The Restatement of the Law Governing Lawyers: A View from the Trenches

Lawrence J. Latto
THE RESTATEMENT OF THE LAW GOVERNING LAWYERS: A VIEW FROM THE TRENCHES

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Other articles in this Symposium will provide insights into how a Restatement is formulated—and into the problems that arise and must be overcome in that process—that are broader and more informed than mine. The Director of The American Law Institute, members of the Institute’s Council, and the Reporters for a proposed Restatement all have a view of the process that is clearer and includes more relevant information than that available to an untitled member of the Institute, especially one subject to the constraints of an active practice.

I propose to describe, in certain respects in considerable detail, how the members and the constituent organizations of the Institute cooperate and interact in the course of formulating a specific Restatement, namely the Restatement of The Law Governing Lawyers. I begin with a sketchy account of the Institute and how it is supposed to function in formulating a Restatement. Then, I turn to the proposed Restatement of The Law Governing Lawyers, a work still in progress, and one likely to break the record for having taken more years to complete than any other Restatement. I shall treat in greatest detail one of its important chapters, one that has been difficult to draft and obtain final Institute approval, and one that seems to me to be structured in a way that in some part confuses rather than helps to clarify an important part of the law.

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* Shea & Gardner, Washington, D.C. My partner, Warner W. Gardner, was kind enough to read an earlier draft. The few felicitous phrases are all his. The substance and errors are all mine.
I. THE AMERICAN LAW INSTITUTE AND THE CREATION OF A RESTATEMENT

A. The Institute

The Institute, created in 1923, is one of the most distinguished legal organizations in the United States, perhaps the most distinguished. The members of the first Council, as recently noted by its current President Charles Alan Wright in the quarterly publication, the *ALI Reporter*, included many of the greatest American lawyers: Root, Wickersham, Cardozo, Lewis, Bates, Davis, Hand, Rugg, Stone, Williston, and others. Currently there are less than 2,750 members, almost all of whom were elected, only after sponsorship by current members in letters of support describing their talents, public service, and promising active participation in the work of the Institute. There are also numerous ex-officio members.

The governing body of the Institute, but only in the sense that it is authorized to amend its bylaws, is the assembled membership, which holds an annual four-day meeting in May of each year. The bylaws, however, confer broad authority over the property and affairs of the Institute—which now has extended well beyond the work of producing Restatements, most notably the extensive and highly useful continuing legal education courses managed jointly with the American Bar Association—to an elected Council, a kind of board of directors. The Council, including emeritus members, has almost seventy members.1 It meets twice a year to conduct business and to review drafts of proposed Restatements and other projects. It also meets for part of a day just before the annual May meeting. Unscheduled meetings are rarely, if ever, held, but there is frequent verbal and written communication among the members and officers. The Council has several committees, which deal primarily with the Institute’s business rather than the Restatements then under consideration. The day-to-day business of the Institute is carried on by the Director, with the help of a relatively small staff. This understates the importance of the Director, who is involved personally and significantly in virtually every project undertaken by the Institute.

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1. There are five officers, all Council members, in addition to the Director and two Deputy Directors.

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B. The Genesis and Production of a Restatement

The decision to embark upon a Restatement can come about in several ways. The Council may conclude, after advice from the Director and its program committee, that an existing Restatement, together with supplements, has become dated or too cumbersome and that a new Restatement (Third) should be undertaken. Suggestions sometimes come from the major speeches made at the Annual Meeting by the Chief Justice and other distinguished members of the judiciary or the bar. Practitioners or academics with specialized knowledge and experience may make suggestions to the Director. Whatever the source, after the initial decision a prospectus is generally prepared and carefully considered by the Council. Its approval is necessary before any of these lengthy and often expensive projects are undertaken.

Generally, the prospectus is prepared by an academic chosen by the Director who is likely to be designated as the Reporter. The Reporter is primarily responsible for preparation of the elaborate drafts that will ultimately reach the Annual Meetings for final approval. Depending upon the expected scope of the project, there may be one to as many as four Associate Reporters. In almost all cases, the Reporters will have spent a significant part of their professional careers in teaching and writing about the subject matter of the proposed Restatement. The Director, often with the advice of some Council members and in consultation with the Reporter, promptly selects a committee of Advisers, which can number anywhere between ten and thirty—composed of judges, practicing lawyers, and law school professors. Advisers commit themselves to an intensive review of drafts prepared by the Reporters and agree to meet at least once a year, and often more frequently, to discuss and review the drafts before they are submitted to the Council.

Since 1988, still an additional committee has reviewed the early drafts of the Reporters. It is called the Members Consultative Group, and unlike the Advisers who are selected with care for their expertise in the field, it is open to any member of the Institute who wishes to participate. The decision to establish these consultative groups seems to have been in response to the desire of many members for greater participation in the work of the Institute than was available through the Annual Meetings of the Institute. Those four-day Annual Meetings customarily require consideration of four or five Restatement drafts and drafts of other projects, with the result that only a few hours can be devoted to any one. Moreover, for some, particularly newer members, entry into the floor debates is a daunting experience. The floor discussions include a diverse melange of speakers: lawyers who are remarkably ar-
ticular and insightful and offer very helpful suggestions, even at this late stage in the development of the end product; academics with excellent knowledge of the subject matter but sometimes burdened by agendas of their own; judges and practitioners who have dealt with some narrow aspect of the subject matter and whose focus occasionally causes them to miss the larger picture; and quite a few others who believe they have found flaws but who need to be gently corrected. Although the Institute has over 2,700 members, less than 150 will actually participate in the debate. Furthermore, important motions respecting the substance of the black letter are often decided by a vote of less than 250 members, many of whom have not given thoughtful consideration to the issue prior to the limited debate. Indeed, it is surprising that this procedure is as effective as it is in carrying out what is, after all, a scholarly enterprise.2

Members are strongly urged to offer suggestions to the Reporters in writing prior to the Annual Meeting, and many do so. The Reporters’ time is limited, however, and although many try to respond to all correspondence, some members believe that their comments are not given the consideration they deserve. Meetings of the consultative groups provide a fuller opportunity for interested members to offer their comments to the Reporters in a much more relaxed atmosphere than the Annual Meeting, in a context where initial resistance by the Reporters can sometimes be overcome by strong support from other members. Another dividend from the institution of the consultative group meetings is that the Reporters, expert though they may be in the general area, will often have their knowledge enlarged by discussions with persons who speak from experience rather than scholarship. They can provide information that is not to be found in court opinions, which are most often and quite understandably the primary source of the Reporters’ learning.

A word about terminology may be useful. The initial draft of one or more chapters of a proposed Restatement, submitted to the consultative group and the Advisers, bears the title “Preliminary Draft No. __.” Following those meetings, a second draft entitled “Council Draft No. __” is submitted to and reviewed at a meeting of the Council. A second revision that is then submitted to the membership at its Annual Meeting is called “Tentative Draft No. __.” If that draft is approved—after incorporating changes made at the meeting and often with authorization to the Reporter to make editorial and other less significant

2. In practice, the Council manages to find a way to correct any errors that may be made at the Annual Meeting of the Institute.
changes—those chapters will appear in the final version. If a proposed chapter is not approved, it will return in a subsequent tentative draft. Sometimes, when significant changes have been made in the tentative drafts, the Institute may be presented with a "Proposed Final Draft No. ___." Even then, substantial changes may be made at the Annual Meeting.

This is a brief outline of the formal procedures followed by the Institute. More illumination about the actual process is provided by examining in greater detail how the procedures have functioned in the formulation of a specific Restatement. The perspective of the observer and the opportunity to follow the full development in detail are important. The Reporters see and know the most. Advisers and Council members, who participate actively, have a wide, but not quite as comprehensive view, as that of the Reporters or of the Director. The rest of us, who participate actively in the consultative group meetings and who correspond frequently with the Reporters (into which category I happen to fall), see more than those who make a token appearance at the Annual Meetings, but less than the others previously mentioned. What follows is a description of the development, thus far, of the Restatement of The Law Governing Lawyers, viewed from this intermediate perspective.

