection with his representation of them in a land dispute against their neighbor. The trial court entered judgment on a jury verdict for husband plaintiff on his claim for emotional distress arising from the malpractice. Vacating that portion of the decision, this court held, inter alia, that plaintiffs were not entitled to emotional-distress damages because

plaintiffs suffered only an economic loss as a result of attorney's negligence, and attorney did not act egregiously. The general rule was that emotional-distress damages were not recoverable in legal-malpractice cases when the only injury was economic, except where the tort was intentional, because of the unforeseeability of emotional-distress damages flowing from an economic loss. Garland v. Roy, 2009 ME 86, 976 A.2d 940, 948.

Md.

Md.2010. Cit. in sup., com. (b) cit. and quot. in sup. Client sued law firm, alleging that it committed legal malpractice when it missed the deadline to request a fifth extension of time to file her request to elect her statutory share of her late husband's estate. After the trial court granted summary judgment for client, the court of special appeals reversed and remanded for entry of judgment in favor of law firm. While reversing and remanding for a trial on the merits, this court agreed with law firm that the trial-within-a-trial doctrine applied, under which the factfinder was to determine what would have occurred absent law firm's malpractice, because law firm disputed causation. The court concluded that, although the underlying case had already been litigated and client's opponent had in fact challenged the untimely request for a fifth extension, firm was not precluded from arguing that, had it timely filed for the fifth extension, opponent would have in any event successfully challenged an allegedly invalid original extension granted to client when proceeding pro se. Suder v. Whiteford, Taylor & Preston, LLP, 413 Md. 230, 992 A.2d 413, 419-422.

Mo.

Mo.2014. Com. (b) cit. in sup. Client brought a malpractice action against law firm that represented him in a dispute with his former employer over his stock options, alleging, among other things, that firm negligently failed to advise him to exercise his stock options immediately after employer merged with another company. The trial court granted summary judgment for firm. Affirming, this court held that client failed to prove that firm's alleged negligence caused his claimed damages. The court pointed out that client sought to recover solely for the decline in the stock's value, which was caused entirely by the market, and concluded, as a matter of law, that the risk of a decline in stock price was not a reasonable or probable consequence of firm's alleged negligence. Nail v. Husch Blackwell Sanders, LLP, 436 S.W.3d 556, 562.

N.J.

N.J.2020. Cit. in sup.; com. (g) cit. in sup. Individual who was wrongfully convicted of sexual assault and imprisoned for over twelve years filed a claim for legal malpractice against state office of the public defender and public defender assigned to his case, after he obtained post-conviction relief on grounds of ineffective assistance of counsel and the indictment against him was dismissed based on DNA evidence confirming that he was not the perpetrator. The trial court denied defendants' motion for summary judgment. The court of appeals reversed on interlocutory appeal. Affirming, this court held, among other things, that plaintiff's claim for loss-of-liberty damages fell within the subset of emotional-distress damages that were potentially recoverable in an attorney-malpractice case, and that plaintiff had to satisfy the Tort Claims Act's requirements for a pain-and-suffering award. The court noted that, while Restatement Third of the Law Governing Lawyers § 53 recognized that a lawyer was potentially subject to emotional-distress damages in an action for legal malpractice, such damages were controlled under the Tort Claims Act through its limitations on the recovery of a pain-and-suffering award. Nieves v. Office of the Public Defender, 230 A.3d 227, 237.

N.J.Super.App.Div.

N.J.Super.App.Div.2014. Com. (g) quot. in disc. Father, individually and on behalf of his daughter, brought a legal-malpractice action against mother's attorney and attorney's law firm, alleging that, during parents' child-custody dispute, defendants improperly released daughter's U.S. passport to mother in violation of parents'

agreement that the passport be held in trust, and that mother soon afterward took daughter out of the country beyond father's reach. The trial court entered judgment on a jury verdict for father. This court affirmed the award of emotional-distress damages to father, holding, inter alia, that, while such damages were generally unavailable in a legal-malpractice case absent "egregious" and "extraordinary" circumstances, father's harm was personal in nature and emanated from the fundamental relationship between parent and child, and thus was sufficiently egregious and extraordinary to warrant an award of emotional-distress damages. The court noted that, according to Restatement Third of the Law Governing Lawyers § 53, Comment *g*, emotional-distress damages were inappropriate in types of cases in which emotional distress was unforeseeable, for instance, where a plaintiff's loss was purely pecuniary. Innes v. Marzano-Lesnevich, 435 N.J.Super. 198, 87 A.3d 775, 795.

Ohio App.

Ohio App.2021. Com. (b) quot. in case quot. in sup. Client filed an action for legal malpractice against attorney who represented it in an underlying action filed against it by a creditor, alleging that, although it owed the creditor $1,186, the creditor managed to obtain summary judgment against it in the amount of $40,279.37 due to attorney's negligence. After a bench trial, the trial court ruled in favor of attorney, finding that there was no causal connection between attorney's negligence and the amount of the judgment. This court reversed and remanded with instructions for the trial court to determine whether there was "some evidence of the merits of the underlying claim" as required to show causation. The court noted that the Ohio Supreme Court had rejected the mandatory application of the case-within-a-case doctrine described in Restatement Third of the Law Governing Lawyers § 53. R & J Solutions, Inc. v. Moses, 171 N.E.3d 478, 486.

Ohio App.2017. Com. (b) quot. in disc. Former clients sued attorney and law firm that represented them in an underlying suit for breach of fiduciary against a bank and its employees, alleging, among other things, that defendants' legal malpractice diminished the value of their case. The trial court granted summary judgment for defendants on plaintiffs' malpractice claim. Affirming that portion of the decision, this court held that plaintiffs failed to present qualified expert testimony in order to show causation under the case-within-a-case doctrine, which required the issues that would have been litigated in the underlying action to be litigated between the client and the client's former lawyer, with the client bearing the same burden that the client would have borne in the original trial. In making its decision, the court noted that, under Restatement Third of the Law Governing Lawyers § 53, the trier of fact could consider whether a lawyer's misconduct made it more difficult for a client to prove what the result would have been in the original trial. Pipino v. Norman, 101 N.E.3d 597, 614.

Ohio App.2012. Com. (b) quot. in case quot. in sup. Corporate client brought a legal-malpractice suit against law firm that represented it in an administrative-expense claim against a debtor in an underlying bankruptcy proceeding, alleging that discovery sanctions levied against it by the bankruptcy court because of defendant's failure to respond to debtor's discovery requests proximately caused it to lose its claim against debtor's estate. On remand, the trial court granted summary judgment for defendant. While reversing and remanding on other grounds, this court held that plaintiff was collaterally estopped from asserting that defendant's negligence in the bankruptcy proceeding had proximately caused the loss of its administrative-expense claim. The court reasoned that the bankruptcy court, in denying plaintiff's claim, had found that plaintiff failed to meet its burden of proving that the administrative expense it claimed was an actual, necessary cost and expense of preserving the estate, and thus plaintiff had obtained a full and fair adjudication of its administrative-expense claim for collateral-estoppel purposes despite the discovery sanctions. C & K Indus. Serv. v. McIntyre, Kahn & Kruse Co., L.P.A., 2012-Ohio-5177, 984 N.E.2d 45, 50.

S.C.App.

S.C.App.2014. Com. (b) quot. in ftn. After client's personal-injury action against driver who injured her in a motor vehicle accident was dismissed for failure to prosecute, client brought a claim for legal malpractice against lawyer who represented her in that action. The trial court granted a partial directed verdict for client and entered judgment on a jury verdict in her favor. Affirming, this court held that the trial court correctly granted a partial

directed verdict for client because, among other things, lawyer proximately caused at least some of her damages and it was not reasonably possible that the jury would return a verdict for lawyer. The court rejected lawyer's argument that client was not entitled to a directed verdict on proximate cause because there was disputed evidence regarding whether client could collect a judgment against driver, reasoning that, even if South Carolina courts were to recognize a collectability requirement under Restatement Third of the Law Governing Lawyers § 53, Comment *b*, lawyer failed to prove that a judgment against driver would have been uncollectible. Tuten v. Joel, 763 S.E.2d 54, 61.

Tex.

Tex.1999. Com. (g) cit. in disc. (citing § 75, T.D. No. 8, 1997, which is now § 53). Husband and wife sued former attorneys for legal malpractice arising out of representation in a business dispute. The trial court directed a verdict for defendants on wife's claims. The court of appeals reversed in part. Reversing in part and rendering judgment that wife take nothing, this court held, in part, that wife could not recover mental-anguish damages as part of her legal-malpractice claim because those damages arose as a consequence of her economic loss. Douglas v. Delp, 987 S.W.2d 879, 885.

Vt.

Vt.2013. Com. (b) quot. in sup., com. (g) quot. in disc. Elderly former client brought a legal-malpractice suit against attorney who represented him in an underlying specific-performance action brought against him by buyers of his home after client refused to go through with the sale, alleging that attorney failed to timely plead meritorious defenses of fraud and misrepresentation, and failed to advise him to accept a pre-suit settlement to rescind the contract of sale for a $15,000 payment to buyers, ultimately resulting in a settlement in which client paid buyers $103,000 to keep his house. The trial court entered judgment on a jury verdict awarding client economic and emotional-distress damages. Affirming in part and reversing in part, this court held that, while emotional-distress damages were not available to client in this legal-malpractice case, because the threatened loss of his home was not of such a personal and emotional nature that it would support an exception to the general rule disallowing recovery of emotional-distress damages in the absence of physical impact, client was entitled to economic damages, because he presented prima facie evidence that the ultimate settlement, though out of sync with the actual market value of the house, was reasonable. The court concluded that the jury could reasonably have determined that a settlement agreement negotiated at arm's length over a period of time between client's new lawyer and opposing counsel, approved by client's guardians, and reviewed and approved by the probate court was reasonable. Vincent v. DeVries, 2013 VT 34, 72 A.3d 886, 895, 898.

Wash.

Wash.2014. Com. (f) quot. in sup., com. (g) quot. in sup. and cit. in diss. op. Client brought negligence and contract claims against lawyer who represented her in a slip-and-fall action, after he named the wrong defendant in the complaint he filed on her behalf and it was later dismissed as barred by the statute of limitations. The trial court denied client's motion to add a claim against lawyer for outrage/reckless infliction of emotional distress, and entered judgment on a jury verdict in favor of client. The court of appeals reversed in part on other grounds. This court, relying on Restatement Third of the Law Governing Lawyers § 53, held that the trial court properly denied emotional-distress damages. The dissent argued that such damages should be allowed in legal-malpractice actions, if proven. Schmidt v. Coogan, 335 P.3d 424, 431, 434, 438.

Wash.2010. Adopted in case quot. in sup., com. (c) quot. in sup. and cit. in ftn. Clients sued former attorney for legal malpractice and breach of fiduciary duty, seeking interest on a settlement payment they would have received approximately 10 years earlier had he not mishandled their case. After attorney admitted liability, the trial court awarded interest calculated on a figure representing the settlement less attorney's contingency fee. The court of appeals reversed, ruling that the interest should have been calculated on the total amount of the settlement, not

the amount clients would have recovered after paying a contingency fee. Affirming, this court held that a legal malpractice plaintiff's damages could appropriately include forfeiture of the attorney's hypothetical contingency fee, reasoning that such a plaintiff should not be burdened with the obligation to pay twice for the same services. In addition, the court noted the rationale that a negligent lawyer should not be "credited" with a fee that he never earned. Shoemake ex rel. Guardian v. Ferrer, 168 Wash.2d 193, 225 P.3d 990, 993, 994.

Wash.App.

Wash.App.2008. Quot. in ftn., com. (c) cit. and quot. in sup. Former clients brought a legal-malpractice action against attorney who had represented them in a personal-injury case. After defendant admitted liability, the trial court awarded plaintiffs damages, reduced by the 40% contingent fee defendant would have recovered had he not been negligent. Reversing, this court held, as a matter of first impression, that a negligent attorney was not entitled to have the damages awarded to a successful malpractice plaintiff reduced by the amount stated in the negligent attorney's contingent-fee contract. The court reasoned that such an outcome would not put an injured plaintiff in the position she would have occupied in the absence of negligence, since, in almost all cases, she would be required to pay a second attorney to prosecute the malpractice action. Shoemake v. Ferrer, 143 Wash.App. 819, 182 P.3d 992, 996-997.

Wyo.

Wyo.2002. Cit. in sup., com. (g) cit. in sup. Divorced wife sued her attorney for malpractice, alleging that he did no meaningful work for her, gave bad advice that complicated her legal problems, pursued hopeless claims, and made false promises of success. Plaintiff sought damages for the emotional upheaval attending her eviction from ex-husband's home and loss of child custody. Answering certified questions from the trial court, this court determined that damages for emotional suffering were not available in a legal malpractice case that alleged mere negligence. Long-Russell v. Hampe, 2002 WY 16, 39 P.3d 1015, 1020.

Restatement (Third) of the Law Governing Lawyers § 54 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

§ 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 (see 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 to 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 to 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.

Case Citations - by Jurisdiction

—

N.D.Cal.
Iowa
Iowa,
Mass.
Tex.

N.D.Cal.

N.D.Cal.2013. Quot. in sup. Former client brought a legal-malpractice action against attorney, asserting, inter alia, claims for professional negligence and breach of fiduciary duty arising from attorney's alleged misappropriation of settlement funds that belonged to him. Granting client's motion for partial summary judgment, this court held that, by deriving her 40% fee from the total settlement amount, and collecting her fee in full from the installment payments that were only partially made by the defendant in the underlying case before distributing any settlement proceeds to client, attorney unlawfully misappropriated funds to which client was entitled, in breach of her fiduciary duty and duty of loyalty to him, and in breach of the tort law duty that she owed him as his attorney. The court rejected attorney's argument that she was not liable because her actions were taken in good faith, concluding that, based on the well-established objective negligence standard, rather than on attorney's subjective state of mind, attorney's conduct was unreasonable as a matter of law. Knight v. Aqui, 966 F.Supp.2d 989, 1000.

Iowa

Iowa, 2016. Com. (d) quot. in sup. Client who was imprisoned for solicitation of a minor to engage in a sex act before obtaining postconviction relief filed a legal-malpractice claim against attorneys who represented him during the criminal proceedings, alleging that defendants improperly advised him to plead guilty to an offense for which there was no factual basis. The trial court granted summary judgment for defendants, finding that plaintiff could not establish that he was innocent in the underlying criminal case. Reversing and remanding, this court

adopted the minority view set forth in Restatement Third of the Law Governing Lawyers §§ 53 and 54 in holding that proof of actual innocence was not a prerequisite to recovery for legal malpractice against criminal-defense attorneys, but rather, one factor to be taken into account in determining whether the elements of such a claim had been established. The court pointed out that a legal-malpractice plaintiff in the criminal context already had to prove both that the defendant lawyer failed to act properly and that, but for that failure, the result would have been different. Barker v. Capotosto, 875 N.W.2d 157, 167.

Iowa,

Iowa, 2015. Com. (g) cit. and quot. in sup. Seller filed a legal-malpractice claim against, among others, attorney who had represented him during a sale of property, alleging that attorney negligently prepared a warranty deed by failing to provide for perfection of a security interest securing seller's interest in the property, and, consequently, when buyer stopped making payments and declared bankruptcy, seller was left with unsecured, fully dischargeable claims. The trial court granted summary judgment for defendant. Reversing and remanding, this court held that plaintiff's claim was not time barred, because the statute of limitations did not begin running when plaintiff signed the deed or when the deed was recorded. Quoting Restatement Third of The Law Governing Lawyers § 54, Comment *g*, the court explained that the statute of limitations did not start to run on the malpractice claim until plaintiff was actually injured, reasoning that plaintiff's injury was merely speculative until buyer stopped making payments. Vossoughi v. Polaschek, 859 N.W.2d 643, 652.

Mass.

Mass.1998. Com. (d) cit. in disc. (citing § 76, T.D. No. 8, 1997, which is now § 54). A woman who sustained losses in real estate investments sued her banker and her lawyer for negligence. Trial court entered judgment on jury verdict for defendants. This court affirmed, holding, inter alia, that because plaintiff's contributory negligence exceeded that of the lawyer, the trial court properly entered judgment for the lawyer on the malpractice claim, even though Massachusetts' comparative negligence statute did not apply to an action based on a claim of financial loss caused by a lawyer's negligence. Clark v. Rowe, 428 Mass. 339, 701 N.E.2d 624, 628.

Tex.

Tex.2015. Com. (b) quot. in ftn. to conc. op. After client filed an action against law firm that had previously represented him in divorce proceedings, defendant moved to compel arbitration based on a provision in the parties' attorney-client employment contract. The trial court denied defendant's motion to compel arbitration; the court of appeals affirmed. Reversing and remanding, this court held that the arbitration provision was enforceable because it was supported by sufficient consideration. Citing Restatement Third of the Law Governing Lawyers § 54, Comment *b*, the concurring opinion noted that arbitration agreements between lawyers and clients were not impermissible if the client received proper notice of the scope and effect of the agreement. Royston, Rayzor, Vickery, & Williams, LLP v. Lopez, 467 S.W.3d 494, 507.

Restatement (Third) of the Law Governing Lawyers 4 2 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

Topic 2. Other Civil Liability

Introductory Note

Introductory Note: In addition to the liabilities discussed in Topic 1 for negligent failure to fulfill their duties as lawyers and for breach of fiduciary duty, lawyers are subject to other civil liabilities and in general to the obligations of general law. This Topic does not catalogue all such other potential liabilities. Rather, it describes certain special liabilities of lawyers and sets forth the applicability of general law to lawyers, covering certain applications of that law most noteworthy in the circumstances of legal practice.

Restatement (Third) of the Law Governing Lawyers § 55 (2000)

§ 55 Civil Remedies of a Client Other Than for Malpractice

(1) A lawyer is subject to liability to a client for injury caused by breach of contract in the circumstances and to the extent provided by contract law.
(2) A client is entitled to restitutionary, injunctive, or declaratory remedies against a lawyer in the circumstances and to the extent provided by generally applicable law governing such remedies.

Comment:

a. *Scope and cross-references.* This Section considers certain civil remedies that clients (or former clients with claims arising from a representation) may obtain against lawyers. It does not consider remedies for malpractice, which are set forth in §§ 48- 54. Nor does it consider client remedies for conversion, fraudulent misrepresentation, intentional infliction of emotional distress, violation of consumer-protection statutes, and other actionable conduct falling under § 56. Other Chapters of this Restatement consider remedies such as professional discipline (see § 5), a client's remedies against a lawyer who acts without authority (see § 27, Comment *f*), fee forfeiture and reduction (see §§ 34, 37, & 39), litigation sanctions (see § 110), disqualification (see § 6, Comment *i*), and criminal sanctions (see §§ 8 & 30(1)). On a client's obligations to a lawyer, see § 17.

Because rules applied to actions under §§ 48- 54 grow out of the special requirements of the client-lawyer relationship, many of them apply also to claims under this Section. Such rules include, where appropriate, § 50, Comment *e* (lawful client objectives) and § 54, Comment *g* (action or inaction required by law or client instruction). The provisions of § 54(2), (3), and (4) concerning prospective limitation of lawyer liability to clients and settlements of claims by clients or former clients against lawyers apply to claims under this Section, with the

exception of settlement of attorney-fee disputes as noted in § 54, Comment *c*. Here and in § 56, lawyers are said to be "subject to liability" rather than to be liable because their liability is subject to such other law as causation and damages requirements and defenses. See Restatement Second, Torts § 5.

b. *Rationale.* The rationale for liability based on a lawyer's negligence set forth in § 48, Comment *b* is generally applicable to this Section. The usual rationales for contract liability and restitutionary, injunctive, and declaratory relief apply respectively to the provisions of this Section considering liability for those remedies (see § 16, Comments *b* & *f*).

c. *Contract claims.* A client's claims for legal malpractice, as considered in §§ 48- 54, can be considered either as tort claims for negligence or breach of fiduciary duty or as contract claims for breach of implied terms in a client-lawyer agreement. Ordinarily, a plaintiff may cast a legal-malpractice claim as a tort claim, a contract claim, or both and often also as a claim for breach of fiduciary duty. The law set forth in §§ 48- 54 governs all three kinds of claim. The choice of theory may, however, affect what statute of limitations applies and in some jurisdictions may affect other issues (see § 48, Comment *c*, & § 49, Comments *c*, *d,* & *e*). A client may also assert against a lawyer contractual claims that likewise could be asserted as tort claims or claims of fiduciary breach and are subject to §§ 48- 54, such as claims that a lawyer disobeyed the client's valid instruction or an agreement concerning what the lawyer would do (see § 21(1) & (2)).

Other contract claims that a client may assert against a lawyer are more readily distinguishable from claims that the lawyer failed to use the care required by §§ 50 and 52 or violated fiduciary duties. A client may assert a claim under a client-lawyer fee agreement, for example that the lawyer has failed to return unearned fees out of an advance payment (see §§ 18, 38, & 42). A client whose lawyer also served as escrow agent may assert a claim for breach of the escrow agreement (see § 48, Comment *d*). Such claims should ordinarily be treated as contract claims, although if possible they should not be dismissed for mislabeling in the pleadings and although the circumstances giving rise to them might also support claims under §§ 48- 54 or other law.

A lawyer who warrants to a client that the lawyer will accomplish a specifically described result for the client, knowing that the result has material importance to the client, owes the client a contractual duty to fulfill that warranty. However, a finding of such a warranty may not be based on proof consisting only of general statements of the lawyer expressing an expectation of favorable results. Likewise, such a finding may not be made, absent an unequivocal promise by the lawyer, when it should have been reasonably clear to the client that the result in question depended on factors other than the lawyer's efforts, for example on the actions of another party or a tribunal. Lawyers are thus free to inform clients of the progress and prospects of a representation (see § 20) without incurring the liabilities of a guarantor.

Illustration:

1. Client asks Lawyer to defend Client against serious criminal charges. Lawyer states to Client, "Considering the facts and my 20 years of experience in criminal defense, I believe that I can get you acquitted." Client retains Lawyer, but Client is convicted. Lawyer has not breached a promise to Client to secure an acquittal. In light of the well-known uncertainty of trial outcomes, Lawyer's statement can be reasonably construed only as a prediction, not a promise.

When a client's contract claim against a lawyer is not subject to §§ 48- 54, the law of contracts governs such matters as contract construction (subject to § 18), breach, damages, and defenses (see generally Restatement Second, Contracts). That law is construed in the light of the special circumstances involved in client-lawyer relationships and the policies applicable thereto. On remedies and burdens of persuasion in attorney-fee disputes, see § 42.

d. A client's claim against a lawyer for restitutionary, injunctive, or declaratory remedies. Although damages are the usual relief sought by clients from lawyers, restitution is also available in appropriate cases, as allowed by the generally applicable principles governing restitution by a fiduciary. See generally § 6, Comment *e* (rescission of prohibited client-lawyer contract or gift); Restatement Second, Agency §§ 388, 403-404A, and 407. Thus, if under the rules stated in § 37 a lawyer forfeits the right to retain a fee that a client has already paid, the client may obtain restitution of the fee. Similarly, if a lawyer mistakenly deposits a client's funds in the lawyer's own bank account (see § 44) and proceeds to invest it and make a profit, the client is entitled to restitution of the original sum and the profits from its investment. Restatement Second, Agency § 403; Restatement Second, Trusts § 202. A client may also secure restitution of profits reaped by a lawyer's use of client confidences for the lawyer's benefit (see § 60, Comment *j*). Restitution may be ordered when appropriate in lawyer-disciplinary proceedings (see § 5).

Injunctive and declaratory relief for violations of a lawyer's fiduciary and other duties (see § 16) are also available under the usual principles governing such relief. See § 121, Comment *e(ii)* (disqualification remedy for conflict of interest); Restatement Second, Torts §§ 933-951; Restatement Second, Agency § 399. Such relief has rarely been sought in the past because, when clients sued lawyers, it was usually after the lawyer's alleged misconduct had ceased. Injunctive or declaratory relief are, however, appropriate when warranted by generally applicable legal principles to prevent continuing violations such as misuse of a client's confidences or engagement in representations creating conflicts of interest.

Reporter's Note

*Comment c. Contract claims.*See Reporter's Notes to § 18 (contract validity and construction); § 21, Comments *c* and *d* (client instructions and agreements); § 38 (fee agreements); § 42 (fee remedies); § 48, Comment *c* (contract and tort theories and their consequences); see also Saad v. Rodriguez, 506 N.E.2d 1230 (Ohio Ct.App.1986) (client claim against lawyer for breach of escrow agreement).

On warranty of result, see Myers v. Butler, 556 F.2d 398 (8th Cir.), cert. denied, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 314 (1977) (claim that lawyer warranted that, if client pleaded guilty, client would receive no prison sentence was belied by record); Broyles v. Brown Engineering Co., 151 So.2d 767 (Ala.1963) (dictum) (lawyer not ordinarily subject to implied warranty, except perhaps for very simple services); Asphalt Engineers, Inc. v. Galusha, 770 P.2d 1180 (Ariz.Ct.App.1989) (upholding claim for breach of promise to file liens); Kushner v. McLarty, 300 S.E.2d 531 (Ga.Ct.App.1983) (lawyer's assertion to client that contract implemented client's stated wishes was not a warranty); Lundy, Butler & Lundy v. Bierman, 398 N.W.2d 212 (Iowa Ct.App.1986) (lawyer does not guaranty trial result more successful than rejected settlement offer); Cherokee Restaurant, Inc. v. Pierson, 428 So.2d 995 (La.Ct.App.1983) (lawyer's undertaking to prepare lease with longest legally permissible term was not warranty); Corceller v. Brooks, 347 So.2d 274 (La.Ct.App.1977) (lawyer could not warrant favorable result of suit); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup.Ct.1978) (liability for breach of contract to incorporate client's business); 1 R. Mallen & J. Smith, Legal Malpractice § 8.6 (4th ed.1996). But see Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc., 465 N.E.2d 500 (Ill.App.Ct.1984) (issue of fact for jury as to whether lawyer guaranteed outcome).

*Comment d. A client's claim against a lawyer for restitutionary, injunctive, or declaratory remedies.*For restitution, see, e.g., 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) (upholding claim for rescission of attorney fees); People v. Morse, 25 Cal.Rptr.2d 816 (Cal.Ct.App.1993) (restitution to clients who retained lawyer as result of false solicitation); Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal.Rptr. 330 (Cal.Ct.App.1989) (constructive trust

appropriate if firm bought property using client confidential information); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.Ct.App.1988) (lawyers who acquired customers of client's collection business without client's informed consent must disgorge profits; constructive trust imposed); Hamilton v. Allen, 125 N.W. 610 (Neb.1910) (lawyer who bought land from client liable for profits unless lawyer proves transaction was fair); Greene v. Greene, 436 N.E.2d 496 (N.Y.1982) (client may rescind trust agreement giving lawyer unusual powers of which client was not informed); Zeiden v. Oliphant, 54 N.Y.S.2d 27 (N.Y.Sup.Ct.1945) (client may recover lawyer's profits from use of client information even though use did not harm client); Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259 (S.D.1988) (constructive trust imposed when lawyer received kickback from third party in transaction in which lawyer represented client); Eriks v. Denver, 824 P.2d 1207 (Wash.1992) (restitution of attorney fees); § 127, Reporter's Note (rescission of improper client-lawyer gifts). On restitution in lawyer-disciplinary proceedings, see, e.g., In re Robertson, 612 A.2d 1236 (D.C.1992); Committee on Legal Ethics v. Gallaher, 376 S.E.2d 346 (W.Va.1988); ABA Model Rules for Disciplinary Enforcement, Rule 10(6) (1989); C. Wolfram, Modern Legal Ethics 137-38 (1986); Annot., 75 A.L.R.3d 307 (1977).

For injunctive relief, see X Corp. v. Doe, 805 F.Supp. 1298 (1992), aff'd sub nom. Under Seal v. Under Seal, 17 F.3d 1435 (4th Cir.1994) (preliminary injunction against misuse of confidential information by former house counsel), final injunction granted, 816 F.Supp. 1086 (E.D.Va.1993); American Motors Corp. v. Huffstutler, 575 N.E.2d 116 (Ohio 1991) (similar; final injunctive relief); State ex rel. Bryant v. Ellis, 724 P.2d 811 (Or.1986) (injunction enforcing disqualification for conflict of interest); Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa.1992) (relief against conflict of interest); cf. Williams v. Poulos, 11 F.3d 271 (1st Cir.1993) (nonclient's injunction against wiretapping lawyer); Penguin Books USA Inc. v. Walsh, 756 F.Supp. 770, 783 (S.D.N.Y.), vacated as moot, 929 F.2d 69 (2d Cir.1991) (denying relief for breach of fiduciary duty because information lawyer proposed to publish was not protected under constricted view of what is confidential). On standards for injunctive relief, see generally D. Laycock, The Death of the Irreparable Injury Rule (1991); Leubsdorf, The Standard for Preliminary Injunctions, 91 Harv. L. Rev. 525 (1978).

Case Citations - by Jurisdiction

—

Colo.
Md.Spec.App.
N.J.Super.
Or.App.

Colo.

Colo.2019. Cit. in sup. Law firm and client who hired law firm to defend him against a criminal prosecution for his wife's murder petitioned for relief from a probate court order requiring law firm to deposit funds held in its client trust account, which client had received from his wife's life-insurance policy, into the registry of the court pursuant to the state's "slayer statute." After considering the parties' responses to its rule to show cause, this court held, among other things, that the funds in law firm's client trust account could not be disgorged under the statute, which protected a person who received a payment in partial or full satisfaction of a legally enforceable obligation from being compelled to return that payment or from being liable for its amount. The court cited Restatement Third of the Law Governing Lawyers § 55 in explaining that, by agreeing to represent client, law firm became obligated to uphold all the duties attendant upon an attorney in an attorney–client relationship in addition to its obligations arising under the express and implied terms of its fee agreement with client. In re Estate of Feldman, 443 P.3d 66, 70.

Md.Spec.App.

Md.Spec.App.2009. Com. (c) cit. and quot. in sup. Attorney sued client for breach of contract, seeking unpaid legal fees; client counterclaimed to recover legal fees he had paid, alleging that plaintiff breached a provision of the retainer agreement promising to represent him in a professionally responsible manner. The trial court entered judgment on a jury verdict for defendant, awarding him the return of his legal fees. Affirming, this court held that, because this case involved an express promise of professional responsibility, the promise was enforceable in a breach-of-contract action; thus, there was no merit to plaintiff's contention that defendant's counterclaim could only be brought as a legal-malpractice tort and not as a breach of contract. Abramson v. Wildman, 184 Md.App. 189, 964 A.2d 703, 711, 712.

N.J.Super.

