

REPORT OF THE ETHICS COMMITTEE*

The American Law Institute (ALI) published its long-awaited Restatement Third, The Law Governing Lawyers (the Restatement¹) in the fall of 2000. Although issued as part of the Restatement Third series, there is no prior Restatement on this topic. This Restatement took fourteen years to prepare and went through numerous drafts and revisions. The Restatement clarifies and synthesizes the common law applicable in ethics proceedings as well as legal malpractice proceedings. It draws on the ABA's Model Rules of Professional Conduct (promulgated in 1983), the ABA's Model Code of Professional Responsibility (promulgated in 1969), various state rules and codes, and case law.

Although the Restatement does not have the force of law and is not binding on courts or other tribunals, it is likely to be influential. Indeed, numerous state and federal courts cited various draft sections of the Restatement in resolving issues arising out of the practice of law.² In general, the ALI's Restatements on other topics have been influential and widely cited.

The Restatement is divided into eight chapters. Chapter 1, Regulation of the Legal Profession, addresses the process of professional regulation, civil judicial remedies in general, lawyer criminal offenses, and law firm structure and operation. Chapter 2, The Client-Lawyer Relationship, addresses the creation and termination of the client-lawyer relationship, as well as the duties and authority accompanying that relationship. Chapter 3, Client and Lawyer: The Financial And Property Relationship, addresses attorney fees, fee-collection procedures, proper handling of client property and documents, and fee-splitting. Chapter 4, Lawyer Civil Liability, addresses professional liability for negligence and breach of fiduciary duty as well as vicarious liability. Chapter 5, Confidential Client Information, addresses confidentiality obligations, the attorney-client privilege, and work product immunity. Chapter 6, Representing Clients – In General, addresses representation of organizational clients, dealings with nonclients, and appearing in legislative and administrative proceedings. Chapter 7, Representing Clients in Litigation, addresses limits on advocacy, and gathering and presenting evidence. Chapter 8, Conflicts of Interest, addresses conflicts arising in various scenarios, including conflicts between lawyer and client, among current clients, with a former client, and due to the law-

* The Committee gratefully acknowledges the assistance of Jacqueline Gerson Cooper, Esq. of Sidley & Austin in the preparation of this report.

1. Copies of the two-volume Restatement are available from ALI for \$195 (phone: 1-800-253-6397; Internet: www.ali-aba.org; or ALI's Customer Service Department, 4025 Chestnut Street, Philadelphia, PA 19104-3099).

2. See generally David C. Little, *The Potential Impact of the Restatement (Third) of the Law Governing Lawyers*, 25 SEP COLO. LAW 83, 83-84 (1996); Susan R. Martyn, *Judicial Reliance on the Restatement (3d) of the Law Governing Lawyers*, 6 No. 2 PROF. LAW. 8 (Feb. 1995).

yer's obligations to a third person.

Several positions taken by the Restatement are of particular note. First, the ABA's Model Code and Model Rules are intended to govern lawyer disciplinary proceedings and expressly state that they are *not* designed to be a basis for civil liability.³ However, section 52 of the Restatement expressly permits the consideration of applicable disciplinary rules by the trier of fact in a civil case. While section 52(2)(a) states that violation of a rule or statute regulating the conduct of lawyers "does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty,"⁴ section 52(2)(c) provides that proof of violation of a disciplinary rule "may be considered by a trier of fact as an aid in understanding and applying" the applicable standard of care, provided that the rule "was designed for the protection of persons in the position of the claimant" and the rule is "relevant to the claimant's claim."⁵ The Restatement expressly contemplates that "[t]he court may instruct the jury as to the content and construction of the statute or rule and its bearing on the issue of care."⁶ This arguably is a departure from the spirit, if not the express intent, of the Model Rules and most state disciplinary codes, which do not appear to contemplate such a prominent role for disciplinary rules in malpractice trials.⁷

Section 51 of the Restatement may pave the way for expanded civil liability to nonclients. This section identifies circumstances in which a lawyer's duty of care, for malpractice purposes, extends to nonclients. While Comment a. to the section states that a lawyer owes a duty of care to a nonclient only in "limited circumstances," the section is broadly written. For example, section 51(2) provides that a lawyer owes a duty of care to a nonclient when "the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion," the nonclient so relies, and "the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection."⁸ In addition, section 51(3) provides that a lawyer owes a duty of care to a nonclient when "the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient," such a duty "would not significantly impair the lawyer's performance of obligations to the client," and "the absence of such a duty would make enforcement of those obligations to the client unlikely."⁹ Finally, section 51(4) defines circumstances in which a lawyer owes a duty of care to a nonclient where the client is a trustee, guardian, executor, or fiduciary for the nonclient and the

3. See generally MODEL RULES OF PROF'L CONDUCT PREAMBLE (2000).

4. RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 52(2)(a) (2000).

5. *Id.* at 52 (2)(c).

