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THE EFFECT OF THE *RESTATEMENT* ON RULES OF MALPRACTICE

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My topic is the effect of the *Restatement* on the malpractice liabilities of lawyers. Before I get to that, though, it is worth considering the process of creating this restatement. Professor Wolfram and the other three associate reporters have recently produced a massive draft on the subject of conflicts of interest, which is one of the key areas for malpractice liability. The advisers might get three or four drafts of that size, all of which include black letter rules, illustrations, supporting precedents, and authorities. After the reporters have produced this document, they call the advisers in for two or three days, and we spend several days telling the reporters what is wrong with all of the rules they have come up with. Afterward, the entire packet of material has to go to the council of the American Law Institute. After the council has told the reporters what is wrong with the whole thing, they go to an annual meeting of the members of the American Law Institute in May, where a whole new group of people steps up to say what is wrong with the package.

People like Professor Wolfram, who despite his modesty has the major responsibility for putting this project together, have to deal constructively with all these critiques and have to keep going back to the drawing board. In spite of it all, Professor Wolfram said he thinks that in four or five years we will actually have a restatement of law governing lawyers. I hope we will, although there is no question that the necessity of the entire project is still controversial.

Professor Susan Martyn's remarks on screening and conflicts of interest illustrate the persistence of a major question about the legal malpractice liability of lawyers and of lawyers' susceptibility to disqualification. The basic problem of screening is whether the *Restatement* should merely accept existing precedent, or do more. In fact, other than those rules dealing with government lawyers, there are very few cases that deal with the propriety of screening in private law firms.[1]

Professor Martyn described in some detail the bitter conflicts that arose among the advisers, not only on this issue, but at all stages in connection with the rules dealing with screening. As it stands, the *Restatement* essentially allows screening with safeguards — an ambitious position, considering the existing law,[2] and one which raises the question of the extent to which we have to adhere to existing law in putting together a restatement.

Blackstone addressed the issue of precedent over two hundred years ago. He began, "[T]he doctrine of the law then is this: that precedent and rule must be followed unless flatly absurd or unjust."[3] And I am sure Professor Wolfram would

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1. *See, e.g.*, Teja v. Saran, 846 P.2d 1375 (Wash. Ct. App. 1993) (holding that former clients need not prove that actual confidences were divulged in order to show conflict of interest).

2. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9, 1.10 (1992).

3. 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

probably accept Blackstone's justification: "For though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose they acted wholly without consideration."[4] The *Restatement*, as has been suggested, is a very ambitious project. When it is eventually finished, it is going to deal with everything from regulation of the legal profession to the delivery of legal services. Chapter 4 will address the question of legal malpractice. The first draft of chapter 4 has been completed and circulated and was discussed by the advisers in Philadelpha, Pennsylvania, on October 7-9. Specifically, chapter 4 will deal with the following topics:

(1) Liability of lawyers to clients and non-clients;

(2) Standards for measuring competence in tort cases (here it should be kept in mind that warranty rules may create greater liability if an attorney warrants a particular result or level of competence);

(3) Standards for a legal specialist;

(4) The role of client instructions;

(5) Expert testimony;

(6) Causation, damages, and defenses;

(7) The concept of a case within a case;

(8) Liability to non-clients for negligent misrepresentation and intentional torts;

(9) Statute-based liability; and

(10) Qualified and absolute privileges and immunities of lawyers.

Actually, even in the existing drafts there are a number of sections that bear on the liability of lawyers. The section dealing with confidential client information, except for the work product immunity, has been substantially adopted. This material is clearly important in this regard.[5] In addition, two controversial sections, sections 117A and 117B, on the use or disclosure of information to prevent death or serious bodily injury or to prevent substantial financial loss, have a substantial effect on the law of malpractice.[6] Essentially, those sections provide that, given a prior good faith attempt by the lawyer to dissuade, a lawyer may use or disclose confidential information, if and to the extent that the lawyer reasonably believes that the client intends to commit a crime or fraud that threatens to cause death or serious bodily injury, *and* the lawyer's use or disclosure is reasonably appropriate to prevent the harm and necessary in view of the imminence of the harm.[7]

That section goes further than the current rules do. The current rules are set out in Rule 1.6(b) of the 1983 ABA Model Rules of Professional Conduct. This rule has been adopted by a minority of states,[8] but there is very little case authority on

4. *Id.*

5. RESTATEMENT OF THE LAW GOVERNING LAWYERS ch. 5 (Tentative Draft No. 3, 1990).

6. *Id.* §§ 117A-117B.