N.J.Super.1999. Cit. in sup., quot. in ftn. in sup. (citing § 76A, T.D. No. 8, 1997, which is now § 55). Client sued attorney for legal malpractice in connection with defendant's decision to settle plaintiff's personal injury action without first securing plaintiff's approval. The trial court dismissed the complaint for failure to comply with the provisions of the Affidavit of Merit statute. Affirming in part, reversing in part, and remanding, this court held that dismissal was appropriate as to plaintiff's claims of professional negligence and fraud; however, to the extent plaintiff had alleged breach of the approval-of-settlement clause included in his retainer agreement, he had stated a claim upon which relief could be granted. Levinson v. D'Alfonso & Stein, 320 N.J.Super. 312, 727 A.2d 87, 89.

Or.App.

Or.App.2015. Subsec. (1) quot. in ftn.; com. (c) quot. in ftn. Assignee of client's claims against law firm brought, inter alia, a breach-of-contract action against law firm and firm's partner, alleging that defendants mishandled the termination of client's lease, which resulted in the other party to the lease extending it for an additional year. The trial court granted defendants' motion for a directed verdict on that claim. This court reversed and remanded, holding that a reasonable factfinder could find that client and defendants had an implied-in-fact contract that defendants breached when they failed to provide timely notice of termination. Citing Restatement Third of the Law Governing Lawyers § 55, the court explained that a claim by a client against a lawyer did not need to take a specific form and could be based on an express or implied promise under a negligence theory, a contract theory, or both. Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue LLP, 272 Or.App. 436, 455, 356 P.3d 121, 133.

End of Document

Restatement (Third) of the Law Governing Lawyers § 56 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

Topic 2. Other Civil Liability

§ 56 Liability to a Client or Nonclient Under General Law

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

Comment:

a. *Scope and cross-references.* This Section states the general principle regulating the civil liability of lawyers, other than their liability for legal malpractice, which is set forth in §§ 48- 54, and the liabilities set forth in § 55. The Section does not consider professional discipline (see § 5), lawyer liability to clients and nonclients for acts beyond a lawyer's authority (see § 27, Comment *f,* & § 30(3)), attorney-fee forfeiture or reduction (see §§ 34, 37, & 39), criminal liability (see §§ 8 & 30(1)), administrative penalties, contempt of court (see § 105, Comment *e*), litigation sanctions (see § 110), or statutes expressly providing for lawyer liability (see § 52, Comment *f*). Certain exceptions to the liability described here appear in § 57, which also considers lawyers' liability for wrongful use of civil proceedings, abuse of process, malicious prosecution, and inducing breach of contract or contractual relations. Client-lawyer agreements restricting or settling a lawyer's liability to a client under this Section are subject to § 54. On a client's liability to a nonclient resulting from a lawyer's activities, see § 26, Comment *d*. On a lawyer's statements to nonclients, see § 98.

b. *Rationale; a nonlawyer in similar circumstances.* Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable or afford the nonlawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense. See Restatement Second, Agency § 343 (acting at principal's command is not a

defense for an agent committing a tort unless the principal is privileged). For special defenses of lawyers, see § 57. However, among the circumstances relevant to liability or defense under the general law are some that commonly attend lawyers practicing law, such as the fiduciary duties lawyers owe to clients and the powers, duties, and responsibilities that lawyers have in the legal system. Thus, courts considering the civil liability of lawyers must consider how a ruling that affirms or precludes liability would affect the vigorous representation of clients within the limits of the law, including, for example, the candid expression to clients of the lawyer's views on any matter within the scope of the representation. Courts must also take care, in construing liability provisions and professional rules, to avoid subjecting lawyers to inconsistent obligations.

c. Advising and assisting acts of clients. When a lawyer advises or assists a client in acts that subject the client to civil liability to others, those others may seek to hold the lawyer liable along with or instead of the client. Whether a lawyer is liable depends on the elements of liability under the law upon which the claim of liability is predicated and may therefore turn on such factors as how the lawyer's acts contributed to the plaintiff's harm, what the lawyer knew or believed as to the relevant facts and law, the lawyer's intent, and how culpable the client's conduct is under the law. On general limitations on advising a client, see § 94.

A lawyer, like other agents, is not as such liable for acts of a client that make the client liable. Thus, a lawyer is not liable to a nonclient for advising a client whether proposed client conduct would be lawful or for counseling a client to break a contract in the client's interest (see § 57, Comment *g*). The social benefit of proper legal advice and assistance often makes it appropriate not to hold lawyers liable for activities in the course of a representation (see § 57). Moreover, a lawyer's liability to a nonclient for legal malpractice is limited to those situations in which the lawyer owes the nonclient a duty of care, as set forth in § 51, and in which the other requirements of Topic 1 have been satisfied.

On the other hand, a lawyer is not always free of liability to a nonclient for assisting a client's act solely because the lawyer was acting in the course of a representation (see Comment *b* hereto). Thus, a lawyer who knowingly helps a client deceive a person may be liable for fraud (see Comment *f* hereto). See generally § 94.

In general, a lawyer is not liable for a client's tort unless the lawyer assisted the client through conduct itself tortious or gave substantial assistance to the client knowing the client's conduct to be tortious. See Restatement Second, Torts § 876 (liability of persons acting in concert). Proper advice to a client does not constitute assistance leading to liability. Whether a more onerous standard applies to a lawyer who assists a client's conduct depends on applicable law, which in general requires negligent or intentional misconduct for civil liability to attach to a principal and often requires a higher level of awareness for a lawyer than for a principal.

When a lawyer is civilly liable to a nonclient for assisting conduct of a client, the lawyer may in some circumstances be entitled to obtain indemnity from the client (see § 17(2); Restatement Second, Agency §§ 438-440). When a client's liability to a nonclient arises from a lawyer's malpractice, the client may seek redress from the lawyer under §§ 48- 54. When both client and lawyer are liable, generally applicable law may allow one of them who pays damages to seek contribution from the other (see § 53, Comment *i*).

d. Breach of contract. A lawyer is generally liable for breach of the lawyer's contract in the same circumstances as a nonlawyer who had entered into a similar contract. On contracts (including fee contracts) and business arrangements between lawyer and client, see §§ 16(4), 18, 19, 55(1), and 126; Chapter 3. On a lawyer's liability on certain contracts entered into by the lawyer on behalf of a client, see § 30. On a lawyer's privilege to advise and assist a client to break the client's contract, see § 57, Comment *g*.

e. Conversion. A lawyer is liable for conversion and trespass to chattels on the same basis as a nonlawyer. See Comment *b* hereto; Restatement Second, Agency § 349; see generally Restatement Second, Torts §§ 216-251. On a lawyer's duties with respect to property of clients and certain nonclients in the lawyer's possession, see §§ 44-45. A lawyer who acquires possession or custody of property as a trustee or escrow agent or in a similar capacity,

is subject to the obligations of one acting in that capacity. See, e.g., § 48, Comment *d*; Restatement Second, Trusts §§ 179-182.

f. Fraudulent misrepresentation. Misrepresentation is not part of proper legal assistance; vigorous argument often is. Thus, lawyers are civilly liable to clients and nonclients for fraudulent misrepresentation, but are not liable for such conduct as using legally innocuous hyperbole or proper argument in negotiations (see § 98, Comment *c*) or presenting an argument to a tribunal in litigation. On the liability of an agent for committing or knowingly assisting fraud on behalf of the principal, see Restatement Second, Agency § 348; on professional discipline, see § 5. Such liability may sometimes depend, among other factors, on whether the principal owed the person claiming to have been defrauded any duties of disclosure and on the nature of the lawyer's participation. On the general law of fraudulent misrepresentation, see Restatement Second, Torts §§ 525-551; Restatement Second, Contracts §§ 159-173. On a lawyer's liability to a nonclient for misrepresenting the lawyer's authority, see § 30(3); Restatement Second, Agency § 330. A lawyer is liable for negligent misrepresentation to a nonclient in the course of representing a client only when the lawyer owes the nonclient a duty of care under § 51. See § 51, Comment *e*; Restatement Second, Torts §§ 552-552B. On evaluations undertaken for third persons, see § 95. On a lawyer's duties of honesty and disclosure to a client, see §§ 16(3) and 20; Restatement Second, Torts § 551, Comments *e* and *f*.

g. Intentional infliction of emotional distress. The tort of intentional infliction of emotional distress has been recognized in many jurisdictions (see Restatement Second, Torts §§ 46-48). Liability for this tort requires "extreme and outrageous conduct" that "intentionally or recklessly causes severe emotional distress to another" (id. § 46(1)). On emotional-injury damages in malpractice, see § 53, Comment *g*. Special considerations apply to some claims brought by nonclients. Vigorous advocacy is important in adversary proceedings. Thus, a lawyer's partisanship in presenting evidence and argument, drafting and serving pleadings, and comparably pressing a client's case in such a proceeding is not considered extreme and outrageous and is privileged from such tort liability to the opposing party (see § 57, Comment *c*). On litigation sanctions, see § 110.

h. Breach of a lawyer's or client's fiduciary duty to a nonclient. Lawyers' liability to their clients for breach of fiduciary duties is considered in § 49. Lawyers are also liable to nonclients for knowingly participating in their clients' breach of fiduciary duties owed by clients to nonclients (see Restatement Second, Trusts § 326; see also § 51). A lawyer may also assume fiduciary duties to a nonclient, for example by becoming a trustee or in some jurisdictions by seeking and obtaining a nonclient's trust, and the lawyer is then liable to such a nonclient under the general law on the same basis as other fiduciaries.

i. Federal legislation: antitrust law, securities law, RICO, Civil Rights Act. Federal legislation applies to lawyers and law firms in accordance with its jurisdictional and substantive terms. Only general observations concerning some of that legislation are given here.

The federal antitrust laws apply to some aspects of the practice of law. If state law, such as disciplinary rules promulgated by a state supreme court, requires lawyers to engage in or avoid specified conduct, lawyers who comply are not liable for anticompetitive effects of such compliance. Compare § 54(1) (lawyer not liable under § 48 or § 49 for action or inaction reasonably believed to be required by law). Lawyers and others who participate in promulgating such requirements may be entitled to immunity from antitrust liability under the "state action" doctrine. In the absence of such immunities, professionals are subject to antitrust remedies for such activities as promulgating minimum and maximum fee scales and bans on competitive bidding and participating in boycotts of clients in order to increase payments to lawyers. Scattered authority indicates that lawyers are not subject to civil antitrust liability for advising and implementing client decisions to engage in conduct that is held to violate the antitrust laws, but that lawyers may be liable to those injured by such conduct if they join in making such decisions; the case law does not elucidate the distinction.

Claims against lawyers under the federal-securities acts typically arise from allegations that the lawyers have participated in securities violations by their clients. In general, lawyers are liable on such claims only when they have participated in a violation, having whatever state of mind, such as scienter, may be required for liability under

the statutory provision in question. Thus, under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission, a lawyer who provides an opinion letter in connection with a transaction subject to that Act containing material misstatements that are knowing, and in some situations (as to which there is divergent authority) reckless, is liable to certain investors who rely on those misrepresentations and are injured as a result. Some statutory provisions that can be bases of liability impose further requirements, for example that the defendant be a "controlling person" of a securities issuer.

Claims may also be asserted against lawyers under the Racketeer Influenced and Corrupt Organizations Act (RICO). Among the requirements for liability under RICO are that the defendant has participated in operation or management of an enterprise (such as a corporation, partnership, or associated group) through a pattern of "racketeering activity" (as defined in the statute) and to the plaintiff's damage. To establish such a pattern, the plaintiff must prove that the defendants have engaged at least twice in certain predicate offenses such as mail fraud and not simply on an isolated occasion. RICO liability thus presupposes violations of other law.

Lawyers who assist in the violation of constitutional rights may be liable to those injured under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Only those acting under color of state law, such as a lawyer employed by a government, are liable under the statute. Certain immunities exist for prosecutors (see § 57) and other state officials. For the application of antidiscrimination legislation to lawyer employers, see Comment *k* hereto.

j. Consumer-protection statutes. Some state consumer-protection statutes have been held applicable, in whole or in part, to law practice (see § 41, Comment *c*). Typically a successful claim under such a statute may entitle the claimant to multiple damages or recovery of attorney fees. Lawyers may be liable thereunder to clients for damages caused by conduct such as misrepresentations and fee misconduct. With respect to federal legislation, the federal Fair Debt Collection Practices Act includes lawyers among the debt collectors to which it applies.

k. Employees of lawyers. A lawyer who hires a lawyer or nonlawyer as an employee is subject to applicable law governing the employment relationship, such as contract law, antidiscrimination legislation, unjust-discharge law, and labor relations law. It remains to be decided whether some such laws, for example the National Labor Relations Act, are subject to implied qualifications that accommodate the professional obligations of lawyers. With respect to vicarious liability of a lawyer for the acts of an employee, see § 58(1).

Reporter's Note

*Comment c. Advising and assisting acts of clients.*Compare, e.g., Dutton v. Wolpoff & Abramson, 5 F.3d 649 (3d Cir.1993) (firm liable under Fair Debt Collection Practices Act for sending debt-collection letter found misleading); Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) (lawyer would be liable for reckless misrepresentation in tax-shelter opinion letter for client's venture); Rosenthal Toyota, Inc. v. Thorpe, 824 F.2d 897 (11th Cir.1987) (lawyer liable for depositing check to clients in lawyer's trust account, knowing that clients would not deliver goods for which check paid); Auriemma v. Montgomery, 860 F.2d 273 (7th Cir.1988), cert. denied, 492 U.S. 906, 109 S.Ct. 3215, 106 L.Ed.2d 565 (1989) (lawyer not immune from Fair Credit Reporting Act liability for using false pretenses to obtain credit report while investigating case); 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) (lawyer liable for helping clients make fraudulent and unlawful loan by making and helping arrange misrepresentations); 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) (lawyer participated in breach of fiduciary duties clients owed to partners by making bad-faith claims and issuing false opinion letter on legal issue); Norman v. Brown, Todd & Heyburn, 693 F.Supp. 1259 (D.Mass.1988) (lawyer would be liable for substantially assisting client's fraud by providing tax-shelter opinion letter and legal assistance, when lawyer knew or should have known of fraud; relying on Restatement Second, Torts § 876(b)); Kline v. First W. Gov't Secs., 24 F.3d 480 (3d Cir.), cert. denied, 513 U.S. 1032, 115 S.Ct. 613, 130 L.Ed.2d 522 (1994) (firm could be liable under federal-securities law for providing opinion letter based on facts it knew were false, even though letter stated that facts had been provided by client); McElhanon v. Hing, 728 P.2d 256 (Ariz.Ct.App.1985), aff'd in part & rev'd in part on other grounds, 728 P.2d 273 (Ariz.1986)

(lawyer not privileged against liability for assisting client by drafting document to execute transfer in fraud of judgment creditor when lawyer had knowledge of facts and intent to defraud); Kimmel v. Goland, 793 P.2d 524 (Cal.1990) (lawyer would be liable for counseling and assisting client's unlawful recording of conversations); Durant Software v. Herman, 257 Cal.Rptr. 200 (Cal.Ct.App.1989), appeal dism'd, 795 P.2d 782 (Cal.1990) (lawyer would be liable for conspiring with judgment-debtor client to defraud creditor by conveying assets to lawyer's firm), with, e.g., Heffernan v. Hunter, 189 F.3d 405 (3d Cir.1999) (no Civil Rights Act conspiracy liability when lawyer acted within scope of representation); Vector Research v. Howard & Howard Attorneys P.C., 76 F.3d 692 (6th Cir.1996) (under Ohio law, lawyer not liable when acting in good faith, without knowledge, with client's knowledge); Engel v. CBS, Inc., 981 F.2d 1076 (9th Cir.1992) (under New York law, lawyer generally not liable for injuries caused to nonclient by services for or advice to client, absent fraud, collusion, or malicious or tortious act); Brown v. Donco Enters., Inc., 783 F.2d 644 (6th Cir.1986) (lawyer not liable for helping client violate antitrust laws by threatening and filing suits to coerce compliance with tying arrangement); City of North Miami v. Berger, 828 F.Supp. 401 (E.D.Va.1993) (corporation's lawyer-officer lacking decisionmaking authority not liable under CERCLA); Sassower v. Field, 752 F.Supp. 1190 (S.D.N.Y.1990) (lawyer who was co-op officer not liable for discrimination by co-op board, when lawyer was not on board); Doctors' Co. v. Superior Court, 775 P.2d 508 (Cal.1989) (lawyer who did not act for financial gain not liable for conspiracy with client-insurer to breach insurer's duty of good faith to insured); Guillebeau v. Jenkins, 355 S.E.2d 453 (Ga.Ct.App.1987) (buyers' lawyer not liable for fraud of buyers of which lawyer unaware); cf. Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 30 (N.D.Ill.1980) (that lawyer, viewing client's chance to prevail in lawsuit as slight, considered how to respond to loss of lawsuit not prima facie proof of fraud waiving attorney-client privilege); see C. Wolfram, Modern Legal Ethics 227-35 (1986); Evans & Dorvee, Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability, 45 S.C. L. Rev. 803 (1994); Hazard, How Far May a Lawyer Go in Assisting a Client in Unlawful Conduct?, 35 Miami L. Rev. 669 (1981); Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 Yale L.J. 1545 (1995); Comments *d, f,* and *i* hereto, and Reporter's Notes thereto; § 51, Comment *h,* and Reporter's Note thereto (assisting client's breach of fiduciary duty).

*Comment d. Breach of contract.*For cases recognizing lawyers' liability under their own contracts, see Westinghouse Elec. Corp. v. Newman & Holtzinger P.C., 992 F.2d 932 (9th Cir.1993) (lawyer assertedly agreed with opposing party not to reveal to third persons documents produced by opposing party); Gunn v. Mahoney, 408 N.Y.S.2d 896 (N.Y.Sup.Ct.1978) (contract to incorporate client's business); Saad v. Rodriguez, 506 N.E.2d 1230 (Ohio Ct.App.1986) (claim for breach of escrow agreement against lawyer-escrowee); Morgan v. Baldwin, 450 N.W.2d 783 (S.D.1990) (claim for breach of partnership agreement by client who entered business partnership with lawyer); § 30, Comment *d,* and Reporter's Note thereto (contracts with court reporters, etc.); § 48, Comment *b* (contractual basis of client's malpractice claim); § 55, Comment *c*.

*Comment e. Conversion.*For cases recognizing a lawyer's liability to clients for conversion, see, e.g., Avianca, Inc. v. Corriea, 705 F.Supp. 666 (D.D.C.1989), aff'd mem., 70 F.3d 637 (D.C.Cir.1995); Husted v. McCloud, 450 N.E.2d 491 (Ind.1983). On liability to nonclients, see, e.g., Skierkewiecz v. Gonzalez, 711 F.Supp. 931 (N.D.Ill.1989) (trespass to chattels by client acting under authority of court order that lawyer obtained in bad faith through ex parte misrepresentation); Miller v. Rau, 30 Cal.Rptr. 612 (Cal.Ct.App.1963) (lawyer paid funds to client during pendency of suit in which court later held the funds to be due to another); Bonanza Motors, Inc. v. Webb, 657 P.2d 1102 (Idaho Ct.App.1983) (lawyer paid judgment proceeds to client knowing of client's prior valid assignment to another); Kahn v. Crames, 459 N.Y.S.2d 941 (N.Y.App.Div.1983) (lawyer directed client to take and keep property belonging to client's husband's clients); C. Wolfram, Modern Legal Ethics 227-28 (1986). Compare Sutherland v. O'Malley, 882 F.2d 1196 (7th Cir.1989) (elements of conversion not established in fee dispute between co-counsel).

*Comment f. Fraudulent misrepresentation.*For cases recognizing a lawyer's liability for defrauding a client, see, e.g., Boynton v. Lopez, 473 A.2d 375 (D.C.1984) (misrepresenting size of settlement offer); McKinnon v. Tibbetts, 440 A.2d 1028 (Me.1982) (falsely claiming to be pursuing client's claim); Finch v. Hughes Aircraft Co., 469 A.2d 867 (Md.Ct.Spec.App.1984), cert. denied, 469 U.S. 1215, 105 S.Ct. 1190, 84 L.Ed.2d 336 (1985) (false billing); Brown v. Gerstein, 460 N.E.2d 1043 (Mass.App.Ct.1984) (assuring client foreclosure sale would not take place); Rodriguez v. Horton, 622 P.2d 261 (N.M.Ct.App.1980) (misleading client about how much of settlement client

would get); cf. United States v. Cassiere, 4 F.3d 1006 (1st Cir.1993) (criminal fraud); Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659 (1990).

On liability for defrauding a nonclient, see, e.g., Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158 (2d Cir.), cert. denied, 510 U.S. 945, 114 S.Ct. 385, 126 L.Ed.2d 334 (1993) (liability where lawyer masterminded transfers to lawyer of client assets in fraud of client's creditors, with accompanying fraud); Nolte v. Pearson, 994 F.2d 1311 (8th Cir.1993) (no liability when lawyer's opinion letter was carefully limited); Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011 (2d Cir.1989) (no liability when seller's lawyer gave client, buyer of large block of shares, lawyer's opinion that government approval was not required for sale); Hartford Accident & Indem. Co. v. Sullivan, 846 F.2d 377 (7th Cir.1988), cert. denied, 490 U.S. 1089, 109 S.Ct. 2428, 104 L.Ed.2d 985 (1989) (liability when lawyer helped client obtain bank loan through fraud); Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) (reckless disregard of fraudulent factual assumptions in tax-shelter opinion letter); Bonavire v. Wampler, 779 F.2d 1011 (4th Cir.1985) (liability if lawyer misrepresented client's honesty and experience); Chase Manhattan Bank, N.A. v. Perla, 411 N.Y.S.2d 66 (N.Y.App.Div.1978) (lawyer liable if asserted that client's house was being sold and nonclient would be paid from proceeds, knowing this to be false); Reiner v. Kelley, 457 N.E.2d 946 (Ohio Ct.App.1983) (lawyer obtained check from client's real-estate broker through misrepresentation and converted proceeds); Jeska v. Mulhall, 693 P.2d 1335 (Or.Ct.App.1985) (statement by seller's lawyer that property was "a lot of property for the money" is fraud if lawyer knew that seller had no transferable interest; lawyer's promise to explain transaction to buyers, if made with intent not to perform promise as part of fraudulent inducement to buyers, is also fraud); General Resources Org., Inc. v. Deadman, 907 S.W.2d 22 (Tex.Ct.App.1995) (lawyer falsely attested to client's ownership of gold that client pretended to sell in order to take down payments); 1 R. Mallen & J. Smith, Legal Malpractice §§ 6.5 & 8.9 (4th ed. 1996); cf. Stewart v. Jackson & Nash, 976 F.2d 86 (2d Cir.1992) (fraud to induce lawyer to join law firm). But see, e.g., Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1256-57 (6th Cir.1997) (lawyer not liable for misrepresentations in opinion letter because recipient was independently represented, could have checked statements, and therefore did not justifiably rely); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir.1991), cert. denied, 503 U.S. 936, 112 S.Ct. 1475, 117 L.Ed.2d 619 (1992) (lawyer not liable for knowingly incorporating client misrepresentations-false financial statements-in documents prepared by lawyer) (for contrary cases, see § 98, Comment *c*, and Reporter's Note thereto).

For cases recognizing a lawyer would be liable for defrauding an opposing party in litigation, see, e.g., Robinson v. Volkswagenwerk AG, 940 F.2d 1369 (10th Cir.1991), cert. denied, 502 U.S. 1091, 112 S.Ct. 1160, 117 L.Ed.2d 408 (1992) (no absolute immunity for fraudulent discovery and litigation statements); Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2d Cir.1979), cert. denied, 449 U.S. 981, 101 S.Ct. 395, 66 L.Ed.2d 243 (1980) (lawyer obtained settlement by recklessly and falsely stipulating that client had only $200,000 in insurance coverage); Raymark Indus. v. Stemple, 714 F.Supp. 460 (D.Kan.1988) (presenting fraudulent claims under asbestos class-action settlement); Cresswell v. Sullivan & Cromwell, 668 F.Supp. 166 (S.D.N.Y.1987) (investors sufficiently pleaded claim against lawyers for financial firm that lawyers fraudulently withheld documents during discovery), on subsequent review, 922 F.2d 60 (2d Cir.1990), cert. denied, 505 U.S. 1222, 112 S.Ct. 3036, 120 L.Ed.2d 905 (1992) (considering defense of lack of reasonable reliance by investors); Fire Ins. Exchange v. Bell, 643 N.E.2d 310 (Ind.1994) (misrepresenting insurance-policy limits); Malewich v. Zacharias, 482 A.2d 951 (N.J.Super.Ct.App.Div.1984) (misrepresenting trial date). Contra, Silberg v. Anderson, 786 P.2d 365 (Cal.1990) (state statutory privilege precludes fraud liability for statements in connection with litigation).

On the extent of possible liability of a lawyer for negligent misrepresentation in providing an opinion letter, see § 51, Comment *e*, and Reporter's Note thereto.

Comment g. Intentional infliction of emotional distress. On liability to a client, compare, e.g., McDaniel v. Gile, 281 Cal.Rptr. 242 (Cal.Ct.App.1991) (claim stated for neglecting client's case because client refused to have sex with lawyer); Singleton v. Stegall, 580 So.2d 1242 (Miss.1991) (imprisoned client may sue lawyer who was paid to file postconviction-relief claim but did not do so and lied to client), with, e.g., Anderson v. Rossman & Baumberger, P.A., 440 So.2d 591 (Fla.Dist.Ct.App.1983) (no claim for refusing to release judgment proceeds to client because of fee dispute); Sherbak v. Doughty, 420 N.Y.S.2d 724 (N.Y.App.Div.1979) (no claim for representing both parties in realty transaction and then suing one).

On the extent of liability to a nonclient for intentional infliction of emotional distress, compare, e.g., Kinnamon v. Staitman & Snyder, 136 Cal.Rptr. 321 (Cal.Ct.App.1977) (claim stated for baselessly threatening prosecution to collect debt); Barnes v. McGough, 623 A.2d 144 (Me.1993), aff'd sub nom. Barnes v. Zappia, 658 A.2d 1086 (Me.1995) (claim stated for aiding client in fraudulent scheme), with, e.g., Schick v. Bach, 238 Cal.Rptr. 902 (Cal.Ct.App.1987) (no liability for advising psychotherapist client to disclose patient confidences); Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178 (Iowa 1991) (no liability for negligent infliction of emotional distress when partner committed suicide after law firm said it was delaying decision on whether lawyer could rejoin firm after hospitalization for depression); Kunau v. Pillers, Pillers & Pillers, P.C., 404 N.W.2d 573 (Iowa Ct.App.1987) (negligent litigation not actionable by opposing party); Sullivan v. Birmingham, 416 N.E.2d 528 (Mass.App.Ct.1981) (litigation pleading absolutely privileged); Kirschstein v. Haynes, 788 P.2d 941 (Okla.1990) (litigation communication absolutely privileged); see 1 R. Mallen & J. Smith, Legal Malpractice § 6.25 (4th ed.1996). On the applicability of the federal Fair Debt Collection Practices Act to lawyers, see Reporter's Note to Comment *j* hereto.

Some jurisdictions recognize liability for negligent infliction of emotional distress and would presumably hold lawyers liable for that tort in appropriate circumstances, which seem unlikely to occur in the absence of illness or bodily harm accompanying the emotional distress (see generally Restatement Second, Torts § 313). On cases, none of which involves lawyer activities, see, e.g., Tommy's Elbow Room, Inc. v. Kavorkian, 727 P.2d 1038 (Alaska 1986) (parent bystander at child's injury); Burgess v. Superior Court, 831 P.2d 1197 (Cal.1992) (mother whose child was injured by physician during delivery); Sullivan v. Boston Gas Co., 605 N.E.2d 805 (Mass.1993) (objectively diagnosable distress from seeing house burn).

*Comment h. Breach of a lawyer's or client's fiduciary duty to a nonclient.*On a lawyer's knowing assistance of a client's breach of fiduciary duty, see § 51, Comment *h,* and Reporter's Note thereto. Some jurisdictions recognize a claim for breach of fiduciary duty against a lawyer who seeks and obtains the trust of one the lawyer does not represent in the matter in question. E.g., Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F.Supp. 360 (S.D.N.Y.1992) (lawyer defrauded plaintiff in business transactions while representing him in other matters); Riggs Nat'l Bank v. Freeman, 682 F.Supp. 519 (S.D.Fla.1988); General Resources Org., Inc. v. Deadman, 907 S.W.2d 22 (Tex.Ct.App.1995); Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645 (Mich.Ct.App.1981); see Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346 (1978) (recognizing fiduciary obligation for disqualification purposes).

*Comment i. Federal legislation: antitrust law, securities law, RICO, Civil Rights Act.*On the applicability of the antitrust laws to the practice of law, see, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (liability of bar association for promulgating minimum fee schedule); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) (boycott by court-appointed criminal-defense lawyers to obtain higher compensation); cf. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (society of engineers' professional rule barring competitive bidding); Arizona v. Maricopa Cty. Medical Soc'y, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (maximum fee scale for doctors in medical-care arrangement); see generally C. Wolfram, Modern Legal Ethics 38-45 (1986); cf. Professional Real Estate Investors v. Columbia Pictures, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993) (bringing litigation cannot subject party to antitrust liability unless it is objectively baseless). On the "state action" exemption, see, e.g., Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984).

On possible lawyer civil liability for helping clients violate the antitrust laws, compare Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir.1989), cert. denied, 498 U.S. 817, 111 S.Ct. 61, 112 L.Ed.2d 36 (1990), aff'd, 500 U.S. 322, 111 S.Ct. 1842, 114 L.Ed.2d 366 (1991) (claim stated when complaint alleged that lawyers exerted influence over client hospital, resulting in denial of staff privileges to doctor), with Brown v. Donco Enters., Inc., 783 F.2d 644 (6th Cir.1986) (lawyer not liable for threatening and filing suits to coerce compliance with tying arrangement); Tillamook Cheese & Dairy Assoc. v. Tillamook County Creamery Assoc., 358 F.2d 115 (9th Cir.1966) (lawyer not liable for advising client, but would be liable for joining in making policy decision); Invictus Records, Inc. v.

American Broadcasting Cos., 98 F.R.D. 419 (E.D.Mich.1982) (lawyers not liable for advising client); Worldwide Marine Trading Corp. v. Marine Transp. Serv., Inc., 527 F.Supp. 581 (E.D.Pa.1981) (lawyer not liable for advising client and acting on its behalf pursuant to its decisions).

