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READING BETWEEN THE LINES: INDIGENT DEFENSE ISSUES AND THE *RESTATEMENT OF THE LAW GOVERNING LAWYERS*

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In the development and analysis of rules of professional responsibility, it has long been recognized that criminal defense is, simply stated, different. Many ethical codes acknowledge this distinction but rarely explain the difference sufficiently to provide practical guidance. And, frankly, if criminal defense is characterized as "different," then indigent defense should probably be described as "peculiar." When the attorney-client relationship is formed not by client choice, but by judicial appointment, dilemmas arise beyond those traditionally recognized in ethics codes. Moreover, prevailing indigent defense delivery systems are not uniform and generate unique ethical issues. To its credit, the *Restatement of the Law Governing Lawyers* makes an initial effort, primarily in commentary, to explain some of the idiosyncratic obligations imposed on lawyers who provide defense services to the indigent. However, much like the American Bar Association Model Rules, the *Restatement* far too frequently requires the public defender or appointed counsel to read between the lines to discern that which would be deemed appropriate conduct given the state of the law. To be of real practical use, the *Restatement* must address concrete practice situations that arise within the context of indigent defense.

Some might argue that the design of the *Restatement* necessarily limits its reach: Because the *Restatement* must report the law as it exists, it remains powerless to address indigent defense issues that the case law ignores. Admittedly, the drafters must exercise care in developing illustrations of the law which clarify obligations rather than create new or alter existing ones. However, some lawmaking inevitably results from this process.[1] And if the drafters make previously implicit obligations explicit by including examples which apply the traditional formulations of the law to nontraditional dilemmas, they will begin to shape the law. Such "lawmaking" appropriately falls within the mandate of the *Restatement.*

Obviously, neither the *Restatement* nor any other guide for professional conduct can identify every ethical dilemma and corresponding obligation that will arise in practice. However, because much of the analysis contained in the most recent drafts of the *Restatement* assumes a narrow construction of client-lawyer relationships, the explanations of responsibilities invariably overlook issues that confront lawyers and clients in nontraditional relationships. By expanding the concept of the client-lawyer relationship to include the various models of service delivery that characterize

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1. To the extent that the drafters attempt to resolve ambiguities in the law, they are explicitly engaging in this process. By making judgments that some issues merit discussion while others do not, the drafters are implicitly making law as they influence the direction of the law.

indigent defense — public defender systems, contract systems, and appointed counsel programs — the *Restatement* could come closer to achieving its dual goals of resolving ambiguities in lawyers' obligations and providing safeguards to clients.[2] In order to highlight some issues peculiar to indigent defense that the *Restatement* should address but currently ignores, I focus on chapter 2, "The Client-Lawyer Relationship."

I. Drafting Modifications to Address Indigent Defense Issues

The first section of chapter 2, "Formation of a Client-Lawyer Relationship," describes the manner in which a lawyer and a prospective client may create a relationship. The drafters acknowledge in commentary that, for the most part, they are examining the duties owed the client in a consensual client-lawyer relationship — the traditional concept. While the drafters note in the black letter that the client-lawyer relationship may be formed by a tribunal's appointment of counsel,[3] they fail to recognize that appointing authorities extend beyond tribunals. They may include, for example, the Chief Public Defender who enters into a contract with groups of lawyers for their services, or an assigned counsel administrator who assigns lawyers to individual cases. When the drafters begin to address these nontraditional formations of the client-lawyer relationship, they will discover unique duties and conflicting loyalties that are currently overlooked by the *Restatement.*

A. Duties to Client

Any comprehensive exploration of the unique duties owed the client in these relationships must begin with the nonconsensual nature of the relationship. While the drafters raise the issue of consent in commentary, they simultaneously evade its problematic character by suggesting that the client's acceptance of the appointment constitutes consent.[4] This assertion ignores the reality that faced with the daunting prospect of proceeding *pro se* against the state, the client may "accept" appointment of counsel for lack of any real alternative. By obscuring this issue, the drafters ultimately disserve lawyers and clients. The commentary should instead acknowledge that given the uneasy perch between force and consent, adherence to standards for the assignment of counsel would be appropriate. Such standards advise appointing authorities that great care is due for the appointment of counsel to indigent clients charged with criminal offenses precisely because the client exercises little, if any, choice in the formation of the relationship.[5] The drafters should then

2. Although the drafters of the *Restatement* have decided to devote a separate chapter to the delivery of legal services, the drafters seem to have adopted the position that when appropriate they would include obligations of appointed counsel in other chapters as well. The drafters should simply attempt to include other examples of those duties throughout the *Restatement.* Without these additional illustrations, lawyers will be encouraged to resolve conflicts in their duties of care and loyalty without appropriate guidance. This cannot be considered sufficient protection for either clients or lawyers.

3. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 26 (Tentative Draft No. 5, 1992).

4. *Id.* ch. 2, § 26 cmt. g.

5. *See* STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS (Nat'l Legal Aid & Defender Ass'n, 1989). These standards are currently under consideration by the American Bar

clarify the lawyer's obligations in this nonconsensual, or at best quasi-consensual, relationship by advising that, even in those jurisdictions where such standards have not yet been adopted, a lawyer should determine that she has the requisite experience contemplated by these standards prior to accepting appointment.

Once the drafters begin to expand their examination of the formation of the client-lawyer relationship, their analysis should then extend to the context in which the lawyer operates. The lawyer who represents a client within an institutional setting, such as a public defender office, may be faced with the problem of conflicting loyalties to the client and her office. The commentary to the section on formation of the client-lawyer relationship currently addresses the more traditional problem of conflicting duties in the context of group representation. Specifically, the drafters discuss conflicts in obligations owed to members of a class in a class action where a lawyer undertakes representation of the entire class.[6] This section could apply to the indigent defense context if the drafters would add an illustration of such a conflict of interest as it arises within an institutional defender office.[7]

For example, the commentary might include a discussion of an assistant public defender's duties when she intends to assert a position on behalf of one client with respect to a change in the law or a new scientific advance which is in opposition to the objectives the defender office anticipates advancing on behalf of other clients. The commentary could offer guidance regarding the lawyer's obligations to disclose this conflict to the individual client as well as the office's duty to notify prospective clients that the conflict exists. Questions that would arise within the defender office might include the following: May the lawyer in a defender office ethically choose among client interests to advance? If so, how does she select those interests to pursue? Should the defender office refuse to accept, or withdraw, from certain cases because of this conflict? If so, to whom might those clients turn for representation? Do defenders, who provide constitutionally mandated services, possess the same freedom to choose among clients as their civil counterparts? Obviously, the drafters of the commentary may not be able to resolve or even address all of these questions, but at least some reference to these issues in the context of an institutional defender office is warranted.

In the current draft of the *Restatement*, when the drafters address the duty a lawyer owes her client, they explain that a lawyer must "act in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after disclosure and consultation; [and must] act in the matter with reasonable competence and diligence."[8] In their efforts to clarify the obligation, the drafters have made a conscious effort to steer clear of emotional zeal[9] and have dangerously

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Association.

6. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 26 cmt. f (Tentative Draft No. 5, 1992).

7. In a forthcoming article, I address the problems that arise when the duties owed to an individual client come into direct conflict with the interests of the "class" of clients that the defender office represents.

8. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 28(1), (2) (Tentative Draft No. 5, 1992).

9. *Id.* § 28 cmt. d (stating that zeal can be "misunderstood to suggest that lawyers are required to

diluted the concept of advocacy. Acting zealously for a client is reduced to acting diligently for that client. While the drafters express concern about unrestrained advocacy, encouraging zealous representation does not necessarily invite wild posturing. Indeed, in the context of representing a client against the power of the State, more than mere diligence is mandated.[10]

Unlike most civil cases, criminal cases involve fundamental questions of liberty, and sometimes even life, that require more than reasonable competence to protect the client. To begin, the disparity of resources and power between the state and the defense in a criminal case demands that the accused be afforded greater protection.[11] This elevated protection for clients in criminal cases translates into a heightened duty for the defense lawyer to act not only as the client's representative, but also as a constraint on the immense power of the state. Secondly, because criminal cases are fraught with emotion — such that most jury instructions explicitly acknowledge this fact[12] — the criminal defense lawyer must be prepared to address those passions. To permit a lawyer to enter the battleground of a criminal case without zeal is to place the client unarmed in a fight for either her life or liberty. Frequently, the lawyer's fervor constitutes the only weapon an accused possesses. And yet the *Restatement*, as currently drafted, ignores this reality and threatens to rob the client of a fundamental safeguard.

For indigent clients charged with crimes, the need for zeal is perhaps most critical. Negative preconceptions tend to be multiplied when the accused is poor and a member of a minority group. Indeed, the lawyer must tackle prejudices held not only by parties outside of the client-lawyer relationship, but she must be admonished to overcome any negative attitudes that she may hold toward clients. The duty of reasonable diligence, however, fails to impress upon the lawyer that effective representation of an indigent accused requires that she zealously attack all presumptions that prevent the client from receiving fair treatment in the criminal justice system.