II. THE RESTATEMENT OF THE LAW GOVERNING LAWYERS

It is not clear from published sources exactly when the decision to embark upon this major project was first conceived. Sometime in 1985, the Institute's program committee reviewed a proposal of Professor Charles W. Wolfram (possibly on his own initiative, but more likely at the suggestion of the Director) for a "mini-Restatement" of the law respecting lawyer confidentiality. The program committee, in October 1985, asked that the project be expanded to cover the entire subject of the law applicable to lawyers. Professor Wolfram expanded his proposal in a memorandum to the Director dated January 20, 1986.

The Director,

3. As will appear, infra Part II.B, the important Chapter 4 of the Restatement of The Law Governing Lawyers on Lawyer Civil Liability, initially submitted in 1994 as Tentative Draft No. 7, was resubmitted as part of Tentative Draft No. 8 in 1997 (there was no tentative draft in 1995), and Chapters 2, 3, 5, and 8 comprised Proposed Final Draft No. 1, which was considered and substantially approved in 1996. Significant changes were made, and the draft was tentatively approved, but the Reporters left with a directive, or perhaps only a suggestion, that the entire chapter should be reorganized or restructured.

in turn, recommended to the Council on April 4, 1986, that the work be undertaken by Professor Wolfram. By this time, or shortly thereafter, Professors Thomas Morgan of George Washington University National Law Center (then at Emory) and John Leubsdorf of Rutgers University Law School had been enlisted as Associate Reporters. For a while, in the early 90s, Linda Mullenix of the University of Texas Law School also served as an Associate Reporter. Professor Geoffrey Hazard guessed that the project would take approximately five years. In his most recent letter to members, President Wright said that he now expected the work to be completed at the May 1998 Annual Meeting. My personal view is that this may turn out to be more a hope than an accurate prediction. Too much remains to be done. The Council and the officers of the Institute are distressed at how long this project has taken and appear to have concluded that a point of diminishing returns has been reached, so that 1999 is certainly not out of the question. They are fully aware, however, that the reputation of the Institute is too important to allow it to be compromised by putting its imprimatur upon an unfinished or imperfect product.

I offer first some rather disconnected thoughts about some of the unique problems posed by this Restatement which may partially explain why it has taken so long. Second, I turn to one of the chapters, one that has been among the more difficult to complete, and explain why I believe that the Reporters have still not found the correct analysis. Last, I offer a different analysis, one that, I believe, is better and would be more useful than that of the Reporters.

A. Problems Unique to the Formulation of the Restatement of The Law Governing Lawyers

There are several problems that arise in connection with the formulation of any Restatement, and they affect the Restatement of The Law Governing Lawyers as well. Some of these, however, are more severe and troublesome because of the subject matter of this Restatement. In addition, there are problems that are unique to this undertaking. I look at some of these problems, recognizing that my catalog is certainly in-

5. Memorandum from Geoffrey C. Hazard, Jr., Director, ALI, to the Council, ALI (Apr. 4, 1986) (on file with the author).
6. These memoranda, together with a reasonably comprehensive outline of the content of each of the eleven proposed chapters of the Restatement of The Law Governing Lawyers and a more detailed outline by Professor Morgan, make up Preliminary Draft No. 1, of September 18, 1986. By that time, 17 Advisers had been selected. The first preliminary draft to be seen by the consultative group was No. 2 of August 9, 1987.
complete. I try to assess the extent to which each has been instrumental in lengthening the time that has elapsed in completing this project and in causing what I believe is unfortunate pressure to get it done at all costs.

1. The Procedure for Several Levels of Review—Theory and Practice

The procedure described above—preparation of a preliminary draft by the Reporter or one of the Associate Reporters, review of that draft within that small group, review by the consultative group, preparation of a revised draft, review by the Advisers, preparation of a revised council draft, review by the Council, preparation of a tentative draft, review and approval by the Institute at its Annual Meeting, all of this under the watchful eye and guidance of the Director—seems in theory an ideal protection against error. In practice, however, there are inherent deficiencies that cannot be ignored. The Reporters do not abandon their daytime jobs. They continue to teach, to participate in law school governance, to write law review articles, and to testify as experts. The preliminary drafts are massive undertakings. Preliminary Draft No. 2, the Reporter’s first try at a single chapter—No. 5 on Client Confidential Information (including the Attorney-Client Privilege and Lawyer’s Work Product Immunity)—ran 416 pages in the customary format of black letter, comments and supporting reporter’s notes. To take another example, Council Draft No. 3—which provided the Council with its first look at Chapter 3 on Client and Lawyer: The Financial Relationship and with Chapter 8 on Conflicts of Interest—comprised 562 pages.

Although, with respect to many of the drafts, there most certainly must have been extensive discussion among the Reporters during the early stages of the drafting process, I sense that the contribution of the Associate Reporters, other than the one who has been assigned primary responsibility for a particular chapter, has progressively lessened during the years in which this work has been in progress. This should in no way be misconstrued as critical of these hardworking and conscientious scholars. I simply note that, given the magnitude of the task, it is not

9. In some instances, the Reporters acknowledge that time constraints have prevented them from reviewing a draft proposed by one of them prior to submission to the Advisers and consultative group. That was the case with Preliminary Draft No. 4A, dated June 1, 1989.
feasible to complete a draft by early August—the ardors of the Annual Meeting having just concluded in late May—that would permit discussion and rewriting prior to the submission of a preliminary draft to the consultative group and Advisers for consideration at meetings in late September or early October. These groups also need a little lead time to digest the lengthy and intrinsically dense material. As a result, the process is greatly compressed, and the opportunity for early refinement is less than what everyone would like.

a. Consultative Group Consideration

The Restatement of The Law Governing Lawyers was the first, or among the first, of the Institute's projects to utilize a consultative group. Preliminary Draft No. 2, of August 9, 1987, lists sixty members who volunteered to serve. My recollection is that well over half traveled to Philadelphia for an all-day session. By August 1997, when Preliminary Draft No. 13 was published, the number had grown to over 500—too large a group for a fruitful exchange of views. Fortunately, well over half, after volunteering with the best of intentions, have not attended a single meeting.

I believe everyone would agree that the institution of this additional level of review and discussion has been a great success, and there is no doubt that it will continue to be an important element in the Institute’s procedures. Still, it has not been as successful as one would have hoped. Attendance at the meetings has been good with generally more than one hundred members present, about half of whom participate actively. Ideally, this group would meet two or three weeks before the meeting of the Advisers, so that the smaller and more influential body would benefit from the work of their subordinates. The time compression problem mentioned above has foreclosed such an arrangement. Indeed, the meetings of the Advisers to discuss each preliminary draft has usually been held a few days before the meetings of the consultative group.

10. In the Fall 1997 issue of the ALI Reporter, President Wright reports, without hiding the astonishment shared by those of us over 60, how the rapid multi-person communication facility of the Internet has greatly improved the interchange of views among Reporters and Advisers during the early stage of the drafting of more recently begun projects. See Charles Alan Wright, The President's Letter, A.L.I. Rep., Fall 1997, at 1, 2. Regrettably, that was not available when this project began in 1986.


group. Moreover, the Reporter who conducts the later meeting only rarely mentions what has transpired at the earlier, so that in fact there is concurrent rather than successive and cumulative review. Still the process works admirably.

There is a significant difference in the extent of the participation by those present. Many come to listen and renew old friendships. Perhaps five or ten percent have read every one of the four to five hundred pages with the care needed even to identify obvious typographical errors. At least a score have read at least one or two hundred pages with intense attention and have also read many of the cases cited in the reporter's notes. Several will have written the Reporter in advance of the meeting to express significant concerns or to offer suggestions.

The Reporters generally conduct the meetings in the same manner as that followed in the Annual Meetings of the Institute. They start at the beginning and allow discussion of a specific section to continue until it begins to be repetitive. As a result, the last two hundred pages of each preliminary draft are often given no or scant attention. This is quite satisfactory to the large majority of those present who had not been able to get that far in their reading anyway.  

I have often wished that the Reporters would conduct these meetings in a more autocratic and rigidly controlled fashion. For example, preset time periods could be set aside for sections and comments identified by those attending the meeting as deserving discussion or thought to require change. One hour could be used to discuss issues raised in writing prior to the meeting and which the Reporters thought worthy enough to solicit additional views. Some time should be reserved for matters or sections chosen by the Reporter because of doubts or a need for more data from the field.

