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CAVEAT LECTOR: CONFLICTS OF INTEREST OF ALI MEMBERS IN DRAFTING THE RESTATMENTS

Monroe H. Freedman*

The American Law Institute’s reputation for impartial judgment in formulating Restatements of the Law has been compromised by conflicts of interest on the part of ALI members who vote on Restatement provisions. That is, there is a significant risk that the independent professional judgment of ALI members has been materially and adversely affected by the interests of members’ clients and by the members’ own interests. As a result, no judge, scholar, or student can rely on a Restatement rule or comment as representing the objective judgment of ALI members, unaffected by the partisanship of advocates who are creating precedents to protect their clients’ and their own interests in future litigation.

In referring to conflicts of interest, I use what Professors Geoffrey C. Hazard, Jr. and W. William Hodes describe as the “modern approach.”1 This approach analyzes conflicts of interest by “focus[ing] on the degree of risk that a lawyer will be unable to satisfy all of the legitimate interests that compete for attention in a given matter.”2 They explain:

In the modern view, a conflict of interest exists whenever the attorney-client relationship or the quality of the representation is “at risk,” even if no substantive impropriety—such as a breach of confidentiality or less than zealous representation—in fact eventuates. The law of law-

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2. 1 Id. §1.7:101, at 223.
yering then proceeds by assessing the risk and providing an appropriate response.3

Noting that “the first explicit use of this approach of focusing on the potential for harm rather than the harm itself appears to have been by Monroe Freedman,”4 they add that this analysis is entirely consistent with prior authority.5

The Restatement (Third) of The Law Governing Lawyers adopts this approach. Section 201 provides that “[a] conflict of interest is involved if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”6

To be “substantial,” the risk of an adverse effect must be “more than a mere possibility.”7 However, it need not be “immediate, actual, and apparent.”8 On the contrary, as explained in the comment, a risk can be substantial, within the meaning of the rule, even if it is “potential or contingent,” and despite the fact that it is neither “certain or even probable.”9 The ultimate test is that there be a “significant and plausible” risk of adverse effect on the lawyer’s independent professional judgment.10 As shown below, that is clearly the case with regard to mem-

3. 1 Id. (footnote omitted).
4. 1 Id. n.3.2 (citing MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 174-79 (1990)).
5. The authors also note:
   Interestingly, although a separation between risk of harm and actual harm had not previously been made explicit in the literature and in the cases, virtually every authority had implicitly followed such an approach for years. Consequently, the cases—even the earlier cases—may all be analyzed according to this new scheme.
1 Id. at 224.
7. Id. cmt. c(iii).
8. Id.
9. Id.
10. Id. The phrase “independent professional judgment” comes from Canon 5 of the Model Code of Professional Responsibility. Although it does not appear in section 201 or in the Model Rules of Professional Conduct, it is nevertheless implicit in them. For example, in discussing the concept of “independent professional judgment” in Canon 5, Professors Hazard and Hodes state:
   Although the Model Rules use the phrases “adversely affect the relationship” and “materially limit the representation” instead [of referring expressly to impairment of the lawyer’s independent professional judgment], no change in the basic method of analysis was intended. The question is still whether the lawyer will, to an unacceptable degree, be diverted from the main task of loyally serving the client.
1 HAZARD & HODES, supra note 1. See also The Am. Law Inst., Council Rule 9.04, reprinted in 74 A.L.I. PROC. 535 (1997), which is headed “Members’ Obligation to Exercise Independent
bers’ participation in the ALI Restatements.

Of course, neither the ALI nor those who rely on its work, are “clients” of the lawyer-members of the ALI. Nevertheless, the Institute, as well as judges and others who look to the Restatements for objective judgment, have, in the language of Professors Hazard and Hodes, a “legitimate interest” in the integrity of ALI members’ independent professional judgment. Recognizing this, the ALI has traditionally been insistent that members should and do “leave their clients at the door” of ALI meetings.

At the ALI Annual Meeting in 1991, however, Roswell Perkins, then President of the ALI, found it necessary to warn members that “the precept of leaving one’s client at the door must be honored if we are to preserve our integrity as an organization.” This precept was in jeopardy, Perkins said, because of a development that he described as “particularly distasteful.” That is, members were mobilizing “outside influences” with possible “economic implications” to influence ALI members. What this means is that some members were getting lucrative clients to threaten to give or withhold their legal business depending on how members voted on particular issues. With regard to a particularly important provision of the ALI’s Principles of Corporate Governance, for example, “[y]ou had corporations calling their outside counsel making it very clear how the client wanted the vote to come out.” In accord with the desires of the corporate-client lobbyists, the members voted to reverse the judgment of the Reporters as expressed in their original draft.

