THE ALI'S RESTATEMENT AND THE ABA'S MODEL RULES: RIVALS OR COMPLEMENTS?

TED SCHNEYER*

In a 1987 article1 laying out his plans as reporter for the American Law Institute's new project to develop a Restatement of the Law Governing Lawyers, Professor Charles Wolfram wondered out loud why it had taken the Institute sixty years to address the subject, which he considered an "obvious" matter for ALI inquiry.2 From my spectator's seat, however, the project seems a notable departure from ALI traditions. A restatement of the law of lawyering cannot be limited to the traditional tasks of identifying, clarifying, and elaborating upon common law principles. It must go where the law of lawyering is, which often means interpreting and evaluating constitutional doctrine, statutory law, and of course the American Bar Association's legal ethics codes as adopted by the state supreme courts. Moreover, since the law of lawyering — unlike, say, torts or agency — has only lately been conceived as a distinct legal field,3 the Restatement must weave together strands of law whose only sure commonality is their bearing on the work of a diverse profession.4 To my ear, a restatement of the law governing securities brokers or health care providers still sounds preposterous. Why is it any more within the ALI's province or worth its time to restate the law of lawyering?

The answer might be that this law is so balkanized — so fragmented and conflicting — as to require the intervention of what is, after all, an elite organization of roughly 3000 lawyers, judges, and law professors.5 But even if one

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* Professor of Law, University of Arizona. LL.B., 1968, Harvard Law School; B.A., 1965, Johns Hopkins University. The author would like to thank Leigh Bernstein for her valuable research assistance.


2. Id. at 196.

3. One might very reasonably take the publication in 1986 of Professor Wolfram's monumental treatise on the subject as the first serious effort to treat the law of lawyering as an integrated legal subject. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986). Earlier treatises were built on a much narrower base of legal authorities. See Ted Schneyer, Uniting the Balkans: Wolfram on Legal Ethics, 37 J. LEGAL EDUC. 434, 435-36 (1987). Henry Drinker's 1953 treatise, for example, drew almost exclusively on bar association ethics opinions construing the ABA's first ethics code, the Canons of Professional Ethics. See HENRY DRINKER, LEGAL ETHICS (1953).

4. On the enormous variation among lawyers in field of specialization, tasks performed, workplace, clientele, and professional status, even in a single city, see JOHN HEINZ & EDWARD LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

5. The Director of the Institute is on record as believing that professional elites play a positive role in policy making for the practice of law. See Geoffrey C. Hazard, Jr., Undemocratic Legislation, 87 YALE L.J. 1284 (1978). Professor Hazard was the reporter to the Kutak Commission, which drafted the non-elite ABA's Model Rules of Professional Conduct. He subsequently proposed this restatement project to the ALI Council in 1986 in the following terms:

The Institute is particularly fitted to undertake such a work, even though the topic is complex and controversial. Like any other complicated legal task, this one must be done by competent lawyers. . . . It should be done in a forum and through a procedure that
accepts, as I do, the premise that the law of lawyering is in disarray, it does not necessarily follow that ALI intervention is a good idea. Intervening in the Balkans is often futile and always risky.

I. The Institutional Dangers of the Restatement Project

The risks I have in mind are mostly those that the Restatement poses for the institutional life and orderly regulation of the legal profession. Consider the potential downside for the Law Institute itself. The authority of its restatements rests on the ALI’s hard-won reputation for disinterested legal craftsmanship. Can that reputation survive this project intact? Recent studies of the making of the ABA’s Model Rules of Professional Conduct and of the process for revising the Federal Rules of Civil Procedure suggest that no body of lawyers examining the law governing lawyers can now escape the political infighting and special pleading of a profession that has become both fractious and skeptical about the distinction between law or ethics on the one hand and interest-group politics on the other. It remains to be seen how resistant to narrow interests the Restatement will be, but commentators have already criticized the ALI for yielding to large-firm pressures for relaxed conflict-of-interest standards.

reduces the tendency toward professional parochialism that has influenced if not dominated much of the organized bar’s consideration of the subject.

Memorandum from Geoffrey C. Hazard, Jr. to ALI Council at 3 (Apr. 2, 1986) (on file with the Oklahoma Law Review); see also Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don’t Get It, 6 GEO. J. LEGAL ETHICS 701 (1993) [hereinafter Hazard, Lawyers and Client Fraud] (stating that the ABA "does not seem to understand the responsibilities entailed in its efforts to prescribe the law governing lawyers").


8. Commenting on the growing politicization of the process for amending the Federal Rules of Civil Procedure, a process in which lawyers increasingly fight for procedural rules that they expect to serve the substantive interests of their own firms and clienteles, the reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States has observed that we lawyers are "all now Legal Realists." Paul Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 287.

9. As I write, the Restatement has been through five tentative drafts. For a progress report, see RESTATEMENT OF THE LAW GOVERNING LAWYERS at xxiii, xxxiii-xxxv (Tentative Draft No. 5, 1992) (reporter’s memorandum). Topics yet to be addressed in published drafts include: the civil liability of lawyers to clients and to nonclients (to be covered in chapter 4); the legal restrictions on lawyers serving as advocates (chapter 6); and the law governing out-of-court legal advisors, negotiators, evaluators, and mediators (chapter 7). At the outset of the project, Professor Wolfram expressed the hope that the ALI’s "prestige . . . in developing policy positions on controversial legal questions free of interest-group claims" would insulate it from the "political dynamics that many saw" in the work of the ABA as it developed the Model Rules of Professional Conduct. Wolfram, supra note 1, at 211. But of course the ABA’s was a rule-making project, for which a nakedly political process does not seem inappropriate. A highly politicized restatement process would presumably be more open to criticism.

My main concern, however, is not for the ALI’s reputation for objectivity, which in any event has already been thrown into question by the recently completed Corporate Governance Project,\(^{11}\) and may be put in further jeopardy by the upcoming Products Liability Project.\(^{12}\) As a legal ethics scholar, I am more concerned that this Restatement will never achieve a *modus vivendi* with the legal ethics codes. While some critics of the ABA codes may welcome this project as an opportunity to undercut the ABA’s traditional role as a lawgiver for the practice of law, the potential rivalry between restatement and ethics codes for the attention of judges and other decision makers worries me. It could be a great show, of course, pitting the product of an elite body of legal craftsmen against the fruits of the ABA’s more representative, broadly participatory, and overtly political process. And competition in the marketplace of ideas can sometimes produce better ideas. Still, if the Restatement shifts the professional center of gravity in defining the law of lawyering away from the ABA and its network of inclusive bar associations, the costs could be substantial.

Contrary to the situation elsewhere, no association in the United States is designated as the official voice of a profession,\(^{13}\) either for the purpose of speaking

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11. *See id. at 20; Business Lawyers Win Showdown Vote in ALI, LEGAL TIMES, May 18, 1992, at 2. Professor Freedman reports that corporate lawyers successfully lobbied the ALI on behalf of corporate managers for principles that permit defendants in shareholder derivative suits to take control of, and then dismiss without court approval, the claims against them. Corporate lobbying on the point became so intense, Freedman writes, that the ALI president felt compelled to admonish the attendees at an annual meeting that "the precept of leaving one's client at the door must be honored if we are to preserve our integrity as an organization." Freedman, *supra* note 10, at 20-21.*

12. *See Kenneth Jost, Rarefied Atmosphere Masks High Stakes, Deep Passions; ALI Turns to Tort Reform, LEGAL TIMES, Apr. 27, 1992, at 1 (stating that tort-reform advocates view new ALI project to draft a restatement of product-liability law as an opportunity for insurers and manufacturers to "make some headway toward limiting the cost of product-related suits"). I say that such projects bring the ALI’s reputation into question, and that they necessarily tarnish its reputation, because the basis of the ALI’s legitimacy as a law reform body may be undergoing a sea-change that makes such projects wholly appropriate despite their potential politicization. With respect to the field of products liability for example, it has been clear since at least the 1960s that tort law is not just a matter of private law or corrective justice but implicates major questions of public policy as well. See, e.g., WALTER J. BLUM & HARRY KALVEN, JR., PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS (1965). Proposed federal product-liability legislation, however, has been stalled in Congress for years. Jost, *supra*, at 1. Perhaps the ALI’s role will increasingly be to address through technical legal discourse issues that prove too intractable to be resolved through compromise in more openly political forums.*

For the thesis that modern bar organizations, by addressing controversial issues in the "idiom of legalism," can contribute to the resolution of otherwise intractable political disputes, see TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISIS, AND PROFESSIONAL EMPOWERMENT* (1987). Halliday argues, for example, that the shared idiom of legalism enabled liberal and conservative lawyers to join ranks against certain legislative excesses during the McCarthy era on the ground that those legislative practices were unconstitutional, not that they were bad public policy. *Id. at 227-45.*

for the profession in public forums or for the equally important purpose of speaking to the profession on behalf of broader interests. The ABA, which has always aspired to be the voice of the bar at the national level, must therefore maintain its visibility and authority with lawyers and the public by other means. Formulating ethics rules and criminal justice standards for the entire legal profession can play a role in maintaining the ABA’s position, but only if legal decision makers take those rules and standards seriously, as I believe they should. When the ABA formulates ethics rules it can draw an enormous number of lawyers into its

There are officially recognized bar organizations in over 30 states, the so-called unified or compulsory membership state bars. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. J. FOUND. RES. J. 1.

14. The ABA has produced not only ethics codes for law practice generally but criminal justice standards that the courts often apply in resolving issues concerning the proper behavior of criminal defense lawyers and prosecutors. See ABA STANDARDS FOR CRIMINAL JUSTICE ch. 3, 4 (1992).