Nonetheless, these meetings have served a highly useful function. In every meeting I have attended—and that is most of them—the Reporters have acknowledged occasional error, agreed that their knowledge has been enlarged, and have accepted suggestions for changes that did, in fact, appear in the subsequent council or tentative drafts. Still, many of the chapters of this Restatement have had to undergo several revisions and have appeared, in improved form, in a succession of preliminary or tentative drafts.  

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13. It is necessary to note that an entire tentative draft is also sometimes not covered at an Annual Meeting. That means, however, that the unreached portion does not get the necessary approval and must be brought back at a subsequent meeting.

14. For example, Chapter 5 on Client Confidential Information, appears, in whole or in part, in Preliminary Drafts 2, 3, 7, 8, 10, 11, and 13, in Tentative Drafts 1, 2, 3, 5, 6, and in Proposed
view process, I believe, might have made fewer drafts necessary.

b. Adviser and Council Review

These are treated together because I have little direct knowledge of either. Extrapolating from experience with the consultative group, however, permits several guesses that are likely to be correct. Attendance at the Advisers' meeting is likely to be less than two-thirds of the approximately thirty members. A higher percentage of these members will have read the drafts with the required intensity. Others, however, will not have done so simply because the time between the arrival of the draft and the meeting is always too short and there are other demands upon the time of these busy men and women. The Advisers, however, meet for two days and sometimes three, and this, combined with the relatively small size of the group, must mean that far more detail is covered and less time is wasted in diversionary excursions into less important areas. Still, a comparison of a few preliminary drafts with the immediately following council draft reveals that, although there are many important differences, the largest part of the earlier draft (perhaps ninety percent of the words) usually survives untouched. This is hardly surprising, but it underscores a point that is well-known to every participant in the process.

Without denigrating in any way the significance and contribution of each of the levels of review described above, the ultimate product reflects, to much the greatest extent, the quality of the research, analysis, and drafting skills of the Reporters. Without citing particular examples, it is surprising to see how often the ablest lawyers, including some who have participated at earlier levels of review, admit at the Annual Meeting to an imperfect understanding of what the Reporters have placed before them. They likewise admit that what they thought was an important omission was actually fully and adequately covered in a section other than the one currently being considered.

The pressures on the Council also make any thorough-going detailed review of an entire council draft impossible. Although the fall meeting of the Council generally consumes three full days, there is always some business to transact, and the Council is generally faced with

Final Draft No. 1.

15. Every lawyer is aware of the advantages of being able to prepare the first draft in, for example, a non-litigation context such as a merger or acquisition agreement or, in litigation, of an agreed stipulation of facts. The opportunity to establish the framework in which all future discussion will take place is often of substantive as well as procedural significance.
the need to discuss four or five drafts of the several proposed Restatements or projects that are slated to be presented as tentative or final drafts at the next Annual Meeting of the Institute. These will have arrived between three to eight weeks before the Council meeting. It is a lot to ask, even of these dedicated Institute members, that they will have read the well over thousand pages of frequently dense and intricate treatises that have just been thrust upon them. Nevertheless, the Council deliberations are often highly fruitful—a conclusion drawn not only from discussions with participants, but also from occasional comparison of important sections or comments in a tentative draft with the earlier versions from which they were derived.

It bears repeating, however, that every Restatement is necessarily the brainchild of the Reporter and his or her associates. The Reporters for the earlier standard Restatements of Contracts, Property, Torts, Trusts, and the Model Penal and Securities Codes were drawn from the greatest and most revered scholars of this century. This is one of the most important reasons for the high standing and authority that the Restatements enjoy, although the uniform high quality and reliability of the end products and the widespread contributions of the Director are factors whose significance cannot be overstated.

2. The Absence of a Model

In many cases, certainly for the more traditional Restatements mentioned above, the Reporters were not obliged to start from scratch. There were multi-volume texts, often several, that had survived the test of usage by the profession and the courts. These texts provided a helpful structural analysis of the subject matter that served as a starting point for the proposed Restatement. In the case of the Restatement of The Law Governing Lawyers, there were some texts, but none that attempted to cover the entire field.

There were, of course, several texts on legal ethics and the most comprehensive of these, Modern Legal Ethics, was authored by Charles Wolfram, who has been the Reporter for the Restatement of The Law


17. For example, the authoritative texts on Contracts, Property, Torts, and Trusts were authored by the Reporters and preceded the Restatements. See Francis H. Bohlen, Cases on the Law of Torts (1st ed. 1915); Richard R. Powell & Patrick J. Rohan, Powell on Real Property (1st ed. 1949); Austin Wakeman Scott, Select Cases and Other Authorities on the Law of Trusts (1st ed. 1919); Samuel Williston, The Law of Contracts (1st ed. 1920).
Governing Lawyers since the beginning. These texts, however, covered only a part, and the smaller part, of the content of this Restatement. Hazard and Hodes' *The Law of Lawyering*, the title of which suggests that it might serve as a predecessor, is an in-depth analysis of the content and interpretation of the Model Rules of Professional Conduct, and it covers very different ground than that proposed for the Restatement. The same is true of the several texts on legal ethics. There are texts on legal malpractice, but these are generally not particularly useful, even in the formulation of Chapter 4 on Lawyers' Civil Liability, a subject dealt with in greater detail below.

The original outline of the scope and content of the Restatement of The Law Governing Lawyers was prepared largely by Professor Wolfram, and it makes up a large part of Preliminary Draft No. 1. It has been substantially revised, of course, over the last ten years, but it is remarkable how much of it has survived and remains the basis for the end product that is now emerging. The Reporter today must wonder at his own effrontery in thinking that he could scope out a work of this magnitude and, at the same time, experience much satisfaction and pride over what a good job he did.

Given the advantages of hindsight, it might have been better if certain topics had been omitted, thereby saving at least two years that might either have permitted an earlier conclusion or allowed other topics—which now are to be omitted or dealt with summarily—to be covered in detail. The first chapter to be presented to the Institute was No. 5, covering Confidential Client Information. Topic 1—Confidential Responsibilities of Lawyers—was and is, of course, an essential part of the Restatement. There was much to be said, however, for a decision to leave uncovered Topics 2 and 3, dealing with the Attorney-Client Privilege and Lawyer’s Work Product Immunity respectively. It should

20. Many of the texts are written by academics for use in law school classrooms. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990); STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS (1998); GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING (2d ed. 1994); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (6th ed. 1995); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (2d ed. 1995). Some homage should be paid to the seminal work, alas no longer on the shelves, HENRY S. DRINKER, LEGAL ETHICS (1953), which fashioned many rules by drawing upon the aristocratic virtues.
21. The most useful text is RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (4th ed. 1996). But it is expansively written and loosely structured, and it offers no guide for the tight analytic structure that is customary for Restatements.

http://scholarlycommons.law.hofstra.edu/hlr/vol26/iss3/8
have been recognized that the attorney-client privilege is only nominally a part of the law that governs the activities of lawyers. It is, in fact, a rule of evidence. To be sure, every lawyer is obligated to keep client information confidential, and that obligation, a central element of the law governing lawyers, applies in a much broader context. The privilege, however, simply describes a right of a client—which, to be sure, lawyers must observe—to resist court (or legislature) imposed disclosure demands. The subject is a complex and controversial one. It was not within the special expertise of the Reporters, except to the extent that almost every lawyer believes that he or she is adequately competent in this area. The subject was covered in an earlier Restatement that might very well have been ripe for a second Restatement. I venture the guess that if the Reporter had only been blessed with uncanny predictive powers, the Council would have approved a request to omit any Restatement of the privilege in order to keep the project within manageable bounds with relatively little loss.

The same decision might have been more difficult with respect to the work product immunity doctrine. Here, after all, we are talking about documents that are produced by or under the supervision of a lawyer. At first blush, it certainly seems that how those documents are identified and the extent to which they are entitled to immunity from disclosure relates directly to the law that applies uniquely to lawyers rather than to other persons. But here, too, it can fairly be said that this topic deals only tangentially with a lawyer's duties, rights or obligations, relationships with clients or others, or the limitations upon a lawyer's authority or actions. Like the attorney-client privilege, it could have been fairly characterized as a rule of evidence and left for restatement elsewhere. Certainly, there would have been as much justification for such a decision as for the decision to leave uncovered in detail the law governing lawyer discipline.