Perkins later wrote to members in April 1992, to express a related concern—that an “imbalance of representation” was affecting ALI votes on Restatement provisions. The ALI has about 3,600 members, but only a small fraction of that number goes to the meetings at which Restatements are debated and voted on. At one meeting dealing with the

11. See 1 Hazard & Hodes, supra note 1.
13. Id.
14. Id.
16. See id. The Chief Reporter was Professor Melvin Eisenberg of the University of California School of Law at Berkeley. Associate Reporters were Columbia Law School Professors John Coffee, Jr. and Harvey Goldschmid, Stanford Law School Professor Ronald Gilson, and Marshall Small, Esq.
17. Id.
Restatement (Third) of The Law Governing Lawyers, for example, attendance varied from a high of 390 to a low of 150, and an important vote was decided by a vote of 110-80. Therefore, the issue was determined by approximately five percent of the ALI membership, illustrating how client campaigns to "get-out-the-vote" of lawyers who have been induced to vote a particular way can control the ALI's position on Restatement provisions.

Similar concerns have been expressed by Professor Charles Alan Wright, who succeeded Perkins as ALI President. In 1994, Professor Wright raised questions about "whether at all times all of us were faithful to the Institute's time-honored policy of 'check your clients at the door.'" Three years later, he reiterated his concerns, noting that one lawyer who was working to influence Restatement votes on behalf of insurance companies had boasted about the "many state-of-the-art lobbying tools" that he was using to successfully influence ALI votes. These tools included inviting members to lobbying "seminars" on Restatement issues where, the companies pointedly promised, ALI members would have "excellent opportunit[ies] to meet potential corporate clients." Wright found this kind of tactic to be "at war with everything I have always hoped and believed about why people become members of The American Law Institute.

Wright's conclusion was that the Institute could no longer rely simply on "the good sense and high ethics" of its members, and that the time had come for a written policy on members' conflicts of interest. Accordingly, at a meeting in December of 1996, the ALI Council adopted a new Rule:

9.04 Members' Obligation to Exercise Independent Judgment

To maintain the Institute's reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. Members should speak and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest. It is improper under Institute principles

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20. See Jonathan Groner, Insurance Lobby Aims at Normally Staid ALI, LEGAL TIMES, June 10, 1996, at 1; Jost, supra note 15, at 1; Prince, supra note 19, at 1.
23. Id.
24. Id.
25. Id. at 1.
for a member to represent a client in Institute proceedings. If, in the consideration of Institute work, a member’s statements can be properly assessed only if the client interests of the member or the member’s firm are known, the member should make appropriate disclosure, but need not identify clients.\footnote{Id. at 2-3.}

As Wright has acknowledged, however, this new rule “provides no enforcement mechanism.”\footnote{Id. at 3.} It is highly doubtful, therefore, that the rule (which simply reiterates what has long been established policy) will have a perceptible effect in bolstering the “good sense and high ethics” of members, which Wright had determined to be inadequate to ensure the independent judgment of ALI members in the deliberations of the Institute. Certainly, a non-enforceable rule is not going to change the attitude of members like the insurance lawyer quoted by Wright, who said: “‘The Restatement has tremendous influence and their product is not neutral . . . . It’s naive for the membership to try to maintain an insular position.’”\footnote{Id. at 2.}

The recent Opinion 97-3 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York appears to address this problem.\footnote{The Committee on Prof’l and Judicial Ethics, Association of the Bar of the City of N.Y., Formal Opinion 97-3: Lawyer’s Right to Engage in Activity or Express a Personal Viewpoint Which Is Not in Accordance with a Client’s Interest, 52 Rec. 874 (1997).} The opinion is headed: “Lawyer’s Right to Engage in Activity or Express a Personal Viewpoint Which Is Not in Accordance with a Client’s Interests.” However, Opinion 97-3 ignores the point that has concerned ALI Presidents Perkins and Wright—that is, the interest of the ALI in receiving the independent judgment of its members when a client wants the lawyer to take a particular position on an issue before the Institute. Indeed, the opinion actually underscores the seriousness of that problem.

The Digest provided with the opinion states that “[a] lawyer may espouse a personal viewpoint adverse to the interest of a former or present client in a pending matter as long as client confidences and zealous representation of the client are not compromised.”\footnote{Id. at 2.} In the body of the opinion, moreover, the committee expressly cautions that a lawyer must take into account “whether publicly and openly espousing his or her personal opinion would be directly deleterious to a representation of a

\begin{itemize}
\item 26. *Id.* at 2-3.
\item 27. *Id.* at 3.
\item 28. *Id.* at 2.
\item 30. *Id.*
\end{itemize}
particular client."[31] What that means is that a lawyer may be forbidden, ethically, to "leave her client at the door" of an ALI meeting.

In addition, the opinion ignores the lawyer's own financial interest in demonstrating her loyalty to present clients or to those whom the lawyer might want to attract as clients.[32] The latter kind of conflict of interest is, of course, the very situation presented in the lobbyist's promise of "excellent opportunit[ies] to meet potential corporate clients"[33] at seminars on ALI issues, which Professor Wright condemned as being "at war with everything I have always hoped and believed about why people become members of the American Law Institute."[34]

Theoretically, of course, a lawyer can avoid a conflict of interest by not attending an ALI meeting or by not discussing or voting on a particular issue. The financial incentives held out to lawyer-members by clients and potential clients, however, create a "significant and plausible risk"—a risk repeatedly acknowledged by the ALI itself—that members will not be giving the ALI the benefit of their independent professional judgment.