15. For the argument that issuing ethics codes plays an important role in maintaining the visibility and authority of professional associations, and for evidence of the historical connection between the founding of modern associations like the ABA and the promulgation of ethics codes, see Schneyer, *supra* note 6, at 691-92. The ABA ethics codes have been influential above all with the state supreme courts. Those courts may no longer defer to the ABA as much as they once did, often amending ABA rules even as they adopt them. Still, roughly 35 states have substantially adopted the Model Rules since the ABA issued them in 1983. STEPHEN GILLES & ROY D. SIMON, JR., *REGULATION OF LAWYER: STATUTES AND STANDARDS* 3 (1993). Moreover, the ABA does not use its ethics rules to influence the courts alone. For example, it has invoked those rules in lobbying Congress. See, e.g., *The Lawyer’s Duty of Disclosure Act: Hearings on S. 485 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) (statements of ABA officials Robert Hetlage and George Bushnell opposing federal crime bill that would be inconsistent with ethics rules on confidentiality).*

Recently, the ABA has invoked an ethics rule to try to dissuade the United States Justice Department from promulgating rules that would authorize U.S. attorneys to contact certain criminal targets and defendants behind their lawyers’ backs. Daniel Klaidman, ABA, *NACDL Bid to Block Justice Rules*, LEGAL TIMES, Dec. 21, 1992, at 1, 12-13. The Model Rules prohibit lawyers from contacting any party known to be represented by counsel without specific legal authorization or counsel’s consent. *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 4.2 (1992). The proposed Justice Department rules would authorize certain contacts that defense counsel had not approved, so those contacts could no longer be regarded as offending Rule 4.2. But although there is no necessary conflict, the ABA, armed with Rule 4.2, is essentially lobbying the Justice Department to keep jurisdiction over this aspect of a federal prosecutor’s work in its hands and those of the courts which adopt and apply Rule 4.2. Whatever influence Rule 4.2 presently enjoys with the Justice Department might well diminish if a narrower anti-contact provision, perhaps one that makes exceptions for pre-indictment investigative contacts and contacts sought by a defendant, should make its way into the *Restatement*. This may be unlikely, since much of the case law supports the broad application of Rule 4.2 to prosecutors. See, e.g., United States v. Lopez, 989 F.2d 1032 (9th Cir. 1993) (holding that federal prosecutor violated Rule 4.2 by meeting with defendant, at defendant’s request but without his counsel’s approval, to discuss a plea agreement, even though prosecutor had gotten U.S. magistrate’s approval for the meeting); United States v. Ferrara, Civ. No. 92-2869 (D.D.C. May 28, 1993) (dictum) (holding that Justice Department’s memo authorizing certain contacts with defendants does not preempt state ethics rule; state may institute disciplinary proceedings against federal prosecutor for violating anti-contact rule); see also Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules, 53 U. PITT. L. REV. 291, 325-54 (1992) (discussing the pre-1992 cases). But Professor Cramton, a leading figure in the ALI, has criticized the organized bar for seeking to put itself “above the law” in opposing the Justice Department. *Id.* at 391. He must think that even in the absence of new Justice Department rules there is settled law for the ABA and the defense bar to put themselves above.

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deliberative web, as its six-year process for developing the Model Rules of Professional Conduct showed.  

16. Formulating rules ABA-style has therefore become a socially valuable spur to professional reflection and debate, whatever one may think of the ABA's ultimate product. But it may only continue to spur this activity if lawyers can expect ABA rules to have real legal bite, as they could not expect until about 1970, when ethics rule making began to be much more than a Sunday-school exercise.  

17. Reduce that bite by rerouting legal decision makers to the Restatement, and fewer lawyers may participate in the collective ethical life of the profession.

Sensitive to such concerns, Professor Wolfram offered his assurances that the Restatement

will not attempt to cover the same grounds as the Kutak Commission and the ABA in writing professional rules; both its method and its end will be quite different. Where the Kutak Commission attempted to formulate rules of professional conduct that could be effectively enforced by lawyer disciplinary agencies, the restatement will focus both more narrowly and more broadly. More narrowly, the restatement will concern itself entirely with existing legal prescriptions . . . . More broadly, the restatement will examine the law affecting legal practice, whether it finds expression in doctrines of professional discipline, evidence, agency, tort or contracts.  

Unfortunately, the peculiarities of the law of lawyering are making it impossible for these jurisdictional walls to hold much water. As I hope to show, the Model Rules, though far less comprehensive than the Restatement will be, are as much an exercise in restating the law as in making it. Moreover, the Model Rules are not applied solely by disciplinary authorities and could not have been expected to be,

16. Schneyer, supra note 6, at 678 (stating that ABA production of Model Rules comprised the most "sustained and democratic debate about professional ethics in the history of the American bar"). While thousands of lawyers (including many who were not ABA members) participated in the process, their views were generally filtered to the Kutak Commission and the ABA's House of Delegates through state and local bar associations, other ABA committees and sections, and various specialty organizations, including some (such as the National Organization of Bar Counsel and the American Trial Lawyers Association) that vigorously opposed certain ABA positions. Id. at 703-23.

17. The year 1970 was a turning point for at least two reasons. First, the ABA promulgated the Model Code of Professional Responsibility, its first comprehensive ethic code revision since 1908, when the Canons of Professional Ethics were adopted. Unlike the Canons, the Code quickly attained binding legal force in most jurisdictions through state supreme court rule-making proceedings. See ABA Spec. Comm. to Secure Adoption of the Code of Professional Responsibility, Report to the House of Delegates, 97 A.B.A. Rep. 268, 268-72 (1972). Second, a well-publicized ABA report in 1970 declared the states' disciplinary systems for lawyers to be "scandalous[ly]" underutilized. ABA SPEC. COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (Final Draft 1970). By 1975, there was a marked increase in funding, in the quality of disciplinary counsel, and in discipline rates. Eric H. Steele & Raymond T. Nimmer, Lawyers, Clients, and Professional Regulation, 1976 AM. B. FOUND. RES. J. 919, 942, 945. These trends have continued.

18. Wolfram, supra note 1, at 199.
though it is fair to call professional discipline their core area of regulatory concern. Their legal significance extends well beyond discipline for the simple reason that they define many of the primary duties of lawyers, duties whose optimal modes of enforcement may vary and must be worked out over time by judges and other decision makers. At the same time, the Restatement is not and cannot be a pure exercise in clarifying the existing law. Because that law is far from uniform, the Restatement must make policy choices, and it must pass judgment on ABA ethics rules in doing so. So far, those judgments have often been negative, but few of the alternatives proposed are demonstrably better.

Of course, the Restatement is not just an ethics code in drag. It is designed to cover in depth many topics that the ABA codes do not address or only touch upon. (It also faithfully restates some Model Rules, thereby lending authority to them.) So, even if it does promote a worrisome rivalry with the ABA ethics codes, the Restatement may also complement those codes in several ways. Any fair evaluation of the ALI's project must take these potential benefits into account. Before considering them, however, let me marshall my evidence that the Restatement overlaps with the Model Rules in form, function, and rhetoric; often diverges needlessly from those rules in content; and could undesirably undermine the ABA's role as lawgiver for the practice of law.

II. Overlap in Form, Function, and Rhetoric

A. Converging Formats

The overlap between the Restatement and Model Rules begins with their converging formats. In a departure from prior ABA practice, the Model Rules were drafted in restatement form. Conceiving of the Model Rules more as a set of standards for adoption and enforcement by legal decision makers and less as a moral guide for lawyers, the drafters eliminated much, though by no means all, of the "aspirational" language which, in the form of Ethical Considerations, stands in

19. As Professor Wolfram himself has shown, professional discipline neither is nor always should be the exclusive remedy when such duties are breached; civil liability, disqualification, trial court sanctions, denial of fees, etc., must be considered as additional or alternative enforcement methods. See Charles W. Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S. CAL. L. REV. 281, 303-19 (1979). For an ambitious effort to work out a typology of optimal methods for enforcing lawyers' duties, see David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 799 (1992).

20. In other words, the Model Rules consist solely of black-letter rules and comments. A comment simply "explains and illustrates the meaning and purpose" of a rule. MODEL RULES OF PROFESSIONAL CONDUCT Scope para. 9 (1992). On the ABA debate over whether to use this format, see ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 3-4 (1987); Schneyer, supra note 6, at 709-10.

21. The Model Rules provision calling on all lawyers to provide pro bono legal services is expressly aspirational, i.e., not intended for legal enforcement. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1, cmt. para. 1 (1992). Moreover, comments to other rules make statements about what lawyers "should" do, which may go beyond enforceable duties. For example, the comment to Rule 2.1 on the
such a murky relationship with the Disciplinary Rules in the older Code of Professional Responsibility.\textsuperscript{22} On the other hand, the Restatement departs from ALI tradition by larding its comments and reporter's notes with sound professional practice pointers\textsuperscript{23} whose relation to the black-letter sections is not always clear.

For example, section 113 authorizes a lawyer to disclose confidential client information when she "reasonably believes" that doing so will "advance the interests of the client."\textsuperscript{24} No client permission is required,\textsuperscript{25} but the reporter's note cautions that a lawyer who proposes to take the risk of divulging important or embarrassing information would be "well advised to consult with a client in advance."\textsuperscript{26} This is sound advice, but it leaves the reader guessing whether the Restatement contemplates legal fallout for the lawyer as one reason why she would be well advised to consult. Suppose a lawyer's tactical disclosures boomerang and the client sues her for failure to consult, claiming that an "informed consultation" would have led a reasonable lawyer not to disclose what otherwise seemed worth revealing. Especially since reporter's notes are not part of the Restatement proper,\textsuperscript{27} one might regard the "advice" as purely aspirational or prudential in character — as a statement of what the law does not require. On this analysis, a judge disposed to follow the Restatement would presumably reject the client's claim. But the same judge could very easily treat the reporter's apocryphal note as a gloss on section 113 and entertain the claim. This reading, after all, would square nicely with the lawyer's duty under section 31 to consult with a client to

\textsuperscript{22} See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 20, at 3. The Code's Ethical Considerations were aspirational in character but also intended to offer "interpretive guidance" to courts and agencies seeking to enforce the Code's black-letter Disciplinary Rules. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980). For an example of the way the dual function of the Ethical Considerations complicates Code interpretation, see Theodore J. Schneyer, The Model Rules and Problems of Code Interpretation and Enforcement, 1980 AM. B. FOUND. RES. J. 939, 943.