In fact, the law governing the attorney-client and work product privileges has been among the most difficult to formulate and obtain Institute approval. Indeed, certain significant aspects of the work product doctrine were eliminated in order to avoid redundant and interminable debate. The final product is useful and will be relied upon by the bar and the courts. However, the cost may have been too great. Part of the cost is the elimination, or partial elimination, of subjects that deserve full treatment. In his memorandum preceding Proposed Final

22. The early Model Code of Evidence, with Edmund Morgan as Reporter, has a substantial section on privileges.
Draft No. 1, of March 29, 1996, the Reporter explained:

[Chapter 9] was originally scheduled to consider the following topics, which will probably not be covered: constitutional and statutory rights of counsel in civil and criminal cases; effective-assistance rights in criminal cases; lawyer publicity; self-representation; unauthorized practice; bar admission; multi-jurisdictional law practice; partnership and non-partnership forms of law practice; and third-party funding of legal services.23

Opposition arose to the loss of coverage of some of these subjects, and the Director agreed that some of these topics would be restored. Some of them now appear in Chapter 1—Regulation of the Legal Profession—the most recent version of which is found in Proposed Draft No. 2 of April 16, 1998. That chapter includes topics (subchapters) on Professional Regulation (Admission, Discipline, Unauthorized Practice, Civil Remedies, Criminal Offense, and Law Firm Structure). In general, however, these topics are given conclusory treatment that differs noticeably from the depth of the analysis given to other chapters, although the reporter’s notes preserve much of the extensive research already done. For example, two pages of this draft are all that are needed to provide the answers to many of the subtle problems that commonly arise when a lawyer has withdrawn from a legal partnership or a firm has dissolved; problems that are similar to those that arise with other partnerships, but which may have different answers. Those differences result from the fact, notwithstanding the public’s perception to the contrary, that the most important underpinning of our ethical code is that lawyers must observe standards of conduct that are stricter than those applicable to the general community. An entire book has just been published dealing solely with these issues.24

How this chapter will fare at the May 1998 meeting remains to be seen. If the other chapters that will be submitted at that time are favorably received, it seems likely that the membership as a whole, given the desire to bring this project to a close, will not fret that a fuller and more detailed analysis of these topics might have been made.

23. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS at lxxxv (Proposed Final Draft No. 1, 1996). These decisions may have been reached, in part, as the result of discussions of an ad hoc committee made up of the Director, the Reporters, and members drawn from the Council, Advisers, and Members Consultative Group. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS at xix (Council Draft No. 11, 1995). This somewhat informal supplement to the Institute’s customary procedures is unusual but not unique to this Restatement.

3. Everyone an Expert

As mentioned above, for Restatements of specialized areas of the law, intensive participation is likely to be limited to the several score who have taught or practiced actively in that area, protected by the leavening contributions of the generalists. With this Restatement, almost every member is likely to consider that every section deals with a matter that is within his or her special competence. Discussion at every level of review is therefore more extensive, and members are more persistent in their views than is usual. The Director put this more gently in 1989:

"We acknowledge the special difficulties the Reporters of this Restatement encounter in the fact that every member of their audience has a personally informed understanding of the subject. Accordingly, while the critical contributions may have been greater than with other subject matter, greater endurance has also been required on the part of the Reporters. We express our appreciation for that as well as for the thoughtfulness of their work."

To this I add only that this alone may have been responsible for adding at least two years to the time needed to complete this project.

An extreme example has been the extended debate over section 117A, Using or Disclosing Information to Prevent Death, Serious Bodily Injury or Substantial Financial Loss. The subject matter, as a practical matter, relates to issues that are never faced by the overwhelming majority of all lawyers. The reporter’s notes cite only a handful of cases, (although there is an extensive analysis of the applicable Model Codes and Rules) so restatement of the sparse relevant precedent should not have been difficult. But the subject is also close to every lawyer’s heart. There is a widely held view that any exception to the obligation to maintain client confidences compromises the ability of all lawyers to serve their clients. Others, not quite so sure, dislike a rule that seems to make them silent accomplices to wrongdoing. Without discussing the merits here, it became clear that these opposing views were strongly held. The result was widespread forgetfulness of the fact that a Restatement was being formulated, and the fierce debates that took place were largely over policy issues, morality, and drafting precision rather than scholarship. This section alone has been through several revisions, each

25. See supra text accompanying notes 1-2.
of which has been extensively discussed.

4. Restatement or Model Code

The Institute has on a few but very important occasions prepared model codes. The most famous, and surely the most influential in its direct influence over legislation in many states, is the Model Penal Code. Working on those projects is fun. The Institute functions, at least in part, as an unelected legislature, and members are free, perhaps even required, to argue for provisions on the ground that they would best serve the community. Very different constraints apply to the formulation of a Restatement. The Reporter's Memorandum that precedes every draft of the Restatement of The Law Governing Lawyers almost always repeats the following admonition:

We take this occasion once again to remind readers that, as with all of this Restatement of the Law Governing Lawyers, this Draft aims to restate the law. It reflects decisional law and statutes and takes account of the lawyer codes in its formulations. The formulations, in general, are statements of the law applicable in legal malpractice and disqualification proceedings and other contexts to which that body of law is applicable. It also may inform the interpretation of the lawyer codes in disciplinary and similar proceedings. Because this is a Restatement of the law, the black letter and commentary do not discuss other important subjects, such as considerations of sound professional practice or personal or professional morality or ethics.

Although I am unaware of whether or where a precise official formulation can be found, there is a well-settled Institute rule that applies to what the black letter sections may state. In general, where there is a significant majority position and a small minority position concerning a specific doctrine or principle, the Institute must, and does, adopt the majority position. Where the decisions are closely divided, however, a strict majority rule does not apply. Here what is regarded as the better reasoned rule may be adopted: where the available decisions are few in number, the necessity to count is even weaker. Even where there is a strong majority, the age of the decisions may be taken into account, and if the Reporters and the Institute can detect a trend in the direction of

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28. The Foreword to the 1985 edition of the Model Penal Code reports revisions of the criminal codes of 34 states that were influenced to a greater or lesser extent by the provisions of the Model Code, and refers to nine other states in which revisions of their laws was still underway. See MODEL PENAL CODE at xi (1985).
the plainly more desirable minority position, that position may be adopted.³⁰

It is evident that there is some flexibility in this doctrine, and although it is hard to document, I believe that flexibility may have been stretched to a greater extent in connection with this project than in most others.³¹ I mention below only two interesting examples, both of which involve rather well-settled but offensive legal doctrines. Both are instances in which judges (formerly lawyers) have fashioned dubious principles that strongly favor lawyers over clients when disputes arise between them.

a. Lawyer’s Liens

In most jurisdictions, a lawyer who has been discharged by a client and believes that his or her fee has not been fully paid may refuse to deliver property, concededly owned by the client, that was previously given to the lawyer and not the result of the lawyer’s work.³² This applies even where the client may need the property desperately in order to complete a transaction or conduct litigation effectively through a new lawyer. The Reporters did not like this law, (parenthetically and irrelevantly, neither do I). Their initial formulation of the law respecting lawyer’s liens, in section 55 of Preliminary Draft No. 5 of May 24, 1989, artfully stated a contrary position. The Reporters did not hide what they had done. Comment b began, “Under the law of most, but not all, jurisdictions, a lawyer may refuse to return ....” The remainder of that comment consisted of undisguised and vigorous advocacy for the rejection of this doctrine.³³