On securities-law liability under Rule 10b-5, the provision most commonly and successfully invoked by claimants against lawyers, compare, e.g., 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) (liability for knowing misrepresentations in opinion letter, despite letter's statement that lawyer relied on facts stated by client); Breard v. Sachnoff & Weaver, Ltd., 941 F.2d 142 (2d Cir.1991) (lawyer would be liable for recklessly drafting offering memorandum that failed to mention promoter's past fraud conviction and later misrepresenting that promoter's past was immaterial); Ackerman v. Schwartz, 947 F.2d 841 (7th Cir.1991) (lawyer providing tax opinion would be liable to investors for reckless misrepresentations in opinion letter), with, e.g., Camp v. Dema, 948 F.2d 455 (8th Cir.1991) (lawyer for stock buyer not liable for failure to disclose to seller interest of outside party in buying corporation, when buyer and seller had no fiduciary relationship and lawyer had no knowledge of buyer's violation of securities laws); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir.1991), cert. denied, 503 U.S. 936, 112 S.Ct. 1475, 117 L.Ed.2d 619 (1992) (lawyer not liable for drafting public documents containing client-authored misrepresentations when lawyer did not sign documents) (but see disagreement with *Schatz* decision in § 98, Reporter's Note to Comment *c*); Renovitch v. Kaufman, 905 F.2d 1040 (7th Cir.1990) (lawyer lacking scienter not liable). See generally Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (no liability for aiding and abetting wrongdoer, but one who makes misstatements or omissions on which buyers or sellers rely may be liable); M. Steinberg, Corporate and Securities Malpractice (1992); 1 R. Mallen & J. Smith, Legal Malpractice, ch. 10 (4th ed.1996).

On RICO liability, compare, e.g., Crowe v. Henry, 43 F.3d 198 (5th Cir.1995) (business venture of lawyer and client can be RICO enterprise); Ikuno v. Yip, 912 F.2d 306 (9th Cir.1990) (lawyer who filed 2 fraudulent annual reports for corporation that lawyer controlled would be liable); State Farm Mut. Auto. Ins. Co. v. Rosenfield, 683 F.Supp. 106 (E.D.Pa.1988) (law-firm associate liable for repeatedly submitting fraudulent claims to insurance companies), with, e.g., Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) (accountants for enterprise not liable when they did not participate in its operation or management); Baumer v. Pachl, 8 F.3d 1341 (9th Cir.1993) (applying *Reves* to lawyer who allegedly helped limited partnership hide fraud); Nolte v. Pearson, 994 F.2d 1311 (8th Cir.1993) (applying *Reves* to lawyers); In Re Burzynski, 989 F.2d 733 (5th Cir.1993) (insufficient continuity when lawyer associated with others only to conduct one litigation); Hartz v. Friedman, 919 F.2d 469 (7th Cir.1990) (no pattern of racketeering if lawyers committed mail fraud and extortion, but all in connection with one case); cf. United States v. Console, 13 F.3d 641 (3d Cir.1993), cert. denied, 513 U.S. 812, 115 S.Ct. 64, 130 L.Ed.2d 21 (1994) (criminal liability where law firm defrauded insurers by padding medical bills); United States v. Eisen, 974 F.2d 246 (2d Cir.1992) (criminal conviction for conducting law firm's litigation through systematic forging of evidence and bribery of witnesses); United States v. Yonan, 800 F.2d 164 (7th Cir.1986), cert. denied, 479 U.S. 1055, 107 S.Ct. 930, 93 L.Ed.2d 981 (1987) (upholding indictment of defense lawyer for repeatedly bribing prosecutor; prosecutor's office was enterprise). See generally D. Abrams, The Law of Civil RICO (1991); 1 R. Mallen & J. Smith, supra ch. 11.

On liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983, see, e.g., Wyatt v. Cole, 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (no qualified immunity for private defendants acting under color of state law, including lawyer, but good-faith defense may be available), on remand, 994 F.2d 1113 (5th Cir.), cert. denied, 510 U.S. 977, 114 S.Ct. 470, 126 L.Ed.2d 421 (1993) (upholding defense); Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (prosecutor absolutely immune for initiating prosecution and presenting state's case, but not for giving advice to police officer); Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (court-appointed defense lawyer does not ordinarily act under color of state law and hence is not subject to liability); Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984) (defense counsel has no absolute immunity and can be liable for conspiring with state officials); 1 R. Mallen & J. Smith, supra § 9.4; cf. Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (civil plaintiff who obtained prejudgment attachment acted under color of state law); Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120

L.Ed.2d 33 (1992) (court's implementation of defense counsel's peremptory challenges constitutes state action for purposes of Fourteenth Amendment and apparently also for purposes of civil rights act).

*Comment j. Consumer-protection statutes.*For decisions on whether state consumer-protection statutes apply to lawyers, see § 41, Reporter's Note to Comment *c*; 1 R. Mallen & J. Smith, Legal Malpractice § 9.5 (4th ed.1996). On the applicability of the Fair Debt Collection Practices Act to lawyers, see P.L. 99-361, 100 Stat. 768 (1986) (amending 15 U.S.C. § 1692a(6) to delete exemption); Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (lawyers included among those potentially liable). On what conduct is covered under various statutes, see, e.g., Clomon v. Jackson, 988 F.2d 1314 (2d Cir.1993) (lawyer liable under Fair Debt Collection Practice Act for collection letter purporting to come from lawyer when lawyer had no role in deciding to send letter); Duncan v. Handmaker, 149 F.3d 424 (6th Cir.1998) (discussing when lawyer is liable under Fair Credit Reporting Act for obtaining opposing party's credit report for use in litigation); Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin, 717 A.2d 724 (Ct.1998) (law firm's negligence does not give rise to cause of action under state's unfair-trade-practices act); Reed v. Allison & Perrone, 376 So.2d 1067 (La.Ct.App.1979) (competing lawyer not entitled to injunction against deceptive advertisements); Doucette v. Kwiat, 467 N.E.2d 1374 (Mass.1984) (liability for withholding improper extra fee from suit proceeds); Latham v. Castillo, 972 S.W.2d 66 (Tex.1998) (liability for lawyer's misrepresentation of status of case); Eriks v. Denver, 824 P.2d 1207 (Wash.1992) (entrepreneurial aspects such as fee matters or obtaining clients covered, but not malpractice in practice of law; failure to disclose conflict of interest covered only if for purpose of obtaining client or increasing profit).

*Comment k. Employees of lawyers.*On antidiscrimination legislation, see Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (sexual discrimination in decision on election to law-firm partnership actionable under federal civil rights law); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir.1992), cert. denied, 510 U.S. 826, 114 S.Ct. 88, 126 L.Ed.2d 56 (1993) (similar; finding no discrimination); Barnhart v. Pickrel, Schaeffer & Ebeling Co., 12 F.3d 1382 (6th Cir.1993) (rejecting age-discrimination claim on facts); Lucido v. Cravath, Swaine & Moore, 425 F.Supp. 123 (S.D.N.Y.1977) (religion and national-origin discrimination in associate assignment and promotion); cf. Vaughn v. Edel, 918 F.2d 517 (5th Cir.1990) (racial discrimination in discharge of house counsel); Breckinridge v. Bristol-Myers Co., 624 F.Supp. 79 (S.D.Ind.1985) (age discrimination against house counsel). For professional rules subjecting employment discrimination to discipline, see, e.g., D.C. Rules of Prof. Conduct, Rule 9.1; N.J. Rules of Prof. Conduct, Rule 8.4(g) (only after determination by court or agency); N.Y. Code of Prof. Responsibility, DR 1-102(A)(6) (similar); Vt. Code of Prof. Responsibility, DR 1-102(A)(6); cf. Minn. Rules of Prof. Conduct, Rule 8.4(g) (forbidding harassment on basis of sex, race, etc.).

On collective-bargaining legislation, see Foley, Hoag & Eliot, 229 N.L.R.B. 456 (1977) (recognizing NLRB jurisdiction); Camden Regional Legal Servs., Inc., 231 N.L.R.B. 224 (1977) (jurisdiction asserted over firms and legal-assistance programs grossing more than $250,000 annually); Wayne County Neighborhood Legal Services, Inc., 229 N.L.R.B. 1023 (1977) (composition of bargaining unit); Santa Clara Cty. Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142 (Cal.1994) (government employees may sue client-employer during employment to enforce collective-bargaining rights). See also Stewart v. Jackson & Nash, 976 F.2d 86 (2d Cir.1992) (recognizing claim by lawyer against firm that fraudulently induced lawyer to join); Brown v. Hammond, 810 F.Supp. 644 (E.D.Pa.1993) (paralegal may sue employer if discharged for refusing to engage in billing fraud); Jacobson v. Knepper & Moga P.C., 706 N.E.2d 491 (Ill.1998) (lawyer may not sue firm when discharged for complaining about unlawful litigation practice); Cutler v. Klass, Whicher & Mishne, 473 N.W.2d 178 (Iowa 1991) (rejecting claim against firm that allegedly drove depressed partner to suicide by delaying decision whether partner could rejoin firm after hospitalization); Wieder v. Skala, 609 N.E.2d 105 (N.Y.1992) (recognizing claim against firm that discharged associate for urging firm to report another firm lawyer's misconduct); § 32, Comment *b,* and Reporter's Note thereto (availability of retaliatory-discharge claims to lawyer-employees). For rights of employers against departing lawyers, see R. Hillman, Lawyer Mobility (1994).

Case Citations - by Jurisdiction

—

C.A.10,
D.Ariz.
S.D.Fla.
D.Mass.
E.D.Pa.
Ariz.
Ariz.App.
Cal.App.
Conn.App.
Iowa,
Me.
Md.Spec.App.
Nev.
N.J.Super.App.Div.
N.J.Super.
N.M.App.
Or.
Tex.
Tex.App.
Wash.

C.A.10,

C.A.10, 2013. Com. (b) quot. in sup. Utah borrowers who executed a deed of trust in favor of lender brought a putative class-action suit in Utah state court against, among others, Texas-based successor trustee and its Utah-based attorney, alleging that defendants had conducted nonjudicial foreclosure sales that did not comply with Utah law. After removal, the federal district court dismissed the complaint for failure to state a claim. Vacating and remanding, this court held, inter alia, that the district court lacked jurisdiction to consider this case, concluding that defendants failed to prove that attorney was fraudulently joined in order to defeat diversity jurisdiction. The court rejected defendants' argument that, under Utah law, attorney, as mere counsel and agent of successor trustee, was immune from suits by non-clients for actions taken in representing his client absent fraud, collusion, or privity of contract, stating that, like all agents, attorney would be liable for torts that he committed while engaged in work for the benefit of a principal. Dutcher v. Matheson, 733 F.3d 980, 989.

D.Ariz.

D.Ariz.2009. Cit. in disc. and sup., cit. and quot. in cases cit. and quot. in disc. and sup., com. (f) quot. in sup. and in ftn. Former CFO of corporation brought a fraudulent-misrepresentation claim, inter alia, against corporation's law firm and individual attorneys, among others, alleging that defendants induced her to enter into a settlement in which she was to receive only shares of corporation's stock by affirmatively misrepresenting to her that there were no pending criminal proceedings against corporation's CEO such as would cause a reduction in the stock's value. On remand, this court granted in part plaintiff's motion for reconsideration of its previous order dismissing the fraudulent-misrepresentation claim, holding that, while fraud claims premised on alleged defamation by opposing counsel were barred by the litigation-defamation privilege, fraud claims arising outside of the defamation context

were not necessarily barred. Thus, under the general rule, a lawyer was subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances. Thompson v. Paul, 657 F.Supp.2d 1113, 1121-1123.

S.D.Fla.

S.D.Fla.2014. Com. (c) quot. in case quot. in sup. Condominium association sued resident who had multiple sclerosis and was confined to a wheelchair, seeking a declaration that it was entitled to deny resident's request for an accommodation allowing her to keep a trained service dog in her condominium to assist her with tasks of daily living; resident counterclaimed against association, its attorney, and president of its board of directors, alleging, among other things, refusal-to-accommodate in violation of the Fair Housing Act (FHA). Granting summary judgment for attorney on resident's counterclaims, this court held that an attorney could not be liable for a client's violation of the FHA under Restatement Third of the Law Governing Lawyers § 56, Comment *c*. The court pointed out that it was undisputed that attorney merely acted as association's attorney, and that he had no authority to vote and did not in fact vote on association's decision to sue resident instead of granting her requested accommodation. Sabal Palm Condominiums of Pine Island Ridge Ass'n, Inc. v. Fischer, 6 F.Supp.3d 1272, 1294.

D.Mass.

D.Mass.2011. Sec. and com. (b) quot. in sup. Homeowners brought a negligence claim, inter alia, against, among others, law firm engaged by loan servicer to handle foreclosure of plaintiffs' residence, arguing that defendant should have refused to proceed with foreclosure after it received a phone call from plaintiff wife informing it that plaintiffs were under consideration for a loan modification and that foreclosure would violate the provisions of the Home Affordable Modification Program. Granting defendant's motion to dismiss, this court held that, because the interests of defendant's client were in direct conflict with the interests of plaintiffs, and defendant was entitled to rely on its client's reasonable assurances that the prerequisites for foreclosure were present, defendant owed no duty to plaintiffs to investigate the legality of that foreclosure due to plaintiff's phone call. Speleos v. BAC Home Loans Servicing, L.P., 824 F.Supp.2d 226, 231.

E.D.Pa.

E.D.Pa.2005. Cit. in sup., quot. in ftn. in sup. Attorney who had provided former client legal services in a divorce matter sued lawyer and law firm representing client, alleging that defendants assisted client in concealing his assets to defraud creditors and prevent application of available assets to pay plaintiff's New Jersey state-court judgment against client. Denying defendants' motion to dismiss plaintiff's civil-conspiracy claim, this court held, inter alia, that, because plaintiff's allegations asserted that lawyer's representation of client assisted with furthering and participating in a fraudulent conveyance, the actions alleged fell outside the scope of legitimate representation, and lawyer could be liable to the extent that a nonlawyer would be in the same situation. Marshall v. Fenstermacher, 388 F.Supp.2d 536, 553.

Ariz.

Ariz.2005. Quot. in disc. Counsel for conservator in personal-injury suit arising out of automobile accident and driver that caused accident entered into agreement under which driver admitted liability and assigned conservator any claims he had against his insurer. Insurer then sued counsel for intentional interference with contractual relations, alleging that counsel induced driver to admit liability and assign his bad-faith claim so that counsel would receive a larger fee. Trial court granted counsel's motion for summary judgment; the court of appeals reversed. Vacating the opinion of the court of appeals and affirming the decision of the trial court, this court held, inter alia, that while counsel did not have an unqualified privilege against liability for tortious-interference claims, he did not act improperly in negotiating the agreement in question. Safeway Ins. Co., Inc. v. Guerrero, 210 Ariz. 5, 106 P.3d 1020, 1025.

Ariz.App.

Ariz.App.2008. Cit. and quot. in sup., com. (c) quot. in sup. Insureds sued insurer's attorney and law firm, alleging that defendants wrongfully recommended, in connection with an action against plaintiffs by a third party, that insurer file a lawsuit against plaintiffs raising all coverage defenses as a means of putting pressure on the third party to settle. The trial court granted summary judgment for defendants on plaintiffs' claim for aiding and abetting various torts. Reversing, this court held, inter alia, that aiding and abetting the tortious actions of a client was a valid cause of action against a lawyer, and that actions against lawyers were not limited to claims for abuse of process and malicious prosecution; the Arizona Supreme Court had adopted the general rule set forth in Restatement Third of the Law Governing Lawyers that lawyers had no special privilege against civil suit. Chalpin v. Snyder, 220 Ariz. 413, 207 P.3d 666, 676, 677.

Cal.App.

Cal.App.2003. Coms. (b) and (f) quot. in sup. Insured homeowners sued insurer, the attorney who was retained by insurer to provide coverage advice in a lawsuit against insureds, and attorney's firm, alleging breach of contract, bad faith, fraud, and conspiracy arising from attorney's fraudulent statement about coverage. Trial court dismissed plaintiffs' claims for fraud and conspiracy. This court reversed, holding that attorney made a fraudulent statement about insurance coverage, that plaintiffs viewed his statement as one of fact and justifiably relied on the misrepresentation, that attorney owed plaintiffs a duty not to make fraudulent statements about insurance coverage, and that litigation privilege did not protect attorney's fraudulent statements. Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 107 Cal.App.4th 54, 67, 69, 131 Cal.Rptr.2d 777, 788, 789.

Conn.App.

Conn.App.2011. Cit. and quot. in ftn. and in diss. op., quot. in ftn. to diss. op., Rptr's Note to com. (f) cit. in ftn. Former husband brought claims for fraud and intentional infliction of emotional distress against ex-wife's attorneys, alleging that defendants intentionally concealed ex-wife's assets from him and the court during alimony proceedings. The trial court entered judgment for defendants. Affirming, this court held that plaintiff's claims against defendants for conduct that occurred during judicial proceedings were barred by the doctrine of absolute immunity. The concurring and dissenting opinion argued that sound public policy did not support the notion that lawyers should be immune from the consequences of their fraudulent behavior. Simms v. Seaman, 129 Conn.App. 651, 661, 662, 678, 679, 681, 23 A.3d 1, 6, 7, 16-18.

Iowa,

Iowa, 2018. Quot. in diss. op.; com. (k) quot. in diss. op. State filed a petition seeking removal of attorney from his position as elected county attorney, on grounds, in part, that attorney engaged in willful misconduct or maladministration in office by creating a hostile work environment that included sexual harassment of his employees in violation of state law. After a bench trial, the trial court ordered attorney's removal from office based on the sexual-harassment claim. This court reversed, vacating the trial court's removal order and remanding for attorney's reinstatement, holding that state failed to meet its high burden to show that attorney intended to commit willful misconduct or maladministration in office. A dissent argued in favor of affirming the trial court, pointing to evidence that attorney had the requisite knowledge that he was engaging in sexual harassment, and reasoning that, under Restatement Third of the Law Governing Lawyers § 56, a lawyer was subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances. State v. Watkins, 914 N.W.2d 827, 864.

Iowa, 2013. Com. (c) quot. in sup. Former client brought a legal-malpractice action against attorney, alleging that attorney had negligently represented her in her personal-injury suit against state and a volunteer driver for a state

agency. The district court entered judgment on a jury verdict for client, and denied attorney's posttrial motion to offset the verdict by the amount of the contingent fee he would have taken had the underlying tort action been successful or, alternatively, the reasonable value of his legal services. Affirming the district court's ruling denying attorney's posttrial motion, this court held, as a matter of first impression, that the damages awarded by the jury to client in her legal-malpractice suit could not be reduced by attorney's contingent fee, because attorney never earned the fee, and client had to pay new counsel who prosecuted the malpractice action. The court reasoned that, to allow attorney a setoff for his contingent fee would leave client less than whole once she paid the fees of the counsel who won her recovery, and thus a fee setoff conflicted with Iowa cases providing that a plaintiff was to be made whole. Hook v. Trevino, 839 N.W.2d 434, 447.

Me.

Me.2012. Cit. in ftn. Borrowers under a commercial loan sued law firm that acted as the closing agent for the loan transaction, alleging that it negligently misrepresented the amount of the prepayment penalty for the loan; the amount listed in the promissory note, which they did not read during the closing, was much larger than the amount listed in a document entitled "Funding Instructions," which law firm's attorney went over with them during the closing. After a nonjury trial, the trial court entered judgment in favor of law firm. Affirming, this court declined to address borrowers' argument that an attorney who acted as a closing agent could be governed by Restatement Third of the Law Governing Lawyers §§ 51 and 56, because borrowers did not raise that argument at trial. St. Louis v. Wilkinson Law Offices, P.C., 2012 ME 116, 55 A.3d 443, 444.

Md.Spec.App.

Md.Spec.App.2009. Cit. and quot. but dist. Co-counsel under a fee-sharing agreement in clients' medical-malpractice case brought negligence and fraudulent-concealment claims, inter alia, against lead counsel, alleging that defendant had a duty to consult and communicate with him on clients' case, and that her failure to do so and her false representations to the clients that they had a possible legal-malpractice action against him caused him to suffer damages. The trial court granted summary judgment for defendant. Affirming, this court held that defendant owed no actionable duty to plaintiff in the conduct of their joint representation of the clients. The court concluded that the declaration in Restatement Third of Law Governing Lawyers § 56 that lawyers were subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances did not support the existence of a tort duty between co-counsel; § 56 merely recognized that being a lawyer did not provide blanket protection from liability when liability would otherwise exist. Blondell v. Littlepage, 185 Md.App. 123, 968 A.2d 678, 688.

Nev.

Nev.2018. Quot. in diss. op.; com. (b) quot. in diss. op.; com. (c) quot. in case quot. in diss. op.; coms. (*i*) and (j) cit. in diss. op. Buyers of a condominium unit sued, among others, condominium association and lawyer who represented association, alleging that defendants retaliated against them in violation of a state statute for requesting that association retain a new lawyer in connection with a dispute regarding a deck on buyers' unit that was built by a previous owner of the unit. The trial court granted lawyer's motion to dismiss, and the court of appeals affirmed. Affirming that portion of the decision, this court held that a lawyer who provided legal services to and acted on behalf of a common-interest community homeowners association client was not an “agent” of the client for purposes of liability under the statute. The dissent argued that, under Restatement Third of the Law Governing Lawyers § 56, a lawyer who violated a statute while representing a client faced the same sanctions anyone else would face. Dezzani v. Kern & Associates, Ltd., 412 P.3d 56, 66, 67.

N.J.Super.App.Div.

N.J.Super.App.Div.2007. Com. (c) cit. in sup. Daughter who was executor/cobeneficiary of her mother's estate brought, along with her cobeneficiary sisters and estate, action for legal malpractice against attorney and law firm for allegedly giving daughter tax advice that resulted in large tax liability for each of the individual plaintiffs. The trial court granted summary judgment for defendants. Affirming in part as to cobeneficiaries, this court held, inter alia, that defendants were not liable to cobeneficiaries because they were not clients of defendants. The court reasoned, in part, that cobeneficiaries did not allege any communications by defendants with, or directed to, cobeneficiaries, or any breach of fiduciary duty by daughter as a result of the advice she received from defendants. Estate of Albanese v. Lolio, 393 N.J.Super. 355, 375, 923 A.2d 325, 337, 338.

N.J.Super.

N.J.Super.2003. Com. (c) quot. in disc. Lender bank sued franchisee/operator of several fast-food restaurants, operator's wife, and his attorney, alleging that attorney advised operator to transfer two houses and a mutual fund into wife's name, that the transfers were fraudulent under the Uniform Fraudulent Transfer Act, and that attorney owed duty to bank under Rules of Professional Conduct as one of operator's creditors. Trial court granted attorney's motion to dismiss. This court reversed in part and remanded, holding, inter alia, that trial court erred in dismissing plaintiff's claim for creditor fraud under state law, because an attorney could be held liable in connection with transfers completed in an effort to prevent execution upon a judgment. Banco Popular North America v. Gandi, 360 N.J.Super. 414, 424, 823 A.2d 809, 815.

N.M.App.

N.M.App.2007. Com. (c) quot. in sup. Insureds sued automobile insurer's attorney, alleging, in part, that defendant aided and abetted insurer's breach of fiduciary duty in handling the arbitration of their claim for uninsured-motorist benefits. The trial court dismissed. Affirming, this court held, inter alia, that plaintiffs failed to allege facts that would support a cause of action against defendant for aiding and abetting breach of fiduciary duty, since an adversarial relationship began between plaintiffs and insurer when plaintiffs demanded arbitration, and each of defendant's alleged acts took place within the scope of her employment as insurer's legal representative. The court concluded that defendant had no duty to plaintiffs as nonclient beneficiaries of insurer, since such a duty would potentially impair defendant's performance of her obligations to client/insurer. Durham v. Guest, 2007-NMCA-144, 142 N.M. 817, 171 P.3d 756, 762.

Or.

Or.2006. Coms. (b) and (c) quot. in ftn. Investor in parcels of land sued joint venturer and her attorney in connection with implementation of a settlement agreement, alleging, in part, that attorney was jointly liable with venturer because he had aided and abetted venturer's breach of fiduciary duties and conversion of plaintiff's property. After plaintiff and venturer settled, the trial court granted summary judgment for attorney. The court of appeals reversed in part. This court reversed, holding, as a matter of first impression, that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship was protected by privilege and was not liable for assisting the client in conduct that breached the client's fiduciary duty to a third party. The court noted that a lawyer's need to protect him/herself from potential tort claims by third parties could conflict with and compromise vigorous representation of the client. Reynolds v. Schrock, 341 Or. 338, 351, 142 P.3d 1062, 1070.

Tex.

Tex.2015. Cit. and quot. in diss. op.; com. (c) cit. and quot. in diss. op., coms. cit. in ftn. to diss. op. Ex-husband and two companies that he received in his divorce brought an action against law firm that represented his ex-wife in the divorce proceedings, alleging that, after the proceedings, defendant fraudulently prepared a bill of sale for an aircraft that ex-wife was awarded in the divorce decree in order to shift ex-wife's tax liability to plaintiff

in contravention of the decree. The trial court granted defendant's motion for summary judgment; the court of appeals reversed in part. This court reversed in part and reinstated the trial court's decision, holding that defendant was immune from liability because defendant established that its conduct was within the scope of representation of its client in the divorce proceedings. Citing Restatement Third of the Law Governing Lawyers § 56, the dissent argued that defendant was not entitled to attorney immunity, because its allegedly fraudulent conduct did not occur in litigation. Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 486, 487, 490, 493.

Tex.App.

Tex.App.2020. Quot. in diss. op. Wife sued attorneys who represented husband in their divorce proceedings, alleging that defendants violated a state statute by producing in response to her discovery requests, among other things, 756 hours of telephone conversations between wife and third parties that husband had recorded illegally. The trial court granted defendants' motion to dismiss based on their defense of attorney immunity, and this court affirmed. The dissent argued that the actual or attempted use or disclosure of intercepted oral communications by an attorney who knew or had reason to know that the communications were illegally intercepted by their client or another fell outside the scope of client representation, and that, under Restatement Third of the Law Governing Lawyers § 56, a lawyer was subject to liability to a non-client when a non-lawyer would be in similar circumstances. Robles v. Nichols, 610 S.W.3d 528, 539.

Wash.

Wash.2006. Quot. in diss. op., com. (b) quot. in diss. op. Following the settlement of client's malpractice action against two attorneys, one of whom had neglected to timely serve the complaint in client's underlying personal-injury case, the other attorney sued his cocounsel to recover, among other things, prospective fees. The trial court dismissed the claims on summary judgment, and the court of appeals affirmed in part. This court affirmed in part, holding, inter alia, that the imposition of any liability between attorneys for prospective fees created a fiduciary duty between attorneys, which could interfere with an attorney's duty of loyalty to the client. The dissent argued that defendant here breached the standard duty of due care that every professional owed to any foreseeable plaintiff, and that there was no remaining duty to the client to protect. Mazon v. Krafchick, 158 Wash.2d 440, 144 P.3d 1168, 1176.

Restatement (Third) of the Law Governing Lawyers § 57 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

Topic 2. Other Civil Liability

§ 57 Nonclient Claims—Certain Defenses and Exceptions to Liability

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

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

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

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

(2) A lawyer representing a client in a civil proceeding or procuring the institution of criminal proceedings by a client is not liable to a nonclient for wrongful use of civil proceedings or for malicious prosecution if the lawyer has probable cause for acting, or if the lawyer acts primarily to help the client obtain a proper adjudication of the client's claim in that proceeding.

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

Comment:

a. Scope and cross-references. This Section sets forth three defenses and exceptions to liability that might otherwise be asserted against a lawyer under § 56. (They are not all "defenses" because the burden of proof for the

exception stated in Subsection (2) falls on the plaintiff.) Lawyer defendants may also rely on defenses available under generally applicable law (see § 56). On judicial and quasi-judicial immunity, see § 48, Comment *d*.

b. *Rationale.* The rules stated in Subsections (1) and (2) protect a lawyer engaging in litigation on behalf of a client from civil actions brought by nonclients. Allowing nonclients to recover for defamation or malicious prosecution or wrongful use of civil proceedings could discourage lawyers from representing clients with proper vigor and thus impede the access of litigants to court. Moreover, the adversary system itself provides some control against improper lawyer conduct in litigation, as does the tribunal's power to govern the conduct of lawyers appearing before it (see § 1, Comment *b*, & § 105, Comment *d*) and the availability of professional discipline (see § 5). This Section thus bars lawyer liability for what would otherwise be defamation in litigation and limits lawyer liability for malicious prosecution and wrongful use of civil proceedings. For the rationale of the privilege set forth by Subsection (3), see Comment *g*.

c. *Defamation privileges.* As is true of parties to litigation and other participants such as witnesses, a lawyer is absolutely privileged against defamation liability for publishing a defamatory statement relating to civil or criminal litigation before a tribunal exercising a judicial function, even if the lawyer acts maliciously and knows the statement to be false. See Restatement Second, Torts § 586 (lawyers) and §§ 587-588 (parties and witnesses). "Publication" and "publish" for this purpose has the same meaning as in the law of defamation. Such a tribunal may be a court, administrative tribunal, or arbitrator. The defamatory statement may be made, for example, in a pleading, brief, question to a witness (including a question subject to valid objection), or oral argument. The person allegedly defamed may be a party to the litigation, a witness, or someone else.

Statements made before litigation is instituted are protected if related to a proceeding contemplated in good faith and under serious consideration by a client who is a prospective plaintiff or reasonably anticipated by a client who is a prospective defendant (see id. § 586, Comment *e*). Thus, the privilege covers a statement in a letter to opposing counsel proposing a settlement or in a conversation with a prospective witness even if the contemplated action is never brought or the prospective witness is not called. The privilege is also a defense to other claims where publication or communication is an element of the claim, for example, a claim that a lawyer's statements during a judicial proceeding constituted intentional infliction of emotional distress (see § 56, Comment *g*). (For the different rules applicable to claims of malicious prosecution and the like, see Subsection (2) and Comments *d* and *e* hereto.) The privilege, however, does not protect statements directed to persons not involved in the litigation or statements having no connection with the proceeding (see Restatement Second, Torts § 586, Comment *c*). Thus, a statement to the press is not covered by the privilege, although the distinct privilege for accurate reports of official proceedings covers some such statements (see Restatement Second, Torts § 611). On what constitutes publication of a statement, see Restatement Second, Torts §§ 577-578. On other grounds of liability, see Comments *d* and *f* hereto; § 56, Comment *f* (fraudulent misrepresentation).

In addition to the absolute privilege provided in Subsection (1), a lawyer is entitled to the absolute and conditional privileges available to any defamation defendant in the circumstances in which they apply (see Restatement Second, Torts §§ 583-612). For example, a conditional privilege protects a lawyer's communication to a client or third person when made in a reasonable effort to protect the interest entrusted to the lawyer (see Restatement Second, Torts § 595, Comment *f*). Similarly, a privilege protects against liability for accurate descriptions of judicial and other official proceedings (see Restatement Second, Torts § 611).

d. *Wrongful use of civil proceeding; abuse of process; false arrest.* A person who takes an active part in the initiation, continuation, or procurement of civil proceedings is liable in tort to the defendant for wrongful use of civil proceedings if the person acts without probable cause and primarily for a purpose other than securing a proper adjudication of the claim and if (except for ex parte proceedings) the proceedings have terminated in favor of the defendant (see Restatement Second, Torts § 674). In many jurisdictions, only those suffering certain kinds of harm known as special injury may recover. The tort is called malicious prosecution in many jurisdictions.