* Since the law leaves room for interpretation of the parameters of the lawyer's duty of diligence,[13] the *Restatement* should not select the lowest common denominator as the standard of conduct. Rather, this section should be expanded to include a range of definitions of diligence suggesting that, weighing both the gravity of the

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function as advocates with a certain emotion or style of litigating, negotiating, or counseling").

10. *See, e.g.*, Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

11. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

12. *See, e.g.*, D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS at 2.02 (3d ed. 1978) (Function of the Jury) (admonishing jurors to determine the facts without prejudice, fear, sympathy or favor); *id.* at 2.14 (Nature of the Charges Not To Be Considered) (cautioning jurors against permitting the character of the charge to affect their deliberations); 1 CALIFORNIA JURY INSTRUCTIONS: CRIMINAL at 1.00 (West 5th ed. 1988) (Respective Duties or Judge and Jury) (informing jury that pity for or prejudice against a defendant should not influence its analysis of the evidence and further cautioning against passion, prejudice, public opinion or feeling influencing its verdict).

13. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2, at 54-55 (1986).

conduct and the severity of the consequences, the duty of diligence contemplates representation with the amount of zeal, fervor, and emotions that are appropriate to the situation. Without a more developed explanation, the duty of diligence will fail to capture that which is essential to the effective representation of a client accused of a crime.

Similarly, in order to provide a more comprehensive analysis of the lawyer's duties of competence and diligence, the commentary should address the problems faced by public defenders as they struggle to provide assistance to ever-increasing numbers of indigent clients, in the face of limited personnel and shrinking resources. Despite recommendations that defender offices impose maximum limits on the numbers of cases assigned to lawyers at a given time,[14] many public defender offices experience tremendous political pressure to accept a higher volume of clients than they can competently represent.[15] Consequently, the commentary to this section should discuss a lawyer's obligation to inform the appointing authority that acceptance of additional cases will jeopardize her duty of competence. It should further inform the lawyer of her duty to refuse appointment to cases if she believes they will exceed the number she can effectively handle.[16] To illustrate the impact

14. *See* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS Standard 13.12 (1973). The standard states:

> The caseload of a public defender office should not exceed the following: Felonies per attorney per year: Not more than 150; Misdemeanors (excluding traffic) per attorney per year: Not more than 400; Juvenile Court cases per attorney per year: Not more than 200; Mental health cases per attorney per year: Not more than 200; and appeals per attorney per year: Not more than 25.

Id.

15. Examples can be found nationwide of excessive caseloads which are crippling public defender offices. Two recent instances demonstrate the problem. Public defenders in Albuquerque, New Mexico, carry caseloads as high as 1100 to 1200 misdemeanors per year, three times the maximum number recommended. In Louisiana, one defender with the Orleans Indigent Defense Program represented 418 clients in the first seven months of 1991 and obtained a court order holding that his excessive caseload prevented him from providing effective representation. The judge stated in his order that "[n]ot even a lawyer with an 'S' on his chest could effectively handle this docket." State v. Peart, 621 So. 2d 780, 789 (La. 1993).

16. *See* STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES Standard 5-5.3 (ABA 3d ed. 1992). The standard states:

> (a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.
>
> (b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

of excessive caseloads on the lawyer's duties of competence and diligence, the drafters might provide an example which delineates the steps the defender may take in that situation. These would include declining appointment, disclosing to current and potential clients that the lawyer's volume of cases threatens to compromise her duty of competence, or withdrawing from current cases.

B. Option to Withdraw

In yet another context, the *Restatement* fails both to provide guidance to appointed counsel and to protect her client. Section 44(3) addresses the issue of withdrawal from representation, stating that a lawyer may withdraw if "the representation has been rendered unreasonably difficult by the client or by the irreparable breakdown of the client-lawyer relationship." Unfortunately, the standard of unreasonable difficulty is far too vague to be of practical use. As currently drafted, this section adheres to the ABA Model Code of Professional Responsibility, which permits withdrawal if "by other conduct [the client] renders it unreasonably difficult for the lawyer to carry out his employment effectively."[17] The ABA Model Rules, however, do not contain such a provision and instead allow withdrawal if "other good cause for withdrawal exists."[18]

The illustration in commentary offered to explain the standard of unreasonable difficulty affords little protection to clients in a nontraditional client-lawyer relationship. It suggests that the client who refuses to communicate with the lawyer is unreasonably difficult and permits withdrawl even if it would adversely affect the client. This illustration omits any discussion regarding the lawyer's duty either to attempt to determine the reasons for the breakdown in communication or to explore ways to restore communication. Nor does the commentary urge the lawyer to exercise care in reaching the decision to withdraw even when the withdrawl may cause affirmative harm. In order to safeguard the interests of the client in this situation, the burden should rest on the lawyer to make efforts to develop a relationship of trust in order to facilitate communication.