\textsuperscript{23} For example, comment 6c to § 114 states that a lawyer is "well advised to consult fully with a client before obtaining the client's consent under this Section to use or disclose the client's confidential information." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 114 cmt. c (Tentative Draft No. 3, 1990). The same comment states that, although it is "not required, a lawyer may be well advised in important matters to employ a writing both to assure that a consenting client is fully informed and to record the client's voluntary consent under this Section." Id.

\textsuperscript{24} Id. § 113.

\textsuperscript{25} Id. § 113 cmt. b.

\textsuperscript{26} Id. § 113 cmt. f reporter's note.

\textsuperscript{27} RESTATEMENT OF THE LAW GOVERNING LAWYERS at xxiv (Tentative Draft No. 5, 1992) (reporter's memorandum). The reporter indicates at the same time that comments are part of the Restatement proper and therefore discuss only the law, not "matters of sound professional practice or personal or professional morality." Id. I cannot reconcile this statement with the occasional comments that offer practice advice, such as the comment quoted in note 23 supra.
a "reasonable extent" concerning even those decisions the lawyer is authorized to make. 28

As this example shows, "sound practice" advice injects the same element of legal indeterminacy into the Restatement that "ethical considerations" can produce in an ethics code. But the injection seems less justified in the case of a restatement, which is addressed more to judges than to practitioners and whose very reason for being is to clarify the law.

B. Significance of the Model Rules Outside the Disciplinary Process

Moving from formal similarities to matters of substance, notice first that although the Model Rules purport to be designed for legal application solely in the disciplinary process, 29 the motives behind this expression of jurisdictional modesty were purely defensive. The drafters worried that without expressing such a limitation the Model Rules might become negligence per se standards, grounds for denial of fee claims, etc. 30 Where the Model Rules could be used to shape lawyers' duties for nondisciplinary purposes without creating substantial new legal risks for lawyers, the drafters were not shy about trying to do so.

Take for example Model Rule 1.13, on the duties of lawyers representing organizations. In 1978, as the Model Rules project got underway, a monitoring committee for the ABA Business Law Section concluded that legal ethics rules were not just grounds for discipline but had become "the basic source of law" from which courts and administrative agencies "draw the responsibilities of lawyers." 31 Armed with this insight, the committee lobbied successfully for a rule that would be demanding enough to convince the SEC not to impose tough new whistleblowing standards on corporate lawyers who encounter company wrongdoing yet would be hedged enough to keep relations between corporate lawyers and management workable. 32 The committee also tried to shape Rule 1.13 to convince the courts to

28. Id. § 31(1). Moreover, a comment to § 32 suggests that a lawyer must consult with a client concerning a matter as to which the lawyer has reason to believe the client would want to "instruct" the lawyer, even if the matter is one on which the lawyer is otherwise authorized to make the decision. See id. § 32 cmt. e, para. 2.

29. MODEL RULES OF PROFESSIONAL CONDUCT Scope para. 6 (1992). The Rules are designed to provide "a structure for regulating conduct through disciplinary agencies," not as "a basis for civil liability"; they "can be subverted when they are invoked by opposing parties as procedural weapons"; and they should not be deemed "to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." Id.

30. Schneyer, supra note 6, at 725-28 (discussing the preoccupation of many lawyers who participated in the Model Rules process with avoiding provisions that the courts could use as a basis for imposing new forms of liability on practitioners).

31. Id. at 706.

32. As ultimately adopted, Rule 1.13 points out that the duties of an organization's lawyer run to the entity itself, not to managers or other particular constituents, and indicates that when the lawyer learns of potential wrongdoing that could harm the organization, he may be obliged to take the matter to a higher level within the entity. But it rejects the principle that the lawyer ever has a duty to the client to disclose the potential wrongdoing to authorities outside the entity. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1992). For the legislative history, see ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, supra note 20, at 87-96; Schneyer, supra note 6, at 698-99, 706, 715, 720-21. For its
reject Garner v. Wolfinbarger, a case that deals with the attorney-client privilege in shareholder derivative suits and, incidentally, a case that wins a vote of confidence in the Restatement.

Even when Model Rules drafters were less concerned with shaping the primary duties of lawyers for nondisciplinary purposes, they formulated many rules whose chief applications are widely understood to be nondisciplinary. For example, when lawyers breach Model Rule 1.8(a) by failing to reduce their business transactions with clients to writing, the obvious remedy is contractual; violation makes the transaction voidable at the client's election. Similarly, the factors listed in Model Rule 1.5(a) for judging the reasonableness of lawyers' fees play a role in setting fee awards which dwarfs their role in disciplinary proceedings against lawyers accused of charging unreasonably high fees.

C. Restatement Activism with Respect to Disciplinary Rules

If the legal significance of the Model Rules extends beyond professional discipline, it is equally true that the Restatement criticizes or rejects some widely accepted Model Rules whose chief application lies in that core area of ABA concern. Section 47 provides an example. Finding absolutely no contrary authority to "restate," section 47(1) grudgingly accepts the traditional rule, codified in Model Rule 1.5(d), that a lawyer may not charge a contingent fee for representing a de-

part, the SEC rejected proposals for administrative rules requiring corporate lawyers to report corporate illegalities to the agency, pending the outcome of ABA deliberations on the point. Bill Winter, 'Whistleblowing' Rule Rejected by SEC, 66 A.B.A. J. 704 (1980). The SEC has never revived those proposals.


34. Garner holds that although the privilege applies to communications between corporate counsel and their clients, courts in shareholder derivative suits may order counsel to disclose privileged information to plaintiffs, even over the objection of management, whenever good cause can be shown. Id. at 1104. The Business Law Section's committee wanted Model Rule 1.13 to trump Garner with commentary to the effect that a corporate lawyer may not reveal privileged information to shareholders in derivative suits. See Schneyer, supra note 6, at 707. As adopted the comments ultimately provided that a lawyer "may not disclose to constituents information relating to the representation" unless disclosure is "authorized by the organizational client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. para. 3 (1992). This language has not stopped the courts from following Garner, and the Restatement supports the decision. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 134 cmt. b (Tentative Draft No. 2, 1989).


36. On the judicial use of such factors as "the time and labor involved," "the fee customarily charged in the locality for similar legal services," and "the amount involved and the results obtained" in making awards under fee-shifting statutes, see Samuel R. Berger, Court-Awarded Attorneys' Fees: What Is Reasonable?, 126 U. Pa. L. Rev. 281 (1977). On their use in adjudicating lawyers' suits to collect fees from clients, see CHARLES W. WOLFRAM, supra note 3, at 534 (stating that in such cases, "courts uniformly employ the lawyer codes as limits on the size of a reasonable fee"). By contrast, Professor Wolfram describes the imposition of discipline for charging excessive or unreasonable fees as "rare." Id. at 516.
fendant in a criminal case. The comment, however, criticizes several of the arguments that have been used to support this ban, and calls for a change in the law. The trouble is that this plea for reform glides quickly over the strongest arguments for the ban, leaving the analysis incomplete. First, while the contingent fee plays an indispensable role where legal services might otherwise be unobtainable, such as in personal injury cases, we have other ways to assure representation in criminal cases, thanks to Supreme Court decisions on the right to counsel. Second, two pervasive features of criminal defense work — unsophisticated clients and ill-defined measures of success — make it hard for a criminal defense lawyer to adequately explain to her clients the contingencies that would trigger their obligation to pay. And third, if the lawyer avoids this problem by using the simplest contingencies — e.g., "my fee is $5000, but you only pay if you get less than two years" — the arrangement could easily compromise her advice to the client; she may be tempted to advise against a plea bargain that is in the client’s interest but would produce no fee, or in favor of a bargain that produces a fee but would strike a disinterested lawyer as a bad deal for the client. Giving these points their due, the case for allowing contingent fees in criminal cases is far from clear. A restatement at all deferential to the ABA as a lawyer would not call for a change.

In another display of Restatement activism, section 48 rejects Model Rule 1.8(e) outright. This widely accepted ethics rule allows litigators to lend clients money only to cover the expenses of litigation; additional loans, the argument goes, might give lawyers too large a stake in their cases to maintain independent

37. "A lawyer shall not enter into an arrangement for, charge, or collect ... a contingent fee for representing a defendant in a criminal case." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1992). The Restatement forbids fees that are "contingent on success in prosecuting or defending a criminal proceeding." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 47(1) (Tentative Draft No. 4, 1991). Model Rule 1.5(d)(2) is unlikely to come into play outside the disciplinary process. Efforts to have criminal convictions overturned on the ground that defense counsel was working for a contingent fee have failed. See People v. Winkler, 523 N.E.2d 485 (N.Y. 1988); State v. Labonville, 492 A.2d 1376 (N.H. 1985).

38. The arguments criticized are makeweights and the criticisms are deserved. It is often said, for example, that contingent fees are unattractive in criminal defense work because a successful defense creates no assets from which the fee could be taken. This is true enough, but as the Restatement points out, it only explains why most defense lawyers are uninterested in charging a contingent fee, and cannot justify a ban on doing so. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 47 cmt. c(i) (Tentative Draft No. 4, 1991). It has also been suggested that contingent fees would encourage unscrupulous or overzealous criminal representation, but it seems inappropriate to raise this objection to contingent fees in the one context in which the courts recognize a constitutional right to effective assistance of counsel. Id.

39. Id. § 47 cmt. c(i) (stating it is "desirable, on balance, that the law be changed so that clients who would find a contingent-fee agreement preferable to a flat fee would be permitted to exercise that preference").