³⁰ An elaborate, closely reasoned explanation and defense of the practice was made by Herbert Wechsler, then Director of the Institute, in a paper presented to the Conference of Chief Justices at its 20th Annual Meeting on August 1, 1968. See Herbert Wechsler, Restatements and Legal Change: Problems of Policy in the Restatement Work of The American Law Institute, 13 St. Louis U. L.J. 185 (1968).
³¹ The rule is a godsend to the Reporters who are often able to reply to a fervent demonstration of the error of a doctrine that has been enshrined in the black letter: “We agree with you, of course, but we are writing a Restatement and the weight of authority is too much the other way.”
³³ Comment b provides:
Such a use of the client’s papers conflicts with the fiduciary responsibilities of lawyers. It may also provide a powerful incentive for clients to keep important papers out of the hands of their lawyers and thus foster uninformed legal services. . . . A lawyer’s retaining lien . . . would allow a lawyer to put pressure on a client that may be wholly disproportionate to the size or validity of the lawyer’s fee. A client may be faced with various
The first appearance of section 55 at an Annual Meeting was in Tentative Draft No. 4 of April 10, 1991. It was somewhat revised and the comment was less fiery. Predictably there are many lawyers, some of them members of the Institute, that rather like this doctrine, and there was complaint about this departure from the Institute’s “Rule respecting Restatements” described above. It is tribute to the persistence of the Reporters, and evidence of my earlier assertion about the primary importance of the Reporters (and of the wisdom of the Council), that their position survived in the reformulated section 55 that was approved as part of Proposed Final Draft No. 1 of March 29, 1996. The disclosure was even more emphatic: “That [majority] law is not followed in the Section; instead it adopts the law in what is currently [meaning, presumably, “but not for too much longer”] the minority of jurisdictions.”

b. Malpractice in Defending an Indicted Client

A very different doctrine may deserve the characterization of outrageous rather than merely offensive. In most jurisdictions, a lawyer who has committed malpractice that has resulted in the conviction of a client, or in a guilty plea by the client, will avoid liability if the client is not able to have the conviction set aside, or at least establish her innocence. The explanation is that the proximate cause of the client’s injury is the established guilt of the client, thus making the lawyer’s conduct, however egregious, immaterial. An account of a couple of cases applying this doctrine may be instructive.

In Carmel v. Lunney, Carmel, a registered representative of a securities broker-dealer, testified at a hearing before the New York State Securities Department. His employer recommended a law firm, one of whose partners represented him only at that hearing. The lawyer did not

consequences because papers are inaccessible and have no practical choice but to pay whatever fee the lawyer seeks. It is unwarranted to assume that a lawyer’s fee is valid when the client disputes it. . . . The lien forces the client to pay or sue. . . . The client likewise has the greater difficulty in seeking protection in advance. . . . The lawyer is usually more sophisticated in such matters . . . use and abuse of the lien are the same thing.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 55 (Preliminary Draft No. 5, 1989). Also, “retaining liens should therefore not be recognized.” Id. It may be noted that the terms “should” and “should not” are generally not appropriate in a Restatement comment.

34. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 4, 1991).


advise him of a possible conflict resulting from the firm's earlier and continuing representation of the employer before the SEC and did not advise him of the possibility of obtaining immunity. Carmel was indicted and, faced with a possible felony conviction, pleaded guilty to a misdemeanor. He sued the law firm, whose motion for summary judgment was granted. The court stated: "[T]he undisturbed determination of the client's guilt in the subsequent criminal prosecution precludes him, as a matter of law, from recovering for civil damages flowing from the allegedly negligent representation." It apparently never occurred to the New York Court of Appeals that innocent persons sometimes plead guilty to a lesser charge when there is a reasonable fear that appearances may prevail over truth, or that the harsh rule might have been softened even a little to allow a plaintiff the opportunity to put all of the facts before a court and jury.

A similar case in Texas, which has adopted the same rule as New York, was *Peeler v. Hughes & Luce*. The law firm representing Ms. Peeler, and at least one other person under criminal investigation, was told by the prosecutors that they were willing to offer Ms. Peeler immunity, but the firm didn't bother to tell her. Apparently, they had a strategy that they hoped would enable all of their clients to prevail. Ms. Peeler was indicted, pled guilty, and sued for malpractice. The court held that the plaintiff could not prevail because Texas law conclusively presumes that the proximate cause of the conviction was the guilt of the plaintiff—rather than the gross negligence of the lawyer—who therefore could not prevail without first establishing her innocence.

The plaintiff in *Perez v. Kirk & Carrigan*, did better in the appellate court after losing in the lower court but only, perhaps, because he had an ingenious lawyer. Mr. Perez, a truck driver for an employer, was in a serious accident when the brakes failed. The employer's lawyers visited him in the hospital, falsely told him that they were his lawyers and that he could provide them with a written confidential statement. Subsequently, they delivered the statement to the district attorney, assertedly because they believed they were required to do so by a subpoena. Mr. Perez was indicted for manslaughter and convicted. His complaint in an action against the lawyers sought damages only for the public humiliation and emotional distress resulting from the indictment.

37. *Id.* at 1127.
39. See *id.* at 835.
Summary judgment for the defendant was reversed. Among other things, the court rejected the contention that the plaintiff had mischaracterized his cause of action in order to avoid application of the doctrine that he could not collect damages attributable to the conviction which was presumed to be the result of his own guilt. The case, however, shows the extremes to which this doctrine might apply.

In Preliminary Draft No. 12 of May 15, 1996, the Reporter, in comment d to section 75, stated the law to be the minority position, without reference to the majority rule. The reporter’s note, however, did summarize a large number of cases, on both sides. In the next Council Draft No. 12 of September 24, 1996, the comment was expanded to note that “most jurisdictions have . . . stricter rules.” There was a debate at the Council meeting which ended with the decision to revise the comment so as to state the majority position. This was done in Tentative Draft No. 8 of March 21, 1997 in a significantly shorter comment. The reporter’s note, in contrast, was enlarged and included an unusual disclosure: “That [majority] position is reflected in the Comment, but the Reporters disagree, believing that ordinary principles of causation should apply.”

That is not the end of this tale. At the Annual Meeting, Professor Roger Cramton, who was involved in the initial decision to undertake this Restatement, and who, throughout the last decade, has been an Adviser and a Council member actively participating in this project, moved to reverse the Council’s decision. A short but lively debate ensued. Professor Cramton spoke with some emotion about the “outrageous position” adopted by the Council, calling it “an archaic, cruel, irrational proposal.” The Associate Reporter, Professor Leubsdorf, stated that two Reporters favored the comment in the council draft (rather than the tentative draft) and one did not, but that the two Reporters had been overruled. No one explained whether the Council’s decision was based

41. See id. at 269.
42. See id. at 267.
43. See Restatement (Third) of the Law Governing Lawyers § 75 cmt. d (Preliminary Draft No. 12, 1996).
44. See id. § 75 reporter’s note, cmt. d.
46. See Restatement (Third) of the Law Governing Lawyers § 75 cmt. d (Tentative Draft No. 8, 1997).
47. Id. § 75 reporter’s note, cmt. d.
upon its view that the "Rule respecting Restatements" should be adhered to or upon other reasons. Neither was this "Rule" mentioned during the debate in the Annual Meeting. Indeed, support for the Council's position was primarily by Sheldon Elsen, a member who usually participates actively in Institute debates on this and other Restatements and who almost always offers helpful and insightful comment. He took the pragmatic view that the majority position was helpful in defeating the frivolous actions brought by convicts who so frequently used their ample empty time to draft malpractice complaints. Therefore, it is hard to tell whether the vote in favor of Mr. Cramton's motion was based upon distaste for the harshness of the doctrine or upon the exception to the "Rule" that a better reasoned minority position, appearing to be gaining acceptance, could appropriately be adopted.

The point is important. The credibility of the Restatements depends heavily upon the fact that their black letter sections are, indeed, restatements of what the law is (or, in the view of competent objective observers, is likely someday soon to be), and not the opinion of a group of distinguished, largely mature lawyers about what the law should or ought to be. My sense, particularly with respect to the Restatement of The Law Governing Lawyers, is that many of the debates—too many—have focused more on the desirability of the rule of law under consideration than upon the accuracy of how that rule has been restated. Nevertheless, I also believe that the Reporters have adequately kept themselves and the membership in check. At the same time, these debates, since they are more interesting than dry scholarship, tend to be more extensive and serve to delay the completion of the project.

B. Chapter 4: Lawyer Civil Liability

This chapter, very important to the members of the profession and to those who might wish to sue them, has not been the easiest to formulate. The first drafts are found in Preliminary Draft No. 9 of July 12, 1993, Council Draft No. 10 of November 17, 1993—an interesting draft in that it showed all the changes that had been made in the preceding preliminary draft—and in Tentative Draft No. 7 of April 7, 1994. It was not approved, and a thoroughly redrafted chapter was part of Tentative Draft No. 8 of March 21, 1997. At the Annual Meeting, as is invariably the case, further changes were made. Then the draft was "tentatively

49. See id. at 353.
50. It may not be entirely unfair to note that only a tiny percentage of the members of the Institute are engaged primarily in defending persons accused of crime.
approved,” qualified by the understanding that the Reporters would give consideration “to reorganizing this Chapter in terms of liability to clients and liability to other parties.” I urge below that although restructuring is indeed necessary, a different reorganization is preferable.