6. RESTATEMENT § 52 cmt. f.

7. See generally, Foreword to Restatement *supra* note 4 ("The Restatement addresses issues of civil liability of lawyers – legal malpractice – whereas the ethics codes carefully skirt the relationship between ethical standards and malpractice liability").

8. RESTATEMENT § 52(2).

9. *Id.* at § 51(3).

client may have breached fiduciary duties owed to the nonclient. All of these sections are likely to be invoked by nonclients in malpractice suits and could become the basis for broadened civil liability.

Section 110 of the Restatement expands the scope of current prohibitions against frivolous advocacy, addressed in Federal Rule of Civil Procedure 11 (Rule 11) and parallel state rules.¹⁰ While Rule 11 is applicable to written pleadings and briefs signed by attorneys, section 110 appears to prohibit frivolous advocacy in nearly every aspect of the litigation process. It broadly prohibits a lawyer from “bring[ing] or defend[ing] a proceeding or assert[ing] or controvert[ing] an issue therein, unless there is a basis for doing so that is not frivolous.”¹¹ It further prohibits a lawyer from “mak[ing] a frivolous discovery request, fail[ing] to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail[ing] otherwise to comply with applicable procedural requirements concerning discovery.”¹² These broad prohibitions against the taking of frivolous positions in any aspect of litigation proceedings may significantly affect litigation practice, in the same way that Rule 11 has affected pleading practice.

Sections 66 and 67 of the Restatement state important exceptions to the lawyer’s duty of confidentiality. Section 66(1) provides that “[a] lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person.”¹³ The lawyer must, however, “make a good-faith effort to persuade the client not to act” prior to disclosure and, if the client has already acted, “advise the client to warn the victim or to take other action to prevent the harm” and advise that the lawyer may have to disclose the client’s actions.¹⁴ The Restatement candidly acknowledges that “[n]o lawyer code explicitly permits disclosure, as broadly as permitted by Subsection (1)” and that “[t]here are no reported judicial decisions on the issue.”¹⁵ Thus, this provision of the Restatement is a significant departure from the common law and disciplinary codes, “based on the overriding value of life and physical integrity.”¹⁶

Section 67 similarly breaks new ground in allowing a lawyer to “use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud” that “threatens substantial financial loss,” where “the client has employed

10. Section 110 appears to apply to administrative proceedings as well as judicial proceedings. The introductory note to the chapter that includes section 110 (which is entitled “Representing Clients in Litigation”) states that the chapter “addresses situations in which the lawyer is ‘representing a client in a matter before a tribunal.’ A tribunal includes a court, administrative hearing board, or similar formal body hearing a contested matter under rules of procedure and evidence.” RESTATEMENT § 110.

11. RESTATEMENT § 110(1).

12. *Id.* at 110(3).

13. RESTATEMENT § 66(1)

14. *Id.* at 66(2).

15. RESTATEMENT § 66 cmt. b.

16. *Id.*

or is employing the lawyer's services in the matter in which the crime or fraud is committed."¹⁷ As with section 66, the lawyer "must, if feasible, make a good-faith effort to persuade the client not to act" prior to disclosure and must advise the client of the lawyer's ability to disclose the client's actions.¹⁸ As one commentator has noted, this exception to confidentiality is "alien to the current ABA Model Rule 1.6(b), as well as to most state codes of ethics."¹⁹ The Restatement concludes, however, that this exception is justified "on the ground that the client is not entitled to the protection of confidentiality when the client knowingly causes substantial financial harm through a crime or fraud," in effect "misus[ing] the client-lawyer relationship."²⁰

Section 124 of the Restatement also departs from most disciplinary codes by allowing screening to remove imputation of certain conflicts for non-government lawyers. Specifically, this section provides that a former-client conflict that disqualifies an individual lawyer is not imputed to affiliated lawyers when "any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter," the disqualified lawyer is screened, and the client is notified of the screening.²¹ The comments to this section acknowledge that "most [state disciplinary] codes do not recognize that screening can preclude disqualification of a law firm by imputation from a personally prohibited lawyer, even if the screening is timely and effective and the client information involved is innocuous."²² The stated rationale for this departure from prevailing practice is that "[i]mputation creates burdens for both clients and lawyers" and that "[t]he burden of prohibition should end when material risks to confidentiality and loyalty resulting from shared income and access to information have been avoided by appropriate measures."²³

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17. RESTATEMENT § 67(1)(a), (d).

18. RESTATEMENT § 67(3).

19. Richard C. Stanley, *The Restatement of the Law Governing Lawyers: Lawyer Regulation Coming of Age*, 48 LA. B.J. 22, 24 (June 2000).

20. RESTATEMENT § 67 cmt. b.

21. *Id.* at 124(2).

22. RESTATEMENT § 124 cmt. d.

23. *Id.* at cmt. b.