40. "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 . . . " MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (1992). The Restatement acknowledges that most jurisdictions follow this rule, citing contrary ethics rules only in Alabama, California, Minnesota, and (by implication) Texas. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 48 cmt. d. & reporter’s note (Tentative Draft No. 4, 1991). Section 48 "restates" the Minnesota rule. Id.
judgment. By contrast, section 48(2)(b) also allows loans for living expenses, if such a loan will enable the client "to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship." Is this a clear enough improvement to justify second-guessing the ABA and nearly all the states? To be sure, the prospect of personal injury victims being forced to drop strong claims because they lack financial staying power is very disturbing. But if the state supreme courts were to drop Model Rule 1.8(e) in favor of section 48(2)(b), their disciplinary agencies would be unlikely to enforce the new rule. How, after all, could disciplinary counsel prove that a client would not have been "unjustly" forced to surrender in the absence of a loan? Given the impracticality of enforcing such a vague rule, the change would probably legitimate all loans of living expenses, even though section 48(2)(b) is presumably designed to authorize only some.

Thus, respectable arguments against the section exist. Yet those arguments go unacknowledged in the comment, and the Restatement ends up supporting a principle that the ABA has long rejected. Since there is no trend away from the ABA position, section 48(2)(b) strikes me less as a restatement of the law and more as an ALI petition for wholesale new judicial rule making. If someone actually initiates rule-making proceedings, as I presume the politically "passive" ALI will not, one wonders whether the ABA or the local bar associations that reviewed the Model Rules and proposed Rule 1.8(e) to the courts will appear in opposition.

Section 117B, which the ALI has not yet approved and may revamp, presents a more ambiguous case of Restatement activism. This section permits lawyers to disclose confidential information in order to prevent client crimes and frauds that would cause substantial financial loss to third parties. Model Rule 1.6, on the other hand, permits disclosure only to protect third parties from client crimes likely to cause bodily injury. Section 117B thus rejects the position the ABA ultimately
took on this subject. For several reasons, however, this seems to me not to be an
unwarranted intrusion into the ABA’s domain.

First, rules on this subject are more likely to come into play outside than inside
the core area of professional discipline — for example, when clients sue lawyers for
making harmful disclosures or third parties sue lawyers for failure to disclose.45
Second, a substantial minority in the ABA House of Delegates has twice endorsed
an exception to the duty of confidentiality in order to protect third parties from
financial loss.46 Third, many state supreme courts have rejected the Model Rules
on the point.47 Fourth, these courts have substituted other provisions that are
themselves a product of the Model Rules process48 or come from the Code of
Professional Responsibility.49 Thus, while section 117B rejects an ABA conclusion,
it restates law that draws heavily on the ABA’s valuable ethical stockpile.

But even if section 117B does not thumb its nose at the ABA, it illustrates the
dangers of restating "transjurisdictionally"50 law that (1) is found almost entirely
in state ethics codes rather than judicial decisions;51 (2) varies sharply from state
to state, and (3) shows no signs of "working its way pure" (i.e., toward uniformi-

45. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 117B cmt. i (Tentative Draft No. 3,
1990) (discussing application of the section in civil suits against the lawyer rather than in disciplinary
proceedings).

46. In February 1983, on a motion by representatives from the American College of Trial Lawyers,
the ABA House of Delegates by a vote of 207-129 deleted from the tentative version of Model Rule 1.6
a provision authorizing lawyers to disclose confidential information to prevent clients from committing
a crime or fraud likely to cause substantial injury to financial interests or property. Midyear Meeting
vote of 251-158 a proposal to amend Model Rule 1.6 by adding a similar provision. AMERICAN BAR
ASS’N, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR

47. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 117B cmt. b reporter’s note (Tentative
Draft No. 3, 1990) (only a minority of the states that had adopted the Model Rules by 1989 adopted Rule
1.6 as ultimately formulated by the ABA). For a survey of state deviations from the ABA version, see

48. Some states rejected Rule 1.6 in favor of an earlier version, proposed by the Kutak Commission,
which permitted disclosure to prevent client crime or fraud likely to cause substantial financial loss or
property damage. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 177B cmt. b reporter’s note
(Tentative Draft No. 3, 1993). For the legislative history of Model Rule 1.6, see ABA CENTER FOR
PROFESSIONAL RESPONSIBILITY, supra note 20, at 47-55.

49. A greater number of states (including Arkansas, Idaho, Indiana, Kansas, Michigan, Minnesota,
Mississippi, North Carolina, Washington, and Wyoming) essentially recodified DR 4-101(C)(3), which
permits lawyers to reveal confidences or secrets as necessary to prevent the client from committing any
crime, including a nonviolent crime. See GILLES & SIMON, supra note 15, at 59.

50. Professor Wolfram has indicated that the Restatement is not committed to restating the law of
any particular jurisdiction; it is "transjurisdictional" in scope. Wolfram, supra note 1, at 202. The
question is whether this orientation, which makes obvious sense in restating common law principles,
is equally valid when restating state law that is found in codes or statutes.

51. RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 117A-117B cmt. b reporter’s note
(Tentative Draft No. 3, 1990) (law on the subject addressed in § 117B "almost entirely codal; very few
decisions have discussed the matter").
ty), as the ALI has traditionally presumed the common law will. By taking any position in this hotly disputed area, the Restatement is less likely to promote uniformity than to introduce one more voice at the Tower of Babel. For the foreseeable future, it will also misstate the law in many states, so that any lawyer who unwisely consults the Restatement to learn whether he can blow the whistle on a client bent on fraud may well be led to the wrong conclusion. The lawyer is less likely to be misled by reading the Model Rules, precisely because the ABA holds them out as a model, not as a representation of the legal landscape. A "transjurisdictional" restatement of ethics rules is a model ethics code pretending not to be.

D. The Model Rules as a Restatement-in-Fact

The Model Rules not only concern themselves with nondisciplinary law; on a number of points they restate (or, more precisely, codify) that law as it was developed by judges. For example, Model Rule 1.9 restates for the first time in an ethics code the "substantial relationship test" that the courts fashioned for deciding whether to disqualify a lawyer from proceeding against a private ex-

52. Id. (pointing out that states have taken "different approaches" to the subject addressed in § 117B "in the process of adopting new lawyer codes after the ABA suggested the Model Rules in 1983"); see also ABA Business Law Section Committee on Counsel Responsibility, Report: Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States, 45 BUS. LAW. 1229, 1230 n.2 (1990) (noting that since the ABA promulgated the Model Rules in 1983 there has come to be a greater disparity among the states than ever before in the rules governing the professional conduct of lawyers, and that this is especially true with respect to the confidentiality provisions of Model Rule 1.6). It appears that although the Model Rules were adopted in hopes of prompting greater uniformity among the states, their promulgation has instead operated like the Big Bang, propelling the states ever farther away from one another. I see no reason to think that the Restatement will retard or reverse this process. As Fred Zacharias puts it, "Drafters of confidentiality rules at the local level have little reason to reconsider their recent value choices just because . . . ALI members would have voted a different way." Fred C. Zacharias, Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?, 6 GEO. J. LEGAL ETHICS 903, 927 (1993).

53. The state ethics codes are of course like the common law and unlike statutory law in that they are adopted by judges who, more so than legislators, can be expected to pay attention to an ALI product. But they are like state statutes and unlike the common law in that they are often the product of political compromise and can only be changed through formal rule-making proceedings which the courts have no obligation to institute.

54. It is difficult to say how frequently lawyers will use the Restatement as a research tool. While judges rather than practicing lawyers are arguably the primary addressees of the traditional restatements, Professor Wolfram expects this Restatement to perform an important "professional education function" by addressing "gaps in lawyers' understanding of the law." Wolfram, supra note 1, at 198-99. The danger of a lawyer being misled by consulting § 117B in its present form is somewhat mitigated by the disclosure in comment b that the subject "remains a matter of debate in many jurisdictions." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 117B cmt. b (Tentative Draft No. 3, 1990).

55. "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1992).
client whose confidences would thereby be put in jeopardy or who might reasonably believe that the lawyer would be attacking the work she had done for him. Under Model Rule 1.9, it is now clearly an ethical offense for a lawyer to proceed against a former client without that client's consent, if the matters are substantially related. Similarly, Model Rule 1.10 restates the doctrine that, if one lawyer in a firm is barred under the "substantial relationship" test, her colleagues are barred as well.

While Model Rules 1.9 and 1.10 bring rules developed for disqualification purposes into the ethical domain, they serve primarily as guides for the courts in further disqualification cases, not as grounds for discipline. For one thing, they ban arrangements which are innocent enough in themselves but give lawyers both the opportunity and the incentive to betray former clients. Since disqualification is less stigmatizing than professional discipline, it seems the more appropriate sanction for breach of these prophylactic rules. Moreover, there are good institutional reasons to have most litigation conflicts policed by the tribunal before which the case is pending rather than ex post by a remote disciplinary body.

Does it follow from the common-law origins and extra-disciplinary use of these rules that the ABA went beyond its province and trespassed on the ALI's turf by restating the law of disqualification in an ethics code? Even putting aside the

56. The older Model Code of Professional Responsibility had expressly addressed the separate issue of a former government lawyer's representing a client in a matter substantially related to work he had done while in government, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1980), but was vague on the rights of other lawyers to proceed against a former client. WOLFRAM, supra note 3, at 363.

57. See Wolfram, supra note 3, at 364 (stating that Rule 1.9(a), though a significant improvement over the 1969 Code, "breaks no new ground, and reflects the predominant view of modern courts that have grappled with former-client conflict problems in disqualification opinions"). For discussion of the case law Model Rule 1.9(a) is based on, see id. at 358-62.

58. "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule[1] . . . 1.9." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1992).