The Restatement (Third) of The Law Governing Lawyers presents particularly acute conflicts of interest relating to lawyers' own financial interests. When we adopt rules of lawyers' ethics, we can profoundly affect both clients' and lawyers' rights and interests.[35] Three issues are illustrative: whether a lawyer should be permitted to advance funds to needy clients to permit them to avoid premature and disadvantageous settlements; whether a client suing a lawyer for malpractice should be able to recover punitive damages that have been lost by the lawyer's negligence; and whether lawyers should be permitted, over client objections, to use screening to avoid conflicts of interest that threaten clients' confidences.

Rejection of a rule permitting lawyers to advance necessary living expenses to needy clients is an instance in which lawyer self-interest

31. Id. at 877. Opinion 97-3 also states:
[It is difficult to see how a lawyer could speak publicly on one side of an issue knowing that he or she must personally argue the opposing side of that issue in front of a tribunal in a pending case. The possibility that a lawyer's publicly proclaimed personal opinion would become known to the tribunal, undermining his or her credibility and thereby jeopardizing the client representation, does warrant some curtailment on public expression of a personal viewpoint to preserve the integrity of a lawyer's advocacy.

Id.

32. A case recognizing a conflict of interest because the lawyer's judgment could be affected by the desire for future business is In re Greene, 429 N.E.2d 390, 396 (N.Y. 1981).

33. Wright, supra note 22, at 2.

34. Id.

35. See FREEDMAN, supra note 4, at 5-10, 43-58.
appears to have prevailed over clients’ rights—here, the rights of the most vulnerable of clients. Such a rule is necessary to prevent tactical use of delay to compel impecunious plaintiffs to accept unfairly low settlements of legitimate claims. First, some relevant background.

The ability to delay litigation for tactical advantage is widely recognized among litigators as an essential lawyering skill. Bruce Bromley, a highly respected litigator, once boasted at a conference of lawyers and judges: “I was born, I think, to be a protractor . . . . I quickly realized in my early days at the bar that I could take the simplest antitrust case . . . . and protract it for the defense almost to infinity.” As frustrating as this tactic may be in antitrust cases, it can be a far more serious concern for an impecunious plaintiff in, say, a personal injury case. The plaintiff may well have pressing costs of medical care in addition to basic rent and food expenses. Thus, the pressure on the plaintiff to accept an early settlement, however inadequate and unfair it is, will be intense. Knowing this, defendants commonly make minimal offers of settlement while causing extensive delays. One lawyer candidly admitted to the trial judge, for example, “the generally known policy of his insurance carrier to offer payment in settlements of personal injury suits of sums less than what may reasonably be anticipated as the probable recovery upon trial.” The trial judge in that case found this “purely business attitude to be inconsistent with public policy.” Noting the plaintiff’s advanced age and the fact that her serious injuries were not seriously challenged by the insurer, the judge ordered the case advanced on the calendar. This order was reversed on appeal, however, adding further delay to the plaintiff’s effort to achieve a fair recovery.

36. Bromley has been honored by having a chair named for him at the Harvard Law School.
39. Id.
40. See id. at 1007.
41. See Abramson, 230 N.Y.S.2d at 247. I am not suggesting that either Bromley or the insurance defense lawyer acted unethically. Model Rule 3.2 requires a lawyer to “make reasonable efforts to expedite litigation” but only insofar as that is “consistent with the interests of the client.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1998). The comment explains that the lawyer’s action should have “some substantial purpose other than delay.” Id. Similarly, DR 7-102(A)(1) forbids delaying tactics that “serve merely to harass or maliciously injure another.” See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1983).

Of course, the lawyer is not likely to succeed with delaying tactics if there is no arguable purpose for the lawyer’s action other than achieving delay. In the insurance case discussed in the text, for example, the lawyer argued that a case could not properly be advanced on the calendar without a finding of bad faith delay based on factual findings on the record, and the appellate court agreed that “the record is devoid of such facts.” Abramson, 230 N.Y.S.2d at 248.
Assume, then, that a lawyer for an impecunious plaintiff wants to enable his client to withstand the defendant's delaying tactics and to recover the fair value of her claim at trial (or, as is common, in an offer of settlement made by the defense immediately before trial). Accordingly, the plaintiff’s lawyer gives or guarantees a loan to his client to provide funds that are essential for her medical care, rent, and food. Has he acted ethically? The answer is yes in about ten jurisdictions,\(^2\) which is more than sufficient for Restatement purposes.\(^3\) Moreover, as an ALI member pointed out, those jurisdictions that have adopted a rule allowing a lawyer to advance or guarantee loans to impecunious clients are “a majority of the states that have specifically addressed the question [of] whether this sort of provision should be included.”\(^4\)

The ethical code provisions allowing loans or guarantees to impecunious clients derive from the 1980 American Lawyer’s Code of Conduct Rule 5.6(c) (for which I was the Reporter). The ALCC would permit the lawyer to “give money to a client . . . to withstand delays in litigation that would otherwise induce the client to settle a case because of financial hardship, rather than on the merits of the client’s claim.”\(^5\) Similarly, the ALI Reporter proposed section 48(2)(b), which would have permitted the lawyer to make or guarantee a loan to a client “to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle . . . a case because of financial hardship rather than on the merits.”\(^6\)

This provision was originally approved by the ALI membership at

\(^{1}\) As Bromley’s article points out, a lawyer can properly delay litigation for tactical reasons. When that happens, it is the court’s responsibility to expedite the proceedings, as good judges do. See Bromley, supra note 37, at 420-26.