1. A Preliminary Look at the State of the Law

If ever there was a discrete area of the law that needed restatement and which calls for the intelligent and flexible application of the “Rule respecting Restatements,” this is surely one of them. There are scores of poorly reasoned and incorrect decisions but also many others that are soundly based. One of the reasons for the confusion is that lawyers have been held liable on a number of different grounds and that needs to be sorted out properly. Second, a major source of the law governing lawyers is the lawyer codes and rules—the most recent of which are the Model Rules of Professional Conduct, one that has been widely but not yet entirely adopted by every state, unfortunately with too many individual variations. An unfortunate assertion in the prefatory commentary to these rules which states that they have nothing whatever to do with the civil liability of lawyers, has been turned into a dreadful obstacle to the proper development of the law in this area. The major manifestation of this assertion has been a bootless debate over the extent to which, and how, the rules of professional conduct may be relied upon in an action that seeks to impose civil liability upon a lawyer. Regrettably, the Reporters have not yet managed to clean up this mess which, had they done so, would have been a great boon to the community.

a. The Several Bases of Lawyer Civil Liability

In his Foreword to Tentative Draft No. 7, Director Geoffrey C. Hazard, Jr. began by explaining that legal malpractice “is usually taken

52. See MODEL RULES OF PROFESSIONAL CONDUCT (1998).
53. One trend that badly needs to be arrested is the privity of the House of Delegates of the American Bar Association to adopt annual changes in the Model Rules. This encourages state bar groups to recommend similar and other changes to their highest courts, thereby destroying any hope of uniformity. The early Canons of Professional Responsibility set forth broad general principles, following the model of a constitution rather than a legislative enactment, leaving ethics committees and the courts to deal with particular situations. The constitution/legislative enactments analogy springs to mind. This is plainly the correct approach, but it has been lost sight of. A typical example of this behavior is a recent proposal by the District of Columbia Bar to revise Rule 1.15 of the Model Rules to deal in detail with the custody and administration of retainer fees, an important matter that could readily be dealt with in the commentary or an ethics opinion.
to mean liability for negligence in the performance of a lawyer's services. However, a lawyer may incur civil liability on other grounds, including breach of fiduciary duty, misrepresentation, and complicity in legal wrongs committed by others.\(^{54}\) The fuller discussion in comment c to section 71 asserts that "[t]he action for legal malpractice has much in common with a tort action for negligence," and "also has similarities to an action for breach of contract," so that the claim may be cast "in the mold of tort or contract or both."\(^{55}\) Although a lawyer may, of course, enter into a written contract with a client and be liable for a breach if one is committed, that is not the situation referred to by the Reporters. A number of courts permit an action for breach of an implied contract by a lawyer to perform services in a careful and non-negligent way, rather than or in addition to a straightforward tort action.\(^{56}\) Some of those cases are collected in the reporter's note and thereafter given the short shrift that they deserve.\(^{57}\) Nor will I mention them again.

Comment c goes on to say that beyond tort and contract "claims by a client against a lawyer are often said to be for breach of fiduciary duty, sometimes called constructive fraud."\(^{58}\) The reason for the emphasized qualification is not clear. It is thoroughly settled that a lawyer has fiduciary duties to clients, and the proposed Restatement of The Law Governing Lawyers accepts this forthrightly.\(^{59}\) This slighting, even disparagement, of the significance of the violation of fiduciary obligations to the civil liability of lawyers is a forerunner of what is yet to come.

Another source of confusion is the failure to agree upon a defini-

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54. *Restatement (Third) of the Law Governing Lawyers* at xix (Tentative Draft No. 7, 1994). Interestingly, the Reporter’s Memorandum introducing the preliminary and council drafts, while making a similar statement, referred to negligence tort and contract-based claims without explicit mention of the equally important breach of fiduciary duty. See *id.* at xxiii.

55. *Id.* § 71 cmt. c.


57. *See Restatement (Third) of the Law Governing Lawyers* § 71 reporter’s note, cmt. c (Tentative Draft No. 7, 1994). These cases were often driven by a desire to apply a contract statute of limitations rather than the statute applicable to torts. Curiously, in Tentative Draft No. 8, the Reporter added a sentence in the comments to the effect that classification of an action, for that purpose, is beyond the scope of the Restatement. *See Restatement (Third) of the Law Governing Lawyers* § 71 cmt. c (Tentative Draft No. 8, 1997). The following sections of the draft, however, deal solely with the action for negligence.


59. To be sure, some courts do refer unnecessarily to “constructive fraud,” and this is noted by the Reporter, but this tends to hinder rather than foster analysis.
tion of "legal malpractice." Some reserve the term for claims based upon a lawyer's negligence. Others use it to include claims for breach of fiduciary duty. The authors of an excellent article, Roy Ryden Anderson and Walter W. Steele, Jr., argue vigorously that malpractice and the breach of a lawyer's fiduciary duty are totally separate torts. The confusion of many opinions derives from the failure to see the significant distinction between actions for negligence and actions for breach of fiduciary duty. Whether both are called "malpractice" or only the former is of little importance, but part of the reason that the distinction between the two separate claims for relief is not given the significance it deserves is because malpractice is often used in both senses. The Reporters, for example, treat some breaches of fiduciary duty under Chapter 4, Topic 1: Liability for Legal Malpractice—mistakenly, I shall argue below—and other breaches under Topic 2: Other Civil Liabilities.

b. The Lawyer's Fiduciary Obligations

As Justice Frankfurter once explained, in the famous case of SEC v. Chenery Corp.:

We reject a lax view of fiduciary obligations and insist upon their scrupulous observance. But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the conse-

60. The Director of the Institute, in his Foreword to Tentative Draft No. 7, adopts this usage. See id. at xix.

61. Legal Malpractice treats fiduciary breaches as one kind of malpractice. See MALLEN & SMITH, supra note 21. The Law and Ethics of Lawyering, a student casebook, has a short section on legal malpractice which is essentially equated with negligence, although it adverts briefly to violations of ethical rules "as a [basis for] [m]alpractice." HAZARD ET AL., supra note 20, at 190. It deals separately and at length with the more important obligations of lawyers to client (confidentiality, avoiding conflicting representation), but does not accord much significance to whether these obligations are "fiduciary."


63. In his article, Legal Malpractice and Professional Responsibility, Professor John Leubsdorf has a section, entitled "Specifying Lawyers' Duties," which is divided into "A. What is Malpractice?," "B. Breach of Fiduciary Duty," and "C. The Relevance of Professional Rules." Unfortunately, he muddles the distinction by indiscriminately citing cases involving intentional breaches of fiduciary duty under "A. What is Malpractice?" See John Leubsdorf, Legal Malpractice and Professional Responsibility, 48 RUTGERS L. REV. 103, 105-20 (1995).

64. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 209 cmt. a (Proposed Final Draft No. 1, 1996). "A suit for professional malpractice is available if a client has suffered damage as a result of a lawyer's conflict of interest." Id. Virtually all, if not all, such cases are based upon an intentional breach of fiduciary duty.
quences of his deviation from duty?

The Reporters have done an excellent job in identifying with precision at least the principal fiduciary obligations. Section 28: Lawyer's Duties to Client in General provides:

[A] lawyer must, in matters within the scope of the representation:

1. proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;
2. act with reasonable competence and diligence;
3. comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and
4. fulfill valid contractual obligations to the client.

Only the five obligations specified in section 28(3) are characterized as "fiduciary.">

One may argue over whether these obligations could be further subdivided so as to specify more than five "fiduciary" obligations. For example, several courts have spoken of full disclosure—the need to keep a client fully informed about the progress of the representation and of the choices that need to be made—as a fiduciary obligation.

And some courts describe a lawyer's obligations in extravagant but vague terms. "[A]n attorney . . . is bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client." The relationship between attorney and client has been described as one of *uberimma fides*, which means 'most abundant good faith,' requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.