59. "In practice," Professor Wolfram has written about the enforcement of vicarious disqualification rules, "discipline is rare, while decisions involving motions to disqualify opposing lawyers and law firms have become increasingly common." WOLFRAM, supra note 3, at 396.

60. Among these reasons are the lack of incentives for the putative victim of the conflict to file a disciplinary grievance, the strong interest of the trial court in the integrity of its own processes, and the value of remedying a conflict before rather than after it has tainted a trial. See Wilkins, supra note 19, at 828 n.113.

61. In proposing the Restatement project to the ALI council in 1986, Professor Hazard wrote that the rules of loyalty and of confidentiality are expressed not only in the codes of professional ethics but in common law. Indeed, the codes of professional ethics are of relatively recent appearance, the ABA Code of Professional Responsibility having been promulgated only in 1970. Long before that there was decisional law. . . ." Memorandum from Geoffrey C. Hazard, Jr. to ALI Council at 2 (Apr. 2, 1986). The statement seems to me to imply that, as between the ABA and the ALI, the latter is entitled to "primary jurisdiction" in influencing the course of disqualification law, though it certainly does not imply that the ABA trespassed on the "dormant" ALI's turf when it adopted Model Rules 1.9 and 1.10. With respect to confidentiality, Professor Hazard has argued that the Model Rules fail even to take into account, let alone to restate, common law doctrines concerning the liability of lawyers for their clients'
obvious point that the ALI never showed any interest in restating the law of lawyering until after the Model Rules were completed, I do not think so. The ABA has often been criticized for not directly addressing conflicts involving former clients in the Code of Professional Responsibility.63 Moreover, it would have been unwise for the ABA to treat as acceptable for disciplinary purposes conduct that the courts had come to treat as grounds for disqualification. Judges sometimes have reason to deny disqualification motions even in the face of an improper conflict, leaving discipline as the only enforcement method.63 And the policies behind Model Rules 1.9 and 1.10 extend to conflicts no trial court is in a position to police.64

But if the ABA was not out of bounds here, then what are we to make of Restatement section 204? Section 204 diverges from Model Rule 1.10; it would not necessarily disqualify the colleagues of Lawyer L, who had represented Client X at another firm, from proceeding against X in a substantially related matter, even without X’s consent.65 Screening L from participating in the matter sometimes legitimizes the representation.66 A few cases decided since the Model Rules were

frauds. Hazard, Lawyers and Client Fraud, supra note 5, at 720. As a result, he says, they text of Rule 1.6 bars lawyers from making the very disclosures they should make to avoid liability. Id. I disagree with some aspects of Professor Hazard’s analysis, but cannot address the matter here.

62. See, e.g., WOLFRAM, supra note 3, at 363 (Code “inexplicably omitted any mention of the former-client conflict problem”).

63. See, e.g., Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (given the availability of state disciplinary machinery, no need to deal with conflict in the very litigation in which it arises unless it "tends to taint the trial"); Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (no disqualification; any corrective action should be accomplished under the auspices of the appropriate bar association); Melamed v. ITT Continental Baking Co., 592 F.2d 290, 295 (6th Cir. 1979) (no disqualification where moving party is trying to use it as a tactic to deny opponent counsel of choice).

64. For example, without filing a complaint in any court, a law firm might informally pursue a claim against a partner whom one of its lawyers formerly represented elsewhere in a similar matter.

65. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204(2) (Tentative Draft No. 4, 1991).

66. It is hard to say how many cases that would result in vicarious disqualification under Model Rule 1.10 would not result in vicarious disqualification under § 204(2). The section not only requires adequate screening of the personally disqualified lawyer and "timely and complete notice" of the screening arrangement to the former client, but also requires that any confidential client information that was communicated to the disqualified lawyer be unlikely "to be significant" in the present case. If courts apply the last requirement using a strong presumption of "significance," the section may not diverge substantially from the Model Rules. See id. § 204 cmt. d (burden of persuasion that there is no material risk of misuse of confidences is on lawyers seeking to avoid imputed disqualification). But the former client may be chilled from raising the issue because it is awkward to argue that the disqualified lawyer has significant information without disclosing the very information the client hopes to suppress. Moreover, the personally disqualified lawyer is only disqualified on confidentiality grounds in the first place if the matters are substantially related in the sense that "it would materially advance the client’s position in the subsequent matter to use the confidential information obtained in the prior representation." Id. § 213 cmt. d. If this is the test for personal disqualification and the Restatement had meant to create a strong presumption of "significance" in vicarious disqualification cases under § 204(2), it would be hard to imagine cases in which screening would legitimize representation. Yet § 204(2) obviously contemplates such cases. For these reasons, it is not far-fetched to read § 204(2) as a major departure from Model Rule 1.10.
promulgated tolerate screening in this situation, but certainly too few to tie the Restatement's hands. Instead, section 204 relies on a misplaced analogy to the vicarious disqualification rules involving former government lawyers to reject the ABA's antiscreening rule.

Consider the mischief this discrepancy between ALI and ABA positions could produce. Section 204 invites trial judges to deny disqualification motions even where the Model Rules as adopted by their state supreme court make the representation a disciplinable offense. Suppose judges begin to accept the invitation, proclaiming the irrelevance of legal ethics rules to a nondisciplinary question.

What then? The state supreme courts would have to reverse the denials in order to keep disqualification and disciplinary standards in line, or be forced by their trial courts to amend Model Rule 1.10, or simply tolerate the anomaly. Anyway you look at it, this seems like a bad way to run a railroad. Having received many notices of joint ALI-ABA programs over the years, I had always supposed the two organizations were on the same side!

Purely on the merits, the ALI position on vicarious disqualification is defensible. For one thing, by refusing to disqualify law firms at wholesale just because they have one personally disqualified lawyer on the letterhead, it gives some would-be

67. The reporter's note claims that the "developing case law" on screening in cases not involving former government lawyers "seems to be consistent with the rule" stated in § 204(2), but the cases mentioned in the note reveal no clear trajectory to me. See id. § 204 cmt. d. reporter's note.

68. See id. § 204 cmt. d. I call the analogy misplaced because the relatively permissive attitude the ABA and the courts have taken toward screening where the personally disqualified lawyer is a former government lawyer rests on a concern that is largely inapplicable to the private bar. The concern is that if departing government lawyers are treated as "Typhoid Marys," spreading their personal disqualifications to private colleagues, they will find it hard to move into the private sector. In turn, relatively few talented lawyers may be willing to take underpaid government jobs. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. para. 5 (1992); id. at Rule 1.11 cmt. para. 3. While these comments in the Model Rules make it clear that as of 1983 the ABA regarded the issue of vicarious disqualification in the former-government-lawyer context as unique, it is of course possible that if the ABA were to revisit the matter now, a decade later, it would see matters differently.

69. This is not a fanciful hypothetical. There are already cases wrestling with the discrepancy between the ALI and ABA positions. Towne Dev. of Chandler, Inc. v. Superior Court, 842 P.2d 1377 (Ariz. Ct. App. 1992), arose after a lawyer who had represented a party on one side of a lawsuit left his firm to join the law firm that represented the other side. The trial court denied a motion to disqualify his new firm from further participation in the case, finding that the firm had dealt adequately with the conflict by screening the new lawyer from any involvement in the matter. Towne Dev., 842 P.2d at 1378. The appellate court reversed, holding that the case was governed by Model Rule 1.10 as adopted by the Arizona supreme court, which imputes "absolute disqualification" to the migratory lawyer's new firm. Id. The court cited a treatise coauthored by ALI Director Geoffrey Hazard for the proposition that the ABA framers had debated and rejected a screening solution for moves within the private sector, as opposed to moves out of government. Id. at 1381. The court also noted that the state supreme court, in adopting the Model Rules, had explicitly adopted the comments that justify the different treatment given to screening depending on whether a former government lawyer or a migratory private lawyer is involved. Id. at 1382. Finally, the court acknowledged that a "countervailing line of thought has emerged," citing § 204(4) of the Restatement, but refused to examine the merits of this view. "Whether the Arizona Rules of Professional Conduct should be revised," the court wisely concluded, "is an issue for another forum and another day." Id.
clients a wider choice of counsel than the Model Rules do. But the crucial institutional question in deciding whether the ALI was justified in diverging from ABA policy on this difficult issue is whether the ALI has a comparative advantage over the ABA in balancing the interests at stake. I do not think it does. The ABA's most glaring policy-making weakness is that a lawyers' association is all too likely to place lawyers' interests above client interests when the two conflict. There is no reason to think that the ALI is immune to this bias. Indeed, on the issue of vicarious disqualification, the ALI may be a more biased policy maker than the ABA, because elite lawyers from large firms appear to be a more dominant force in the ALI.

If strict rules on vicarious disqualification can cause headaches in any law firm, they cause migraines at the largest. Large firms obviously have the greatest number of lawyers who could spread any personally disqualifying condition. They probably also have the greatest percentage of lawyers with disqualifying conditions to spread. One can draw this inference from the facts that large firms like to maintain ongoing relationships with large business clients, whose future adversaries often cannot be known, but also like to recruit lawyers laterally from other firms, where those lawyers will have represented businesses that may well become adversaries of their new firm's clients. If screening cannot prevent vicarious disqualification, large firms must either forgo their preferred recruiting strategies or accept the likelihood of being conflicted out of some of their best clients' cases. And their lawyers, as potential "Typhoid Marys," must resign themselves to fewer opportunities to change firms.

The policy-making implications seem clear. In deciding whether or how widely to permit screening, one must balance lawyer and client interests: One either protects clients from the risk that their confidences will slip through a screen and be used against them or one leaves lawyers free to move and law firms free to grow. Since screening bans are a particular impediment to mobility and growth in the largest firms, elite lawyers have more reason than other lawyers to undervalue the risk that screening poses for clients or overvalue lawyers' interests in personal mobility and unconstrained law firm growth. Consequently, on the question of vicarious disqualification, the ALI's higher proportion of members from large firms makes it a less attractive policy maker than the ABA.