\(^3\) Law students and even some judges will be surprised to learn that the law that purports to have been “restated” may be wholly novel. For example, with regard to a screening provision, Professor Roger Cramton protested that the Reporter’s proposal was “totally novel” and that he “cite[s] no cases” in support of the proposal in the reporter’s notes. Discussion of Restatement of the Law Third, The Law Governing Lawyers, 73 A.L.I. Proc. 248 (1996). Professor Leubsdorf replied, “[Y]ou are quite correct, there is no case law dealing with this particular issue . . . .” Id. The provision was nevertheless adopted.

\(^4\) Id. at 273 (statement of Professor Kenneth F. Kirwin).

\(^5\) American Lawyer’s Code of Conduct Rule 5.6(c) (Public Discussion Draft 1980); see also, e.g., N.D. Rules of Professional Conduct Rule 1.8(e)(3) (1995) (permitting a lawyer to guarantee a loan to the client “to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits”).

its Annual Meeting in 1991 by a vote of 78 to 74. However, a majority of the ALI Council (which consists of only 62 members) overruled the membership, causing the issue to go back to the Annual Meeting in 1996. At that meeting, the provision allowing loans or guarantees to impecunious clients was defeated by a vote that was close enough to require a show of hands.

In the debates, members expressed the fear that lawyers who were unwilling to offer loans would lose clients to lawyers who might “buy clients” with promises of loans. This kind of argument is reminiscent of the minimum fee schedules which, until struck down by the Supreme Court, prevailed throughout the country and were enforced by disciplinary action. That is, lawyers were disciplined for “buying clients” by undercutting the bar’s fixed fees.

Another member, who said that he does exclusively plaintiffs’ work, called for a “reality check.” The reference, unfortunately, was not to the impact of litigation delays on impoverished clients who, he acknowledged, are “unable to retain their rights by holding out.” Rather, he was talking about his desire to “continue driving a nice car.” His argument is worth quoting at length, including the references to laughter by other members, which displaced concern for the plight of hapless clients:

[My clients] sometimes drive up in some pretty nice cars and say, “Can you loan me the money?” (laughter) and I say, “I can’t do it.” I can’t do it if I intend to continue driving a nice car myself .... (Laughter)

But I know what will happen if this becomes the law. The client will come, and they will say, “Mr. Wagner, can you loan me the money?” And I will say, “Okay, I’ll loan you the money,” and I can afford to do that. But if I could not afford to do it, and I said, “I’m

49. See id. at 277-78.
51. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), where a unanimous Supreme Court, in an opinion by Chief Justice Burger, held that enforcement of minimum fees by disciplinary action violated the Sherman Antitrust Act.
53. Id.
54. Id.
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sorry, I can’t afford to do it” . . . the client would say, “Well, Mr. Habush would loan me the money.” (Laughter) Bob can afford it, and the client would be gone.

Now that is the reality, unfortunately, of the competition in the plaintiffs’ practice today, and while it is true there are some who are unable to retain their rights by holding out, that is a problem with the system that lets delay govern.

Having dismissed the unfair impact of delay on clients’ rights as simply a “problem with the system” (and, impliedly, a matter that the ALI can ignore), the speaker concluded by deploring the “much more serious problems” of adding a “competitive factor” to his own practice. He therefore “oppose[d] the motion strongly.”

Another member was similarly candid about who and what was being protected by the “ethical” rule forbidding loans to impecunious clients. The rule, she said, “protects lawyers against requests from clients for financial help” and “protects lawyers from competition by other lawyers.” She added that the rule also prevents lawyers from getting a financial stake in litigation. The Reporter observed, however, that the ban on acquiring an interest in litigation is “almost meaningless” because of the universal allowance of contingent fees. Moreover, lawyers are universally allowed to advance clients the costs of litigation, including medical and other experts, which can far exceed minimal living expenses for a poor client.

Ultimately, the proposal lost on a close vote. As a result, the ALI forbids lawyers who are willing to do so to give loans or guarantees to help poor clients to avoid the impact of delay as a litigation tactic. Participating in that close vote were not only plaintiffs’ lawyers expressly concerned with their own finances, but insurance defense lawyers whose clients would want to maintain the advantages of forcing inadequate settlements by delay. That several members were admittedly moved by their own self-interest rather than justice to impecunious clients is, therefore, another illustration of conflicts of interest in the formulation of Restatement provisions. Again, there is a “significant and plausible” risk that the outcome of the vote of ALI members was ad-

55. Id.
56. Id.
57. Id.
59. See id.
60. Id. (statement of Professor John Leubsdorf).
versely affected by members' personal financial interests and the interests of their clients.