The effect of the rule stated in this Section is that, in a claim for wrongful use of civil proceedings, the existence of probable cause and of an improper purpose are assessed separately for a lawyer and for the client on whose

behalf the civil proceeding was brought. A lawyer is liable only if there was no probable cause for bringing the civil proceeding, the lawyer did not act primarily to aid the client in securing a proper adjudication of the client's claim, and the civil proceeding has terminated in favor of the defending party. Probable cause exists if the lawyer has a reasonable belief that the facts on which the claim is based can be established to the satisfaction of the trier of fact and has a reasonable belief that there is a sound chance that under those facts the claim may be held valid (see Restatement Second, Torts § 675 & Comments *d* & *e* thereto). (On a client's defense of advice of counsel with respect to claims of third persons, see § 29, Comment *c*.) Whether probable cause existed is determined on the basis of the facts known to the lawyer at the time. When there is no dispute as to what facts were so known, the existence of probable cause is an issue of law to be decided by the tribunal, not a jury issue (see Restatement Second, Torts § 681B(1)(c)). A decision by a competent tribunal upholding the client's claim on the merits is ordinarily conclusive evidence of probable cause, even if it is reversed on appeal (see Restatement Second, Torts § 675, Comment *b*).

Similarly, regardless of the client's purpose, even if a lawyer "has no probable cause and is convinced that his client's claim is unfounded, he is still not liable [for wrongful use of civil proceedings] if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim" (Restatement Second, Torts § 674, Comment *d*; see also id. § 676). A desire to earn a contingent or other fee does not constitute an improper motive. But if a lawyer acts without probable cause "and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person" (Restatement Second, Torts § 674, Comment *d*). On limitations against use of threats such as a criminal prosecution in negotiating a settlement, see § 98, Comment *f*. The lawyer's motive is assessed separately from that of the client. However, the client's motives, if known to a lawyer, may constitute evidence bearing on the lawyer's motives.

Lack of probable cause and improper motive are elements of the cause of action for wrongful use of civil proceedings. Thus, the burden of persuading the jury of their existence normally falls on the party seeking recovery (see Restatement Second, Torts § 681A).

Abuse of process is a tort distinct from wrongful use of civil proceedings. A damaged party may recover for abuse of process from one "who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed" (Restatement Second, Torts § 682). Abuse of process may be available even when, for example, probable cause to initiate the proceedings existed or the main proceeding was terminated favorably to the lawyer's client. The critical element is the use of the particular civil or criminal process in question in order to accomplish an illegitimate purpose. A lawyer is not liable for abuse of process when the lawyer acted for some proper purpose, such as securing adjudication of the client's claim, even though this would also procure the lawyer a fee. However, a lawyer may be liable for acting for an improper purpose, for example if the lawyer causes the opposing party to be arrested in order to coerce that party to settle (id. § 682, Illustration 3). Even one acting with improper intent is ordinarily not liable unless the actor performed some act, such as an arrest without proper grounds, not proper in the regular conduct of the proceedings.

A related tort is false imprisonment (see Restatement Second, Torts §§ 35-45A). Although one instigating or participating in the unlawful confinement of another is civilly liable for this tort, lawyers like other participants are privileged against liability when someone is confined pursuant to a warrant that is valid or fair on its face (see id. § 37, Comment *b*; § 45A, Comment *b*; §§ 122- 124). Participants are likewise privileged when someone is arrested upon the oral order of a court acting within its jurisdiction or by a police officer reasonably suspecting that the person arrested has committed a felony (see id. §§ 120-121).

e. *Malicious prosecution.* A private person who initiates or procures initiation of criminal proceedings against one not guilty is liable for malicious prosecution if the person acts without probable cause and primarily for a purpose other than bringing an offender to justice and the proceedings have terminated in favor of the accused (see Restatement Second, Torts § 653).

A public prosecutor acting in that capacity is absolutely privileged against civil liability for initiating, instituting, or continuing criminal proceedings (see Restatement Second, Torts § 656). Thus, regardless of any improper motive or lack of probable cause, a lawyer acting as a public prosecutor (including a lawyer working for the prosecutor) is not liable for malicious prosecution or false arrest. The privilege is limited to acts in the prosecutor's official capacity.

A private lawyer representing a client, for example a complaining witness, could under certain circumstances be liable for malicious prosecution. To establish such liability, a plaintiff must show that the lawyer procured the initiation of criminal proceedings, for example by advising the client to institute them, as opposed to informing the client of available legal options (see Restatement Second, Torts § 653, Comment *h*). It is also necessary that the lawyer acted without good cause and primarily for a purpose other than bringing an offender to justice or assisting a client to assert the client's rights. The lack of probable cause and improper purpose of a lawyer are assessed separately from those of a client, and the burden of persuading the trier of fact of their existence rests on the plaintiff in the malicious-prosecution action (see Comment *d* hereto).

f. Lawyer liability for litigation misconduct. Even if not civilly liable for defamation, wrongful use of civil proceedings, or malicious prosecution, a lawyer nevertheless may be subject to professional discipline (see § 5) or procedural sanctions for litigation misconduct (see § 110). For example, a lawyer who brings a factually unsupported civil action primarily with the purpose of aiding a client to secure a proper adjudication of the client's claim, but without reasonably investigating facts necessary to support the claim, might be subject to litigation sanctions imposed by the tribunal as stated in § 110. Likewise, in some jurisdictions a lawyer could be disciplined for threatening to institute a criminal prosecution to gain advantages in an unrelated matter. See § 98, Comment *f*. See also § 56, Comment *f* (intentional misrepresentation); § 118, Comment *c* (spoliation of evidence).

g. Advising or assisting a client to break a contract. As with other advisors to a contracting party, lawyers are protected against liability for interfering with contracts or with prospective contractual relations or business relationships. On such liability, see generally Restatement Second, Torts §§ 766-774A. That protection reflects the need of contracting parties for advice and assistance, the difficulty of knowing in advance whether an arguable refusal to perform will be held to constitute an actionable breach of contract, and the view that even an actionable breach may sometimes be defensible. Thus a lawyer may ordinarily, without civil liability, advise a client not to enter a contract or to breach an existing contract. A lawyer may also assist such a breach, for example by sending a letter stating the client's intention not to perform, or by negotiating and drafting a contract, with someone else that is inconsistent with the client's other contractual obligations. The same principles apply to dissolving relationships such as a marriage or business partnership. They likewise apply to advising or assisting a client to interfere with a contract or a prospective contract or business relationship with one party, for example by entering into a contract or relationship with another, or to interfere with a contract or relationship between nonclients.

A lawyer so advising and acting is not liable if the lawyer does not employ wrongful means and if the lawyer acts to protect the client's welfare (see Restatement Second, Torts § 770(b), Comment *b,* § 772(b)). So long as the lawyer acts or advises with the purpose of promoting the client's welfare, it is immaterial that the lawyer hopes that the action will increase the lawyer's fees or reputation as a lawyer or takes satisfaction in the consequences to a nonclient. Nor does a lawyer become liable to nonclients for giving with a proper purpose advice that is negligent or harms the client. But a lawyer who acts or advises a client for the lawyer's own benefit, for example so that the client will enter contractual relations with a business in which the lawyer owns an interest, is subject to liability to a nonclient when the lawyer's activities satisfy the other requirements of the tort. A lawyer may also be liable to a nonclient for assisting a client with a proper purpose but by wrongful means, such as threatening the nonclient with an unfounded criminal prosecution in order to induce the nonclient to cancel a contract (see § 98, Comment *f*; Restatement Second, Torts § 770, Comment *d*). On liability for assisting a client to violate that client's fiduciary duties, see § 51(4) and 56.

Reporter's Note

*Comment c. Defamation privileges.*Compare, e.g., Ball Corp. v. Xidex Corp., 967 F.2d 1440 (10th Cir.1992) (privilege applies in Patent and Trademark Office proceeding); Arundel Corp. v. Green, 540 A.2d 815 (Md.Spec.Ct.App.1988) (prefiling investigatory letter privileged if related to suit); Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling, 535 N.W.2d 653 (Minn.Ct.App.1995), cert. denied, 517 U.S. 1221, 116 S.Ct. 1850, 134 L.Ed.2d 950 (1996) (letter soliciting potential plaintiffs privileged against suit by defendant to eventual suit); Surace v. Wuliger, 495 N.E.2d 939 (Ohio 1986) (statement in pleading about nonparty privileged); Odeneal v. Wofford, 668 S.W.2d 819 (Tex.Civ.App.1984) (lawyer's statements before state-bar grievance committee investigating lawyer privileged), with, e.g., Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (no Civil Rights Act privilege for prosecutor's statement at press conference); Scott Fetzer Co. v. Williamson, 101 F.3d 549 (8th Cir.1996) (author of letter to advertiser protesting advertisement not privileged to send copy to newspapers in which advertisements appeared); Green Acres Trust v. London, 688 P.2d 617 (Ariz.1984) (statements to press not privileged); Nguyen v. Proton Technology Corp., 81 Cal.Rptr.2d 392 (Cal.Ct.App.1999) (no privilege for irrelevant statement about prospective defendant's criminal record in demand letter); Rothman v. Jackson, 57 Cal.Rptr.2d 284 (Cal.Ct.App.1996) (press-conference statement not privileged); Post v. Mendel, 507 A.2d 351 (Pa.1986) (no privilege when copy of letter to opposing lawyer sent to judge, disciplinary board, and witnesses); compare, e.g., Branca v. Mayesh, 476 N.Y.S.2d 187 (N.Y.App.Div.), aff'd, 473 N.E.2d 261 (N.Y.1984) (lawyer's distribution of complaint at bar-association seminar privileged as report of judicial proceeding). See generally C. Wolfram, Modern Legal Ethics 230-32 (1986); Annot., 23 A.L.R.4th 932 (1983). On the applicability of the privilege to claims that are similar to defamation claims, see, e.g., Rubin v. Green, 847 P.2d 1044 (Cal.1993) (unlawful solicitation of claim); Silberg v. Anderson, 786 P.2d 365 (Cal.1990) (infliction of emotional distress and breach of contract; discussing other theories); Kirschstein v. Haynes, 788 P.2d 941 (Okla.1990) (intentional infliction of emotional distress); Lee v. Nash, 671 P.2d 703 (Or.Ct.App.1983) (invasion of privacy). Compare Comments *d* and *e* hereto (malicious prosecution and wrongful use of civil proceedings); § 56, Comment *f,* and Reporter's Note thereto (fraud).

On a lawyer's privilege against defamation claims in other situations, see, e.g., Sacramento Brewing Co. v. Desmond, 89 Cal.Rptr.2d 760 (Cal.Ct.App.1999) (litigation privilege applied when lawyer mistakenly named stranger as bankruptcy debtor in notice to creditors); Kruse v. Rabe, 79 A. 316 (N.J.Ct.Err. & App.1910) (absolute privilege for advice to client; but if shouted so others can hear, lawyer's malice is jury question); Dano v. Royal Globe Ins. Co., 451 N.E.2d 488 (N.Y.1983) (disclaimer letter from insurer's lawyer to insured and its adjuster and attorneys); Fusco v. D'Agostino, 551 N.Y.S.2d 276 (N.Y.App.Div.1990) (lawyer's letter to police to prevent client's arrest; but privilege does not cover irrelevant abuse of person charging client); Rodgers v. Wise, 7 S.E.2d 517 (S.C.1940) (letter between co-counsel absolutely privileged and did not constitute publication).

*Comment d. Wrongful use of civil proceeding; abuse of process; false arrest.*On variation among jurisdictions in the elements of the cause of action, see 1 F. Harper, F. James & O. Gray, The Law of Torts §§ 4.8-9 (2d ed. 1986). See generally 1 R. Mallen & J. Smith, Legal Malpractice §§ 6.6-.21 (4th ed.1996); Annot., 46 A.L.R.4th 249 (1986). On comparable liability of a defense lawyer, see Aranson v. Schroeder, 671 A.2d 1023 (N.H.1995).

On probable cause to believe that a claim merits litigation, see Wong v. Tabor, 422 N.E.2d 1279 (Ind.Ct.App.1981); Cottman v. Cottman, 468 A.2d 131 (Md.Spec.Ct.App.1983); Friedman v. Dozorc, 312 N.W.2d 585 (Mich.1981); W. Keeton, et al., Prosser and Keeton on The Law of Torts 893-94 (5th ed.1984); 1 R. Mallen & J. Smith, supra, § 6.14. On the rule that probable cause is appraised on the basis of the information available to the lawyer, without any requirement of investigation, see Lucero v. Stewart, 892 F.2d 52 (9th Cir.1989); Sheldon Appel Co. v. Albert & Oliker, 765 P.2d 498 (Cal.1989) (no legal research required); Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990); Friedman v. Dozorc, supra; 1 R. Mallen & J. Smith, supra, §§ 6.17-18. Contra, Nelson v. Miller, 607 P.2d 438 (Kan.1980). On the rule that, when it is undisputed what facts were available to the lawyer, probable cause is an issue of law for the court, see, e.g., Professional Real Estate Investors v. Columbia Pictures, 508 U.S. 49, 63, 113 S.Ct. 1920, 1929-30, 123 L.Ed.2d 611 (1993) (in antitrust context); Bird v. Rothman, 627 P.2d 1097 (Ariz.Ct.App.), cert. denied, 454 U.S. 865, 102 S.Ct. 327, 70 L.Ed.2d 166 (1981); Sheldon Appel Co. v. Albert & Oliker, supra; Badell v. Beeks, 765 P.2d 126 (Idaho 1988); Prewitt v. Sexton, 777 S.W.2d 891 (Ky.1989). On the rule that a party's success at trial on the merits in a contested hearing is conclusive proof of probable cause, even if reversed on appeal, see Colquitt v. Network Rental, Inc., 393 S.E.2d 28 (Ga.Ct.App.1990); Keefe v. Aluminum Co. of

America, 519 N.E.2d 955 (Ill.App.Ct.1988); Nagy v. McBurney, 392 A.2d 365 (R.I.1978); Annot., 58 A.L.R.2d 1422 (1958). A few jurisdictions include in their definition of probable cause not only the objective element stated in the Comment, but also the lawyer's good-faith belief that the claim merits litigation. E.g., Wong v. Tabor, 422 N.E.2d 1279 (Ind.Ct.App.1981).

On malice as requiring that the lawyer have an intent other than helping the client obtain a proper adjudication of a claim, see, e.g., Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990); Nelson v. Miller, 607 P.2d 438 (Kan.1980); Prewitt v. Sexton, 777 S.W.2d 891 (Ky.1989); Gaar v. North Myrtle Beach Realty Co., 339 S.E.2d 887 (S.C.Ct.App.1986); 1 R. Mallen & J. Smith, supra, § 6.20. But see Slater v. Durchfort, 42 Cal.Rptr.2d 186 (Cal.Ct.App.1995) (depublished; not citable as authority) (replacement lawyer's failure to investigate case may sufficiently evidence malice).

On a lawyer's liability for abuse of process, see generally 1 R. Mallen & J. Smith, supra, § 6.22; Annot., 97 A.L.R.3d 688 (1980). On the requirement that the lawyer's primary purpose be to accomplish a purpose for which the process is not designed, compare, e.g., Hewes v. Wolfe, 330 S.E.2d 16 (N.C.Ct.App.1985) (liability for filing lis pendens on property whose ownership was undisputed, with stated intent to "ruin" and "get" plaintiff); Tedards v. Auty, 557 A.2d 1030 (N.J.Super.Ct.App.Div.1989) (liability for using ne exeat writ, obtained by misrepresentation, to coerce settlement); Strid v. Converse, 331 N.W.2d 350 (Wis.1983) (jury question where lawyer allegedly caused client's spouse to be arrested to coerce spouse into granting visiting rights), with, e.g., DeNardo v. Michalski, 811 P.2d 315 (Alaska 1991) (no liability for bringing supplementary proceedings to collect judgment); Mozzochi v. Beck, 529 A.2d 171 (Conn.1987) (not enough to allege that lawyer sought to injure plaintiff and to enrich lawyer and client through meritless suit); Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990) (no liability where lawyer's primary goal was seeking recovery for client, not securing release of lawyer from opposing party). On the requirement that the lawyer perform some act not proper in the regular conduct of the proceedings, compare, e.g., Goucher v. Dineen, 471 A.2d 688 (Me.1984) (actionable to secure attachment for ulterior purpose by signing writ that falsely asserted that judge had approved attachment); Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 343 N.E.2d 278 (N.Y.1975) (claim stated when lawyer subpoenaed 87 teachers to appear to testify the same day, in order to force board of education to hire substitutes), with, e.g., Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., 728 P.2d 1202 (Cal.1986) (filing environmental suit to coerce financial settlement not sufficient for liability); Scozari v. Barone, 546 So.2d 750 (Fla.Dist.Ct.App.1989) (even if lawyer sought lis pendens to resolve client's custody dispute, no liability if there was reasonable basis in law and fact); see W. Keeton, et al., Prosser and Keeton on the Law of Torts 897-99 (5th ed.1984); cf. 1 F. Harper, F. James & O. Gray, The Law of Torts 481-97 (2d ed.1986).

On a lawyer's liability for false arrest, compare Executive Commercial Servs., Ltd. v. Daskalakis, 393 N.E.2d 1365 (Ill.App.Ct.1979), cert. denied, 446 U.S. 967, 100 S.Ct. 2945, 64 L.Ed.2d 826 (1980) (no liability when plaintiff's liberty restrained by formal legal process, writ ne exeat); Koury v. John Meyer of Norwich, 261 S.E.2d 217 (N.C.Ct.App.1980) (judge's erroneous but not void arrest order complete defense for lawyer who procured it); Lozano v. Tex-Paint, Inc., 606 S.W.2d 40 (Tex.Civ.App.1980) (no liability for arrest under warrant in valid form issued by proper official), with Havens v. Hardesty, 600 P.2d 116 (Colo.Ct.App.1979) (no immunity for lawyer who mistakenly arranges for arrest of person having same name as person intended to be arrested).

*Comment e. Malicious prosecution.*On the absolute privilege of prosecutors acting within their official capacity, see, e.g., Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (no absolute privilege for prosecutor who acts as complaining witness in obtaining warrant); Buckley v. Fitzsimmons, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (prosecutor not absolutely privileged for defamatory statements at press conference); Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (prosecutor privileged under federal civil rights act for presenting evidence to obtain search warrant, but not for advising police officer); Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutor privileged under civil rights act for using false evidence and suppressing exculpatory evidence); Gregoire v. Biddle, 177 F.2d 579 (2d Cir.1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950) (privilege covers false arrest); Coleman v. Turpen, 697 F.2d 1341 (10th Cir.1982) (no immunity for depriving defendant of seized property); State ex rel. Dept. of Justice v. District Court, 560 P.2d 1328 (Mont.1976) (privilege covers malicious prosecution); Blanton v. Barrick,

258 N.W.2d 306 (Iowa 1977) (similar); Blake v. Rupe, 651 P.2d 1096 (Wyo.1982), cert. denied, 459 U.S. 1208, 103 S.Ct. 1199, 75 L.Ed.2d 442 (1983) (absolute privilege for statements in instituting prosecution, conducting preliminary investigation, and announcing prosecution to press); Annot., 67 A.L.R. Fed. 640 (1984); cf. Ferri v. Ackerman, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979) (no similar immunity required by federal law for court-appointed defense counsel). Some jurisdictions grant immunity to public defenders (see § 53, Comment *d,* and Reporter's Note thereto).

There is little authority on the liability of lawyers who represent private parties for malicious prosecution of a criminal proceeding. See Voytko v. Ramada Inn, 445 F.Supp. 315 (D.N.J.1978) (claim stated against lawyer who threatened plaintiff with prosecution, helped file charges, and whose associate acted as prosecutor under rule allowing private lawyers to prosecute); Vehrs v. Piquette, 684 P.2d 476 (Mont.1984) (providing information to prosecutor, who made decision to prosecute, not actionable); Motheral v. Burkhart, 583 A.2d 1180 (Pa.Super.Ct.1990) (not enough that lawyer provided false information to prosecutor, when lawyer did not institute proceedings). On improper threats of criminal prosecution, see § 98, Comment *f*, and Reporter's Note thereto.

*Comment f. Lawyer liability for litigation misconduct.*See § 56, Comment *f,* and Reporter's Note thereto; § 98, Comment *f*, and Reporter's Note thereto; § 110, Reporter's Note; Wade, On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions, 14 Hofstra L. Rev. 433 (1986).

*Comment g. Advising or assisting a client to break a contract.*On a lawyer's freedom from liability for advising a client to break a contract or terminate an economic relationship, see, e.g., Maness v. Star-Kist Foods, Inc., 7 F.3d 704 (8th Cir.1993), cert. denied, 512 U.S. 1207, 114 S.Ct. 2678, 129 L.Ed.2d 813 (1994) (lawyer advised client of conduct of client's employee, leading to employee's discharge); Brown Mackie College v. Graham, 981 F.2d 1149 (10th Cir.1992) (lawyer not liable to school for advising student clients to withdraw); Los Angeles Airways, Inc. v. Davis, 687 F.2d 321 (9th Cir.1982) (lawyer not liable for advising breach, even though lawyer hoped this would improve lawyer's standing with client); Schick v. Bach, 238 Cal.Rptr. 902 (Cal.Ct.App.1987) (lawyer not liable for advising psychotherapist client to disclose patient secrets); Kakadelis v. De Fabritis, 464 A.2d 57 (Conn.1983) (no liability for advising client in connection with change in brokers); Beatie v. DeLong, 561 N.Y.S.2d 448 (N.Y.App.Div.1990) (lawyer's negligent advice that client's contingent-fee contract with other lawyer was unenforceable not actionable by other lawyer); C. Wolfram, Modern Legal Ethics 229 (1986); Annot., 85 A.L.R.4th 846 (1991). For exceptions, see, e.g., Miller v. St. Charles Condominium Assoc., 491 N.E.2d 125 (Ill.App.Ct.1986) (lawyer advised breach because nonclient refused to pay lawyer's fee); Duggin v. Adams, 360 S.E.2d 832 (Va.1987) (lawyer advised breach of sale contract to purchase property himself).

Case Citations - by Jurisdiction

—

D.D.C.
M.D.Fla.
D.N.J.
M.D.Tenn.
Ariz.
D.C.App.
Idaho
Ky.
Nev.
N.J.
N.J.Super.App.Div.
N.C.App.

S.D.
Tex.
Utah

D.D.C.

D.D.C.2004. Subsec. (3) quot. in sup., com. (g) quot. in sup. and in ftn. Apartment-building owners, each of which had designated management company as exclusive agent, brought action against company's attorney for, among other things, tortious interference with contractual rights, after company retained funds from owners at attorney's direction, in violation of contracts between owners and company. Upon cross-motions for summary judgment, this court entered judgment for attorney, holding, inter alia, that attorney had no liability to nonclient owners where owners presented no evidence that the attorney was acting for any reason other than to advance his client's objectives, and there was no claim that his actions were illegal. Shenandoah Associates Ltd. v. Tirana, 322 F.Supp.2d 6, 10, 11.

M.D.Fla.

M.D.Fla.2019. Cit. in case quot. in ftn.; subsec. (3) and com. (g) quot. in sup. Seller of timeshares sued attorney who claimed to specialize in ridding timeshare owners of their timeshare obligations, alleging, among other things, that attorney tortiously interfered with seller's contracts with owners by directing them to stop making timeshare payments to seller. This court granted in part seller's motion for summary judgment, holding that attorney's actions were unjustified. The court rejected attorney's argument that his directions to owners were privileged under Restatement Third of the Law Governing Lawyers § 57, which provided that a lawyer was not liable to a non-client for interference with contract if the lawyer acted to advance the client's objectives without using wrongful means, reasoning that attorney's actions were fraudulent, because, contrary to what he told owners, stopping payments did not effectuate a valid timeshare exit, but rather, caused seller to initiate foreclosure proceedings. Westgate Resorts, Ltd. v. Sussman, 387 F.Supp.3d 1318, 1352.

D.N.J.

D.N.J.2004. Subsec. (c) quot. in disc. After client entered into settlement agreement without attorney's knowledge or consent, attorney brought suit against client's employer and opposing counsel, alleging that defendants tortiously interfered with attorney's retainer agreement with client. Granting defendants' motions to dismiss and to set aside magistrate judge's order granting plaintiff leave to file an amended complaint, this court held, inter alia, that the amended complaint failed to specifically allege that opposing counsel advised client's employer to interfere with the retainer agreement by wrongful means. Marks v. Struble, 347 F.Supp.2d 136, 150.

M.D.Tenn.

M.D.Tenn.2001. Com. (g) cit. in disc. (citing § 78, T.D. No. 8, 1997, which is now § 57 of the Official Draft). Health benefits plan administrator sued plan beneficiary and law firm that had represented beneficiary in obtaining settlement from third-party tortfeasor under Employee Retirement Income Security Act (ERISA) to enforce its subrogation rights under plan. Both parties moved for summary judgment. Granting plaintiff's motion in part, this court held, inter alia, that attorney was not “privileged” from liability for actions taken in contradiction to his client's contractual agreements where attorney knew of plaintiff's right to subrogation, yet counseled client to lie to plaintiff about settlement amount. Greenwood Mills, Inc. v. Burris, 130 F.Supp.2d 949, 962.

Ariz.

Ariz.2005. Subsec. (3) cit. in ftn., com. (c) quot. in ftn., com. (g) quot. in disc. Counsel for conservator in personal-injury suit arising out of automobile accident and driver that caused accident entered into agreement under which driver admitted liability and assigned conservator any claims he had against his insurer. Insurer then sued counsel for intentional interference with contractual relations, alleging that counsel induced driver to admit liability and assign his bad-faith claim so that counsel would receive a larger fee. Trial court granted counsel's motion for summary judgment; the court of appeals reversed. Vacating the opinion of the court of appeals and affirming the decision of the trial court, this court held, inter alia, that while counsel did not have an unqualified or absolute privilege against liability for tortious-interference claims, he did not act improperly in negotiating the agreement in question. Safeway Ins. Co., Inc. v. Guerrero, 210 Ariz. 5, 106 P.3d 1020, 1025, 1027, 1029.

D.C.App.

D.C.App.2016. Com. (g) quot. in case quot. in sup. After former boyfriend brought a breach-of-contract claim against former girlfriend, seeking to recover money that he had advanced to her, girlfriend filed a claim for abuse of process against boyfriend and his attorney. The trial court dismissed attorney as a party, and this court affirmed, holding that girlfriend failed to allege facts from which it could be inferred that attorney acted with malice or a desire to harm girlfriend that was independent of his desire to protect boyfriend. The court pointed out that the only allegation against attorney was that he repeatedly harassed girlfriend's counsel and attempted to rehash matters that were previously dismissed or settled in an attempt to increase costs of litigation for girlfriend, and explained that, under Restatement Third of the Law Governing Lawyers § 57, so long as the lawyer acted or advised with the purpose of promoting the client's welfare, it was immaterial that the lawyer hoped the action would increase his or her fees or reputation, or that the lawyer took satisfaction from the consequences to a nonclient such as girlfriend or her counsel. Nave v. Newman, 140 A.3d 450, 456.

Idaho

Idaho, 2010. Subsecs. (2) and (3) quot. in sup. Plaintiff in an underlying action that was still ongoing sued lawyer and law firm that represented defendants in the underlying action, alleging, among other things, that defendants aided and abetted or assisted others in the commission of tortious acts in the underlying action. The trial court granted defendants' motions to dismiss. Affirming, this court concluded that plaintiff's claims against defendants were barred by the litigation privilege, holding, inter alia, that a cause of action against one party's opponent's attorney in litigation, based on conduct the attorney committed in the course of that litigation, could not properly be instituted prior to the resolution of that litigation, even where the allegedly aggrieved party believed that the attorney in question had been acting outside the legitimate scope of representation and solely for his own benefit. Taylor v. McNichols, 149 Idaho 826, 243 P.3d 642, 656.

Ky.

Ky.2020. Cit. in sup.; subsec. (2) and coms. (d) and (g) quot. in sup. Owner of a commercial property that had hired a contractor to repair the roof of the property sued law firm and attorneys who represented the contractor, alleging that defendants wrongfully filed an invalid materialman’s and mechanic’s lien against the property, as well as a third-party complaint against plaintiff in a separate action. The trial court granted defendants’ motion to dismiss, finding that plaintiff failed to allege sufficient facts to establish the “improper purpose” element of a claim for wrongful use of civil proceedings, and the court of appeals affirmed. Affirming, this court held that neither the desire to earn attorney’s fees nor the filing of a claim seeking damages on behalf of a client constituted an improper purpose sufficient to sustain an action for wrongful use of civil proceedings against an attorney who represented a former adversary under Restatement Second of Torts §§ 674, 675, 676, and Restatement Third of the Law Governing Lawyers § 57. Seiller Waterman, LLC v. RLB Properties, Ltd., 610 S.W.3d 188, 197, 198.

Nev.

Nev.2018. Subsec. (3) quot. in diss. op. Buyers of a condominium unit sued, among others, condominium association and lawyer who represented association, alleging that defendants retaliated against them for requesting that association retain a new lawyer in connection with a dispute regarding a deck on buyers' unit that was built by a previous owner of the unit. The trial court granted lawyer's motion to dismiss and awarded lawyer fees and costs. The court of appeals reversed the award of fees and costs on the ground that buyers failed to submit their claim to mediation, as required by a state statute. This court reversed in part, holding that the statute did not apply, because the question before the court did not involve an interpretation of the condominium's covenants, conditions, and restrictions. The dissent cited Restatement Third of the Law Governing Lawyers § 57, which provided that a lawyer was not liable to a non-client if the lawyer acted to advance a client's objectives without using wrongful means, in arguing that buyers had to mediate their claims, because the claims required interpretation of the covenants, conditions, and restrictions to determine whether lawyer engaged in wrongful retaliation. Dezzani v. Kern & Associates, Ltd., 412 P.3d 56, 67.

N.J.