E. The Model Rules as a Product of Restatement Rhetoric

Let me push my rivalry theme one more step. Even when the Model Rules cannot be said to actually restate the judge-made law of lawyering, a fascinating aspect of the process in which they were created was the participants' frequent resort to restatement-like rhetoric in order to generate a consensus or gain a sympathetic...

70. The proportion of law firm income from organizational rather than individual clients varies sharply and directly with firm size. RICHARD L. ABEL, AMERICAN LAWYERS 203 (1989). Moreover, large firms tend to have longer relationships with their clients than do small firms and solo practitioners. Id. at 204.

71. See id. at 187-88; James F. Fitzpatrick, Legal Future Shock: The Role of Large Law Firms by the End of the Century, 64 IND. L.J. 461, 464 (1989); Nelson, Lateral Hiring Established as Major Component of Recruiting Process, OF COUNSEL, May 18, 1987, at 8 (stating that among the 500 largest law firms in 1987, over 25% reported that more than half of their new partners came from other firms).
hearing on a controversial issue. Arguing about what other law requires of lawyers now seems central to the process in which a highly diverse bar hammers out its ethics rules. Yet the more definitive the Restatement proves to be as an arbiter of what the external law of lawyering requires, the less available this rhetoric may become in producing ethics rules.

Sociologist Terry Halliday calls the rhetoric I have in mind the "idiom of legalism." The idiom treats as settled law a position that, defended on naked policy grounds, would never sway lawyers with different values. Robert Kutak, the chair of the Model Rules drafting commission, relied heavily on the idiom. At one point, for example, he had to respond to criticism of his commission's proposal to require lawyers to reveal confidential information when "necessary to prevent the client from committing an act that would result in death or serious bodily harm." Since many lawyers consider confidentiality a rock-bottom ethical value, Kutak did not try to justify the proposal on policy grounds. Instead, he argued that recent judicial "pronouncements" dictated that the ABA recognize an unprecedented ethical duty to disclose.

Tarasoff v. Regents of University of California was the pronouncement Kutak probably had in mind. Tarasoff holds that, notwithstanding the value of professional confidentiality, tort law may require a therapist to warn third parties that they are the objects of his patient's violent threats. On close examination, it is far from clear that this duty to warn extends to lawyers, especially since the Tarasoff court tied its decision to the principles of medical ethics. Still, Tarasoff gave Kutak a respectable legal argument and, although he lost this battle at the

72. For discussion of this point, see Schneyer, supra note 6, at 703-05.
73. See Terence Halliday, The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism, and the Civil Rights Era, 1982 AM. B. FOUND. RES. J. 911. Almost 30 years ago, philosopher Judith Shklar described legalism as the "tendency to think of law as 'there,' as a discrete entity, discernibly different from morals and politics," and regarded it as the "operative outlook of the legal profession." JUDITH N. SHKLAR, LEGALISM 1-2, 8 (1964).
74. See Schneyer, supra note 6, at 703-05.
75. Model Rules of Professional Conduct Rule 1.6(b) (Discussion Draft, 1980).
76. Of course, even those lawyers who do consider confidentiality a nearly absolute ethical value try to justify their position to nonbelievers by resort to the idiom of legalism, attempting whenever possible to ground confidentiality in the evidentiary law of privilege, the constitutional right to counsel, and the constitutional privilege against self-incrimination. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 134-39 (1990).
77. See Schneyer, supra note 6, at 705.
78. 551 P.2d 334 (Cal. 1976).
79. Id. at 345.
80. For a case extending the Tarasoff principle to a lawyer, see Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App. 1979) (lawyer must reveal information that client intends to commit violent crime against unknowing third party) (dictum).
81. Because the Principles permit doctors to reveal professional confidences to protect the welfare of the community, the court saw no obstacle to recognizing a tort duty to warn. Tarasoff, 551 P.2d at 347. In this respect, Tarasoff is a marvelous example of the "mirrors within mirrors" relationship that can exist between a profession's internal rules and what we might call the external law of that profession. See Schneyer, supra note 6, at 705.
ABA, his disclosure requirement has been accepted as an ethics rule in six states. Had the Restatement existed in 1980, and had it cast doubt on the applicability of Tarasoff to lawyers (as a comment to still-unapproved section 117A does), it might have cut Kutak's rhetorical legs out from under him.

III. The Restatement as a Complement to the Model Rules

I hope I have said enough to show that the Restatement and the Model Rules overlap considerably in form, function, and production rhetoric; that the overlap makes them potential rivals; and that the rivalry raises troubling questions of institutional authority. But even viewing these concerns from the narrow standpoint of the ABA, as this article more or less does, one cannot write the Restatement off as an unfortunate project without considering how it might complement the ABA's regulatory efforts. With respect to the law of lawyering, I now want to ask, what tasks do the ABA ethics codes leave undone? How well can a restatement perform those tasks, and how well is this Restatement performing them? Six tasks come to mind: (a) restating judge-made law that is addressed specifically to lawyers but gets little attention in ethics codes, (b) integrating non-ethical bodies of law that bear on the same aspect of lawyering but have developed in isolation, (c) clarifying the mostly statutory law on which ethics rules piggyback, (d) contextualizing general legal principles to show how they apply to lawyers, (e) specifying when the various techniques available for enforcing lawyers' duties should be used, and (f) addressing head-on the issues of lawyer liability that the ABA codes avoid.

A. Restating the Non-Ethical Law of Lawyering

Some judge-made law deals quite specifically with law practice but has never played a role in ethics codes. Much of it is ripe for restating. The clearest example is the law of privilege. (Indeed, the Restatement was first conceived as a project on the law of privilege.) While the attorney-client and work-product privileges are now partially codified in evidence codes, they remain judges' law. There is a steady flow of litigation on the scope of the privileges, and there is every reason to think that ALI expertise can improve the judicial product in this area. Another subject for ALI attention by virtue of its nontreatment in the ethics codes is the law of agency as it bears on the authority of lawyers to bind their clients in settle-

82. See Model Rules of Professional Conduct, Rule 1.6(b)(1) (1992) (lawyer may, but need not, reveal confidential information when necessary to prevent client from committing a criminal act likely to result in death or substantial bodily harm).


84. See Restatement of the Law Governing Lawyers § 117A cmt. i (Tentative Draft No. 3, 1990) (lawyer not liable to a nonclient "solely on the basis" of a failure to disclose confidential information, even though the section authorizes such disclosures to prevent client illegality that threatens to cause death or serious bodily injury).

85. Wolfram, supra note 1, at 196.
ment negotiations or other dealings with third parties. The Restatement already deserves high marks for its clarity and good sense in these areas.\textsuperscript{86} One hopes the same qualities will be in evidence when the ALI turns to the more controversial subject of lawyer liability to clients and third parties.\textsuperscript{87}

B. Integrating Isolated Bodies of Law on the Same Subject

Even within a single jurisdiction, some aspects of law practice are governed by multiple bodies of law which developed without anyone taking much notice of the connection between them.\textsuperscript{88} Take the lawyer who wonders whether she can file in federal court the imaginative but possibly frivolous complaint sitting on her desk. Putting ethics rules aside,\textsuperscript{89} tort law (malicious prosecution) and the law of civil procedure (Rule 11) both bear on the question. But they are apt to hold the lawyer to different standards,\textsuperscript{90} presumably because these islands of law were created to protect the separate interests of adverse parties and the courts, respectively. The lack of integration between the relevant tort and procedural law discourages not only comprehensive research by lawyers, but rationality in the law itself. If our aim is to deter frivolous claims without unduly chilling lawyers from bringing nonfrivolous claims, then we want judges who are shaping the tort of malicious prosecution to take the role of Rule 11 into account, and vice-versa. The Restatement can help by identifying all the strands of law that bear on a "multi-law" subject like this, cross-referencing them, and restating them in a way that alerts judges to the functional connections. At a minimum, this requires careful coordination with provisions in other restatements.

\textsuperscript{86} The ALI has approved material on the attorney-client privilege. See Restatement of the Law Governing Lawyers §§ 118-126 (Tentative Draft No. 2, 1989). Sections on the work-product privilege were introduced at the 1952 annual meeting but will be revised before adoption. Provisions on the lawyer's authority to bind a client were adopted in 1992. See Restatement of the Law Governing Lawyers §§ 37-42 (Tentative Draft No. 5, 1992).

\textsuperscript{87} This subject is slated for treatment in chapter 4, which is currently being drafted.

\textsuperscript{88} For an all too rare judicial exposition of the relationship between two such bodies of law, see Judge Richard Posner's excellent opinion in Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987) (holding that a lawyer who misrepresented in letter to lender that his client's property was free of encumbrances is liable to lender for negligent misrepresentation and professional malpractice alike, despite historical differences between those theories).

\textsuperscript{89} The Code of Professional Responsibility proscribed the filing of frivolous claims. See Model Code of Professional Responsibility DR 7-102(A)(1), (2) (1980). Rule 11 of the Federal Rules of Civil Procedure closely tracks the Code's standards for defining frivolousness. Since trial court sanctions under Rule 11 have become the principal regulatory technique for dealing with the problem of frivolous pleadings, the ethics codes have become largely irrelevant, though they remain applicable in principle. For the Model Rules treatment of the subject, see Model Rules of Professional Conduct Rule 3.1 (1992).