Another issue that appears to have been determined by lawyers' self-interest rather than clients' rights is whether a client suing a lawyer for malpractice should be able to recover punitive damages that have been lost by the lawyer's negligence. Take, for example, the following case. Client consults Lawyer about recovering her hospital and medical expenses, which total $25,000. Client had thought that she had medical insurance. She has discovered, however, that the insurance agent who sold her the policy had been misappropriating the premium payments and had failed to tell her that the policy had lapsed because the insurance company had not been receiving the premiums. Lawyer explains that compensatory damages alone would hardly be worth suing for. The litigation could be protracted and expensive, Lawyer would receive only about $8,000 (which would be insufficient for the work involved), and Client might end up with half or less of her $25,000 out-of-pocket expenses. Lawyer explains further, however, that punitive damages are available in a case like this and, based on prior cases, that $100,000 in punitive damages would not be unlikely.61

Client retains Lawyer, who files a complaint for the $125,000 in compensatory and punitive damages. The complaint is dismissed, however, because Lawyer fails to appear at pre-trial motion hearings and conferences and fails to file responses to the defendant's motions. Also, Lawyer does not inform Client that her case has been dismissed. Belatedly learning what has happened, Client unsuccessfully attempts to vacate the dismissal, and then sues Lawyer for malpractice. Question: Is Client entitled to the $100,000 in punitive damages lost as a result of the lawyer's neglect?

The answer is clear. Citing cases from six jurisdictions, all reaching the same conclusion, the Mallen and Smith treatise on legal malpractice62 says flatly that "[a]ttorneys can be liable for exemplary or punitive damages lost or imposed because of their negligence."63 Mallen


63. 2 MALLEN & SMITH, supra note 62, § 19.7, at 608.
and Smith add: "If the client should have recovered exemplary damages in the underlying action but for the attorney's wrongful conduct, then such a loss should be recoverable in the malpractice action as direct damages." This result also appears to be required by section 75 of the Restatement (Third) of The Law Governing Lawyers: "A lawyer is liable... for injury of which the lawyer's breach of a duty of care was a legal cause, as determined under generally applicable principles of causation and damages." Moreover, the client should recover the lost punitive damages regardless of how the measure of damages standard in legal malpractice is phrased, either "the value of the claim lost" or "the loss actually sustained" by the client.

Comment h to the Restatement is therefore a matter of surprise—surprise, that is, until one realizes that it is a rule drafted by lawyers protecting their own interests against clients whom they have injured. The comment says:

A few decisions allow a malpractice plaintiff to recover from a lawyer punitive damages that would have been recovered from the defendant in an underlying action but for the lawyer's negligence. However, such recovery is not required by the punitive and deterrent purposes of punitive damages. Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury's reaction.

The reporter's note cites six authorities, including the Mallen and Smith treatise, but omits four of the cases cited by Mallen and Smith in support of allowing recovery of punitive damages.

In addition to its obvious lawyer-protective bias, the comment is remarkable for its disingenuousness. First, it says that recovery of punitive damages from the underlying action is supported by only a "few decisions." Putting together the Reporter's citations and those in Mallen and Smith, however, the cases appear to be nine to one in favor of the client's recovery of punitive damages, which is not fairly characterized

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64. Id. at 608-09.
65. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75, at 60 (Tentative Draft No. 8, 1997).
67. Id. at 616 (Simons, J., dissenting).
68. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75 cmt. h, at 65.
as a "few." Second, the argument that such recovery is "not required by the punitive and deterrent purposes of punitive damages" is beside the point. The issue is not the purpose of punitive damages, but the purpose of compensatory damages, which is to give the client what she lost because of the lawyer's negligence. Here, that includes the client's loss of punitive damages. Essentially, as a result of the lawyer's negligence, the punitive damages recoverable from the original tortfeasor become compensatory damages recoverable from the lawyer. Finally, it is pointless to contend that a punitive damage award "calls for a speculative reconstruction of a hypothetical jury's reaction." The same is true in any lawyer malpractice case involving a lost claim in which it is necessary to reconstruct what a hypothetical jury would have found with regard to liability and compensatory damages in the underlying action.

There is good reason to conclude, therefore, that the comment to section 75 represents neither the majority nor the "better" view but, rather, that it is a self-serving citation for lawyers to use against their clients in future malpractice litigation.

70. The causation standard in malpractice is considerably looser than the traditional but-for standard. In Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994), the Second Circuit held that it is not necessary to find a strict but-for relationship between the breach of duty and the harm suffered by the client. The Court said, "We need not and cannot determine whether . . . [the client] would have successfully completed the transaction without [the law firm's] conduct against her interests." Id. at 544. The Second Circuit explained in part that "breaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages." Id. at 543.

In "loosen[ing] [the] normally stringent requirements of causation and damages," id., in cases involving fiduciaries, the Second Circuit was echoing the analysis of Chief Justice Cardozo in Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). In that case, Salmon, the fiduciary, had withheld knowledge of a business opportunity from the trust beneficiary, Meinhard. See id. at 546. Salmon's contention was that causation was uncertain—that it was speculative whether Meinhard would have realized the business opportunity even if he had been informed of it. Reciting a list of "might-have-beens," Cardozo responded: "[I]t is [n]o answer . . . to say that the chance would have been of little value even if seasonably offered. Such a calculus of probabilities is beyond the science of the chancery." Id. at 547. Salmon, as a fiduciary, could not rely on the uncertainty of causation, because that uncertainty had been brought about by his own wrongdoing.