N.J.2009. Cit. in sup., subsec. (2) cit. and quot. in sup., com. (b) quot. in sup., com. (d) quot. in sup. and cit. in case cit. in sup. After owners of a beach club brought defamation and other claims against neighbors who opposed their application to expand the club, neighbors filed a third-party complaint against owners' attorneys for, among other things, malicious use of process. The trial court granted summary judgment for attorneys. The court of appeals affirmed. Affirming as modified, this court held, inter alia, that there was no support in the record on the required element of malice as it related to attorneys; all of the evidence on the subject of attorneys' motivations pointed to their good faith belief that owners and their business had been damaged, that neighbors' alleged conduct was wrongful, and that the claims were made for no improper purpose. LoBiondo v. Schwartz, 199 N.J. 62, 82-84, 110-113, 970 A.2d 1007, 1018, 1019, 1035, 1036.

N.J.Super.App.Div.

N.J.Super.App.Div.2016. Com. (d) cit. in case quot. in sup. Objector to licensee's renewal of its liquor license filed a SLAPP-back action for malicious use of process against attorneys who had represented licensee in an unsuccessful defamation case concerning plaintiff's comments during a public hearing regarding the license, alleging that defendants' defamation complaint lacked probable cause and was actuated by malice. The trial court denied defendants' motion to dismiss. This court affirmed, holding that, because malicious use of process was an intentional tort requiring proof of malice, plaintiff was not required to submit an affidavit of merit to prove that defendants deviated from a certain standard of care. Citing Restatement Third of the Law Governing Lawyers § 57, Comment *d*, the court explained that the determination as to whether the defamation claim was motivated by defendants' malice could be made through interrogatories and depositions. Perez v. Zagami, LLC, 443 N.J.Super. 359, 366, 128 A.3d 1139, 1144.

N.C.App.

N.C.App.2011. Subsec. (2) and coms. (d) and (e) quot. in sup. Wife sued husband and his attorney, alleging malicious prosecution, abuse of process, and intentional infliction of emotional distress. The trial court granted attorney's motion to dismiss. Although reversing in part, this court clarified that an attorney could be considered to have procured a malicious criminal prosecution initiated by a client only when the attorney advised the client, without any instigation from client regarding the criminal prosecution, to initiate a criminal proceeding. Here, while wife's complaint did not definitely reveal whether attorney actually procured the criminal prosecution by initiating the idea with husband, vagueness or lack of detail was not grounds for a motion to dismiss, and wife stated a valid cause of action against attorney for malicious prosecution, in light of her allegations that attorney

procured a criminal prosecution against her with malice and without probable cause, and that the prosecution terminated in her favor. Chidnese v. Chidnese, 708 S.E.2d 725, 733-735.

S.D.

S.D.2002. Subsec. (3) cit. in ftn. Investors in a corporation sued attorney who had prepared incorporation documents on behalf of former client, alleging fraud, conversion, malpractice, and breach of fiduciary duty. Trial court granted attorney summary judgment, holding that no privity of contract existed between anyone other than lawyer and his client. This court affirmed in part, holding that record was insufficient to show a contractual arrangement wherein attorney agreed to represent anyone other than client and corporation. But the court reversed in part, holding that fact issues existed on claim of aiding and abetting breach of fiduciary duty. Although attorney may not have taken any active role in defrauding investor-directors and may not have owed any direct fiduciary duty to them, client did owe such a duty, and fact issue existed as to whether attorney substantially assisted client in breaching that duty. Chem-Age Industries, Inc. v. Glover, 2002 SD 122, 652 N.W.2d 756, 775.

Tex.

Tex.2021. Com. (c) quot. in sup. Operators of tiger exhibit sued animal-rights organization, attorney, and radio-station owner, alleging, inter alia, that defendants published defamatory statements regarding plaintiffs' tiger exhibit when, after serving plaintiffs with notice of intent to sue for purported violations of the Endangered Species Act, defendants publicized their allegations in press releases for publicity purposes. The trial court granted defendants' motion to dismiss under state anti-SLAPP statutes. The court of appeals affirmed. This court reversed in part and remanded, holding that defendants were not entitled to attorney immunity against plaintiffs' defamation claims. Quoting Restatement Third of the Law Governing Lawyers § 57, Comment *c*, the court explained that the privilege of attorney immunity did not protect statements directed to persons not involved in the litigation. Landry's, Inc. v. Animal Legal Defense Fund, 631 S.W.3d 40, 52, 53.

Tex.2015. Cit. in diss. op. and in ftn. to diss. op. Ex-husband and two companies that he received in his divorce brought an action against law firm that represented his ex-wife in the divorce proceedings, alleging that, after the proceedings, defendant fraudulently prepared a bill of sale for an aircraft that ex-wife was awarded in the divorce decree in order to shift ex-wife's tax liability to plaintiff in contravention of the decree. The trial court granted defendant's motion for summary judgment; the court of appeals reversed in part. This court reversed in part and reinstated the trial court's decision, holding that defendant was immune from liability because defendant established that its conduct was within the scope of representation of its client in the divorce proceedings. Citing Restatement Third of the Law Governing Lawyers § 57, the dissent argued that, in order to be entitled to immunity, the conduct should have occurred in litigation and that, here, defendant's allegedly fraudulent conduct did not occur in the divorce proceedings. Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 487, 493.

Utah

Utah, 2003. Com. (d) quot. in disc. Corporation's minority shareholder sued law firms and several of firms' partners for, in part, abuse of process through wrongful institution of civil proceedings. Trial court granted defendants' motion to dismiss the abuse-of-process claim. This court affirmed, holding, inter alia, that plaintiff did not show that the legal process of seeking a bar order or contempt sanctions from California federal district court was used by defendants for any purpose other than the one for which it was designed or intended, i.e., to protect a class-action settlement from plaintiff's potential suit. Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17, 28.

End of Document

Restatement (Third) of the Law Governing Lawyers 4 3 Intro. Note (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

Topic 3. Vicarious Liability

Introductory Note

Introductory Note: Most of this Chapter addresses the civil liability of an individual lawyer. Many lawyers, however, practice in law firms or similar groups. This Topic considers when a firm (or similar group) and its principals share in the liability resulting from activities of some of the firm's principals or employees.

End of Document

Restatement (Third) of the Law Governing Lawyers § 58 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

Topic 3. Vicarious Liability

§ 58 Vicarious Liability

(1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.
(2) Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm.
(3) A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

Comment:

a. *Scope and cross-references.* This Section sets forth the vicarious liability of a law firm and its principals. It presupposes that a firm principal or employee is liable on one or more claims under §§ 48- 57 and considers when the firm itself and each of its principals share in that liability. Other Sections address when a lawyer is directly liable for acts of another, for example because a lawyer in charge of a matter did not properly supervise an assisting lawyer or paralegal (see § 52, Comment *c*). On the extent to which other lawyers or a firm are subject to professional discipline or litigation sanctions, see § 5. On a client's liability for certain acts of the client's lawyer, see § 26, Comment *d,* and § 27, Comment *e*. The term “legal cause,” defined in Restatement Second, Torts § 9, is equivalent to “proximate cause.”

b. *Rationale.* Vicarious liability of law firms and principals of traditional general partnerships results from the principles of respondeat superior or enterprise liability. See Revised Uniform Partnership Act §§ 305 and 306 (1993); Restatement Second, Agency, Chapter 7; Uniform Partnership Act §§ 13 and 14; § 26, Comment *b*; § 27, Comment *b*; cf. Uniform Partnership Act § 102(f) (partner's knowledge attributed to other partners, unless

partner committed or consented to fraud on partnership). Vicarious liability also helps to maintain the quality of legal services, by requiring not only a firm but also its principals to stand behind the performance of other firm personnel. Because many law firms are thinly capitalized, the vicarious liability of principals helps to assure compensation to those who may have claims against principals of a firm.

On the other hand, limited liability is a principle generally accepted for those engaged in gainful occupations, and it may be difficult for a lawyer to monitor effectively the behavior of other lawyers in a firm. For those and other reasons, legislatures have adopted statutes making it possible for lawyers to practice in modified partnerships or other entities in which the principals are not subject to the traditional vicarious liability of general partners. Such entities themselves continue to be vicariously liable for acts of their principals and employees, and their lawyers continue to be liable for their own acts.

c. Firms, principals, and employees. In a law firm organized as a traditional general partnership without limitation of liability, the partners are "principals" within the meaning of this Section, and associates, paraprofessionals, and other employees (including part-time employees while so acting) are "employees." The firm and its principals are ordinarily liable for wrongful acts and omissions of lawyers who have an of-counsel relationship with the firm (see § 123, Comment *c(ii)*), while they are doing firm work. However, the scope of liability for acts of an of-counsel lawyer may be affected by the terms of the of-counsel relationship and the extent of the lawyer's affiliation to the firm apparent to the lawyer's clients. The scope of the of-counsel lawyer's vicarious liability for acts of firm lawyers is determined by general partnership law. On liability for independent contractors, see Comment *e* hereto. On the distinction between employees (referred to in agency law as servants) and independent contractors, see Restatement Second, Agency §§ 2 and 220.

Even though no traditional partnership exists, a person might be able to assert vicarious liability under the doctrine of partnership by estoppel, or purported partnership, against lawyers who represented themselves to be partners or consented to another's so representing them when the person relied on that representation.

Legislation allows lawyers to practice in professional corporations and, in many states, in limited-liability general partnerships or limited-liability companies. Such legislation generally contains language excluding liability of principals of the entity for negligence or misconduct in which they did not participate directly or as supervisors. The effect of such statutory language on lawyers may be limited by the state supreme court's rules and by statutory provisions concerning professional regulation. Thus, rules in some states require lawyers in professional corporations or other entities to accept specified vicarious liability, to maintain specified liability insurance, or to give notice to clients of the nature of the firm.

Whether the principals of a professional corporation or other entity, as well as the entity, are liable for other liabilities, such as the corporation's obligation to pay rent for its office, depends on the law of the jurisdiction. The firm may enter into contracts excluding or limiting vicarious liability in commercial transactions such as renting office space, but may not enter into agreements prospectively limiting the firm's liability to a client for malpractice (see § 54).

The lawyers of a corporate law department are not vicariously subject to each other's liabilities under this Section. Such departments usually have no outside clients, and their client-employer does not need vicarious liability to enforce responsibility on the part of its lawyer employees. Any outside nonclient injured by a law department lawyer can look to the corporation as responsible for its lawyer employees; such outsiders normally are adequately protected by the corporation's liability under general principles of enterprise liability. A department lawyer who participated in the acts giving rise to liability is directly, but not vicariously, liable (see Restatement Second, Agency §§ 320-360).

For similar reasons, the lawyers of the legal office of a governmental agency are not vicariously subject to each other's liabilities under this Section. In addition, the damage liability of the agency or of the government of which

it is part is often affected by rules and statutes regulating governmental liability or immunity for torts and other wrongs.

d. Ordinary course of business or actual or apparent authority. Even when liability results from the act of a firm's principal or employee that was not within actual or apparent authority, the firm (and, to the extent stated in Subsections (2) and (3), its principals) is liable if the act was in the ordinary course of the firm's business (see Revised Uniform Partnership Act § 305 (1993); Uniform Partnership Act § 13; Restatement Second, Agency § 219). When an actor has apparent authority to act for the firm and an injured person has relied on that authority, the firm is subject to liability for certain of the actor's torts, for example negligence and fraud, and on contracts the actor entered into. Restatement Second, Agency §§ 159, 219, 248, 254, 257, 261, 265, and 267.

The ordinary course of business of a law firm includes the practice of law and various activities normally related to it. Thus, liability is imposed for legal malpractice (see §§ 48- 54) by any firm lawyer; indebtedness incurred by staff in purchasing services or supplies; misapplication of funds in the custody of the firm or its personnel (see Revised Uniform Partnership Act § 305 (1993); Uniform Partnership Act § 14); and torts committed by a principal or employee while acting in the scope of employment, for example for the negligent driving of an employee who is on firm business (see generally Restatement Second, Agency §§ 219-249). That an act or omission giving rise to liability violated specific instructions given to the actor by the firm, for example a set of detailed malpractice-avoidance rules, does not remove the act or omission from the ordinary course of business. But nonfirm business or other acts, such as entry by a law-firm principal into an unrelated business partnership that is not part of the firm's practice of law and its ancillary activities, are not within the ordinary course of a law firm's business. Also excluded are acts of nonprincipals that are not within the scope of their employment, for example the writing of a will by a nonlawyer firm librarian not authorized to do so. Jurisdictions disagree about whether, under general agency law, a principal is liable for intentional torts such as assaults that an agent commits without any purpose of serving a principal whose enterprise helped create the risk of the act. In the case of law firms, the grounds for such liability are stronger when the plaintiff is a client and a client-lawyer relationship facilitated the tort.

The scope of a firm's course of business is determined from its own activities; a particular firm may have an ordinary course of business broader or narrower than those of otherwise comparable firms. For example, if other lawyers in a firm know that a firm lawyer regularly makes investments for firm clients from the proceeds of recoveries or the like, that may warrant a fact finder in concluding that the firm's ordinary course of business includes making such investments for clients. Likewise, activities such as the provision of title insurance can be within the ordinary course of the business of a law firm. When a firm or its principals own an enterprise that is not engaged in the practice of law, the corporate or other form of that enterprise may limit the liability of its owners; the professional rules of the jurisdiction may nonetheless subject the firm's principals to obligations other than civil liability with respect to the enterprise (see § 10, Comment *g*).

When a firm principal or employee has actual authority to act or refrain from acting, under this Section the firm is subject to resulting liabilities even if the act or omission was not within the ordinary course of the firm's business. For example, a firm may authorize a lawyer to engage in business transactions with a client. Actual authority may be conferred by specific authorization, an employment agreement, general understandings reflected in past practice and other circumstances (see Restatement Second, Agency § 229). A firm may also authorize an act by subsequent ratification (see Restatement Second, Agency § 218).

Determining whether vicarious liability results from an act or omission involves considerations different from those that determine whether that act is binding on a client under §§ 26 and 27. A law firm and its principals may be subject to vicarious liability for an act that does not bind the client, for example if a firm lawyer purports to settle the client's case against the client's instructions (see § 22 & § 27, Comments *d* & *f*). Conversely, the client may be bound although the firm and its principals are not vicariously liable, for example if a firm lawyer performs negligently but at the client's express direction some task unrelated to the practice of law or to the firm's ordinary course of business.

e. Liability for conduct of an actor not within a firm. Whether a firm is vicariously liable for wrongful acts or omissions by independent contractors such as process servers is determined by general principles of agency (see Restatement Second, Agency §§ 212-218 & 250-267). On the distinction between agents who are servants and independent contractors, see id. §§ 2 and 220. On contractual liability, see id. §§ 140-211. On liability for the firm's own involvement in tortious activities of nonemployees, see Restatement Second, Torts §§ 875-881. A firm and its principals are not liable to the client for the acts and omissions of independent contractors except when a contractor is performing the firm's own nondelegable duty to the client, but the firm is liable for its own negligence in selecting or supervising such contractors and for directing tortious conduct (see Restatement Second, Agency §§ 351, 356, & 358).

A firm is not ordinarily liable under this Section for the acts or omissions of a lawyer outside the firm who is working with firm lawyers as co-counsel or in a similar arrangement. Such a lawyer is usually an independent agent of the client over whom the firm has no control, not a servant or independent contractor. That is especially likely to be the case when the second lawyer represents the client in another jurisdiction, in which that lawyer, but not the firm's lawyers, is a member of the bar. The firm may, however, be liable in some circumstances. Thus a firm may be liable to the client for the acts and omissions of the outside lawyer if the firm assumes responsibility to a client for a matter, for example pursuant to obligations in fee-sharing arrangements (see § 47) or by assigning work to a temporary lawyer who has no direct relationship with the client. Such arrangements make the outside lawyer the firm's subagent (see Restatement Second, Agency §§ 5 & 406). In such circumstances, the outside lawyer may be liable to the firm for contribution or indemnity. A firm is liable to its client for acts and omissions of its own principals and employees relating to the outside lawyer, for example when it undertakes to recommend or supervise the outside lawyer and does so negligently or when its lawyers advise or participate in the outside lawyer's actionable conduct (see Restatement Second, Agency § 405). A firm may also be liable to a nonclient for the acts and omissions of an outside lawyer, for example when principals or employees of the firm direct or help perform those acts or omissions (see Restatement Second, Torts §§ 875-881; Restatement Second, Agency §§ 351 & 358). For of-counsel lawyers, see Comment *c* hereto.

f. Extent of liability. This Section addresses liability for compensatory damages (see § 53). Vicarious liability for punitive damages is determined by general principles of tort law (see Restatement Second, Torts § 909; Restatement Second, Agency § 217C). The person on whom civil penalties and the like fall depends on the law under which the penalty is imposed. Other remedies such as rescission, restitution, and fee reduction or forfeiture, when applicable to one firm lawyer, ordinarily also apply to the firm as a whole (see §§ 34, 37, 39, & 55, Comment *d*). When injunctive or declaratory relief is warranted against a firm lawyer, whether relief should extend to the lawyer's firm depends on the circumstances of the case and the nature of the legal violation. Rules set forth in §§ 123 and 124 govern the extent of vicarious disqualification due to a conflict of interest. There are also special rules of professional discipline governing disciplinary responsibility for acts of another lawyer or a nonlawyer employee (see § 5, Comment *f*). Whether a firm is subject to sanctions for the misconduct of a firm lawyer in litigation depends on the rules under which the sanctions are imposed (see § 110). Criminal liability of lawyers (see §§ 8 & 30(1)) ordinarily depends on personal guilt.

g. Joint and several liability; contribution. When firm principals are personally liable vicariously, they are jointly and severally liable (see Revised Uniform Partnership Act § 306 (1993); Uniform Partnership Act § 15). They may be entitled to contribution or indemnity under the firm's governing agreement or other contractual provision or general legal principles. Under the Revised Uniform Partnership Act (see id. § 307), a judgment creditor must exhaust the partnership's assets before enforcing a judgment against a partner's assets.

h. Insurance. A law firm and its principals may obtain insurance against vicarious liability resulting from the acts or omissions of a firm principal or employee or others. Although public policy prohibits a lawyer from obtaining insurance against liability for some wilful torts, insurance may properly cover vicarious liability for such torts. See § 54, Comment *b*.

i. Effect of the termination of a client's relationship with a firm. A lawyer's vicarious liability, if any, does not extend to acts and omissions occurring after the lawyer ceased to be a firm principal, except to the extent that

failure to give proper notice of a dissolution or withdrawal may result in continuing responsibility for the firm's affairs (see § 33, Comment *b*). A lawyer is likewise not vicariously liable for acts and omissions occurring before the lawyer became a principal of a firm.

A lawyer's ceasing to be a principal of a firm, whether because the firm dissolves or the lawyer withdraws, does not terminate the lawyer's vicarious liability, if any, for acts and omissions occurring prior thereto. Likewise, a lawyer's death does not terminate vicarious liability, if any, for prior acts and omissions, although the vicarious liability must then be asserted against the lawyer's estate.

Reporter's Note

*Comment c. Firms, principals, and employees.*On partnership by estoppel, see, e.g., Bonavire v. Wampler, 779 F.2d 1011 (4th Cir.1985) (lawyers had "firm" name on door and stationery, and one introduced another as partner); Royal Bank & Trust Co. v. Weintraub, Gold & Alper, 497 N.E.2d 289 (N.Y.1986) (lawyers continued business in firm name after dissolution); Atlas Tack Corp. v. DiMasi, 637 N.E.2d 230 (Mass.App.Ct.1994) (summary judgment for lawyer improper when stationery described lawyers as "professional association" and listed their names); American Cas. Co. v. Costello, 435 N.W.2d 760 (Mich.Ct.App.1989) (no liability where plaintiff did not rely); Revised Uniform Partnership Act § 308; 1 R. Mallen & J. Smith, Legal Malpractice § 5.3 (4th ed.1996); C. Wolfram, Modern Legal Ethics 884-85 (1986). On professional discipline for inaccurately stating or implying that a partnership exists, see ABA Model Rules of Professional Conduct, Rule 7.5(d) (1983); ABA Model Code of Professional Responsibility, DR 2-102(C) (1969). See generally DeMott, Our Partners' Keepers? Agency Dimensions of Partnership Relationships, 58 L. & Contemp. Probs. 109, 119-29 (1995).

Statutes in all jurisdictions allow lawyers to form professional corporations and in many states also limited-liability partnerships or limited-liability companies. E.g., N.Y. Business Corp. L. Art. 15 (professional-service corporation); D.C. Code §§ 29-601 ff. (professional corporation); Fla. Stats. §§ 621.01 ff. (both professional corporations and professional limited-liability companies); N.J. Stats. Ann. § 42:2B-f ff. (limited-liability company); Tex. Rev. Civ. Stats. Art. 6132a-1 (limited-liability partnership); Bamberger & Jacobson, State Limited Liability and Partnership Laws (1995). The legislation contains provisions restricting vicarious liability. See generally 1 R. Mallen & J. Smith, Legal Malpractice §§ 5.5-.6 (4th ed.1996); Johnson, Limited Liability for Lawyers: General Partners Need Not Apply, 51 Bus. Law. 85 (1995) (discussing variation among statutes, some of which for example leave lawyers liable for acts of lawyers under their direct supervision); ABA/BNA Law. Manual Prof. Conduct § 91:302-04. The application of such provisions to lawyers may be affected by the principle in some states vesting regulation of the practice of law in the state supreme court and by construction of savings clauses in the legislation. See Petition of the Bar Ass'n, 516 P.2d 1267 (Haw.1973); Reiner v. Kelley, 457 N.E.2d 946 (Ohio Ct.App.1983) (modified by Rule III, infra); see also Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 943 P.2d 104 (N.M.1997) (shareholders liable if they participated personally and substantially in act giving rise to liability); but see Henderson v. HSI Fin. Servs., Inc., 471 S.E.2d 885 (Ga.1996) (court controls whether lawyers may use form of practice, whose liability consequences are specified by legislature; court allows lawyer member of professional corporation to practice without vicarious liability), overruling First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga.1983). Courts in a few states have preserved by rule the vicarious liability of lawyers in professional corporations. Ill. S. Ct. R. 721(d); Neb. Ct. R. Professional Service Corporations; see Supreme Ct. of Kentucky, Order of September 22, 1995 (discussed in Note, The Ethical Implications of the Limited Liability Status in the Practice of Law, 87 Ky. L. J. 489 (1998)) (declining to adopt limited-liability rule). In other states, rules allow lawyers to avoid vicarious liability if their professional corporations have adequate liability insurance. E.g., Cal. L. Corp. Rules, Rule IV(B); N.J. Rules of Gen. Application, Rule 1:21-1A; see also N.M. Stat. Ann. § 54-1-7; Rules for the Government of the Bar of Ohio, Rule III.

Because of such legislative and judicial activity, accurate determination of any jurisdiction's law on vicarious liability of lawyers in professional corporations, limited-liability partnerships, and limited-liability companies requires investigation of current statutes, rules, and case law. For the last of these, compare Vinall v. Hoffman, 651 P.2d 850 (Ariz.1982) (dictum); Beane v. Paulsen, 26 Cal.Rptr.2d 486 (Cal.Ct.App.1993); First Bank & Trust Co.

v. Zagoria, supra; Petition of the Bar Ass'n, supra; Reiner v. Kelley, supra; Anderson v. McBurney, 467 N.W.2d 158 (Wis.Ct.App.1991) (rejected by S. Ct. R. 20:5.7); cf. Heath v. Craighill, Rendleman, Ingle & Blythe, P.A., 388 S.E.2d 178 (N.C.Ct.App.1990) (recognizing liability), with FDIC v. Cocke, 7 F.3d 396 (4th Cir.1993), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 12 (1994); Grayson v. Jones, 710 P.2d 76 (Nev.1985); Sucese v. Kirsch, 606 N.Y.S.2d 60 (N.Y.App.Div.1993); Stewart v. Coffman, 748 P.2d 579 (Utah Ct.App.1988); Vanderhoof v. Cleary, 725 A.2d 917 (Vt.1998) (rejecting vicarious liability).

On shareholder liability for a professional corporation's business debts, compare South High Dev., Ltd. v. Weiner, Lippe & Cromley Co., 445 N.E.2d 1106 (Ohio 1983) (shareholders liable on corporation's lease), with We're Associates Co. v. Cohen, Stracher & Bloom, P.C., 480 N.E.2d 357 (N.Y.1985) (no liability on similar facts); First Bank & Trust Co. v. Zagoria, supra (dictum) (nonliability on purely business and nonprofessional obligations). See generally 1 R. Mallen & J. Smith, Legal Malpractice § 5.4 (4th ed.1996) (describing variation in statutes); Annot., 39 A.L.R.4th 556 (1985); Comment *d* hereto and Reporter's Note thereto. On of-counsel lawyers, see Homa v. Friendly Mobile Manor Inc., 612 A.2d 322 (Md.Spec.Ct. App.1992) (firm not vicariously liable when of-counsel lawyer, not firm, separately represented client).

On a corporation's liability for acts of house counsel, see Noble v. Sears, Roebuck & Co., 109 Cal.Rptr. 269 (Cal.Ct.App.1973) (invasions of privacy while defending suit against corporation).

*Comment d. Ordinary course of business or actual or apparent authority.*Compare, e.g., 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) (firm, a professional corporation, liable for lawyer's negligence in preparing tax-shelter offering memoranda, even though lawyer was also principal); 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) (firm liable when lawyer manipulated settlement, issued false opinion letter, threatened suit in bad faith, and participated in breaches of client fiduciary obligations); Thomas v. Ross & Hardies, 9 F.Supp.2d 547 (D.Md.1998) (firm subject to RICO liability when lawyer helped operate client's fraudulent business); Federal S. & L. Ins. Corp. v. McGinnis, Juban, Bevan, Mullins & Patterson, P.C., 808 F.Supp. 1263 (E.D.La.1992) (firm liable when lawyer borrowed from client without proper disclosure); First Bank & Trust Co. v. Zagoria, 302 S.E.2d 674 (Ga.1983) (professional-corporation shareholder liable when lawyer withdrew funds from corporate account and issued check to client on that account, and check was dishonored); Husted v. McCloud, 450 N.E.2d 491 (Ind.1983) (firm liable for lawyer's conversion of client funds); Phillips v. Carson, 731 P.2d 820 (Kan.1987) (jury issue whether firm liable when partner took loan from client without proper advice and failed to file mortgage securing it); Kansallis Fin. Ltd. v. Fern, 659 N.E.2d 731 (Mass.1996) (partner liable for lawyer's opinion-letter fraud if lawyer had apparent authority or acted with intent to benefit partnership); Baker v. Ploetz, 597 N.W.2d 347 (Minn.Ct.App.1999) (firm's vicarious liability for statutory trebled damages for associate's fraud); Clients' Security Fund v. Grandeau, 526 N.E.2d 270 (N.Y.1988) (partner liable for lawyer's conversion of client funds); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988) (partners liable when lawyer failed to place client's rights in joint tenancy requested by client); Reiner v. Kelley, 457 N.E.2d 946 (Ohio Ct.App.1983) (professional corporation liable when lawyer who represented land seller defrauded real-estate broker); Roach v. Mead, 722 P.2d 1229 (Or.1986) (firm liable when lawyer borrows from client without giving proper advice), with, e.g., Entente Mineral Co. v. Parker, 956 F.2d 524 (5th Cir.1992) (firm not liable when lawyer buys royalty interest from client, interfering with client's contract with plaintiff); Sheinkopf v. Stone, 927 F.2d 1259 (1st Cir.1991) (firm not liable for acts of lawyer who solicited nonclient's investment in outside business venture); Heath v. Craighill, Rendleman, Ingle & Blythe, P.A., 388 S.E.2d 178 (N.C.Ct.App.1990) (professional-corporation shareholders not liable when lawyer solicited investments from client, before and after leaving firm); Shelton v. Fairley, 356 S.E.2d 917 (N.C.Ct.App.1987) (partners not liable for lawyer's acts as executor, even though lawyer was also attorney for estate, when lawyer kept executor fees); Hayes v. Far West Servs., Inc., 749 P.2d 178 (Wash.Ct.App.1988) (firm, a professional corporation, not liable when lawyer shot another patron in cocktail lounge); Anderson v. McBurney, 467 N.W.2d 158 (Wis.Ct.App.1991) (professional-corporation shareholders not liable when lawyer testified falsely in probate proceeding to uphold will benefiting lawyer); see 1 R. Mallen & J. Smith, Legal Malpractice § 5.3 (4th ed.1996); Annot., 70 A.L.R.3d 1298 (1976). On liability for an agent's intentional torts under general agency law, see Faragher v. City of Boca Raton, 524 U.S. 775, 792-806, 118 S.Ct. 2275, 2286-92, 141 L.Ed.2d 662 (1998). On when one lawyer is subject to discipline for the misconduct of another firm lawyer

or employee, see ABA Model Rules of Professional Conduct, Rules 5.1(c) & 5.3(c) (1983); § 5, Comment *f*, and Reporter's Note thereto. On a lawyer's responsibilities regarding law-related services provided by the lawyer or an entity the lawyer controls, see ABA Model Rule 5.7; see also § 10, Comment *g*.

*Comment e. Liability for conduct of an actor not within a firm.*For nonlawyers, compare Noble v. Sears, Roebuck & Co., 109 Cal.Rptr. 269 (Cal.Ct.App.1973) (corporation and its house counsel liable to nonclient for negligent choice of detective agency); Kleeman v. Rheingold, 614 N.E.2d 712 (N.Y.1993) (firm liable to client for negligence of outside process server, an independent contractor, because firm owes client nondelegable duty to use care in serving process), with Kersten v. Van Grack, Axelson & Williamowsky, P.C., 608 A.2d 1270 (Md.Ct.Spec.App.1992) (firm not liable to client for misconduct of outside process server); Bockian v. Esanu Katsky Korins & Siger, 476 N.Y.S.2d 1009 (N.Y.Sup.Ct.1984) (firm not liable to nonclient for harassment by outside process server). For lawyers, see Macawber Eng'g, Inc. v. Robson & Miller, 47 F.3d 253 (8th Cir.1995) (local counsel with limited functions operating under direction of other firm not liable for other firm's negligence unknown to counsel); Tormo v. Yormark, 398 F.Supp. 1159 (D.N.J.1975) (lawyer would be liable for lack of care in recommending another lawyer, who embezzled client funds; whether lawyer assumed supervisory responsibility was issue of fact); Floro v. Lawton, 10 Cal.Rptr. 98 (Cal.Ct.App.1960) (when original lawyer agrees with client that second lawyer will try case and fee will be shared, lawyer responsible to client for second lawyer's negligence); Duggins v. Guardianship of Washington, 632 So.2d 420 (Miss.1993) (similar; liability for misappropriation and punitive damages); Homa v. Friendly Mobile Manor Inc., 612 A.2d 322 (Md.Ct.Spec.App.1992) (firm not liable for lawyer's fraud on client when lawyer was "of counsel" and lawyer, but not firm, represented client); Duggins v. Guardianship of Washington, 632 So.2d 420 (Miss.1993) (when 2 lawyers handled case, splitting work and fees, each was joint venturer liable for other's conversion); Staron v. Weinstein, 701 A.2d 1325 (N.J.Super.Ct.App.Div.1997) (considering when firm liable for "of counsel" lawyer); Broadway Maintenance Corp. v. Tunstead & Schechter, 487 N.Y.S.2d 799 (N.Y.App.Div.1985) (firm not liable for negligence of second firm that it recommended to client but did not supervise); Wildermann v. Wachtell, 267 N.Y. Supp. 840 (N.Y.Sup.Ct.1933), aff'd, 271 N.Y.S. 954 (N.Y.App.Div.1934) (lawyer not liable for negligence of cocounsel in another state when lawyer, without negligence, recommended retention of foreign lawyer and relied on that lawyer); Scott v. Francis, 838 P.2d 596 (Or.1992) (when lawyer from other state arranged with local lawyer to bring suit and local lawyer assured foreign lawyer there was no statute-of-limitations problem, local lawyer must indemnify foreign lawyer for malpractice damages when foreign lawyer's delay led to dismissal of suit); Ortiz v. Barrett, 278 S.E.2d 833 (Va.1981) (local counsel not liable to client for negligence of other lawyer who made all decisions). See generally 1 R. Mallen & J. Smith, Legal Malpractice §§ 5.8 & 5.9 (4th ed.1996); C. Wolfram, Modern Legal Ethics 236-38 (1986); § 47, Comment *d*, and Reporter's Note thereto.