When attorneys are appointed to represent clients, difficulties in communication can be predicted with virtual certainty. The client understandably mistrusts appointed counsel because she did not choose this lawyer, knows little or nothing about the lawyer, and must now place her fate in the hands of a virtual stranger. To suggest that the client-lawyer relationship will be anything other than strained and exceptionally difficult, at least initially, ignores the reality of practice. This section, as currently drafted, fails to recognize this inherent difficulty and enables the lawyer far too easily to withdraw from representation. Consequently, the language regarding unreasonable difficulty should be excised from the black letter.

The second clause of section 44(3)(g), which suggests that a lawyer may withdraw if there is an irreparable breakdown of the client-lawyer relationship,

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Id.; *see also* Ligda v. Superior Court, 85 Cal. 744 (1970); Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980).

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (C)(1)(d) (1969).

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(6) (1983).

should be the standard espoused; however, it will require further illustration to identify circumstances that would permit withdrawal. The commentary should admonish the lawyer, particularly in the context of appointment, not to exercise her option to withdraw simply because the relationship may be somewhat troublesome. The commentary should emphasize that "irreparable breakdown" contemplates that withdrawal will be the option of last resort for the lawyer. It would also serve lawyers and clients better by outlining steps for working with the difficult client, and then, if such efforts fail, permit the lawyer to seek to withdraw.[19] Without these changes, clients may suffer affirmative harm.

C. Duties to Third Parties

The drafters devote an entire section of chapter 2 to the discussion of the lawyer's obligations that are defined by contract.[20] Here, again the drafters should extend the discussion to issues faced by criminal defense practitioners under contract with the state or a public defender office. In this nontraditional relationship where the lawyer has a duty not only to the client but to the contracting party, some rather significant conflicts of interest will often arise.

New Jersey offers a current example of conflicting duties in a context where there exists little, if any, guidance.[21] In that jurisdiction, the public defender enters into contracts with private attorneys to handle cases in which the public defender office cannot proceed because of an existing conflict of interest or case overload. As in virtually every other state during the past year, the New Jersey legislature drastically cut funding to the public defender office, which prevented the chief defender from meeting both his payroll and contractual obligations. The chief defender, faced with the hobson's choice of laying off public defenders or refusing to pay private counsel under the contract, opted for the latter.[22] Using this as an example, the commentary to this section could address the duty of a lawyer operating pursuant to contract when the chief defender announces that her fee will not be paid.[23] The commentary currently notes that a lawyer does not ordinarily have a duty to honor a contract for services when one of the parties is in breach of that contract; however, when the services are constitutionally mandated and the breach was not occasioned by the client, the commentary should advise the lawyer of her overriding obligation to provide services even though the

19. The commentary could suggest that lawyers should attempt to determine the reasons for the client's unwillingness to communicate by asking the client to state her objections, by discussing the need for an effective working relationship, and by explaining that the client will retain the authority both to define her objectives and to hold the lawyer to her obligation to advance those goals.

20. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 29A (Tentative Draft No. 5, 1992).

21. *In re* Representation of Certain Indigent Defendants, Juveniles and Parents, No. E-2 (N.J. 1992). *See generally* Kathleen Bird, *Defending the Poor: Who Pays?*, N.J. L.J., Sept. 21, 1992, at 1; Hanna W. Rosin, *Justices Stay Hand on Pool Lawyers*, N.J. L.J., Nov. 23, 1992, at 1.

22. Bird, *supra* note 21, at 26.

23. An infinite variety of issues arise from this situation, beginning with the obligations that the chief defender may or may not have and extending to the obligations of virtually every actor within the criminal justice system. For purposes of this section of the *Restatement*, however, some discussion of the duties of lawyers appointed pursuant to contract may be all that is required.

funder is in breach.