In Lewis v. Dobyns, No. CA96-08-012, 1997 WL 133525 (Ohio Ct. App. Mar. 24, 1997) (unpublished opinion), the Bank had filed suit against Lewis to foreclose on mortgages because of delinquent payments. Lewis's lawyer failed to inform the bank that Lewis had been awarded a valuable contract. See id. at *1. An expert testified that if the bank had known of the contract, it "very well may have proceeded differently" with regard to the foreclosure, but that "I would have no way of knowing whether they would have done any differently." Id. at *2. The trial court granted summary judgment in favor of the lawyer due to Lewis's failure to establish any genuine issue of fact with regard to proximate cause. See id. at *3. The appeals court reversed: "[T]he expert's testimony . . . is 'sufficient evidence to raise a question of fact for the jury as to the existence and extent of [the client's] claim.'" Id. at *6 (citation omitted).
Screening in cases of conflicts of interest is another issue where lawyers' self-interest appears to have affected the ALI's vote on an important issue. The issue arises, for example, when a lawyer who has been representing the defendant in a case, becomes a partner in the firm representing the plaintiff. Understandably, the defendant will be anxious that its confidential information and work product will be used against it by its adversary. Screening would allow the plaintiff's firm, even over the objections of the defendant, to continue in the case—something that was universally condemned as unethical until a short time ago.

The traditional conflict of interest rules on switching sides were designed to protect former clients' confidences, even at the expense of affecting lawyers' employment mobility. The evasion of these rules through screening jeopardizes client confidences in order to increase lawyers' job opportunities, and therefore mocks the claim that the law is a profession and not a business.

Screening was not a significant issue until the mid-1970s, and then only with regard to lawyers moving from government service to private law firms. Until that time, when a lawyer left the government to join a private firm, two things followed. First, the lawyer was disqualified from opposing the government in any matter in which the lawyer had been substantially involved on behalf of the government. Second, the lawyer's new firm was similarly disqualified through imputed disqualification. As the result of an intensive effort by large law firms in Washington, D.C. and New York, for whom the government/private-practice revolving door was a way of professional life, imputed disqualification was effectively eliminated by allowing screening of the former government lawyer from involvement in the case.

During the following two decades, there has been a significant increase in movement of lawyers between law firms. Again, the large law firms find it in their interest to use screening to avoid disqualification because of conflicts of interest caused by lateral transfers. The Model Code does not allow for screening in any cases, however, and the

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71. Screening consists of assurances that the migrating lawyer will not have access to files of the case, will not communicate with lawyers who are handling the case, and will not share directly in fees from the case. It is sometimes referred to as erecting a "Chinese Wall," a term that was coined by its supporters to suggest impregnability. However, that expression is sometimes misperceived as a slur and will not be used here.

72. See generally FREEDMAN, supra note 4, at 205-11.

73. See id. at 206-07.

74. The fallacies in the purported justification for this practice are discussed id. at 208-10.

75. The Model Code of Professional Responsibility was adopted by the ABA in 1969 and governs (with variations) in a minority of jurisdictions (including New York).
Model Rules provide for it only in cases involving former government lawyers, but not when lawyers move between private firms. If lawyers can create authority in the Restatement of The Law Governing Lawyers that permits screening in the private context, they will have significant authority to persuade judges to deny disqualification motions in such cases.

In order to understand the problems raised by screening, consider a typical case. Attorney is with firm A & B and is heavily involved in representing Plaintiff. In the middle of the litigation, Attorney switches to Firm Y & Z, which is representing Defendant in the same case. As noted earlier, the traditional rule of ethics has been that both Attorney and Firm Y & Z are disqualified from representing Defendant in that case. The rule relies on presumptions that are based upon common sense and the practicalities of proof.

The first presumption is that Attorney learned confidences from Plaintiff while serving as its lawyer. This presumption is justified in part by Attorney’s ethical obligation to learn everything that might be relevant to Plaintiff’s case. Moreover, the presumption that Attorney learned confidences from Plaintiff avoids making Plaintiff reveal its confidences in order to protect them.

The second presumption is that Attorney, having switched sides, might use Plaintiff’s confidences on behalf of Defendant. This presumption is based in part on the fact that Attorney, in representing Defendant, would be ethically required to be loyal to Defendant, to act zealously on its behalf, and to communicate to Defendant all information material to the representation. If only unconsciously, Attorney might violates Plaintiff’s confidences in representing Defendant. Thus, the traditional rule of disqualification recognizes that Plaintiff could reasonably believe that its confidences were being betrayed, and the rule respects this legitimate client concern.

The imputed disqualification of Firm Y & Z also relies on presumptions that are based on common sense and the practicalities of proof. Even if Attorney is not personally representing Defendant at his new firm, there is a reasonable possibility that Attorney, having

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76. The Model Rules of Professional Conduct were adopted by the ABA in 1983 and govern (with variations) in a large majority of jurisdictions.

77. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1998). Indeed, screening of the former government lawyer was originally justified on grounds that had no application in the private context. It was contended that the public interest required allowing lawyers to switch between government service and private practice. Otherwise, it was erroneously contended the quality of government legal service would suffer. See FREEDMAN, supra note 4, at 206-07 (arguing that concerns regarding the government’s ability to hire competent lawyers was unfounded).
switched allegiances, might disclose Plaintiff’s confidences to his new partners. As observed in the Harvard Law Review, Attorney’s new colleagues have a “significant incentive” to elicit the confidences, and Attorney has a similar incentive to prove his allegiance to his new firm by cooperating. 78 Thus, there is a “distinctive danger” that Attorney will reveal Plaintiff’s confidences to Defendant’s lawyers. 79 Moreover, such violations would be virtually impossible to police. A conversation in someone’s office, or during a private dinner, or in a phone call to Attorney’s home, would be hard to expose and to prove.

In short, the traditional presumption underlying disqualification in such cases is based upon a high level of temptation, a low level of visibility, and a near impossible burden if Plaintiff were required to prove a specific breach of its confidences.

Of course, Plaintiff might consent to Attorney’s representation of Defendant, or might consent to Y & Z’s continued representation of Defendant with the understanding that Attorney would not be involved in that representation. Plaintiff might be willing to consent, for example, in order to avoid delaying the case. And if Plaintiff does consent, there is no need for disqualification. But what if Plaintiff, understandably, refuses to consent? As noted earlier, the answer under both the Model Rules and the Model Code is that the firm is disqualified.

Allowing Y & Z to erect a screen would defeat this result. That is, the lawyers at Y & Z would write to Plaintiff saying that Attorney will not work on the case or talk about it with the lawyers who represent Defendant. Nothing else would change. The temptations to violate Plaintiff’s confidences would be just as high, violations would still be virtually impossible to police, and Plaintiff would still be under an impractical burden to prove a violation.

Supporters of screening contend, of course, that objections to screening reflect skepticism, even cynicism, about lawyers’ ethics. That may be. There is, sad to say, some skepticism in that regard among members of the public. Indeed, a major purpose of the conflict of interest rules is to allay that skepticism, 80 and an unpoliceable assurance of screening by a law firm is not likely to achieve that goal. As noted in a recent federal case: “In an age of sagging public confidence in our legal system, maintaining confidence in that system and in the legal profession is of the utmost importance. In this regard, courts should be reluc-
tant to sacrifice the interests of clients and former clients for the perceived business interests of lawyers.\textsuperscript{81}

Another contention by supporters of screening is that violations of screening have not in fact occurred, for example, in cases of former government lawyers. But, again, a major part of the problem is that we can never know. We cannot really expect lawyers to admit that they were subject to screening but nevertheless violated client confidences. A current case, however, with an issue analogous to screening, provides compelling evidence that assurances of confidentiality—even at a large, prestigious law firm—are less than reliable.\textsuperscript{82}

Procter & Gamble sued Bankers Trust Company, alleging in an amended complaint that Bankers Trust is a racketeer-controlled organization. The court issued a protective order sealing the amended complaint. Bankers Trust was represented by Sullivan & Cromwell. The law firm is more than a century old and widely respected. Sullivan & Cromwell has strict rules and established procedures about safeguarding confidential documents. But when a Business Week reporter, Linda Himelstein, picked up a telephone and asked a Sullivan & Cromwell partner for a copy of the sealed complaint, he sent it to her by messenger the same day.

The partner is Steven Holley. He had not worked on the Bankers Trust case, and he did not know that the amended complaint was under seal. In response to Himelstein's request, Holley simply asked an associate for a copy, and the associate gave it to him, without asking why Holley wanted it and without telling him about the court's order sealing it. The amended complaint was not kept in a secure place, nor was the copy stamped on its face that it was under seal. Nor did Holley follow Sullivan & Cromwell policy by checking first with the partner in charge of the case before giving the complaint to Himelstein.

It gets even worse. Himelstein testified that she had learned the following day that the complaint had been sealed and that she immediately called Holley to tell him. Under oath, Holley several times denied the call. In fact, he testified, at the time Himelstein said she had called him, he had not been at his office, but at home. Then, on cross-examination, Holley was confronted with telephone records showing a telephone call from Himelstein to his home that day.

The way Sullivan & Cromwell dealt with a highly sensitive docu-

\textsuperscript{82} The following account is based on John E. Morris, \textit{How Could Anyone Lose This Case?}, \textit{AM. LAW.}, Nov. 1995, at 5.
ment has to give pause to anyone who considers screening to be an ethical way to avoid conflicts of interest. But the analogy isn’t perfect. In fact, the case of Sullivan & Cromwell and Bankers Trust is even more compelling than the usual screening case in showing the fallibility of law firms in protecting sensitive documents. First, Sullivan & Cromwell had not simply given assurances to an adversary; it had been ordered by a court to maintain confidentiality; thus, the law firm was subject to contempt of court and to sanctions. Second, it was in the interest of Sullivan & Cromwell’s valued client, Bankers Trust, that Sullivan & Cromwell obey the order, not violate it. Third, giving the sealed complaint to a reporter was guaranteed to alert the world that there had been a leak somewhere.