*Comment f. Extent of liability.*On punitive damages, compare Husted v. McCloud, 450 N.E.2d 491 (Ind.1983) (innocent partners not liable); Shelton v. Fairley, 356 S.E.2d 917 (N.C.Ct.App.1987) (same), with Shetka v. Kueppers, Kueppers, Von Feldt & Salmen, 454 N.W.2d 916 (Minn.1990) (firm may be liable, but financial condition of nonculpable partners irrelevant); Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn, 907 P.2d 506 (Ariz.Ct.App.1995), cert. denied, 517 U.S. 1234, 116 S.Ct. 1877, 135 L.Ed.2d 173 (1996) (firm liable under respondeat superior); see H. Reuschlein & W. Gregory, Agency & Partnership 307-08 (2d ed.1990) (noting conflicting authority). On injunctive relief and restitution, see § 55, Comment *d,* and Reporter's Note thereto. On discipline, see ABA Model Rules of Professional Conduct, Rules 5.1, 5.2, and 5.3 (1983); Schneyer, Professional Discipline for Law Firms, 77 Cornell L. Rev. 1 (1991). On litigation sanctions, compare Pavelic & Le Flore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989) (firm as whole not subject to sanction under then version of Fed. R. Civ. P. 11), with Brignoli v. Balch Hardy & Scheinman, Inc., 735 F.Supp. 100 (S.D.N.Y.1990) (firm as whole subject to sanction under 28 U.S.C. § 1927); Fed. R. Civ. Proc., R. 11(c) (as amended 1993) (court may levy sanction on "the attorneys, law firms, or parties"); Uniform Rules for the N.Y. State Trial Courts § 130-1.1(b) (firm subject to sanction).

*Comment g. Joint and several liability; contribution.*See Uniform Contribution Among Tortfeasors Act § 1(a) and (g) (contribution available from others jointly and severally liable, but not for breach of trust or other fiduciary obligation); Kramer v. Nowak, 908 F.Supp. 1281 (E.D.Pa.1995) (lawyer's limited right to recover for associate's negligence exposing lawyer to liability); St. Paul Fire & Marine Ins. Co. v. Perl, 415 N.W.2d 663

(Minn.1987) (firm's right to seek reimbursement from lawyer at fault superseded by firm bylaw entitling lawyer to indemnification from firm); H. Reuschlein & W. Gregory, Agency & Partnership 271-73, 312-19 (2d ed.1990).

Comment h. Insurance. See Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209 (Minn.1984) (contrary to public policy for insurance to cover culpable lawyer's liability for fee forfeiture for breach of fiduciary duty; but insurance may cover firm's liability); 4 R. Mallen & J. Smith, Legal Malpractice ch. 33 (4th ed.1996); C. Wolfram, Modern Legal Ethics 240-41 (1986); Hanen & Hanna, Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues, 33 S. Tex. L. Rev. 75 (1992); Schneyer, Mandatory Malpractice Insurance for Lawyers in Wisconsin and Elsewhere, 1979 Wis. L. Rev. 1019. On the public policy against insurance for willful torts, compare 9 Couch on Insurance § 39:15 (2d ed.1985), with St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F.Supp. 155 (E.D.Va.1993), aff'd, 48 F.3d 778 (4th Cir.1995) (discussing exceptions).

Comment i. Effect of the termination of a client's relationship with a firm. See generally 1 R. Mallen & J. Smith, Legal Malpractice § 5.3 (4th ed. 1996). On liability of a lawyer's estate for the lawyer's malpractice, see Jones v. Siesennop, 371 N.E.2d 892 (Ill.App.Ct.1977); McStowe v. Bornstein, 388 N.E.2d 674 (Mass.1979); Loveman v. Hamilton, 420 N.E.2d 1007 (Ohio 1981); Annot., 65 A.L.R.2d 1211 (1959).

On liability-creating acts after a lawyer leaves a firm, compare Redman v. Walters, 152 Cal.Rptr. 42 (Cal.Ct.App.1979) (lawyer who was partner when representation starts remains liable, where client did not consent to substitution of counsel); § 33, Comment *b,* and Reporter's Note thereto (failure to notify firm client that lawyer is leaving or firm is dissolving leaves lawyer liable for subsequent negligence of other firm lawyers), with Burnside v. McCrary, 384 So.2d 1292 (Fla.Dist.Ct.App.1980) (departing lawyer who had been appointed to bench not liable for subsequent negligence despite failure to notify clients); Gibson v. Talley, 275 S.E.2d 154 (Ga.Ct.App.1980) (also contrary to *Redman* decision); Ragan v. Scullin, 368 So.2d 196 (La.Ct.App.1979) (lawyer not liable when, after partnership ended, former partner hired but did not pay experts). On a lawyer's nonliability for acts occurring before the lawyer joined a firm, see French v. Gabriel, 788 P.2d 569 (Wash.Ct.App.1990), aff'd on other grounds, 806 P.2d 1234 (Wash.1991).

Case Citations - by Jurisdiction

—

D.N.J.
N.J.Super.
N.Y.Sup.Ct.App.Div.
N.Y.Sup.Ct.
Ohio
Ohio App.
Ohio Com.Pl.
Okl.

D.N.J.

D.N.J. 2012. Sec. and com. (d) quot. in sup. Husband and wife clients sued, among others, financial advisor, attorney for both plaintiffs and advisor, and attorney's law firm, alleging that defendants conspired to steal plaintiffs' funds by unlawfully transferring the funds through attorney's trust account. Denying in part defendant's motion to dismiss, this court held that plaintiffs sufficiently pled a negligent misrepresentation claim against firm as vicariously liable for the actions of attorney committed in the course of his employment with firm. The court pointed to facts alleged by plaintiffs, which, if proven, would show that attorney acted in the course of ordinary business during his representation of husband, and would demonstrate husband's belief, traceable to attorney's

manifestations, that attorney was representing him as a partner at firm. Wiatt v. Winston & Strawn LLP, 838 F.Supp.2d 296, 313.

N.J.Super.

N.J.Super.1997. Cit. in sup., coms. (c) and (i) quot. in sup. (citing § 79, Proposed Final Draft No. 1, 1996, which is now § 58). When an attorney let a statute of limitations run after he was retained to represent a husband and wife in a personal injury action, the clients sued the attorney and the attorney's former law firm for legal malpractice. The trial court granted the law firm summary judgment; this court reversed and remanded, holding that fact issues existed as to whether the law firm was liable for the attorney's malpractice. Plaintiffs made a sufficient showing that the firm became their counsel by virtue of both the retainer agreement and the fact that the attorney had at least apparent authority to enter into such agreements on the firm's behalf. Although the firm did not know of the clients' case and for that reason failed to notify plaintiffs that its relationship with the attorney was terminated, the retainer agreement referred to the firm as the firm retained. Furthermore, evidence of the firm's role in the attorney's cases and its entitlement to a share of the proceeds of any recovery obtained by the attorney was not developed, nor did the court know what the firm did to assure knowledge of, and proper control over, cases retained by the attorney as "of counsel" to the firm. Staron v. Weinstein, 305 N.J.Super. 236, 701 A.2d 1325, 1328.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.2008. Com. (e) quot. in disc. and cit. in sup. Client sued law firm she retained to recover her interest in a partnership, alleging that defendant was vicariously liable for the negligence of a Florida attorney and/or negligently failed to supervise attorney in filing a notice of claim against estate of plaintiff's former partner, who had died a resident of Florida before a judgment that defendant had secured for plaintiff against former partner was satisfied. The trial court denied the parties' cross-motions for summary judgment. Affirming as modified by reversing the denial of plaintiff's cross-motion, this court held that, because defendant retained Florida attorney without plaintiff's knowledge, and plaintiff completely relied on defendant to take the steps necessary to satisfy her judgment, defendant assumed responsibility to plaintiff for the filing of the Florida estate claim, and attorney became defendant's subagent; therefore, defendant had a duty to supervise attorney's actions. Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey, 53 A.D.3d 912, 913, 914, 863 N.Y.S.2d 100, 102.

N.Y.Sup.Ct.

N.Y.Sup.Ct.2007. Com. (c) quot. in case quot. in sup. Class member who decided to seek relief independently brought a special proceeding against class counsel, alleging that he had a right to the files, including attorney work product, created in connection with his representation in the class actions. Granting class member's motion to compel production of the files, this court held that class member's relationship with class counsel was sufficiently similar to a traditional attorney-client relationship to create a presumption in favor of affording him access to the files. The court required counsel to provide a privilege log to preclude discovery of documents it claimed were excepted from disclosure, including those files intended for internal law office review that allegedly revealed counsel's impressions and strategies. Wyly v. Milberg Weiss Bershad & Schulman, LLP, 15 Misc.3d 583, 589, 834 N.Y.S.2d 631, 636.

Ohio

Ohio, 2009. Quot. in sup., com. (a) cit. in sup. Client brought action in federal court against law firm and its attorney, claiming that attorney committed legal malpractice, that firm was vicariously liable for attorney's malpractice, and that firm itself had committed malpractice. The district court granted summary judgment for defendants. The court of appeals certified to this court for review the question of whether a legal-malpractice claim could be maintained directly against a law firm when all of the relevant principals and employees had either

been dismissed from the lawsuit or were never sued in the first instance. Answering the certified question in the negative, this court held, inter alia, that a law firm was not vicariously liable for legal malpractice unless one if its principals or associates was liable for legal malpractice; under Ohio law, a principal was vicariously liable only when an agent could be held directly liable, and there was no basis for differentiating between a law firm and any other principal. Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 600, 2009-Ohio-3601, 913 N.E.2d 939, 945.

Ohio App.

Ohio App.2020. Cit. in case quot. in sup.; subsec. (1) quot. in case quot. in sup. Adult sons of deceased patient filed a legal-malpractice action against attorney and law firm, alleging that attorney, who represented patient in filing a medical-malpractice action against his treating physicians, had also filed claims on their behalf and had them sign releases of those claims in the medical-malpractice action without their knowledge or assent. The trial court granted summary judgment for attorney and law firm. This court affirmed in part, holding that the trial court did not err in finding that law firm was not liable for the actions of attorney in obtaining releases from sons, because attorney was its independent contractor and law firm did not have the ability to control the manner or means of his work. The court noted that, according to Restatement Third of the Law Governing Lawyers § 58, a law firm had no vicarious liability unless at least one principal or employee of the firm was liable. Tye v. Beausay, 156 N.E.3d 331, 352.

Ohio App.2017. Com. (a) quot. in case quot. in sup. Owner of business equipment, who successfully defended against a lawsuit for possession of the equipment filed by his former business partner, sued former partner's attorney and law firm, alleging malicious civil prosecution and third-party legal malpractice in connection with certain actions defendants took in the underlying lawsuit. On remand, the trial court granted summary judgment for defendants, finding that there was no evidence that attorney acted with malicious intent, a required element of both claims. Affirming, this court held that summary judgment was properly granted in favor of attorney, and that law firm was also entitled to summary judgment, because plaintiff's vicarious-liability claim against law firm was derivative of the malicious-prosecution and third-party legal-malpractice claims against attorney. The court explained that, under Restatement Third of the Law Governing Lawyers § 58, the vicarious liability of a law firm presupposed that an employee or principal of the firm was liable on one or more claims. Fourtounis v. Verginis, 101 N.E.3d 101, 108.

Ohio Com.Pl.

Ohio Com.Pl.2010. Quot. in sup. Client brought legal-malpractice action against law firm, alleging that it would not have incurred substantial losses in settling an underlying lawsuit but for firm's negligent and untimely filing of various motions during that action. This court granted firm's motion for summary judgment, holding, inter alia, that firm could not, as a matter of law, be vicariously liable for the alleged malpractice of its attorneys, because, in order for it to be so liable, one or more of its principals or associates had to be liable for malpractice; here, client had not asserted any malpractice claims against any of firm's attorneys who had worked for client in the underlying action, and any such claims were now time-barred. Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., 158 Ohio Misc.2d 1, 9, 2010-Ohio-3231, 931 N.E.2d 215, 222.

Okl.

Okl.2010. Subsec. (3) and coms. (a) and (b) quot. in ftn. State bar association commenced disciplinary proceedings against attorney, alleging that he failed to supervise a nonlawyer employee, who, without attorney's knowledge, induced a client to sign a contract and pay for legal services to be provided by employee's separate business. A trial panel of the professional responsibility tribunal recommended that attorney be suspended from the practice of law for six months and be directed to pay for the costs of the proceeding. This court ordered attorney disciplined by a public reprimand and by imposition of the costs of the proceeding, holding, among other things, that attorney was

vicariously liable for employee's misdeeds, which went unnoticed until the client complained; attorney's failure to supervise any of employee's work activities not only enabled employee to misrepresent attorney's individual involvement in the case but also to engage in the unauthorized practice of law. State ex rel. Oklahoma Bar Ass'n v. Martin, 2010 OK 66, 240 P.3d 690, 698.

Restatement (Third) of the Law Governing Lawyers 5 Intro. Note (2000)

Introductory Note

Case Citations - by Jurisdiction

Introductory Note: This Chapter considers the law protecting the confidentiality of client information. The rules derive from agency law and professional regulations (see Topic 1), the attorney-client privilege (see Topic 2), and the lawyer work-product immunity (see Topic 3). Confidentiality is of great significance in both litigation practice and office practice. Moreover, the rules governing conflicts of interest (see Chapter 8) are founded on concepts of confidentiality that go beyond the attorney-client privilege and work-product immunity.

While the professional obligation to keep client information secret is a hallmark of professional practice, confidentiality can also be exploited to violate the law. The rules of confidentiality therefore provide exceptions to guard against abuse. The law is molded on the premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication.

The Chapter first considers, in Topic 1, the legal responsibilities of lawyers in dealing with "confidential client information"—a category that includes much of the information that a lawyer learns about a client (see § 59). The basic requirement is that a lawyer use confidential client information only to advance the interests of the client (see § 60). Much of the law on client confidentiality derives from the attorney-client privilege, considered in Topic 2. The immediate remedial consequence of the privilege—excluding evidence at hearings and depositions—is only one aspect of the rights and liabilities concerning client confidentiality. Nonetheless, judicial decisions construing the limits of the attorney-client privilege are the source of much of the law governing other aspects of client confidentiality. The Chapter concludes with Topic 3, which considers the lawyer work-product immunity, a protective rule that arose in response to broadened pretrial discovery.

Other Chapters address remedies for violations of the confidentiality responsibilities of lawyers, including the sanctions of professional discipline (see § 5), civil actions for negligent or intentional violation of the rules of confidentiality (see Chapter 4), disqualification of lawyers from representing clients (see § 6, Comment *i*), and injunctive remedies (see § 6).

The rules of client confidentiality have differed in some particulars from one jurisdiction to another. Those variations reflect different relative weight to be accorded to protection of clients and to protection of third parties through disclosure of information about a client. The differences were manifested in the variant reactions in the states to the ABA's proposed Rule 1.6 of the ABA Model Rules of Professional Conduct (1983) on lawyer disclosure of client involvement in wrongdoing. Similar differences have existed between the evidentiary law of some states and that formulated by the federal courts under Rule 501 of the Federal Rules of Evidence. The federal courts apply the state law of attorney-client privilege with respect to claims or defenses in civil actions that are governed by state law, but articulate through the "principles of the common law" the law of the attorney-client privilege as it applies to claims and defenses governed by federal law. Questions of choice of law in applying the

law governing lawyers, including doctrines of confidentiality, are examined in § 1, Comment *e*, § 5, Comment *h*, and § 48, Comment *f*.

Case Citations - by Jurisdiction

S.D.N.Y.

S.D.N.Y.1999. Intro. Note cit. in disc. (citing Ch. 5, Intro. Note to Prop. Final Draft No. 1, 1996. The Intro. Note has since been revised; see Official Text). American pharmaceutical company sued French competitor, seeking a declaration of noninfringement, invalidity, and unenforceability of certain patents. District court held that French patent agents were not entitled under French law to an evidentiary privilege comparable to the attorney-client privilege as it is enjoyed by patent attorneys under United States law. Thus, the French patent agents' communications and memoranda were not privileged. This court denied the French competitor's motion for reconsideration and ordered the French competitor to produce all communications or documents in the pertinent files relevant to this matter that were not prepared pursuant to the authority of an American patent attorney. Bristol-Myers Squibb Company v. Rhone-Poulenc Rorer, Inc., 188 F.R.D. 189, 199.

Restatement (Third) of the Law Governing Lawyers § 59 (2000)

§ 59 Definition of "Confidential Client Information"

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

Comment:

a. *Scope and cross-references.* This Section defines information concerning the representation of a client governed by the confidentiality rule stated in § 60 and for which exceptions are stated in other Sections in this Topic. For the most part, the definition of this Section is relevant to applications of the general duty of confidentiality (see § 60) owed to a current client and to former clients. On the relevance of the definition of confidential information to a determination whether a former matter is "substantially related" to a current matter, see § 132, Comment *d(ii)*.

b. *Kinds of confidential client information.* A client's approach to a lawyer for legal assistance implies that the client trusts the lawyer to advance and protect the interests of the client (see § 16(1)). The resulting duty of loyalty is the predicate of the duty of confidentiality. The information that a lawyer is obliged to protect and safeguard is called *confidential client information* in this Restatement.

This definition covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms. It covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege (see § 70). It includes work

product that the lawyer develops in representing the client, such as the lawyer's notes to a personal file, whether or not the information is immune from discovery as lawyer work product (see Topic 3). It includes information acquired by a lawyer in all client-lawyer relationships (see § 14), including functioning as inside or outside legal counsel, government or private-practice lawyer, counselor or litigator, advocate or intermediary. It applies whether or not the client paid a fee, and whether a lawyer learns the information personally or through an agent, for example information acquired by a lawyer's partners or associate lawyers or by an investigator, paralegal, or secretary. Information acquired by an agent is protected even if it was not thereafter communicated to the lawyer, such as material acquired by an investigator and kept in the investigator's files.

The definition includes information that becomes known by others, so long as the information does not become generally known. See Comment *d* hereto; compare § 71 (condition of attorney-client privilege that communication be made with reasonable expectation of confidentiality); § 79 (waiver of the attorney-client privilege by subsequent disclosure). The fact that information falls outside the attorney-client privilege or work-product immunity does not determine its confidentiality under this Section.

A lawyer may learn information relevant to representation of a client in the course of representing another client, from casual reading or in other accidental ways. On the use of information learned from representation of another client, see § 60, Comment *l.* In the course of representation, a lawyer may learn confidential information about the client that is not necessary for the representation but which is of a personal or proprietary nature or other character such that the client evidently would not wish it disclosed. Such information is confidential under this Section.

c. The time at which information is acquired. Information acquired during the representation or before or after the representation is confidential so long as it is not generally known (see Comment *d* hereto) and relates to the representation. Such information, for example, might be acquired by the lawyer in considering whether to undertake a representation. On the duties of a lawyer with respect to confidential information of a prospective client, see § 15, Comment *c.* Post-representation confidential client information might be acquired, for example, in the form of information on subsequent developments.

Illustrations:

1. Lawyer represents Employer in defending against a claim of employment discrimination by Plaintiff. Plaintiff has joined both Employer and Personnel Director as defending parties. Lawyer extensively confers with Inside Legal Counsel, general counsel of Employer, who provides information about the claim as it relates to Personnel Director. Subsequently, Inside Legal Counsel authorizes Lawyer to represent Personnel Director as a co-client. Information acquired by Lawyer relating to representation of Personnel Director prior to forming the client-lawyer relationship is confidential client information under this Section. On application of the attorney-client privilege, compare § 76 (common-interest arrangements).

2. Lawyer represented Defendant in civil litigation, in which Defendant prevailed. Two years after the representation ended, a Juror in the case writes a letter to Lawyer stating that Defendant approached Juror and several other jurors in a recess during their deliberations and improperly provided them with new evidence that persuaded the jury to find for Defendant. Juror states in the letter that Juror wishes Lawyer to show the letter to the Judge who presided at the trial. Although not subject to the attorney-client privilege (see §§ 70 & 71), the letter relates to Lawyer's representation of Defendant and is thus confidential under this Section. Whether Lawyer may disclose the information is governed by §§ 61- 67.

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

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

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

e. Information concerning law, legal institutions, and similar matters. Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. Such information is part of the general fund of information available to the lawyer. During legal research of an issue while representing a client, a lawyer may discover a particularly important precedent or devise a novel legal approach that is useful both in the immediate matter and in other representations. The lawyer and other members of the lawyer's firm may use and disclose that information in other representations, so long as they thereby disclose no confidential client information except as permitted by § 60. A lawyer may use such information-about the state of the law, the best way to approach an administrative agency, the preferable way to frame an argument before a particular judge-in a future, otherwise unrelated representation that is adverse to the former client. On the otherwise general prohibition against adverse use or disclosure of confidential information of a former client, see § 132, Comment *f.*

Reporter's Note

*Comment b. Kinds of confidential client information.*The expansive definition of client information not protected by the attorney-client privilege that nonetheless a lawyer is obliged to keep confidential comes primarily from the law of agency and rules of professional regulation. A somewhat similarly described area of protected information was referred to in DR 4-101 of the ABA Model Code of Professional Responsibility (1969) as client "secrets." Secrets were to be distinguished from "confidences"-information protected by the applicable law of attorney-client privilege-although a lawyer's responsibilities with respect to both were generally the same. See C. Wolfram, Modern Legal Ethics § 6.7.2, at 297 (1986). Courts have occasionally extended the legally operative range of secrets beyond lawyer-disciplinary proceedings. E.g., In re Advisory Opinion No. 544, 511 A.2d 609, 614-15 (N.J.1986) (neither public nor private organizations that funded legal-services organization could be given names of clients by service lawyers because such information, if not a confidence protected by attorney-client privilege, was a secret entitled to legal protection).

The origin of the separate legal obligation that requires a lawyer to protect secrets, as opposed to the evidentiary privilege, is uncertain. The "secrets" terminology became widely used when it appeared—conjoined with "confidences"—in ABA Canons of Ethics, Canon 6 (1908) and, even more significantly, in the ABA Model Code, DR 4-101(A) in 1969. The ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983), altered the terminology, discarding the "confidences and secrets" term and concept in favor of an expansive and unitary notion of "information relating to representation of a client" without regard to the source or time it was acquired. Id., Comment ¶ [5] (confidentiality rule applies "to all information relating to the representation, whatever its source").

On the coverage of information gathered by agents of a lawyer, compare § 70, Comment *h* (protection under attorney-client privilege).

*Comment c. The time at which information is acquired.*On the time period during which receipt of confidential information about a client is protected, compare DR 4-101(A) (information "gained in the professional relationship") with ABA Model Rule 1.6(a) (information "relating to representation of a client" apparently without regard to time at which lawyer learns of it). See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:201, at 258 (2d ed.1990, Supp.1992 & 1994). This Section is based upon the ABA Model Rules definition. Both the Code (EC 4-6) and the ABA Model Rules (Comment ¶ 21 ("The duty of confidentiality continues after the client-lawyer relationship has terminated.")) assume that the confidentiality duty endures indefinitely.

*Comment d. Generally known information.*The "generally known" standard of this Section is the standard of ABA Model Rules of Professional Conduct, Rule 1.9(b) (1983), which is not further elaborated upon in its Comment. The ABA Model Code of Professional Responsibility (1969) included in DR 4-101(A) all information, without regard to its public or private nature, within its definition of "confidences and secrets." See EC 4-4 ("… This broad ethical concept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge…."). Cf. ABA Canons of Ethics, Canon 37 (1908) (lawyer may not employ information gained in a representation to disadvantage of former client "even though there are other available sources of such information"). ABA Model Rule 1.9(b), on the other hand, excepts from its requirement of confidentiality information that "has become generally known." No similar exception is contained, however, in the general-purpose analog to ABA Model Rule 1.9(b), ABA Model Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3."). Commentators have differed over the wisdom of the ABA Model Rule approach. Compare, e.g., C. Wolfram, Modern Legal Ethics §§ 6.7.4, 7.4.2(c), at 364-65 (1986) (arguing against excepting public information from duty to safeguard confidential client information), with, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:401, at 311-12 (2d ed.1990 & Supp.1994) (defending exception of generally known from ABA Model Code definition of confidential client information for conflict-of-interest purposes). Case law is sparse, but extant authority agrees with the position taken in the Section and Comment. See Cohen v. Wolgin, 1993 WL 232206 (E.D.Pa.1993) (citing Restatement).

The law generally provides that a client communication cannot become public and still remain protected by the attorney-client privilege. See §§ 71 and 79. The general law of agency also permits a former agent to compete with a former principal so long as the agent employs only information about the principal that is "a matter of general knowledge." See Restatement Second, Agency § 395. The scant case authority is divided on the question whether the definition of confidential client information includes publicly available information. Compare, e.g., City of Wichita v. Chapman, 521 P.2d 589, 595-96 (Kan.1974) (no former-client conflict when relevant information about common issue that created substantial-relationship linkage was based on former client's appraisal report that, during former representation, was provided to opposing counsel and to government agencies as part of their publicly accessible records), with, e.g., Kaufman v. Kaufman, 405 N.Y.S.2d 79, 80 (N.Y.App.Div.1978) (lawyer disqualified in substantially related, subsequent representation against former client despite argument that all relevant information relating to common issue was available from public sources). In general, the authorities agree that the category of confidential information includes nonsecret information. E.g., NCK Org., Ltd. v. Bregman, 542 F.2d 128, 133 (2d Cir.1976) (for conflict-of-interest purposes, former client's information was "confidential" even if not secret); H. Drinker, Legal Ethics 135 (1953) (confidential client information includes nonsecret information).

The position taken in the Section and Comment—that "generally known" information is not part of the definition of confidential client information for either present or past clients—adheres to ABA Model Rule 1.9(b). The absence of a similarly limiting provision in ABA Model Rule 1.8(b), which applies to ongoing representations, is not inconsistent. Any such lawyer use would be impermissible on the broad ground (see ABA Model Rule 1.7) that a lawyer may not use even publicly known information to the detriment of a current client, whether to further a personal interest of the lawyer (§§ 60 & 125) or to further the interest of another client (Topic 3 hereto). Revealing client information adversely (see § 60(1)) in a way that is gratuitous or negligent would violate the duty to take all reasonably available steps to advance the client's lawful objectives (§ 16(1)).

*Comment e. Information concerning law, legal institutions, and similar matters.*No judicial decisions have been found that specifically address the issues raised here. The Section is based on the principles behind the concept of generally known information, the customary and accepted practices of lawyers, and the public interest in effective professional practice consistent with the general protection of confidential client information. On conflicts of interest in law-reform activities, see § 125, Comment *e.*

Case Citations - by Jurisdiction

—

C.A.6
C.A.D.C.
D.D.C.
D.Nev.
S.D.N.Y.
Cal.App.
Colo.
Md.
Mont.
Pa.Super.

C.A.6

C.A.6, 2008. Coms. (b) and (d) quot. in sup. Corporate client sued attorney and law firm that it hired to help raise money to fund construction of a bridge after learning that defendants had also agreed to represent city in opposing construction of the bridge. The district court denied plaintiff's motion for discovery and granted summary judgment for defendants. Reversing and remanding, this court held, inter alia, that the district court's denial of plaintiff's motion for discovery was an abuse of discretion. The court concluded that a letter to the U.S. Coast Guard that attorney prepared on behalf of city in opposition to the bridge was not confidential, because it appeared to contain only generally known information, and documents or information that were public or published were not considered confidential under Michigan's Rules of Professional Conduct. CenTra, Inc. v. Estrin, 538 F.3d 402, 423.

C.A.D.C.

C.A.D.C.1998. Cit. in ftn., com. (c) cit. in ftn. (citing § 111, Prop. Final Draft No. 1, 1996, which is now § 59). Independent counsel moved to compel testimony of Deputy White House Counsel, who had declined to answer certain questions before the grand jury on the ground, in part, of the President's personal attorney-client privilege. Affirming in part and reversing in part the district court's grant of the motion, this court held, inter alia, that the President's personal attorney-client privilege allowed the Deputy White House Counsel to refuse to disclose

information obtained while serving as an intermediary between the President and his private counsel. In re Lindsey, 158 F.3d 1263, 1281, cert. denied 525 U.S. 996, 119 S.Ct. 466, 142 L.Ed.2d 418 (1998).

D.D.C.

D.D.C.2013. Quot. in sup. Provider of summer-camp programs, together with its founder, brought claims for conversion, inter alia, against purported business partner, alleging that defendant misappropriated a large sum of money from plaintiffs. Defendant moved to disqualify law firm representing plaintiffs, asserting that two law-firm partners had provided him with legal and personal advice. Denying defendant's motion without prejudice, this court held that defendant failed to show that the prior representation and the current litigation were substantially related. The court noted that, to warrant disqualification, there had to be a substantial risk that the subsequent representation would involve the use of confidential information regarding the former client that was obtained in the course of the prior representation, and Restatement Third of the Law Governing Lawyers § 59 defined the term "confidential information" as information relating to representation of a client, other than information that was generally known. Headfirst Baseball LLC v. Elwood, 999 F.Supp.2d 199, 211.

D.Nev.