The obligation to keep a client fully informed is certainly one that is widely recognized. It is not too much of a stretch, however, to classify

67. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 72 (Tentative Draft No. 8, 1997). Although they are mentioned in the same breath, the obligation not to deposit client's funds in a personal account and then spend them is quite different from the obligation to maintain client confidences.
68. *See*, e.g., *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982). It can also be argued that the prohibition against charging excessive fees and against entering into certain transactions with clients, set forth in sections 46 and 48 (Proposed Final Draft No. 1, 1986), are also "fiduciary obligations."
it as subsumed under the wider category of "honesty." 71 The obligation not to accept a representation that requires specialized expertise that a lawyer is lacking might be characterized as a "fiduciary" obligation. But it can just as well fall within the general obligation of section 28(2) "to act with reasonable competence and diligence," which the Reporters have classified not as "fiduciary" but rather as the standard that lawyers must meet in connection with whatever legal services they provide. 72

Some courts have found significant the differing capabilities of fiduciary and beneficiary, referring to the fact that the lawyer may be more sophisticated than the client and in a position to apply improper coercion. This may be less true when the client is a Fortune 100 corporation rather than a plaintiff in a negligence action. 73 Thus, if a client is poor and likely to be deferential to the lawyer, an obligation not to apply undue pressure to settle a case may arise. Should this be regarded as one of the fiduciary obligations that Justice Frankfurter reminded us must be specified, or is it simply a way of saying that the standard of care that the lawyer must meet in such circumstances is higher? There can be endless debate about these matters.

Therefore, although there may be some room for reasonable disagreement, we may accept, for present purposes, the Reporters' decision to list only the five obligations specified in section 28(3), quoted above, as "fiduciary obligations."

2. The Relationship of the "Ethical Codes" to the Civil Liability of Lawyers

What many, too many, courts have said about the materiality of a violation of a provision of the ethical codes to a lawyer's civil liability is, for the most part, shameful nonsense. 74 The same holds true of the courts' comments regarding the relevance of those provisions to

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71. Worth noting, if only as an aside, is Barbara A. v. John G., 193 Cal. Rptr. 422 (Ct. App. 1983). The defendant, a lawyer, had overcome his client's reluctance to have sexual relations by representing, "I can't possibly get anyone pregnant." Id. at 426. A damaging ectopic pregnancy ensued. The question was whether there was consent to the battery. If the representation was made in a fiduciary capacity, lack of consent was presumed. The court left to the jury the question of whether the false representation was made in a personal or a fiduciary capacity. See id. at 432-33.


73. See, e.g., Sanders v. Townsend, 582 N.E.2d 355, 358 (Ind. 1991) (finding that the attorney-client relationship entails one occupying a superior position to the other).

74. By "ethical codes" I refer primarily to the Rules of Professional Conduct, now adopted by most of the states. The Rules are based upon the Model Rules adopted by the American Bar Association and on the Code of Professional Responsibility, which preceded it and is still in effect in a few places.
whether a lawyer has adequately fulfilled his duties or has performed services with adequate care. Much of this sorry state is attributable to the pernicious disclaimers in the preambles to the codes. In defining the scope of the rules, the preamble to the Model Rules asserts:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.... Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.  

Professor Hazard, who as Reporter for the Kutak Commission that initially produced the Model Rules might be thought to bear a share of the responsibility, dismissed these efforts to deny that the Rules had anything to do with civil liability as “predictably futile, however, if not fatuous.” It would have been nice if his prediction had been sound, but unfortunately it was not. Court after court has pointed to this disclaimer and then made it the basis for an erroneous decision.

An extreme example is Sanders v. Townsend. Ms. Sanders sued her lawyer asserting that he had brought excessive pressure on her to accept an inadequate settlement. The court’s statement of the case indicates that this may well have happened. An intermediate appellate court had sustained a summary judgment for the lawyer on the plaintiff’s negligence claim but reversed the judgment on the breach of fiduciary claim because there were genuine issues of material fact. The Indiana Supreme Court quoted approvingly from earlier cases to the effect that a fiduciary “‘occupying [a] superior position’” should not exert improper influence and found that this doctrine applied to lawyers. But the plaintiff, unfortunately, had asserted that her lawyer’s conduct violated the Code of Professional Responsibility (although without specifying which rule or rules). The court held, solely on the basis of the disclaimer quoted above, that although the lawyer might be subject to discipline,
there could be no civil liability.\textsuperscript{79}

A much discussed case is \textit{Hizey v. Carpenter}.\textsuperscript{80} The defendants had represented plaintiffs and other persons in connection with the purchase and refinancing of real property. As their fortunes waned, the defendant drafted additional documents which, among other things, changed the plaintiffs' status from creditors to joint owners. When the other clients became bankrupt, plaintiffs were forced to accept an unsatisfactory settlement. Their claim was that their damage was attributable to their lawyer continuing to represent both parties after their interests became conflicting. On appeal, their principal contention was that the lower court improperly prohibited their expert witness from testifying that he had relied upon the Rules of Professional Conduct or the Code of Professional Responsibility in reaching his opinion.\textsuperscript{81} As is often the case in actions of this kind, the plaintiffs' new lawyers had adopted a shotgun approach, stating that they should have been allowed to rely upon asserted violations of half a dozen rules rather than relying exclusively, or at least primarily, upon the lawyer's breach of his fiduciary obligation to avoid conflicting representations.\textsuperscript{82}

The Washington Supreme Court started its analysis by noting that most courts have found that violation of an ethical rule does not "give rise to an independent cause of action against the attorney."\textsuperscript{83} Citing numerous cases, it adopted that position, basing its decision solely upon the disclaimers in the preambles to the Codes.

The court then considered the plaintiff's contention that "even if a violation of the CPR or RPC does not \textit{create} a cause of action, such violation nonetheless provides evidence of malpractice."\textsuperscript{84} It cited many cases adopting such a rule, or at least something similar though phrased differently. But it disagreed with all of these decisions, once again based

\textsuperscript{79.} See \textit{id.} at 359. Conceivably, if the plaintiff's second lawyer had not mentioned the Code, she would at least have had an opportunity to present evidence. I cannot resist referring to a dissenting opinion, drafted by a friend who is an appellate judge, but which was withdrawn from publication at the request of the judges in the majority: "I dissent, for the reasons given in the majority opinion."

\textsuperscript{80.} 830 P.2d 646 (Wash. 1992) (en banc).

\textsuperscript{81.} See \textit{id.} at 648.

\textsuperscript{82.} See \textit{id.} at 650.

\textsuperscript{83.} \textit{Id.} Here the court was quite correct. The concept of an implied cause of action, based upon a statute that says nothing about civil liability (e.g., the civil action based upon section 10 of the Securities Exchange Act and Rule 10b-5) has generally been rejected in the context of lawyers' civil liability, although a few courts have held that a violation of a rule that causes damages does give rise to liability.

\textsuperscript{84.} \textit{Id.} at 651.
upon the “clear and unambiguous” disclaimer language.\textsuperscript{85}

The court then embarked upon a lengthy analysis of the elements of a legal malpractice action, all of which plainly related, although without using the word, to an action for negligence. Citing numerous authorities, the court explained why reference to the Codes would be not helpful, and may even be confusing.\textsuperscript{86} Of course, in this portion of its opinion the court was quite correct. If the basis for a claim is that a lawyer waited until after the statute had run or that the lawyer relied solely upon a wholly inapplicable theory when any third-year law student would have known that another was likely to succeed, reference to the Rules of Professional Conduct is not of much use. Rules 1.1 and 1.3, requiring competence and diligence, might be cited, but they do little more than state in general terms the familiar negligence standard of care in this context.\textsuperscript{87} As the \textit{Hizey} court pointed out, whether the required standard of care has been met is usually fact driven, and the Rules (or at least Rules 1.1 and 1.3) are too general to be useful.\textsuperscript{88} This portion of the court’s opinion would not have been correct, however, if it had been about the facts in the case before it, rather than written in a vacuum. Where the claim is that a lawyer was unlawfully representing conflicting interests and that this was the proximate cause of the damage to the plaintiff, Rules 1.7 and 1.10 are quite specific. The issue of whether the violation of \textit{those} rules may be relevant evidence or relied upon by an expert witness or whether the violation creates a presumption of liability is a very different one.