Moreover, the disputed testimony about the telephone call to Holley’s home underscores the difficulties of proving a breach of confidentiality. In the Sullivan & Cromwell case, Himelstein had no incentive to go along with Holley’s false denial of their telephone conversation. In the typical screening case, by contrast, both parties to any conversation about a former client’s confidences will have an incentive to cover it up.

Despite this background of ethics codes, tradition, policy, common sense, and practical experience, the ALI has adopted a screening exception to allow lawyers to avoid disqualification because of conflicts of interest relating to a former client.\footnote{The reporter’s note asserts that “developing case law” supports the screening exception, but that assertion is contradicted by the cases discussed in the two long paragraphs that follow it. \textsc{Restatement (Third) of The Law Governing Lawyers} § 204 reporter’s note, cmt. d, at 621-22 (Proposed Final Draft No. 1, 1996).} Note that the exception does not even arise unless the present representation is “materially adverse” to the former client, and “there is a substantial risk that representation of the present client will involve the use of information acquired in . . . representing the former client.”\footnote{\textit{Id.} § 213(2).} In the face of the substantial risk that confidential information will be misused against the former client, and notwithstanding the objections of the former client, section 204(2) allows the law firm to avoid imputed disqualification if (a) the confidential information is “unlikely to be significant in the subsequent matter,” (b) the personally-prohibited lawyer is screened, and (c) notice of the screening is given to the former client.\footnote{\textit{Id.} § 204(2)(a)-(c).}

As noted by Lawrence Fox, the former chair of the Litigation Section of the American Bar Association, compelling the former client to litigate the issue of whether its confidential information is “likely to be
significant" in the current matter creates "an impossible situation for the client." This is because the client will be confronted with what Norman Redlich has called "the inevitable affidavits" from the law firm saying, "we know nothing, etc., etc." The former client will then be required to prove the significance of the information that it disclosed to the lawyers—that is, the client will be compelled to reveal its confidences, and the significance of its confidences, in order to protect its confidences.

Making the further point that there is a significant and plausible risk that screens will be circumvented, Fox has said (without contradiction) that every lawyer at the ALI meeting knows a law firm "to which one of his or her lawyers moved where you would be worried, because screening—the locking of file cabinets and the labeling of files and admonition to everybody—will not stop the dissemination of information ..."

Apart from expressing a concern with some "scoundrels" who will purposefully circumvent screening, Fox has stressed that "inadvertent disclosures" are also "too likely" to occur. "[W]e know at large law firms we end up with multiple clients and multiple screens," he said, "and who knows who’s being screened from what and who’s supposed to leave the room when we have a firm meeting to discuss client matters." Fox therefore urged the ALI members to "refocus on what is good for clients." Nevertheless, in another important vote that was

90. Id.
91. Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers, 73 A.L.I. Proc. 374 (1996). Walter Loeber Landau contends that allowing lawyers to avoid disqualification through screening—over client objections—is actually in the interests of clients. See, e.g., Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers, 73 A.L.I. Proc. 379 (1996); Discussion of Restatement of the Law Third, The Law Governing Lawyers, 68 A.L.I. Proc. 424 (1991). The argument is that disqualification deprives the current client of its chosen counsel. One answer is that no client has a right to a lawyer who has a conflict of interest that jeopardizes another client’s confidences. More to the point, if clients at large were consulted about the rule, there is no doubt that they would vote against screening.

Ironically, Landau, who was one of the most vocal supporters of screening in ALI debates, is a partner in Sullivan & Cromwell. Landau has not explained how Sullivan & Cromwell will do a more effective job of screening (when it will have powerful incentives to violate confidentiality) than it did in protecting sealed information on behalf of Bankers Trust (where it had every incen-
close enough to require a show of hands, the screening exception was retained.\textsuperscript{92}

My point, of course, is not that all or even most members of the ALI were moved by "the perceived business interest of lawyers"\textsuperscript{93} in voting on the screening exception. Indeed, Lawrence Fox and Norman Redlich are examples of lawyers who have put their clients' interests ahead of their own in ALI debates. Nevertheless, as ALI Associate Reporter Charles Wolfram has observed, "An exception addressed only to the special needs and fairness claims of lawyers naturally arouses strong suspicions of special pleading."\textsuperscript{94} On a close vote, moreover, it can make all the difference if only a few lawyers are less focused on what is good for clients, and more focused on their own career opportunities and on the financial welfare of their firms.

Conflicts of interest on the part of members of the ALI have called into question the integrity of ALI Restatements of the Law. That is, there is a significant and plausible risk that the independent professional judgment of ALI members has been materially and adversely affected by powerful pressures, including substantial financial inducements, to vote on Restatement issues in ways consistent with their clients' partisan interests. In addition, there is a significant and plausible risk that the independent professional judgment of ALI members regarding important Restatement provisions has been materially and adversely affected by their own financial interests, such as anticompetitive concerns and potential malpractice liability. These conflicts of interest have compromised the integrity of the ALI's Restatements of the Law to the point that no judge, scholar, or student can rely on a Restatement rule or comment as representing the objective judgment of members, unaffected by the partisanship of advocates who are creating precedents to protect their clients' and their own interests in future litigation.


\textsuperscript{94.} CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986).