Moreover, the drafters should address whether or not obligations owed to the funding authority in a contract for services will be considered subordinate to the obligations owed to the client. Some illustration of the limits of the duties to the nonclient/funder in the context of indigent defense may be easily inserted into this section in order to provide a more complete analysis of this issue. Even a cursory examination and comparison of views of the client and the funder regarding the objectives of representation would help to illustrate the nature of the conflict of interest faced by lawyers attempting both to provide service to the client and to honor their obligations to the contracting authority. The commentary to this section already suggests that in a situation where a nonclient underwrites the cost of legal services to the client, such "nonclient often is not subject to the same pressures as a client and may not be owed the same fiduciary duties."[24] At a minimum, the drafters should augment this discussion by identifying contracting parties, such as the state, the judiciary, or the defender office, as examples of such nonclients.

II. Examples of Successful Drafting

While the *Restatement* should provide clearer guidance to indigent defense practitioners by including additional illustrations as mentioned above, the drafters successfully achieve their dual goals of protecting clients and informing lawyers of the state of the law in two sections of chapter 2: section 34 (Authority Reserved to Lawyer) and section 35 (Client Under Disability). Operating from the premise that lawyers often possess more power than their clients in the client-lawyer relationship, the drafters caution that the exercise of this authority either must be based upon consultation with the client or, in those situations where consultation is not possible, must be consistent with objectives that the client has already identified.

The drafters recognize that, in virtually all representations, a lawyer's authority to make decisions on behalf of her client will be greater than the limited description provided in the black letter.[25] The black letter explains that the client cannot override the lawyer's authority

> (1) to refuse to perform, counsel or assist further in ongoing acts that the lawyer reasonably believes to be unlawful; (2) to make decisions that law or an order of a tribunal requires the law to make; and (3) to decide what should be done on behalf of the client when law or an order of a tribunal requires an immediate decision without time to consult the client.[26]

As any practitioner will admit, this provision leaves the lawyer significant room within which to make decisions for the client and, consequently, represents an area

24. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 29A cmt. g (Tentative Draft No. 5, 1992).
25. *Id.* § 34 cmt. a.
26. *Id.* § 34.

ripe for abuse. The drafters carefully stress in commentary that even though this latitude exists, the lawyer has no legal right to impose her own moral views on the client when the client's interests are at stake.[27] Especially where counsel is appointed to represent clients accused of committing often heinous acts, this cannot be overemphasized. The *Restatement* properly reminds counsel that the client-lawyer relationship does not empower the lawyer to substitute her moral judgments for those of her client or to force her client to accept a different view.

Similarly, section 35 exhibits respect for the client and her right to make decisions regarding her case, even if those decisions ultimately prove unwise. By instructing that a client has the right to pursue a course of action that the lawyer considers to be foolish, the *Restatement* properly emphasizes that the lawyer should represent the client's wishes and not determine for the client what those interests should be. Indeed, the drafters specifically warn that a lawyer should not assume a client suffers from a mental disability which might necessitate some substitution of the lawyer's judgment simply because the client insists on an eccentric course. In the same vein, the drafters note that in juvenile delinquency proceedings where the lawyer representing the juvenile will often feel inclined to substitute her judgment for that of the minor client, the lawyer should resist this impulse by adhering to the function of advocate and agent of the client, not judge or guardian.[28] In those instances when the lawyer must substitute her judgment for her client, the commentary urges the lawyer to consider the client's circumstances, problems, needs, character, and values in order to calculate what the client's desires would be if the client were able to express them.[29] While in practice, the rule still leaves lawyers room to interpret the clients' views and may not control the lawyers' instincts sufficiently, at least the commentary offers guidance for the substitution of judgment.

III. Conclusion

In order to be comprehensive and of practical use, the commentary to chapter 2 of the *Restatement* should include illustrations of the distinctive problems that arise in the context of providing criminal defense representation under the various indigent defense delivery systems. In an area where clients are potentially the most vulnerable, we tend to leave lawyers with, at best, limited guidance both in determining the duties imposed by the relationship and in resolving conflicts that arise in the context of such relationships. By acknowledging that the appointment of counsel may carry its own set of ethical dilemmas and duties, the drafters have at least begun to offer guidance in an area that has long been considered to have different, but unspecified, obligations. With the inclusion of additional illustrations examining those dilemmas, the *Restatement* may help to make ethical considerations in the context of indigent defense a little less peculiar.

27. *Id.* § 34 cmt. e.
28. *Id.* § 35 cmt. c.
29. *Id.* § 35 cmt. d.