RESTATEMENT OF THE LAW THIRD

THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW

THE LAW GOVERNING LAWYERS

As Adopted and Promulgated
BY
THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D.C.
May 12, 1998

Volume 1
Chapters 1 to 5

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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 single-handedly by Martha Crowe.

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

July 10, 2000

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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.

TOPIC 2. SUMMARY OF THE DUTIES UNDER A CLIENT–LAWYER RELATIONSHIP

Introductory Note

Section

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.

§ 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).

§ 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).

§ 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.

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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).

§ 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.

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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).

TOPIC 3. AUTHORITY TO MAKE DECISIONS

Introductory Note

Section

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).

§ 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).

§ 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 proper-

ly 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.

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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.

§ 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 accor-

dance 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.

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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).

§ 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)).

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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.

§ 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.

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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 Decision-making 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).

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

Introductory Note

Section

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.

§ 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.

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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).

§ 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 nego-

tiating 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.

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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.

§ 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).

§ 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) (adminis-

trative 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).

§ 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 repre-

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.

CHAPTER 3

CLIENT AND LAWYER: THE FINANCIAL AND PROPERTY RELATIONSHIP

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.

TOPIC 1. LEGAL CONTROLS ON ATTORNEY FEES

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).

§ 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 & 50). 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); Thornton, 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).

§ 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.

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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); Thornton, 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).

§ 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.

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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).

§ 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 commonplace 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).

TOPIC 2. A LAWYER'S CLAIM TO COMPENSATION

Introductory Note

Section

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.

§ 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 three rules 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).

§ 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.

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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).

§ 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).

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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 con-

tract 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.

TOPIC 3. FEE–COLLECTION PROCEDURES

Introductory Note

Section

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).

§ 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).

§ 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 233 (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).

§ 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.

TOPIC 4. PROPERTY AND DOCUMENTS OF CLIENTS AND OTHERS

Introductory Note

Section

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

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sional 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.

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.

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

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.

TOPIC 2. SUMMARY OF THE DUTIES UNDER A CLIENT–LAWYER RELATIONSHIP

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

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.

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, on remand 265 Ga.App. 6, 593 S.E.2d 555, 2005 (2005).

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.

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.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.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).

§ 17. A Client's Duties to a Lawyer

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.

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.

§ 18. Client–Lawyer Contracts

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.

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.

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.

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.

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.

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.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.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.

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.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.

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.

§ 19. Agreements Limiting Client or Lawyer Duties

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.

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.

TOPIC 3. AUTHORITY TO MAKE DECISIONS

N.J.1993. Intro. Note quot. generally in disc. (T.D. No. 5, 1992). 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.

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

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.

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.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.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.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.

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

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.

§ 22. Authority Reserved to a Client

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.

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.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.

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.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.

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.

§ 24. A Client with Diminished Capacity

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.

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

§ 26. A Lawyer's Actual Authority

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.

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 judg-

ment 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.

N.D.Miss.2001. Quot. in case quot. in ftn. (P.D. No. 6, 1990). 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.

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.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.

§ 27. A Lawyer's Apparent Authority

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.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.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.

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).

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.

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.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.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.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.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.

TOPIC 5. ENDING A CLIENT–LAWYER RELATIONSHIP

§ 31. Termination of a Lawyer's Authority

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.

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.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.

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.

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

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.

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.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.

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.

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

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.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.

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.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.

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.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.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.

CHAPTER 3. CLIENT AND LAWYER: THE FINANCIAL AND PROPERTY RELATIONSHIP

TOPIC 1. LEGAL CONTROLS ON ATTORNEY FEES

§ 34. Reasonable and Lawful Fees

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.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.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.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.

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.

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.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).

See also cases under division, chapter, topic, title, and subtitle that include section under examination.

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.

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.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.

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.

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.

Cit.—cited; com.—comment; fol.—followed; sup.—support.
A complete list of abbreviations precedes page 1.

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.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.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.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.

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.

§ 35. Contingent–Fee Arrangements

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.

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.

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, 6 P.3d 965, 970.

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.

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.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.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.

§ 36. Forbidden Client–Lawyer Financial Arrangements

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.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.

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.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.

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.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.

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.

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

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.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.

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.

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. 547, 561.

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.

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.

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.

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.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). See above case.

TOPIC 2. A LAWYER'S CLAIM TO COMPENSATION

§ 38. Client–Lawyer Fee Contracts

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 recom-

mendation 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.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.

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.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.

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.

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

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.

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.

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.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.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.

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, Bla-

ney & White v. Estate of Nicolaysen, 340 N.J.Super. 104, 123, 773 A.2d 1176, 1189.

§ 40. Fees on Termination

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.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.

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.

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.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.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.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.

TOPIC 3. FEE-COLLECTION PROCEDURES

§ 42. Remedies and the Burden of Persuasion

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.

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.

§ 43. Lawyer Liens

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.

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.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 ___ Cal.4th ___, 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).

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, 723 A.2d 577, 580.

TOPIC 4. PROPERTY AND DOCUMENTS OF CLIENTS AND OTHERS

§ 44. Safeguarding and Segregating Property

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.

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.

§ 46. Documents Relating to a Representation

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.

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.

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.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