7. *Id.*

8. *E.g.*, 7A COLO. REV. STAT. RPC 1.6 (1992 Supp.); 5 OKLA. STAT. ch. 1, app. 3A, rule 1.6 (1991); S.C. CODE ANN., App. Ct. R. 407, Rule 1.6 (1993 Supp.); S.D. CODIFIED LAWS ANN., App. Ch. 16-18, RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993 Supp.).

its interpretation.[9] Thus, the rules that are adopted in this section of the *Restatement* could very well have a significant impact on the malpractice liability of attorneys.

Another important section is the one dealing with conflicts of interest.[10] Clearly, a lawyer who gets into a conflict of interest has a very serious problem. Not only the lawyer, but the whole firm, can be disqualified. The attorney can lose his entire fee. The attorney may end up being liable for the fees of the attorney that replaces him. And if there is a bad result in the litigation, and proximate cause and damages can be shown, there is authority to indicate that the attorney can be liable for the subsequent judgement. In addition to all that, further disciplinary proceedings may be instituted by the appropriate tribunal. Conflicts, obviously, are going to be of great importance in the malpractice area, and worth the very large amount of time that we have spent on the issue.

One of the things that can be done in a conflict-of-interest situation is to obtain informed consent to a conflict. California allows an attorney to obtain written, informed consent in a conflict-of-interest situation.[11] However, "non-consentable" conflicts exist, in which representation of the later client is absolutely prohibited; it does not matter whether the attorney obtains written, oral, or any other kind of consent from the parties. For example, adversaries in litigation normally cannot consent to a conflict of interest. A client who is incapable of giving consent, such as a minor, cannot consent. Consent is ineffective in a situation where it is unlikely that adequate representation will be given.[12] The *Restatement* deals with some of these situations.

Even when informed consent can be obtained, it often is not. As an attorney who deals with these issues every day, I am always amazed that attorneys can be involved in obvious conflicts of interest without even realizing it — at least, until the parties start screaming at each other. One example is attempted representation of multiple parties with cross claims against each other, or of a corporation and its employees. Conflicts arise not only in a litigation context, but also in advisory situations. Attorneys try to represent both buyer and seller, or multiple parties in a will- or estate-planning situation. All of those situations pose obvious problems.

Professor Martyn has dealt at some length with screening, which is certainly one of the most important issues that the *Restatement of the Law Governing Lawyers* has dealt with for malpractice liability. We have spent a considerable amount of time on it, and as Professor Martyn has correctly stated, the issue is by no means dead.

One final section that needs to be mentioned is chapter 3, which deals with the financial relationship between client and lawyer.[13] Section 49 of that chapter deals

9. *See, e.g., In re* Grand Jury Subpoenas, 906 F.2d 1485 (10th Cir. 1990) (holding that source of attorney fee payments for representation relating to drug charges is not subject to confidentiality).

10. RESTATEMENT OF THE LAW GOVERNING LAWYERS ch. 8 (Tentative Draft No. 3, 1990).

11. CAL. RULES OF PROFESSIONAL CONDUCT Rules 3-300, 3-310 (1993).

12. *See, e.g.*, CAL. FAMILY CODE § 8800 (West 1993) ("[M]ultiple representation by an attorney should be avoided whenever a birth parent displays the slightest reason for the attorney to believe any controversy might arise.").

13. RESTATEMENT OF THE LAW GOVERNING LAWYERS ch. 3 (Tentative Draft No. 4, 1991).

with fee forfeiture, mandated where there is clearly unlawful conduct constituting a serious violation of the duty to the client.[14] If such a violation has occurred, some or all of the fee can be forfeited, and malpractice liability is clearly implicated as well.

14. *Id.* § 49.