D.Nev.2007. Quot. in ftn. Administrator of the estate of the owner of several gaming patents brought patent-infringement and other claims against casinos. A magistrate judge granted defendants' motion to compel production of unredacted documents containing plaintiff's litigation strategy, ruling that the documents were not privileged under the work-product doctrine because they had been prepared by deceased for the purpose of "shopping" his case to attorneys. Sustaining plaintiff's objection to the magistrate's order, this court noted that a lawyer need not have been involved at all for the work-product doctrine to take effect, and held, inter alia, that documents related to "shopping" for an attorney met the Ninth Circuit's standard to qualify for protection against discovery. Goff v. Harrah's Operating Co., Inc., 240 F.R.D. 659, 661.

S.D.N.Y.

S.D.N.Y.1999. Quot. in ftn. (citing § 111, Proposed Final Draft No. 1, 1996, which is now § 59). American pharmaceutical company sued French competitor, seeking a declaration of noninfringement, invalidity, and unenforceability of certain patents. District court held that French patent agents were not entitled under French law to an evidentiary privilege comparable to the attorney-client privilege as it is enjoyed by patent attorneys under United States law. Thus, the French patent agents' communications and memoranda were not privileged. This court denied the French competitor's motion for reconsideration and ordered the French competitor to produce all communications or documents in the pertinent files relevant to this matter that were not prepared pursuant to the authority of an American patent attorney. Bristol-Myers Squibb Company v. Rhone-Poulenc Rorer, Inc., 188 F.R.D. 189, 199.

S.D.N.Y.1992. Quot. in sup., cit. generally in sup. (citing § 111, T.D. No. 3, 1990, which is now § 59). Corporation moved to disqualify its former attorney from representing former employees of corporation in employment discrimination suit against corporation. The court granted disqualification. Applying the Restatement to the question of whether issues raised in discrimination suit were substantially related to attorney's earlier representation of corporation, the court held that attorney's representation of former employees made it very likely that corporation would be disadvantaged by attorney's unavoidable use of confidential information acquired while working for corporation. Ullrich v. Hearst Corp., 809 F.Supp. 229, 234.

Cal.App.

Cal.App.2013. Quot. in sup. The People of the State of California filed a two-count wardship petition alleging that 10-year-old child had committed arson. The juvenile court denied child's motion for appointment as a defense expert a psychologist who had indicated that she would disclose any information concerning child abuse or threats obtained during her assessment of child only to child's counsel, and not to law-enforcement authorities, despite the affirmative duty to report imposed on mental-health professionals by California's Child Abuse and Neglect Reporting Act (CANRA). Granting child's petition for writ of mandate, this court held that the juvenile court abused its discretion in limiting child's choice of expert assistance to the juvenile court's competency panel, whose members had stated that they would report information of child abuse or threats to authorities. The court declined to interpret CANRA to apply to a psychotherapist assisting defense counsel, and concluded that child was entitled to the assistance of an expert who would respect the lawyer-client privilege and defense counsel's duty of confidentiality. Elijah W. v. Superior Court, 216 Cal.App.4th 140, 151, 156 Cal.Rptr.3d 592, 599.

Colo.

Colo.2016. Quot. in ftn., Rptr's Note to com. (b) quot. in ftn. In disciplinary proceedings, attorney was charged with filing a stipulated motion to dismiss his client's federal lawsuit, in which he publicly disclosed his adverse analysis of the client's case, without first making reasonable attempts to communicate with the client about the motion. The hearing board determined that attorney's conduct violated the state's rules of professional conduct, and ordered attorney to be temporarily suspended from the practice of law. The board rejected attorney's argument that he should not be suspended because another attorney could have replicated his analysis based on the administrative record or that the information had already been disclosed by another attorney who represented the client, reasoning that, although authorities differed as to whether a lawyer was permitted to reveal information generally known to all members of the public, Restatement Third of the Law Governing Lawyers § 59 provided that disclosure of the lawyer's work product, without authorization, contravened the lawyer's duty of confidentiality. People v. Muhr, 370 P.3d 677, 695.

Md.

Md.1993. Quot. in part in ftn., com. (d) quot. in part in ftn. (citing § 111, T.D. No. 3, 1990, which is now § 59). A newspaper brought an action under the state's public information act, seeking to obtain records of expenses incurred by the office of the public defender in a highly publicized capital murder prosecution. This court vacated an order to produce the records and remanded, holding that the lawyer/custodian had to disclose the information unless the rule governing confidentiality of client information would be violated. Harris v. The Baltimore Sun Co., 330 Md. 595, 608, 625 A.2d 941, 947.

Mont.

Mont.2017. Com. (d) quot. in sup. In disciplinary proceedings, attorney was charged with violating the rules of professional conduct in connection with his representation of clients in an action to evict tenants from clients' rental property. The commission on practice determined that, after attorney obtained a default judgment against clients for unpaid legal fees and assigned the judgment to a collection agency, attorney did not violate the professional rules when he successfully bid on clients' rental property at a sheriff's sale initiated by the collection agency. While adopting the commission's recommendation that attorney be sanctioned by public censure, this court held that the commission erred in concluding that attorney did not violate the rule prohibiting attorneys from using representation-related information to the disadvantage of a former client under Restatement Third of the Law Governing Lawyers § 59; although it would have been possible for attorney to discover the existence of clients' rental property through searches of public records, he undisputedly learned of the property as part of his representation of clients. Matter of Tennant, 392 P.3d 143, 148.

Pa.Super.

Pa.Super.2016. Quot. in sup., coms. (b) and (d) quot. in sup. Former client brought a claim for breach of fiduciary duty against law firm that represented him after he received a grand jury subpoena in connection with a federal investigation in which he was not a target, alleging that law firm was responsible for revealing confidential information about client—including information contained in an FBI affidavit securing the search of his residence, which had been filed under seal—to a newspaper that law firm subsequently defended against client's defamation action. The trial court granted summary judgment for law firm. Reversing and remanding, this court held that questions of fact remained as to how and when the affidavit came into the newspaper's possession and whether the affidavit was publicly available or “generally known” before then. The court cited Restatement Third of the Law Governing Lawyers § 59 in noting that, although the affidavit had, years earlier, been inadvertently appended to a document in an unrelated criminal case in which client was not a party, such that it could have been accessed by members of the public, a person who was interested in the affidavit could only have obtained it by means of special knowledge. Dougherty v. Pepper Hamilton LLP, 133 A.3d 792, 798-800.

Restatement (Third) of the Law Governing Lawyers § 60 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

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

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

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

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

(2) Except as stated in § 62, a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.

Comment:

a. *Scope and cross-references.* This Section states the principal duties of a lawyer with respect to confidential client information. The first duty is negative—not to use or disclose the information. The second is positive—to safeguard confidential client information in the client's interests. The third duty protects clients against lawyer use or disclosure of confidential information for self-profit (see Comment *j* hereto). The duty not to use or disclose confidential client information is subject to the exceptions provided in §§ 61- 67. The duty to safeguard entails the corollary duties to provide adequate supervision of nonlawyer personnel (see § 11) and to assert privileges and other legal protection applicable to confidential client information such as the attorney-client privilege (see § 86(1)

(b)) and the work-product immunity (see § 87). See Comment *c* hereto. The duty to safeguard such information is also a principal basis for the rules prohibiting former client conflicts of interest (see Chapter 8, Topic 4). On a lawyer's duty to safeguard confidential information of a prospective client, see § 15.

Remedies for a lawyer's breach of the obligation of § 60 may depend upon the kind of information involved and the nature of the improper use or disclosure. Remedies include exclusion or suppression of the lawyer's attempted testimony in violation of the attorney-client privilege (see § 86), the protection of lawyer work-product against intrusion by third parties (see Topic 3), a client's right to recover damages for negligent (see § 48) or intentional (see § 56) breach of an obligation of confidentiality, professional discipline (see § 5), and the remedies relating to conflicts of interest (see § 6, Comment *i*).

b. Conflicts between protection of confidential client information and other values. The broad prohibition against divulging confidential client information comes at a cost to both lawyers and society. Lawyers sometimes learn information that cannot be disclosed because of the rule of confidentiality but that would be highly useful to other persons. Those may include persons whose personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed. Moreover, the free-speech interests of lawyers is impinged by a broad rule of confidentiality. Nonetheless, despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it. It is recognized that the rule better protects legitimate client expectations about communications to their lawyers and that permitting divulgence would be inconsistent with the goal of furthering the lawful objectives of clients (see § 16(1)).

Illustration:

1. Lawyer is appointed to represent Client, a person who has been accused of murder. During confidential conferences between them, Client informs Lawyer that Client in fact committed not only the murder charged but two others as well. Client gives Lawyer sufficient detail to confirm beyond question that Client's story is true. The two other murders involve victims whose bodies have not yet been discovered. Because of similarities between the circumstances of the murders, parents of one of the victims approach Lawyer and beg for any information about their child. Lawyer realizes the personal anguish of the victim's parents and the peace the information that he knows could bring them. Unless Client consents to disclosure (see § 62), Lawyer must respond that Lawyer has no information to give them.

c. Impermissible use or disclosure—in general. A lawyer is prohibited from using or disclosing confidential client information if either of two conditions exists—risk of harm to the client or client instruction.

c(i). Impermissible use or disclosure—a reasonable prospect of adverse effect on a material client interest. The duty of confidentiality is defined in terms of the risk of harm. Subject to exceptions provided in §§ 61- 67, use or disclosure of confidential client information is generally prohibited if there is a reasonable prospect that doing so will adversely affect a material interest of the client or prospective client. Although the lawyer codes do not express this limitation, such is the accepted interpretation. For example, under a literal reading of ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983), a lawyer would commit a disciplinary violation by telling an

unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client's identity creates no possible risk of harm. Such a strict interpretation goes beyond the proper interpretation of the rule.

What constitutes a reasonable prospect of adverse effect on a material client interest depends on the circumstances. Whether such a prospect exists must be judged from the perspective of a reasonable lawyer based on the specific context of the client matter. Some representations involve highly secret client information; others involve routine information as to which secrecy has little or no material importance. In most representations, some information will be more sensitive than other information. In all representations, the relevant inquiry is whether a lawyer of reasonable caution, considering only the client's objectives, would regard use or disclosure in the circumstances as creating an unreasonable risk of adverse effect either to those objectives or to other interests of the client. For example, a lawyer advising a client on tax planning for a gift that the client intends to keep anonymous from the donee would violate this Section if the lawyer revealed the client's purpose to the donee. If there is a reasonable ground to doubt whether use or disclosure of a client's confidential information would have the described effect, the lawyer should take reasonable steps to ascertain whether adverse effect would result, including consultation with the client when appropriate. Alternatively, the lawyer in such circumstances may obtain client consent to the use or disclosure (see § 62).

Adverse effects include all consequences that a lawyer of reasonable prudence would recognize as risking material frustration of the client's objectives in the representation or material misfortune, disadvantage, or other prejudice to a client in other respects, either during the course of the present representation or in the future. It includes consequences such as financial or physical harm and personal embarrassment that could be caused to a person of normal susceptibility and a normal interest in privacy.

Both use and disclosure adverse to a client are prohibited. As the term is employed in the Section, *use* of information includes taking the information significantly into account in framing a course of action, such as in making decisions when representing another client or in deciding whether to make a personal investment. *Disclosure* of information is revealing the information to a person not authorized to receive it and in a form that identifies the client or client matter either expressly or through reasonably ascertainable inference. Revealing information in a way that cannot be linked to the client involved is not a disclosure prohibited by the Section if there is no reasonable likelihood of adverse effect on a material interest of the client. Use of confidential client information can be adverse without disclosure. For example, in representing a subsequent client against the interests of a former client in a related matter, a lawyer who shapes the subsequent representation by employing confidential client information gained about the original client violates the duty of § 60(1) not to use that information, even if the lawyer does not disclose the information to anyone else (see § 132).

c(ii). Impermissible use or disclosure—specific client instructions. Even in the absence of a reasonable prospect of risk of harm to a client, use or disclosure is also prohibited if the affected client instructs the lawyer (see § 21(2)) not to use or disclose information. Such a direction is the client's definition of the client's interests (see § 16(1)), which controls (see § 21(2)). Such an instruction may also limit a lawyer's implied authority to use or disclose confidential client information to advance a client's interests. On the ability of a lawyer to withdraw, see § 32. However, client limitations on a lawyer's authority do not alter a lawyer's obligations under § 63 (using or disclosing confidential client information when required by law or court order) (see § 23). With respect to communications with a third person such as a relative of a client with diminished capacity, see § 24, Comment *c*.

When a fee for a client is paid by a third person (see § 134(1)) and in the absence of different client agreement or instructions, the client and not the third person directs the lawyer with respect to such matters as the treatment of files or other confidential client information. For the special instance of liability insurers, compare § 134, Comment *f*.

d. A lawyer's duty to safeguard confidential client information. A lawyer who acquires confidential client information has a duty to take reasonable steps to secure the information against misuse or inappropriate disclosure, both by the lawyer and by the lawyer's associates or agents to whom the lawyer may permissibly divulge it (see Comment *e*). This requires that client confidential information be acquired, stored, retrieved, and transmitted under

systems and controls that are reasonably designed and managed to maintain confidentiality. In responding to a discovery request, for example, a lawyer must exercise reasonable care against the risk that confidential client information not subject to the request is inadvertently disclosed (see § 79). A lawyer should so conduct interviews with clients and others that the benefit of the attorney-client privilege and work-product immunity are preserved (see § 70, Comment *f*). On the release of information to further a client's objectives, including the waiver of claims of privilege or immunity, see § 61, Comment *d.* On asserting objections to attempts to obtain the client's confidential information, see § 63, Comment *b*.

A lawyer must take reasonable steps so that law-office personnel and other agents such as independent investigators properly handle confidential client information. That includes devising and enforcing appropriate policies and practices concerning confidentiality and supervising such personnel in performing those duties (see § 11). A lawyer may act reasonably in relying on other responsible persons in the office or on reputable independent contractors to provide that instruction and supervision (see id.). The reasonableness of specific protective measures depends on such factors as the duties of the agent or other person, the extent to which disclosure would adversely affect the client, the extent of prior training or experience of the person, the existence of other assurances such as adequate supervision by senior employees, and the customs and reputation of independent contractors.

Greater precautions may be necessary when use or disclosure is not directed toward representation of the client (see Comment *f* hereto) or facilitating the lawyer's law practice (see Comment *g*), for example when information is provided to a lawyer outside the firm to assist that lawyer's own representations. A lawyer must not engage in casual or frivolous conversation about a client's matters that creates an unreasonable risk of harm to the interests of the client.

e. Postrepresentation safeguarding. The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client. Accordingly, a lawyer must take reasonable steps for the future safekeeping of client files, including files in closed matters, or the systematic destruction of nonessential closed files. A lawyer must also take reasonably appropriate steps to provide for return, destruction, or continued safekeeping of client files in the event of the lawyer's retirement, ill health, death, discipline, or other interruption of the lawyer's practice.

f. Divulgence to persons assisting a lawyer in representing a client. A lawyer generally has authority to use or disclose confidential client information to persons assisting the lawyer in representing the client. Those include other lawyers in the same firm and employees such as secretaries and paralegals. A lawyer also may disclose information to independent contractors who assist in the representation, such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf (see also § 70, Comment *h*). Such disclosures are not permitted contrary to a client's instructions, even within the lawyer's firm (see Comment *c(ii)* hereto), or when screening is required to avoid imputed disqualification of the lawyer's firm (see § 124, Comment *d,* & § 133, Comment *g*).

A lawyer's authority to disclose information for purposes of carrying out the representation is implied and therefore does not require express client consent (see § 21(3)). Agents of a lawyer assisting in representing a client serve as subagents and as such independently owe a duty of confidentiality to the client. See generally Restatement Second, Agency § 428(1) (subagent's general duties to known principals); id. § 395 (agent's general duty of confidentiality).

g. Divulgence to facilitate law practice. A lawyer may disclose confidential client information for the purpose of facilitating the lawyer's law practice, where no reasonable prospect of harm to the client is thereby created and where appropriate safeguards against impermissible use or disclosure are taken. Thus, disclosure is permitted to other lawyers in the same firm and to employees and agents such as accountants, file clerks, office managers, secretaries, and similar office assistants in the lawyer's firm, and with confidential, independent consultants, such as computer technicians, accountants, bookkeepers, law-practice consultants, and others who assist in furthering the law-practice business of the lawyer or the lawyer's firm.

Use or disclosure of confidential client information, if prohibited under § 60, is not permitted for other business purposes, such as aiding investment or business, including one in which the lawyer owns an interest.

h. Divulgence for purpose of professional assistance and development; historical research. When no material risk to a client is entailed, a lawyer may disclose information derived from representing clients for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers, or more formally, as in continuing-legal-education lectures. Thus, a lawyer may confer with another lawyer (whether or not in the same firm) concerning an issue in which the disclosing lawyer has gained experience through representing a client in order to assist the other lawyer in representing that lawyer's own clients.

A lawyer may cooperate with reasonable efforts to obtain information about clients and law practice for public purposes, such as historical research, when no material risk to a client is entailed, such as financial or reputational harm. A lawyer thereby cooperates in furthering public understanding of the law and law practice.

i. Divulgence concerning property dispositions by a deceased client. The attorney-client privilege does not apply to communications relevant to an issue between parties who claim an interest through the same decedent (see § 81). As a corollary, the lawyer may reveal confidential client information to contending heirs or other claimants to an interest through a deceased client, in advance of testifying, if there is a reasonable prospect that doing so would advance the interests of the client-decedent (see § 61). Authority to instruct the lawyer (see Comment *c(ii)* hereto) with respect to such divulgence is determined under the law of succession.

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

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

On limitations on business transactions between a lawyer and client, see § 126.

It is not inconsistent with Subsection (2) for a lawyer to use one client's confidential information for the benefit of another client in the course of representing the other client, even if doing so might also redound to the lawyer's gain, such as by enhancing a contingent-fee recovery. In all such instances, of course, the lawyer may not do so when it would create a material risk of harm to the original client. Thus, if otherwise permissible, a lawyer representing a plaintiff who has acquired extensive confidential information about the manner in which a defendant manufactured a product may employ that information for the benefit of another client with a claim against the same defendant arising out of a defect in the same product.

k. Confidentiality duties to a prospective client. See § 15, Comment *c*.

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

be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them (see § 75).

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

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

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

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

In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person. See also § 66.

Illustration:

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

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

4. Lawyer represents both A and B in forming a business. Before the business is completely formed, A discloses to Lawyer that he has been convicted of defrauding business associates on two recent occasions. The circumstances of the communication from A are such that Lawyer reasonably infers that A believes that B is unaware of that information and does not want it provided to B. Lawyer reasonably believes that B would call off the arrangement with A if B were made aware of the information. Lawyer must first attempt to persuade A either to inform B directly or to permit Lawyer to inform B of the information. Failing that, Lawyer must withdraw from representing both A and B. In doing so, Lawyer has discretion to warn B that Lawyer has learned in confidence information indicating that B is at significant risk in carrying through with the business arrangement, but that A will not permit Lawyer to disclose that information to B. On the other hand, even if the circumstances do not warrant invoking § 67, Lawyer has the further discretion to inform B of the specific nature of A's communication to B if Lawyer reasonably believes this necessary to protect B's interests in view of the immediacy and magnitude of the threat that Lawyer perceives posed to B.

Even if the co-clients have agreed that the lawyer will keep certain categories of information confidential from one or more other co-clients, in some circumstances it might be evident to the lawyer that the uninformed co-client would not have agreed to nondisclosure had that co-client been aware of the nature of the adverse information. For example, a lawyer's examination of confidential financial information, agreed not to be shown to another co-client to reduce antitrust concerns, could show in fact, contrary to all exterior indications, that the disclosing co-client is insolvent. In view of the co-client's agreement, the lawyer must honor the commitment of confidentiality

and not inform the other client, subject to the exceptions described in § 67. The lawyer must, however, withdraw if failure to reveal would mislead the affected client, involve the lawyer in assisting the communicating client in a course of fraud, breach of fiduciary duty, or other unlawful activity, or, as would be true in most such instances, involve the lawyer in representing conflicting interests.

m. *Use or disclosure of confidential information of a nonclient.* A lawyer may come into possession of confidential information of a nonclient, such as that of an opposing party in litigation or in negotiations. Such information may come from the other person or the lawyer or other agent of the person. When the receiving lawyer reasonably concludes that the transmission was authorized, the lawyer may use the information for the client's benefit, for example, where an opposing lawyer has conveyed the information apparently to advance representation (see § 61). Otherwise, the receiving lawyer's responsibilities depend on the circumstances. If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives (see § 16(1)). That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony (compare §§ 78, 86(1)(b), & 91(3)). The same legal result may follow when divulgence occurs inadvertently outside of court (see §§ 79 & 91). The receiving lawyer may be required to consult with that lawyer's client (see § 20) about whether to take advantage of the lapse.

If the person whose information was disclosed is entitled to have it suppressed or excluded (see § 79, Comment *c*), the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege (see § 79, Comment *h*).

Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim.

Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage (see § 6, Comment *i*). A tribunal may also order suppression or exclusion of such information.

Reporter's Note

*Comment b. Conflicts between protection of confidential client information and other values.*Illustration 1 is based on the well-known Lake Pleasant Bodies Case. See People v. Belge, 376 N.Y.S.2d 771 (N.Y.App.Div.1975), aff'd, 359 N.E.2d 377 (N.Y.1976). See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:303 (2d ed.1990); C. Wolfram, Modern Legal Ethics § 12.6.1, at 664-65 (1986).

*Comment c. Impermissible use or disclosure—in general.*See generally ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."); id., Rule 1.9(b) ("A lawyer who has formerly represented a client shall not thereafter: … (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."). ABA Model Code of Professional Responsibility, DR 4-101(B)(1)-(3) (1969) provides as follows:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

See also 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:200, at 158-158.2 (2d ed.1990); C. Wolfram, Modern Legal Ethics § 6.7.5 (1986), and authorities cited. On the particular challenges of electronic modes of communication, see, e.g., ABA Formal Opin. 99-413 (1999) (protecting the confidentiality of unencrypted electronic mail sent or received by lawyer).

Comment c(i) Impermissible use or disclosure—a reasonable prospect of adverse effect on a material client interest. All authorities agree that lawyer use, even without disclosure, of confidential client information adverse to the material interests of a client is prohibited. E.g., ABA Model Code of Professional Responsibility, DR 4-101(B)(2) (1969); ABA Model Rules of Professional Conduct, Rule 1.6 (1983). Case law is sparse. See authorities noted at Reporter's Note to Comment *e*, below. Most reported decisions deal with egregious instances in which lawyers have improperly used or disclosed confidential client information in order to gain an advantage for the lawyer or to act vengefully toward a client. E.g., In re Nelson, 327 N.W.2d 576, 578-79 (Minn.1982) (discipline of lawyer who, following discharge by client in dispute over lawyer's fee, made unfounded reports of client's tax violations to government agencies); Bar Ass'n of Greater Cleveland v. Watkins, 427 N.E.2d 516 (Ohio 1981) (lawyer suspended indefinitely for threatening client with report to authorities of assertedly illegal payments unless client withdrew bar-association complaint against lawyer). The prohibition against adverse use of a client's confidential information is one of the principal bases for the rules against both concurrent (Chapter 8, Topic 3) and former-client (§ 132) conflicts of interest.

Comment c(ii) Impermissible use or disclosure—specific client instructions. The point is made explicitly in ABA Model Code of Professional Responsibility, DR 4-101(A) (1969) in the definition of "secret." See supra, Reporter's Note to Comment *c*. ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) comprehensively includes (all) "information relating to representation of a client" and so includes a fortiori information that the client expressly instructed the lawyer to keep confidential. See also In re Pressly, 628 A.2d 927 (Vt.1993) (discipline for violating client instruction not to reveal to husband's lawyer client's suspicion that husband was sexually abusing daughter until client had gathered additional evidence).

Comment d. A lawyer's duty to safeguard confidential client information. See generally Williams v. Trans World Airlines, Inc., 588 F.Supp. 1037, 1044 (W.D.Mo.1984) (access of paralegal to confidential information requires imposition of confidentiality rules similar to those applicable to lawyers on paralegal's change of employment to another law firm); Florida Bar v. Wolding, 579 So.2d 736 (Fla.1991) (no violation of duty to secure files and premises in absence of evidence of divulgence of harmful information); see also, e.g., ABA Formal Opin. 99-413 (1999) (permissible for lawyer to transmit confidential client information on unencrypted electronic mail). On lawyer gossip and "shop talk," see, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:202, at 159-60 (2d ed.1990) (drawing distinction between beneficial and justifiable shop-talk within a "rule of reason" that notes factors such as need of listener to know, utility of conversation in lawyer's practice, degree of confidence lawyer can have that client remains anonymous, and innocuous nature of information).

Comment e. Postrepresentation safeguarding. Most of the authority arises in the context of disqualification motions by a former client. E.g., United States v. Calabria, 614 F.Supp. 187, 192 (E.D.Pa.1985) (former defense lawyer's continuing duty to prosecution witness not to disclose confidential information); Beck v. Bd. of Regents of State of

Kansas, 568 F.Supp. 1107, 1111 (D.Kan.1983); Rodriguez v. District Court, 719 P.2d 699, 704 (Colo.1986); Greene v. Greene, 391 N.E.2d 1355, 1358 (N.Y.1979); Gleason v. Coman, 693 S.W.2d 564, 566 (Tex.Ct.App.1985). See also, e.g., Sargent v. Buckley, 697 A.2d 1272 (Me.1997) (damage claim for use of information gained in negotiating antenuptial agreement for client wife used against former client in representing husband in dissolution action); Thiery v. Bye, 597 N.W.2d 449 (Wis.Ct.App.1999) (damage claim for failure to redact identifying information when file of former personal-injury client was passed out in technical college course).

*Comment f. Divulgence to persons assisting a lawyer in representing a client.*On a lawyer's implied agency authority to divulge confidential client information to other lawyers and employees in the same firm assisting the lawyer or who have legitimate need to deal with the information in order to carry on the operation of the firm, see, e.g., ABA Model Code of Professional Responsibility, EC 4-2 (1969); cf. ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [8] (1983) (to lawyers within same firm, unless client has otherwise instructed); id. Rule 5.3, Comment (supervising office personnel in firm). See generally C. Wolfram, Modern Legal Ethics § 6.4.4, at 271 (1986). The same implied authority permits a lawyer to disclose confidential client information to the extent necessary to obtain assistance from appropriate experts, lawyers, and other agents outside the lawyer's firm. E.g., State v. Schneider, 402 N.W.2d 779, 787 (Minn.1987) (proper for defense lawyer to disclose facts of client's history to psychiatrist whom lawyer consulted for advice on insanity defense); Sprader v. Mueller, 121 N.W.2d 176, 180 (Minn.1963). But see EC 4-3 (client consent required before consulting with lawyer outside firm, but no consent required before consulting with nonlawyer consultants outside firm). The lawyer's implied authority to divulge information to such persons does not permit disclosures if they conflict with the manifest best interests or expressed or evident wishes of an affected client. E.g., Schetter v. Schetter, 239 So.2d 51 (Fla.Dist.Ct.App.1970) (lawyer, who tape-recorded conversation with client without client's knowledge, had no authority to divulge tape to psychiatrist for purpose of preparing psychiatrist to testify as expert that client was incompetent in support of lawyer's motion to have guardian ad litem appointed for client in divorce action). On the obligation of other firm lawyers to safeguard confidential client information, see, e.g., Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1193 (D.S.C.1974).

On a supervising lawyer's responsibility to assure that both in-firm and external representational agents observe appropriate precautions in dealing with confidential client information, see, e.g., ABA Model Code of Professional Responsibility, DR 4-101(D) (1969); id. EC 4-2 (employees); id. EC 4-3 (outside agencies); ABA Model Rules of Professional Conduct, Rule 5.3, Comment (1983). See generally C. Wolfram, Modern Legal Ethics § 16.3.1, at 894 (1986). See also § 11, Reporter's Note.

*Comment g. Divulgence to facilitate law practice.*E.g., ABA Inf. Opin. 1364 (1976) (lawyer not required to obtain client consent to practice of sending detailed time-sheet information to computerized data-processing company for purposes of bookkeeping).

*Comment h. Divulgence for purpose of professional assistance and development; historical research.*No authority specifically in point has been found. The Comment seems to follow from the limited risk of adverse use or disclosure of client information and the superior legal interest in the described uses.

With respect to divulgence for the purpose of cooperating in historical research, it may be desirable to create special legal mechanisms by which lawyers may obtain clearance to disclose confidential client information to assist such research. Such a procedure should provide for notice to the client or a representative of a deceased or defunct client and for the right of the client or the client's representative to intervene. The procedure could permit a weighing of the relative importance of releasing the information in the circumstances and the magnitude of any risk of impairing confidentiality interests. Compare § 77, Comment *d* (similar balancing standard suggested for post-death waiver of attorney-client privilege in cases of need and undue hardship).

*Comment i. Divulgence concerning property dispositions by a deceased client.*No authority directly in point has been found. The point made in the Comment, however, is both consistent with the corresponding Section on the attorney-client privilege, § 81, and consistent with the general doctrine of Subsection (1), allowing a lawyer to use or reveal confidential client information to advance client interests.

Comment j. A lawyer's self-dealing in confidential client information. See generally Restatement Second, Agency § 388, Comment *c*; 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:300, at 266-67 (2d ed.1990 & Supp.1993); C. Wolfram, Modern Legal Ethics § 6.7.6, at 304 (1986). See generally § 55, Comment *d*, Reporter's Note. The position in the Section and Comment is based on Restatement Second, Agency § 388, Comment *c*. Section 388 states that, beyond the duty of an agent not to use confidential information to the disadvantage of a principal, an agent "also has a duty to account for any profits made by the use of such information, although this does not harm the principal…."

Most decisions involve instances of lawyer use of a client's confidential information that was harmful to the client. E.g., Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal.Rptr. 330 (Cal.Ct.App.1989) (lawyer in defendant law firm was also limited partner in client entity; trial required on client's claim that lawyer usurped business opportunity (real-estate purchase) by use of confidential information); David Welch Co. v. Erskine & Tulley, 250 Cal.Rptr. 339 (Cal.Ct.App.1988) (defendant law firm liable for damages for use of former client's confidential information in setting up competing debt-collection business); City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc., 322 N.W.2d 369 (Neb.1982) (client could void sale of property to lawyer's other client, where lawyer used first client's confidential information to usurp intended purchase of property); In re Wood, 634 A.2d 1340 (N.H.1993) (discipline of lawyer for public use of client's confidential information in opposing client's plan to develop shopping mall on property adjacent to lawyer's home); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (claim that lawyer induced truck driver to reveal information as if client-lawyer relationship existed, then provided information to prosecutor to enhance criminal conviction of employer, defendant in damage suits by other clients of lawyer).