\textsuperscript{90} Compare Federal Rules of Civil Procedure Rule 11 (complaint must be based on reasonable inquiry) with Friedman v. Dozorc 312 N.W.2d 585, 605 (Mich. 1981) (in malicious prosecution suit, extent of lawyer's investigation normally irrelevant in determining whether he had probable cause to file claim).
C. Clarifying the Mostly Statutory Law on Which Ethics Rules Piggyback

Ethics rules often define the propriety of a lawyer's conduct in terms of law that is external to the ethics codes themselves. Some observers attribute this phenomenon to an ethical outlook they find pervasive in the profession — the view that lawyers should do all they can for clients "up to the limits of the law." But there are other plausible explanations. The drafters of ethics rules may wish to give lawyers clear notice of their exposure to discipline, and may believe that rules which piggyback on other law are an effective way to do so. (Lawyers are supposed to know that other law.) Or, the drafters may believe that they should defer to other policy makers in defining some of the lawyer's rights and duties. But whatever explains their existence, the fact is that piggybacking ethics rules rarely identify or interpret the external law on which their meaning depends. For example, Model Rule 3.4 simply forbids lawyers to alter or destroy evidence "unlawfully." The lawyer or the disciplinary counsel who reads this does not learn much. To comply with the rule or enforce it properly, she must recognize that it refers implicitly to the law of discovery and obstruction of justice, and she must find that law understandable. So, the law on which ethics rules piggyback might seem an especially fruitful area for Restatement attention.


92. See Schneyer, supra note 6, at 707-08 (describing bar association criticism of a proposed model rule on the ground that the ethical restrictions on altering or destroying documents should be identical with legal restrictions, in the interest of giving lawyers fair notice of their duties).

93. Id. at 708 (noting that some participants in the Model Rules process argued that a lawyer's ethical duty to expedite litigation should be no stricter than the duty as defined in the rules of civil procedure because trial courts rather than disciplinary agencies should be primarily responsible for applying and enforcing rules on the subject).

94. Model Rule 3.4 provides in part that a lawyer shall not "(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) (1992).

95. Bruce Green has recently offered a poignant example of an ethics rule whose meaning is obscure because the rule piggybacks on criminal law that is itself obscure. Green asks us to suppose that a lawyer represents a businessman who is the target of a grand jury investigation into illegal payoffs to federal authorities. Bruce A. Green, Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law, 69 N.C. L. REV. 687, 690 (1991). May counsel advise his client's employee, who has information that potentially incriminates the client and the employee alike, to assert his fifth amendment privilege instead of cooperating with the government's investigation? May counsel at least remind the employee of his fifth amendment rights?

The Code of Professional Responsibility, still in effect in many states, bars a lawyer during the course of representation from giving advice to a person who is not represented by counsel if the interests of that person are likely to be in conflict with the interests of his client. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2) (1980). If the employee's interests are in harmony with the client's, this rule would be no obstacle to informing the employee of his privilege or even advising him to invoke it. Moreover, the Code requires the lawyer to seek the lawful objectives of the client through all reasonably available means. But the lawyer may refuse to "participate in conduct that he believes to be unlawful." Id. at DR 7-101(B)(2). Would the conduct in question here be unlawful? Federal obstruction of justice law could be interpreted to bar the lawyer from advising the employee not to testify. See 18
For several reasons, however, I doubt that the Restatement can make a major contribution here. Sometimes the task is just too daunting. For example, in restating the ethics rule that allows lawyers to disclose confidential client information if other law requires disclosure, section 115 can hardly be expected to identify, let alone construe, the myriad of laws of general application that might or might not trigger this right to disclose — statutes concerning cash transactions, improperly buried bodies, government officials’ sources of private income, professional knowledge of child abuse, etc., etc. No can the Restatement flesh out what counts as a crime or fraud for purposes of the crime-fraud exceptions to the attorney-client privilege and the ethical duty of confidentiality, though it can and does indicate that the exception does not extend to other forms of client wrongdoing.

Of course, some ethics rules piggyback on more limited bodies of law. For example, the law of extortion is an obvious referent for the ethics rules that bear on negotiating tactics. Obstruction-of-justice laws are a referent for the ethics rules that bear on some perennial issues for criminal defense lawyers — e.g., what to do when you come into possession of physical evidence of a client’s crime.

U.S.C. § 1512 (1988) (stating it is a crime to "corruptly persuade" another person to withhold testimony); United States v. Fayer, 525 F.2d 661 (2d Cir. 1975) (holding that obstruction-of-justice laws do not exempt lawyers who "corruptly" advise witnesses not to testify before grand jury; "corrupt intent" includes intent to protect lawyer’s own client rather than to benefit the witness). But that law could also be interpreted to permit the advice, or at least to permit reminding the witness of his fifth amendment rights. Green, supra, at 703-04. If the lawyer concludes that the law permits him to advise the witness not to testify, then DR 7-101(A)(1) would seem to require him to do so. Yet, in doing so, the lawyer would be running a serious risk of committing a crime.

Green’s solution would be to amend the Code of Professional Responsibility to make it clear that defense counsel may never advise nonclients to “take the fifth." Id. at 716. An alternative might be for the Restatement to clarify what the federal obstruction-of-justice laws require of lawyers in this situation.


99. The Model Rules govern lawyers as negotiators only obliquely. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 cmt. (1992) (lawyer may not disregard legal rights of third persons while representing a client); id. at Rule 8.4 ("catch-all" provisions including ban on criminal conduct that reflects adversely on the lawyer’s fitness to practice law); cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105 (1980) (lawyer may not present or threaten to present criminal charges solely to obtain an advantage in a civil matter). For discussion of the extortion laws as they bear on lawyers as negotiators, see Joseph M. Livermore, Lawyer Extortion, 20 ARIZ. L. REV. 403 (1978).

and whether to encourage a client's employee to invoke his Fifth Amendment privilege if he is asked to testify in a grand jury investigation of your client. And the duty not to knowingly use perjured testimony obviously piggybacks on perjury and subornation law.

Bar association ethics committees often run up against these bodies of law when they render advisory opinions interpreting the rules of ethics. But whether out of jurisdictional modesty, lack of expertise, or plain fear of being wrong, ethics committees usually refuse to opine about the meaning of any law external to the ethics codes — even the very law on which an ethics rule piggybacks. As Professor Wolfram has noted, this greatly limits the value of their opinions. Can we expect more from the Restatement? Will it restate the criminal law of obstruction, extortion, and perjury?

To expect this would be to lose sight of the fact that the ALI, for good reason, has never restated the general criminal law. If the ALI now tries to restate the criminal law of lawyering, it will run into the same problem it has encountered in restating ethics rules — how to deal "transjurisdictionally" with law that is "codal" and far from uniform. It may also encounter an awkward institutional problem: In restating the pertinent law of obstruction, extortion, and perjury, will the ALI be prepared to undermine its own authority by reconsidering the less-than-universally-accepted positions it has taken on those subjects in its Model Penal Code? Or is it only ABA model codes that are fair game for rejection in an ALI restatement?

Considering these complexities, I predict that the ALI will be unable to restate usefully the mostly statutory law on which many ethics rules depend. And even putting the complexities aside, the question remains whether the ALI has the will to try. In one instance where the task would have been quite straightforward — where an ethics rule piggybacks on law that is federal and therefore uniform — the Restatement has already shied away from a key issue of statutory interpretation. Section 111 permits lawyers to use confidential client information for their own gain if the use will not harm the client and is "otherwise lawful." This provision, which incidentally rejects the stricter fiduciary principles codified in many ethics

101. See supra note 95.
103. WOLFRAM, supra note 3, at 67 (suggesting that one reason why a national association such as the ABA might hesitate to address questions of external law in its ethics opinions is the substantial variation that exists in that law from one state to another).
104. The ALI has already encountered a similar problem with noncriminal state statutes. As originally proposed, § 55 would have prohibited lawyers from asserting any nonconsensual lien on client property other than documents prepared by the lawyer for which the client has not yet paid. The lawyer could not retain other parts of a client's file (or other property) to coerce payment of her fees. When some members protested that statutes in their jurisdictions permitted broader use of retaining liens, the reporters backed off and promised to modify the rule to permit lawyers to exercise additional liens wherever local statutes permit. See ALI Wraps Up Corporation Law Project, Works on Lawyer Ethics, Complex Trials, 60 U.S.L.W. 2727, 2731 (May 26, 1992).
codes, piggybacks on the "insider trading" laws. Yet one finds no commentary on the applicability of those laws to corporate lawyers who trade on confidential client information.

D. Contextualizing General Common Law Principles

I am more hopeful that the Restatement will elaborate usefully on general common law principles to show how they bear on lawyers. For example, it can go much farther than the Restatement of Agency in clarifying how agency law applies to lawyers. This should forestall judges from drawing unjustified distinctions between lawyers and other agents, as I believe the fourth circuit recently did in Schatz v. Rosenberg. In that case, one party to a transaction sued the law firm that had represented the other party. Plaintiffs alleged that the law firm knowingly delivered to their counsel a letter from the firm's client which represented the client's financial health to be rosier than the firm knew it to be through confidential communications. In addition to transmitting the letter, the law firm prepared closing documents for the transaction and participated in the closing. The court held as a matter of law that the law firm was not liable for the losses the plaintiffs suffered as a result of the client's misrepresentation.

Perhaps this decision can be explained by the plaintiffs' relying too heavily on the theory that the law firm had a duty to warn them that its client's financial statement was false; a lawyer generally has no affirmative duty to tell third parties that his client has lied to them, even if the client has perpetrated a fraud in the course of the representation. And perhaps, in the interest of promoting candid client communications, lawyers should have no such duty. But there is no

105. See Model Code of Professional Responsibility DR 4-101(B)(3) (1980) (lawyer may not use confidential information for personal gain without client consent even if use would in no way disadvantage client); see also Restatement (Second) of Agency § 388 (1958) (agent must account to principal for profits made through use of confidential information). The Restatement defends its relaxation of this fiduciary principle by invoking the "no harm/ no foul" principle. See Restatement of the Law Governing Lawyers § 111 cmt. e (Tentative Draft No. 3, 1990). But there is potential harm in licensing lawyers to fish for client confidences they can profit from without harm to the particular client from whom such information is gained. Clients who suspect lawyers of embarking on such fishing expeditions may trust them less, with resulting deterioration in lawyer-client relationships.