The lawyer codes differ with respect to whether lawyer self-dealing in confidential client information is impermissible if not shown to be harmful to the client. ABA Model Rules of Professional Conduct, Rule 1.9(b) (1983) provides that ("a lawyer who has formerly represented a client in a matter shall not … (b) use information relating to the representation to the disadvantage of the former client except as rule 1.6 would permit with respect to a client or when the information has become generally known."). See also id. Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.") ABA Model Code of Professional Responsibility, DR 4-101(B)(3) (1969) contains a stricter rule: "a lawyer shall not knowingly … (3) [u]se a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure." The prohibition of the ABA Model Code does not require a showing that the lawyer's self-profiting use was to the disadvantage of the client, while the ABA Model Rules do require that showing.

The merits of the differing approaches in the lawyer codes have been debated. Compare, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:300, at 266-67 (2d ed.1990 & Supp.1993) (advancing the position taken in the ABA Model Rules), with, e.g., C. Wolfram, Modern Legal Ethics § 6.7.6 and § 7.4.2(c), at 364-65 (1986) (arguing that all self-dealing of lawyers in client information, regardless of harm to client, should be prohibited).

Even in a jurisdiction otherwise following the ABA Model Rules, a court has disciplined a lawyer despite the absence of harm to the client. See, e.g., In re Guidone, 653 A.2d 1127 (N.J.1994) (lawyer who, without client's knowledge, acquired 20% interest in purchaser of client's property is disciplined, despite finding that client suffered no economic loss). However, and in general agreement with the position in the Section, courts have required a showing of harm to the client when the client seeks damages other than profits gained by the lawyer. E.g., Hooper v. Gill, 557 A.2d 1349 (Md.1989) (even if lawyer's report of client wrongdoing to prosecutor was violation of duty, client, who was acquitted, could not recover absent showing of damages); cf., e.g., American Motors Corp. v. Huffstutler, 575 N.E.2d 116 (Ohio 1991) (injunction against lawyer who left staff of inside legal counsel of automobile manufacturer and advertised availability as expert witness against manufacturer in same type of roll-over cases as those on which lawyer had worked).

A clear instance of lawyer liability for use of confidential client information even in the absence of harm to a client is insider trading in a client's stock. E.g., SEC v. Singer, 786 F.Supp. 1158, 1171 (S.D.N.Y.1992) (breach

of fiduciary duty for lawyer to invest in stock of client based on confidential, nonpublic information). In several cases, lawyers have been disciplined following a criminal conviction for insider trading using information gained in representing clients. E.g., In re Glauberman, 586 N.Y.S.2d 601 (N.Y.App.Div.1992); In re Rubinstein, 506 N.Y.S.2d 441 (N.Y.App.Div.1986); In re Florentino, 478 N.Y.S.2d 289 (N.Y.App.Div.1984); In re Hall, 455 N.Y.S.2d 258 (N.Y.App.Div.1982).

*Comment l. Use or disclosure of confidential information of co-clients.*On the nature of the relationship and the consequent duty of the common lawyer to keep all co-clients informed, see, e.g., Sky Valley Ltd. Partnership v. ATX Sky Valley, Ltd., 150 F.R.D. 648 (N.D.Cal.1993); see also § 75, Comment *d,* and Reporter's Note thereto. On the conflict of interest created when the interests of the joint clients diverge, as evidenced by hostile communications by one of the co-clients, see, e.g., P. Rice, Attorney-Client Privilege in the United States 245 (1993); cf. Eureka Investment Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 937-38 (D.C.Cir.1984) (even if conflict of interest existed in lawyer's representation of co-clients at same time lawyer was advising one about rights against the other, that would not affect second client's right to invoke attorney-client privilege in subsequent litigation arising out of side representation). In *Eureka Investment,* supra, the affected client was aware that the lawyer was also advising the communicating client on a matter on which they were at odds. The decision is thus authority for preserving confidentiality for communications excluded from the co-client representation, but it does not extend to the situation of a lawyer representing co-clients whose interests are apparently congruent.

The position in the Comment on a lawyer's discretion to disclose hostile communications by a co-client has been the subject of very few decisions. It was approved and followed in A. v. B., 726 A.2d 924 (N.J.1999). It is also the result favored by the American College of Trusts and Estates Counsel in its *ACTEC Commentaries on the Model Rules of Professional Conduct* 68 (2d ed.1995) ("In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case…."); on the need to withdraw when a disclosing client refuses to permit the lawyer to provide the information to another co-client, see id. at 69; see generally Collett, Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence, 28 Real Prop. Prob. Tr. J. 683 (1994). Council Draft No. 11 of the Restatement (1995) took the position that disclosure to an affected, noninformed co-client was mandatory, in view of the common lawyer's duties of competence and communication and the lack of a legally protected right to confidentiality on the part of the disclosing co-client. That position was rejected by the Council at its October 1995 meeting, resulting in the present formulation.

*Comment m. Use or disclosure of confidential information of a nonclient.*On authority concerning a client's ability to introduce into evidence otherwise privileged communications of an opposing party due to failure to assert the privilege properly on the part of the opposing party or that party's lawyer or agent, see § 78(3), Comment *c,* and Reporter's Note thereto. The ABA ethics committee has taken the position that a lawyer must return inadvertently disclosed confidential documents, without consulting his or her client, regardless of whether disclosure waived confidentiality for evidentiary or other legal purposes. See ABA Formal Opin. 92-368 (1992); cf. also ABA Formal Opin. 47 (1931) (lawyer must resign from representation and not inform client when lawyer learns of confidential information concerning client's adversary from lawyer for adversary in clear violation of other lawyer's confidentiality obligations). That position is contrary to the Section and Comment. It has, however, received some judicial support. E.g., State Compensation Ins. Fund v. WPS, Inc., 82 Cal.Rptr.2d 799 (Cal.Ct.App.1999) (lawyer who receives obviously privileged material inadvertently transmitted should refrain from examining and promptly notify sender).

On a lawyer's duties on receipt of material wrongfully taken from an opposing party, see, e.g., In re Shell Oil Refinery, 143 F.R.D. 105 (E.D.La.1992), amended and reconsidered on other grounds, 1992 WL 275426 (E.D.La.1992) and 144 F.R.D. 73 (E.D.La.1992) (ordering suppression of confidential documents of defendant supplied to plaintiff's lawyer by unidentified current employee); Cooke v. Superior Court, 147 Cal.Rptr. 915 (Cal.Ct.App.1978) (evidence excluded, but lawyer for wife in dissolution action not required to be disqualified despite receipt of confidential information about husband, including confidential communications between husband and his lawyer, purloined and passed to lawyer by husband's unfaithful agent without complicity of receiving lawyer); Lipin v. Bender, 644 N.E.2d 1300 (N.Y.1994) (client plaintiff took and surreptitiously copied

confidential documents of opposing counsel sitting on deposition table while lawyers engaged in heated discussion outside room; extent and blatant nature of harm require extreme remedy of dismissal of plaintiff's action); Estate of Weinberg, 509 N.Y.S.2d 240 (N.Y.Surr.Ct.1986) (Lawyer Y representing Client B came into possession of Client A's privileged information on dissolution of firm of Lawyer X who represented A; privileged information ordered suppressed but court refuses to disqualify Lawyer Y from further representing B); Restatement Second, Agency § 312, Comment *c* (if divulgence to third person occurs because of "breach of the obligations" of agent, third person not entitled to use divulged information against interests of wronged principal); ABA Formal Opin. 94-382 (1994) (receipt of confidential information of opposing party from person without authority to make disclosure). See also Geralnes B.V. v. City of Greenwood Village, 609 F.Supp. 191 (D.Colo.1985) (Lawyer Y sought and obtained confidential client information from Lawyer X, opposing client's former lawyer, after latter incorrectly opined that no privilege was involved; except for Lawyer Y's good-faith confusion about Lawyer X's status and fact that Lawyer Y had given advance notice of interview of Lawyer X to client's present lawyer, Lawyer Z, court would have disqualified Lawyer Y from further representing party adverse to client whose confidential information was obtained).

Under the constitutional guarantee of the effective assistance of counsel in criminal trials, a stricter standard may apply to the use by the government of confidential client information of an accused person obtained, even if without government complicity, from a defense lawyer. See People v. Knippenberg, 362 N.E.2d 681, 685 (Ill.1977) (defendant denied fair trial when prosecutor used as evidence summary of client interview taken by defense investigator that somehow reached prosecutor).

Case Citations - by Jurisdiction

—

C.A.3
N.D.Ga.
S.D.N.Y.
S.D.Tex.
Cal.
N.J.

C.A.3

C.A.3, 2007. Com. (*l*) cit. in disc. Chapter 11 debtor subsidiaries brought an adversary proceeding against controlling corporation for breach of contract, breach of fiduciary duties, estoppel, and misrepresentation arising from the manner in which it ceased funding debtors' corporate parent. The district court ordered defendant to turn over documents that were withheld based on the attorney-client privilege. This court vacated and remanded for a determination of whether defendant and debtors were parties to a joint representation, since the district court could only compel defendant to produce the disputed documents because of the adverse-litigation exception to the co-client privilege if it found that defendant and debtors were jointly represented by the same attorneys on a matter of common interest that was the subject matter of those documents. In re Teleglobe Communications Corp., 493 F.3d 345, 369.

N.D.Ga.

N.D.Ga.1998. Com. (m) and Rptr's Note quot. in sup. and cit. generally in ftn. (citing § 112, Proposed Final Draft No. 1, 1996, which is now § 60). In an antitrust suit, defendants moved for a protective order, return of inadvertently produced confidential documents, and disqualification of plaintiffs' counsel. This court granted in part and denied in part defendants' motion, holding, inter alia, that it could not find that a reasonable possibility existed that plaintiffs' counsel violated a specifically identifiable ethical rule by retaining and using the documents,

and disqualification was not appropriate under the circumstances. It stated that it was debatable whether ABA Committee Formal Opinion 92-368 established an ethical rule that governed the conduct of attorneys in this circuit. In re Polypropylene Carpet Antitrust Litigation, 181 F.R.D. 680, 698.

S.D.N.Y.

S.D.N.Y.1999. Subsec. (1)(a) quot. in disc. (citing § 112, Proposed Final Draft No. 1, 1996, which is now § 60). American pharmaceutical company sued French competitor, seeking a declaration of noninfringement, invalidity, and unenforceability of certain patents. District court held that French patent agents were not entitled under French law to an evidentiary privilege comparable to the attorney-client privilege as it is enjoyed by patent attorneys under United States law. Thus, the French patent agents' communications and memoranda were not privileged. This court denied the French competitor's motion for reconsideration and ordered the French competitor to produce all communications or documents in the pertinent files relevant to this matter that were not prepared pursuant to the authority of an American patent attorney. Bristol-Myers Squibb Company v. Rhone-Poulenc Rorer, Inc., 188 F.R.D. 189, 199.

S.D.N.Y.1992. Quot. in ftn. in sup. (citing § 112, T.D. No. 3, 1990, which is now § 60). Corporation moved to disqualify its former attorney from representing former employees of corporation in employment discrimination suit against corporation. This court granted disqualification. Applying the Restatement to question of whether issues raised in discrimination suit were substantially related to attorney's earlier representation of corporation, the court held that attorney's representation of former employees made it very likely that corporation would be disadvantaged by attorney's unavoidable use of confidential information acquired while working for corporation. Ullrich v. Hearst Corp., 809 F.Supp. 229, 234.

S.D.Tex.

S.D.Tex.1996. Cit. in sup. (citing § 112, T.D. No. 2, 1989, which is now § 60). Unincorporated association of residential condominium unit owners and an individual owner sued condominium association and its board of directors, alleging claims for service mark and trademark infringement and unfair competition, inter alia. Granting plaintiff individual owner's motion to disqualify law firm representing defendants, the court held that a law-firm attorney's former representation of individual owner in his divorce proceeding disqualified the law firm from representing defendants in this case, since the law firm possessed confidential information provided by individual owner during his divorce proceeding that could be used to individual owner's disadvantage during the course of this case. Islander East Rental Program v. Ferguson, 917 F.Supp. 504, 512.

Cal.

Cal.2011. Sec., subsec. (1)(a), and com. (c)(i) quot. in sup. Former client brought claims for breach of fiduciary duty, professional negligence, and breach of contract against, among others, attorney who had represented it in its effort to obtain approval of a redevelopment project from city council, after attorney became involved in a campaign opposing plaintiff's project. The trial court denied defendant's motion to strike the complaint under the anti-SLAPP statute; the court of appeals reversed. Reversing, this court held that plaintiff's claims possessed at least minimal merit within the meaning of the anti-SLAPP statute; plaintiff demonstrated a “probability of prevailing” on the claims when it asserted that defendant used confidential information acquired during his representation of plaintiff in support of a referendum to overturn the city council's approval of the project, where the council's approval of the project had been the explicit objective of the prior representation. Oasis West Realty, LLC v. Goldman, 51 Cal.4th 811, 124 Cal.Rptr.3d 256, 250 P.3d 1115, 1122, 1124.

N.J.

N.J.2009. Com. (*l*) cit. in case cit. in sup. (citing § 112 of Prop. Final Draft No. 1, 1996, which is now § 60 of the Official Text). After owners of a beach club brought defamation and other claims against neighbors who opposed their application to expand the club, neighbors filed a third-party complaint against owners' attorneys for, among other things, malicious use of process. The trial court granted summary judgment for attorneys. The court of appeals affirmed. Affirming as modified, this court held, inter alia, that there was no support in the record on the required element of malice as it related to attorneys; all of the evidence on the subject of attorneys' motivations pointed to their good faith belief that owners and their business had been damaged, that neighbors' alleged conduct was wrongful, and that the claims were made for no improper purpose. LoBiondo v. Schwartz, 199 N.J. 62, 110, 970 A.2d 1007, 1034.

N.J.1999. Cit. generally in disc., com. (*l*) cit. and quot. in sup., illus. 2 and 3 quot. in disc. (citing § 112, Prop. Final Draft No. 1, 1996, and C.D. No. 11, 1995, which is now § 60). Law firm formerly engaged in joint representation of husband and wife doing estate planning sought to disclose to wife that husband had recently fathered an illegitimate child. The trial court determined that disclosure was appropriate and entered judgment accordingly. The appellate court reversed and remanded. Reversing and remanding, this court held that, under the circumstances, disclosure of the existence of the child, though not his or her identity, was proper under rule 1.6 of New Jersey's Rules of Professional Conduct. Disclosure was further supported by the parties' earlier execution of letters captioned "Waiver of Conflict of Interest," and by the fact that nondisclosure could frustrate wife's testamentary intent. A. v. B., 158 N.J. 51, 726 A.2d 924, 928-931.

Restatement (Third) of the Law Governing Lawyers § 61 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 5. Confidential Client Information

Topic 1. Confidentiality Responsibilities of Lawyers

Title B. Using or Disclosing Confidential Client Information

§ 61 Using or Disclosing Information to Advance Client Interests

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

Comment:

a. *Scope and cross-references.* This Section defines the agency power of lawyers to use and disclose confidential client information in the course of representation. The power of the client and lawyer to define the scope of the representation and the client's power to instruct a lawyer to take greater precautions are considered in Comment *c* hereto. With respect to acts for a client with diminished capacity, see § 24.

Succeeding Sections in this Title describe situations in which a lawyer may use or disclose confidential client information even when doing so will adversely affect a material interest of the client (see §§ 62- 67).

b. *A lawyer's authority to use or disclose confidential client information.* A lawyer has general authority to take steps reasonably calculated to further the client's objectives in the representation (see § 21(3)). This Section is a particular application of that general authority. No explicit request or grant of permission is required. On a lawyer's duty to communicate with a client, see § 20.

This Section requires that a lawyer have a reasonable belief that the use or disclosure will further the objectives of the client in the representation. In certain instances, permissible use or disclosure under this Section may create a risk, reasonable in the circumstances, that may extend beyond what is permitted under § 60(1) alone. The fact that the client's interests are not in fact furthered does not demonstrate that the lawyer's belief at the point of use or disclosure was unreasonable. A lawyer must often contend with uncertainties, unexpected decisions, and the need for immediate action. For example, offering a witness reasonably believed to have generally favorable testimony may entail the risk of also revealing embarrassing or counterproductive facts about the client. So long as reasonably calculated to advance the client's interests, such use or disclosure is permissible under this Section.

An action of a lawyer in violation of this Section nonetheless may create a right in a third person that adversely affects the lawyer's client. For example, if the lawyer negligently fails to object to an adversary's introduction in evidence of a client's privileged communication, the opposing party may hold the client to a waiver of the privilege (see § 78(3)) despite the fact that the lawyer thereby breached an obligation to the client. With respect to the effect of an adversary's knowledge that a lawyer's out-of-court waiver exceeds the lawyer's authority, see § 60, Comment *m,* and § 79, Comment *h.*

c. A client direction limiting use or disclosure. See § 60, Comment *c(ii)*.

d. Reasonable calculation of advantage to a client. A lawyer may use or disclose confidential client information when presenting evidence or argument or engaging in other proceedings before a court, governmental agency, or other forum in behalf of a client. Thus, a lawyer may disclose such information in pleadings or other submissions, in presenting the testimony of witnesses and other evidence, in submitting briefs and other memoranda, or in discussing the matter with potential witnesses. Information thus disclosed may be not entirely favorable to the client. For tactical reasons, a lawyer may reasonably decide to present partly unfavorable information, even though it is confidential. A lawyer may do so in the interest of mitigating its damaging effect (for example, to prevent it from being brought out first by an adversary) or in order to present a complete account and thus gain the confidence of the factfinder.

A lawyer who reasonably believes that it is in the interests of the client to do so may refrain from objecting to an adversary's attempt to introduce otherwise inadmissible confidential client information, even if that failure will cause the waiver of a privilege (see § 78(3)). For example, a lawyer may acquiesce in an adversary's eliciting testimony from the lawyer's client that, although privileged under the attorney-client privilege, is favorable to the client's litigation position.

A lawyer has the same authority in matters other than litigation. A lawyer may, for example, exchange confidential client information reasonably calculated to further settlement of a lawsuit or negotiation of a business transaction. In most jurisdictions, statements made in the course of settlement negotiations are not thereafter admissible in evidence to establish liability against the person who or whose lawyer made the statement. In so using or disclosing information, a lawyer must use due care (see § 50) to avoid unintended waiver of the attorney-client privilege or other injury to the interests of the client.

Reporter's Note

*Comment b. A lawyer's authority to use or disclose confidential client information.*E.g., ABA Model Code of Professional Responsibility, EC 4-2 (1969); ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983). See generally 8 J. Wigmore, Evidence, § 2325 (J. McNaughton rev.1961); C. Wolfram, Modern Legal Ethics § 4.2, at 149-50 (1986). E.g., ABA Formal Opin. 98-411 (1998) (extent to which lawyer has implied authority to reveal limited confidential information to consulting lawyer called on for advice on limited issue).

*Comment c. A client direction limiting use or disclosure.*See § 21, Comment *d,* and Reporter's Note thereto. See also § 60, Comment *c(ii),* and Reporter's Note thereto.

*Comment d. Reasonable calculation of advantage to a client.*E.g., ABA Model Code of Professional Responsibility, EC 4-2 (1969) (lawyer may disclose confidential information "when necessary to perform his professional employment"); ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) ("disclosures that are impliedly authorized to carry out the representation"); id., Comment (Authorized Disclosure). For decisions, see, e.g., United States v. Franklin, 598 F.2d 954 (5th Cir.), cert. denied, 444 U.S. 870, 100 S.Ct. 147, 62 L.Ed.2d 95 (1979) (plea-bargain disclosures); Schetter v. Schetter, 239 So.2d 51 (Fla.Dist.Ct.App.1970). On the requirement that a disclosure be in the interests of the disclosing lawyer's client, see, e.g., In re Wyse, 688 P.2d 758 (Mont.1984) (discipline for disclosing, without client's prior consent, information about first client's prior charges of sexual abuse for use of second client faced with possible prosecution for later charges of sexual abuse of first client), modified, 697 P.2d 94 (Mont.1985) (disciplinary sanction modified); Cruz v. State, 586 S.W.2d 861 (Tex.Crim.App.1979) (lawyer who took complete confession from client without informing him of his rights, took him to police station, and assisted police in duplicating confession for their use had no implied authority to waive attorney-client privilege).

The law generally permits a lawyer negotiating a settlement to make statements "without prejudice" or under a similar rubric that makes the statements inadmissible in evidence to establish liability in subsequent proceedings. See generally C. Wolfram, Modern Legal Ethics § 6.7.7, at 307 (1986). Modern evidence codes generally make inadmissible in evidence, at least for most purposes, both settlement offers and statements made in settlement discussions, even without the ceremony of stating that a disclosure is "without prejudice." E.g., Federal Rules of Evidence, Rule 408 (second sentence) ("conduct or statements made in compromise negotiations" not admissible "to prove liability for or invalidity of the claim or its amount"); Revised Uniform Rules of Evidence, Rule 408 (1974) (same). Similar rules make inadmissible statements made in the course of plea bargaining in criminal cases. E.g., Federal Rules of Evidence, Rule 410(4) ("any statement made" in course of plea bargaining inadmissible if plea is not accomplished); Revised Uniform Rules of Evidence, Rule 410(4) (1974). Ordinarily a lawyer will be well advised to consult with a client in advance when a lawyer proposes to take the risk of divulging particularly compromising client information that need not otherwise be divulged.

Restatement (Third) of the Law Governing Lawyers § 62 (2000)

§ 62 Using or Disclosing Information with Client Consent

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

Comment:

a. *Scope and cross-references.* This Section states the general rule that client consent to a lawyer's use or disclosure of information otherwise defined as confidential client information under § 59 removes the limitations of § 60. On a lawyer's use or disclosure without regard to client consent, see §§ 63- 67. On the prohibition against a lawyer contracting with a client to limit or avoid future instances of malpractice, see § 54. With respect to the validity of client consent in advance to future conflicted representations, see § 122, Comment *d.* On the limited conditions under which a client can withdraw consent to a conflict, once validly given, see § 122, Comment *f.*

b. *Client consent to use or disclosure.* A client can expressly relieve the lawyer of the duty of confidentiality stated in § 60, for example by consent to the lawyer's use of confidential client information in a book being written by the lawyer. A client may also consent to a lawyer's adverse use of confidential client information in a succeeding representation (see § 132). On client capacity to consent, see § 122, Comment *c.* On lawyer representation of a client with diminished capacity, see § 24.

c. *Adequately informed client consent.* A lawyer is required to consult with a client before the client gives consent under this Section. The legal effect of failure to consult depends upon whether the question concerns the lawyer's duty to the client or the rights or interests of third persons. When the question concerns the lawyer's duty to the client, the client's consent is effective only if given on the basis of information and consultation reasonably appropriate in the circumstances. When the question concerns the effect of consent with respect to the client's legal relationship with third persons, the principles of actual and apparent authority control. See §§ 26 and 27.

Reporter's Note

*Comment b. Client consent to use or disclosure.*E.g., ABA Model Code of Professional Responsibility, DR 4-101(B)(3) (1969) (lawyer shall not knowingly "use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure"); id. DR 4-101(C)(1) (lawyer "may reveal" "confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them"). The references to client consent in the ABA Model Code, although probably only the result of a drafting lapse, are possibly open to the interpretation that client consent after full disclosure is effective as to any "revelation," but only with respect to those "uses" that do not operate to the disadvantage of the client. The consent provision of the ABA Model Rules avoids any such possible ambiguity. See ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation …"). See generally C. Wolfram, Modern Legal Ethics § 6.7.7, at 306 (1986). This Section, following the ABA Model Rules, takes the position that adverse use or disclosure is permissible with client consent. Under § 60(1), benign use or disclosure is permissible and does not require client consent.

No decision seems to have considered the question addressed by the Section outside the context of consent to a lawyer's use or disclosure in the circumstances described in § 61 (using or revealing client information to advance a client's interests), §§ 78- 80 (waiver of the attorney-client privilege), or § 122 (client consent to conflict of interest). See the Reporter's Notes thereto.

*Comment c. Adequately informed client consent.*The different effects of omitting full disclosure can be seen by contrasting the provisions of the lawyer codes cited in the Reporter's Note to Comment *b* hereto with the attorney-client privilege doctrine of waiver by subsequent disclosure by act of the lawyer, where no authority requires client consultation. See § 78(3) (waiver by defectively asserting the privilege); § 79, Comment *c* (waiver by lawyer's act of making subsequent disclosure of privileged client communication).

Restatement (Third) of the Law Governing Lawyers § 63 (2000)

Restatement of the Law - The Law Governing Lawyers | May 2023 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 5. Confidential Client Information

Topic 1. Confidentiality Responsibilities of Lawyers

Title B. Using or Disclosing Confidential Client Information

§ 63 Using or Disclosing Information When Required by Law

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

Comment:

a. *Scope and cross-references.* A lawyer's general legal duty (see § 60) not to use or disclose confidential client information (see § 59) is superseded when the law specifically requires such use or disclosure. For example, a lawyer may be called as a witness and directed by the tribunal to testify to what the lawyer believes is confidential client information protected by the attorney-client privilege (see § 68), the work-product immunity (see § 87), or another evidentiary rule. The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise in pretrial discovery or in supplying evidence to a legislative committee, grand jury, or administrative agency. A lawyer may be directly required to file reports, such as registering as the agent for a foreign government or reporting cash transactions. Other laws may require lawyers to turn over certain evidence and instrumentalities of crime to governmental agencies (see § 69). In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required.

On the extent of a lawyer's duty to disclose wrongdoing of another lawyer, see § 5(3). On a lawyer's liability for failure to exercise due care to protect a nonclient, see § 51 and following. The rule of the Section is important in addressing the duties of a lawyer to make disclosure to co-clients under §§ 51(4) and 56 (see also §§ 66- 67). See also, e.g., § 98.

b. A lawyer's obligation to invoke available protection. A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information (see § 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see § 62), unless disclosure would serve the client's interest (see § 61). The duty follows from the general requirement that the lawyer safeguard such information (see § 60) and act competently in advancing the client's objectives (see § 16(1)). The duty to object arises when a nonfrivolous argument (see § 110) can be made that the law does not require the lawyer to disclose such information. Such an argument could rest on the attorney-client privilege (see § 86(1)(b)), the work-product immunity (see § 87), or a ground such as the irrelevance of the information or its character as hearsay. When the client is represented by successor counsel, a predecessor lawyer's decision whether to invoke the privilege is appropriately directed by successor counsel or the client.

Whether a lawyer has a duty to appeal from an order requiring disclosure is determined under the general duties of competence (see § 16(2)). A lawyer may be instructed by a client to appeal (see § 21(2)). If a lawyer may obtain precompliance appellate review of a trial-court order directing disclosure only by being held in contempt of court (see § 105), the lawyer may take that extraordinary step but is generally not required to do so by the duty of competent representation. In any event, under § 20 the lawyer should inform the client of an attempt to obtain the client's confidential information if it poses a significant risk to the material interests of the client and when circumstances reasonably permit opportunity to inform the client.

Reporter's Note

*Comment a. Scope and cross-references.*See ABA Model Code of Professional Responsibility, DR 4-101(C)(2) (1969) (lawyer "may reveal … (2) [c]onfidences or secrets when … required by law or court order."); ABA Model Rules of Professional Conduct, Rule 1.6, Comment ¶ [20] (1983) ("The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client…. [A] lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession."). On the omission from the ABA Model Rules of an explicit required-by-law exception, see generally 1 G. Hazard & W. Hodes, Law of Lawyering § 1.9:402, at 312 (2d ed.1990 & Supp.1994). A number of states have restored the exception to the general confidentiality rule in their adopted version of the ABA Model Rules. 2 id. § AP4:101.

The exception is generally recognized or assumed by courts. E.g., Fellerman v. Bradley, 493 A.2d 1239, 1248 (N.J.1985); Seventh Elect Church in Israel v. Rogers, 688 P.2d 506, 510-11 (Wash.1984).

*Comment b. A lawyer's obligation to invoke available protection.*E.g., In re Advisory Opinion No. 544, 511 A.2d 609, 612 (N.J.1986). See also Comment *a* and Reporter's Note thereto, supra. On the permissibility of a lawyer's risking a final adjudication of contempt in order to obtain precompliance appellate review of the correctness of a lower-court order directing the lawyer to use or disclose client information that the lawyer contends is protected by a privilege, see, e.g., Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975); United States v. Ryan, 402 U.S. 530, 532-33, 91 S.Ct. 1580, 1581-1582, 29 L.Ed.2d 85 (1971); State v. Schmidt, 474 So.2d 899 (Fla.Dist.Ct.App.1985). See § 105, Reporter's Note.

Case Citations - by Jurisdiction

D.C.App.

D.C.App.2007. Com. (a) quot. in sup. Defendants in an action for fraudulent inducement alleged that plaintiff's claims were barred by the relevant three-year statute of limitations, pointing to a demand letter authored and sent to defendants by plaintiff's attorney more than three years earlier. The trial court granted defendants' motion to compel attorney to submit to a deposition, ruling that the information sought by defendants to determine the authenticity of the letter and whether plaintiff authorized it was not privileged. Affirming, this court held, inter alia, that the District of Columbia rule of professional conduct setting forth a lawyer's ethical obligation to preserve client confidences and secrets was not an evidentiary bar to attorney's deposition, because the trial court's order mandating compliance superseded the rule. Adams v. Franklin, 924 A.2d 993, 997.

Ohio

Ohio, 2002. Com. (a) quot. in disc. After an attorney who was disciplined and placed on probation with oversight by a monitoring attorney failed to obtain releases of the attorney-client privilege from his clients, county bar association filed motion with state supreme court requesting that the clients' files and records be made available to the monitoring attorney. This court ruled that the monitoring attorney could not interfere with the attorney-client privilege between the disciplined attorney and his clients by reviewing privileged materials without the clients' specific waiver of the privilege. The monitoring attorney's oversight was limited to nonprivileged matters, and he would not be authorized to examine the disciplined attorney's privileged client correspondence. Allen Cty. Bar Assn. v. Williams, 95 Ohio St.3d 160, 162, 766 N.E.2d 973, 975.

Ohio, 2000. Com. (a) quot. in disc. (citing § 115, Proposed Final Draft No. 1, 1996, which is now § 63). After discovering that his client in a capital trial had written a letter that contained threats against others, the client's attorney withdrew as defense counsel. Thereafter, attorney refused to comply with a subpoena asking him to appear before the grand jury and to bring any letter written by the client that led to his withdrawal as legal counsel, and the trial court held him in civil contempt. Appellate court affirmed in part and vacated in part. This court affirmed, concluding that the attorney was required to comply with the grand jury subpoena and to relinquish the letter. The court held that where an attorney received physical evidence from a third party relating to a possible crime committed by his or her client, the attorney was obligated to relinquish that evidence to law-enforcement authorities and comply with a subpoena issued to that effect. In re Original Grand Jury Investigation, 89 Ohio St.3d 544, 733 N.E.2d 1135, 1138-1139.