106. The omission was not inadvertent. Comments to § 111 include an illustration that could very well implicate the federal insider trading laws. The illustration simply notes this point and bluntly "assumes" that the conduct in question would not violate those laws. Restatement of the Law Governing Lawyers § 111 illus. 2 (Tentative Draft No. 3, 1990).


108. Schatz, 943 F.2d at 498.

109. The ABA ethics codes subordinate the transactional lawyer's duty to rectify client frauds on third parties to the duty of confidentiality. Compare Model Rules of Professional Conduct Rule 4.1(b) (1992) with Model Code of Professional Responsibility DR 7-102(B)(1) (1980). The Code was apparently still in effect in Maryland when the defendant law firm worked on the transaction that resulted in the Schatz' losses, but the Code as adopted in Maryland may not have followed the ABA version in this respect. See Schatz, 943 F.2d at 492 (state ethics opinion supported theory that firm had an ethical duty either to disclose its client's misrepresentation or to withdraw without completing transaction).
redeeming social value in allowing a lawyer to help a client complete a transaction in which the lawyer knows the client has made material misrepresentations. And general agency principles provide a ready theory to support liability based on the law firm’s assistance in such a case. An agent who knowingly assists his client in committing a fraud is liable to the victim in tort, even if the agent made no false representations himself. 110 On this theory, the law firm should have been liable in Schatz, not for failing to blow the whistle on its client, but for helping the client complete the deal rather than withdrawing, as ethics rules certainly permitted and probably required. 111 The court dodged this point, reasoning that although there are "similarities" between an attorney-client relationship and an agent-principal relationship, lawyers "do not vouch for the probity of their clients when they draft documents reflecting their clients' promises, statements, or warranties." 112 In other words, the court reduced the law firm’s identity as an agent to a mere analogy, dismissed the analogy as inapt, and then felt free to disregard the applicable agency principle. By making it plain that general agency principles apply to lawyers in such a case, the Restatement could discourage this kind of move.

At the same time, there are situations where lawyers do differ from other agents and where contextualized agency rules should reflect the differences. Section 42 of the Restatement provides a good example. Agents are generally not liable on contracts they negotiate with third parties on behalf of a principal whose identity is known to those parties. 113 In serving their clients, lawyers regularly contract for the services of experts, investigators, and the like. These contractors commonly look to the lawyer for compensation, at least if the client for whom their work was done refuses or is unable to pay them. Section 42 wisely distinguishes lawyers from other agents in these cases. 114 Absent a disclaimer, it makes the lawyer liable on contracts with a party who "normally deals with lawyers rather than clients," even if the party knows the identity of the client for whom his services were engaged. 115

E. Specifying How Various Lawyers' Duties Should Be Enforced

As indicated earlier, lawyers' duties can be enforced in many ways. The ABA ethics codes have little to say about enforcement, except to note that their

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110. See RESTATEMENT (SECOND) OF AGENCY § 348 (1958) (stating that an "agent who fraudulently makes representations, . . . or knowingly assists in the commission of tortious fraud" by his principal is subject to tort liability even if the fraud occurs in a transaction on behalf of the principal) (emphasis added).

111. Lawyers must terminate representations that will result in their violation of other disciplinary rules, and such rules forbid lawyers to knowingly assist clients in conduct that is fraudulent. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.16(a), 1.2(d) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B), 7-102(A)(7) (1980).

112. Schatz, 943 F.2d at 495.


115. Id. § 42.
standards can serve as disciplinary rules. The codes are more concerned to identify lawyers' primary duties than to develop a full-blown enforcement framework. Yet, depending on the duty in question, some enforcement method or combination of methods will be better than others. In deciding whether to use a particular technique, decision makers should and sometimes do make judgments about the availability and appropriateness of alternative techniques. Unfortunately, those judgments are often based on untutored assumptions and sometimes display an almost comical circularity. For example, the Supreme Court has immunized prosecutors from civil liability to criminal defendants on the assumption that professional discipline is a more appropriate remedy for prosecutorial misconduct. Disciplinary agencies rarely proceed against prosecutors who commit ethical infractions; they seem to assume that political accountability is a more suitable way to keep prosecutors in line. And the voters and elected officials who are in a position to mete out political retribution are unlikely to become exercised about any prosecutorial misconduct that reflects a "tough-on-crime" mentality. In the words of Abbott & Costello: "Who's on first?"

Because enforcement choices are endemic in the law of lawyering, the Restatement should focus heavily on remedial issues. It can suggest priorities among the remedies for enforcing certain duties, and has already done so with particular thoughtfulness in its provisions on the financial aspects of the lawyer-client relationship. For example, section 46 explains why the reasonableness of a lawyer's fee might be judged more harshly in adjudicating a fee dispute than in a disciplinary proceeding. And section 49 makes fee forfeiture an appropriate remedy in a fee dispute with a client only when a lawyer's misconduct amounts to a serious violation of duties to the client; the client who induces his lawyer to harrass an opposing party hardly deserves protection. Even where the Restatement does not prioritize among enforcement techniques, it can still identify the principles of fairness and institutional advantage that ought to inform future judicial choices. It does so, for example, in comparing the pros and cons of various techniques for enforcing conflict-of-interest rules.

F. Addressing Vital Questions of Civil Liability

The ABA ethics codes discourage judges from using their provisions to define lawyers' civil liabilities. The codes not only expressly disclaim any role for themselves in defining those liabilities; they give no content to the lawyer's

117. Id. at 428-29.
118. WOLFRAM, supra note 3, at 761.
119. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 46 cmts. a, d, f (Tentative Draft No. 4, 1991).
120. Id. § 49 & cmts. c, d.
121. Id. § 201 cmt. e.
122. MODEL RULES OF PROFessional CONDUCT Scope para. 6 (1992) (Rules not designed to serve as "a basis for civil liability" and should not be deemed "to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty"); MODEL CODE OF PROFESSIONAL CONDUCT Scope para. 6 (1980) (Rules not designed to serve as "a basis for civil liability" and should not be deemed "to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty").
duty of competence, for fear that they would be writing negligence per se
standards for use against lawyers in malpractice cases. Yet judges often insist
on leaving the liability ball in the bar's court. Barker v. Henderson, Franklin,
Starnes & Holt is a case in point. Barker affirmed a decision refusing to hold
a law firm liable under federal securities law for the losses sustained by the
purchasers of bonds and notes that its client-foundation sold on the basis of
inadequate disclosure documents. Though the firm had done preliminary work
on the bond issues, it had not prepared the disclosure documents. The court held
that, in the absence of any evidence that it stood to gain from the transactions or
knew of any client misconduct when it provided assistance, it was not sufficiently
involved in the transactions to be liable for the client's sins. The firm's failure
to alert the purchasers when it later saw the inadequate disclosure documents was
not an act in furtherance of the client's scheme because lawyers "are [not] required
to tattle on their clients" unless they have some legal duty running to the client's
victims.

What prevented the court from finding such a duty implicit in the securities laws
themselves? Judge Easterbrook acknowledged that whether lawyers should reveal
client wrongdoing and, if so, to whom, have become issues "of great moment." But he was satisfied that "an award of damages under the securities laws is not the
way to blaze the trail toward improved ethical standards" in the legal profession;
the securities laws "must lag behind changes in ethical and fiduciary standards." In other words, professionally defined ethical duties must precede legal
ones for purposes of civil liability.

With the explosion of claims against the lawyers who represented failed thrift
institutions, issues of lawyer liability under the federal securities and banking
laws are now of great moment indeed. So are questions of malpractice liability to
nonclients and to the federal agencies who become receivers for the failed
thrifts. Since the ABA has not provided the leadership on such issues that

AL RESPONSIBILITY Preliminary Statement para. 5 (1980) (Code does not "undertake to define standards
for civil liability of lawyers for Professional Conduct").

122. RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1992); MODEL CODE OF PROFESSIONAL
RESPONSIBILITY Canon 6 & DR 6-101 (1980).
123. See supra note 6, at 726-27.
124. 797 F.2d 490 (7th Cir. 1986).
125. Id. at 497.
126. ld. at 496-97.
127. Id. at 497.
128. Id.
129. Id.
130. Id.
131. For a summary of the major administrative actions and lawsuits brough by federal banking
agencies against the law firms who represented failed thrifts in the 1980s, see ABA WORKING GROUP
ON LAWYERS' REPRESENTATION OF REGULATED CLIENTS, LABORING IN DIFFERENT VINEYARDS? THE
132. One issue here is whether a defendant law firm can raise the equitable defenses such as
fraud and contributory negligence against a federal receiver that it could have raised in any malpractice
suit brought by the owners of the failed thrift itself. Compare FDIC v. O'Melveny & Meyers, 969 F.2d
744 (9th Cir. 1992) (no imputation of owner wrongdoing to receiver) with FDIC v. Ernst & Young, 967
Judge Easterbrook envisions for the bar, perhaps the Restatement can take up the slack. This will be a crucial test of the ALI's implicit claims of superiority over the ABA as an arbiter of the lawyer's rights and duties.

IV. Conclusion

Too little of the Restatement of the Law Governing Lawyers has been completed to justify any final appraisal. So far, while I admire the technical quality of the work and see the potential value of the Restatement on several fronts, I am not convinced that the project is worthwhile. Although the courts are surely presiding over more disputes concerning lawyers' rights and duties than ever before, those disputes are increasingly governed by complex statutes and regulations, material that has never lent itself to restatement. Moreover, viewing the matter from an institutional standpoint, I think the project has a potential downside for both the ALI and the ABA, for the collective ethical life of the legal profession, and for the orderliness of professional regulation. As I said at the outset, intervening in the Balkans is often futile and always risky.

F.2d 166 (5th Cir. 1991) (bank officer's fraud imputed to FDIC suing in its capacity as receiver, but perhaps not when suing in its corporate capacity as insurer).