Returning to the \textit{Hizey} opinion, the court distinguished some earlier, apparently conflicting, decisions of its own and then reached a remarkable conclusion. An expert will be permitted to conclude that a lawyer has not satisfied the requisite standard of care because of a failure to conform to the ethical rules. The expert may even quote from the rules, so long as the source of the quotation is hidden from the jury. The expert may refer generally to “ethical rules” but not to the ones that the state supreme court has adopted.\textsuperscript{89} So, too, they may not be mentioned in the court’s charge. “We therefore hold in a legal malpractice action that the jury may not be informed of the CPR or RPC, either directly through

\begin{itemize}
\item \textsuperscript{85} See id. The court did not discuss whether “malpractice” included breaches of fiduciary duty, such as the obligation to avoid conflicting representation, and so did not consider whether a different conclusion might be drawn depending upon the nature of the claim.
\item \textsuperscript{86} See id. at 653.
\item \textsuperscript{87} See \textit{Model Rules of Professional Conduct} Rules 1.1 & 1.3 (1998).
\item \textsuperscript{88} See \textit{Hizey}, 830 P.2d at 652.
\item \textsuperscript{89} Id. at 654.
\end{itemize}
jury instructions or through the testimony of an expert who refers to the CPR or RPC.90

I have dwelt at such length on this case because, despite the fact that its conclusions are extreme, it is representative of many other decisions that talk broadly about the possible relevance of the ethical codes without ever referring to whether the gravamen of the action is breach of a fiduciary duty or the negligent performance of legal services.91

Where, then, is the correct analysis to be found? We need look no further than the Director’s Foreword to Tentative Draft No. 8 of March 21, 1997. Though lengthy, it deserves full quotation rather than paraphrase:

As with previous drafts in the Law Governing Lawyers, a complicated problem facing the Reporters is the relationship between these formulations and the “ethical codes.” The term “ethical codes” refers to the Rules of Professional Conduct as adopted in most states, based on the American Bar Association Model Rules of Professional Conduct; the Code of Professional Responsibility as adopted in a few states (notably New York), based on the earlier American Bar Association Model Code of Professional Responsibility; and counterpart regulations in other states (notably California and Illinois) that have proceeded in distinctive pathways concerning rules of ethics. The term “ethical codes” has become familiar usage within the legal profession and hence apt as a reference to these regulations. However, it must be kept constantly in mind that these regulations are rules of law and not merely admonitions of the legal profession to its members. The legal profession is and has been a vocation regulated by law, partly by these regulatory codifications and partly by common law and statute.

Indeed, the text of the 1970 American Bar Association Model Code of Professional Responsibility was in large part a Restatement of rules

90. Id.
91. See, e.g., Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980) (creating confusion because of the court’s lack of clarity as to whether the action should be treated as negligence or as inadequately disclosed conflict); Allen v. Leikoff, Duncan, Grimes & Dermer, P.C., 453 S.E.2d 719, 721 (Ga. 1995) (concluding, after general discussion with no reference to the facts of the case, that “pertinent Bar Rules are relevant to the standard of care in a legal malpractice action,” and leaving unclear whether the claims were for negligence or for violation of fiduciary duty); Shaw v. Everett, 582 So. 2d 195, 198 (La. Ct. App. 1988) (reversing grant of summary judgment to a lawyer who allegedly converted plaintiff’s property by lying to the court and holding “[t]he same duty risk analysis of any action in negligence must be applied to the totality of the facts as they are presented at the trial of this matter”); Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986) (stating that violation of the rule may be evidence of negligence, but expert testimony about the violation is inappropriate); Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991) (treating as negligence a claim for damages attributable to impermissible conflicting representations).
established in judicial decisions. The Model Rules of Professional Conduct were largely based on the Code and hence had the same provenance. Yet the Code and the Rules, as adopted in various states, are a form of legislation with attendant authoritative significance. This project therefore must deal sensitively with a problem that now arises in most fields where we undertake Restatements: the relationship between rules evolved through judicial decision, conventionally called "common law," and rules promulgated through legislation, in this case the "ethical codes."

From a theoretical viewpoint, the relationship between statute and common law is a jurisprudential conundrum. The conundrum presents itself in various forms: Isn't every common-law rule governed by the exception that common law must yield to an applicable statute? (Of course, at least in domains outside the "inherent power" of the judiciary.) Isn't a statute to be interpreted in terms of the common-law concepts on which all legislation in this country is expressly or impliedly predicated? (Of course, but that opens the question of how the content of those common-law concepts can be accurately discerned.) In determining what the common-law rule is, and hence whether it has been superseded by a statute, isn't it necessary to consider the whole pattern of statutory intervention and not merely the immediately cognate phrases? (Of course, but that opens the question of the extent and shape of the "pattern.") In determining whether a statute has superseded a common-law rule, isn't it necessary to consider the whole pattern of the common law and not merely the rule immediately at hand? (Of course, but that opens the question of the common law's pattern.)

The foregoing issues have persistently intruded into deliberations over the texts in this project. They also intrude more or less in all other projects. There is not and cannot be any definitive general answer to the relationship between common law and legislation. That truth is, of course, difficult to accept in a project, such as a Restatement, whose very purpose is to be definitive.

Fortunately, an integration that may be impossible as a matter of jurisprudential theory can turn out to be quite practicable as a matter of legal technique. In my view that has been the case in this project. After all, the Code and the Rules were based on common law and not, for example, the Justinian Code or the Code Napoleon. Moreover, judicial decisions and codifications both address a familiar calling, the practice of law. In addressing this familiar calling, the rules of law—whether common law or code—have had to deal with the same basic problems: the duty of loyalty to client and limits thereto (through their mirror image, the rules concerning conflict of interest); the duty to protect client confidences and the limits thereto; and the relationship between the
It seems to me that the Reporters in dealing with these problems have taken adequate account of the relationships between common law and code. One can only agree heartily with and commend this elegant statement. However, a two part addendum is necessary.

First, Professor Hazard fails—as so many courts and commentators before him have failed—to distinguish between those ethical rules which were "in large part a restatement of rules established in judicial decisions" and those which were not. Rule 1.6, Confidentiality of Information, is certainly in the first category. So are Rules 1.7, 1.8, 1.9, and 1.10 covering Conflicts of Interest and Business Transactions with a Client. But Rule 1.17, authorizing the sale of a law practice, does not find its provenance in the common law. That rule, to the extent it has been adopted, is simply legislation adopted by a court at the behest of the bar. Its objective is to forestall a possible decision, emanating from the policy underlying Rule 5.6—that a lawyer has no property interest in client relationships—that an agreement to pay for a law practice is unenforceable. Significantly, if each of the Rules is examined, one by one, it turns out that the ones that are essentially codifications of common law are first, Rules 1.1 and 1.3, and second, those that describe the fiduciary obligations of section 28(3). There may be a couple of other obligations of lesser significance that the Reporters might have mentioned, but did not.

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92. **RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS** at xxi-xxiii (Tentative Draft No. 8, 1997).

93. *Id.* at xxiii.

94. See **MODEL RULES OF PROFESSIONAL CONDUCT** Rule 1.6 (1998).

95. See *id.* Rules 1.7-.10.

96. See *id.* Rule 1.17. As well-meaning additions to the Rules of Professional Conduct continue to be made, new problems may arise. The District of Columbia, for example, has added a Rule 9.1, prohibiting a lawyer from discriminating on the basis of race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap. This certainly establishes a standard of conduct, but it is not one that can be easily traced to the common law. It is easy to conceive of situations in which a person might be damaged by a violation of this rule and who will be unable to rely upon a more generally applicable prohibition of the same conduct (for example, the violator might have less than ten employees). If civil liability were sought to be imposed because of a violation of this Rule, the temptation here to apply preamble disclaimer would indeed be strong. See **D.C. RULES OF PROFESSIONAL CONDUCT** Rule 9.1 (1997).

97. Rule 1.15, which prohibits a lawyer from commingling a client's property with his own, is surely within the section 28(3) obligations. Courts have imposed liability where a violation of this duty is the cause of damage. Rule 3.5(a), which forbids a lawyer from trying to bribe a juror, may or may not be based on the common law. It is hard to conceive that a court—even those that
As Anderson and Steele point out, what distinguishes a malpractice or negligence action from an action for breach of fiduciary duty is that the essence of the former is a violation of a *standard of care* while the latter involves the violation of a *standard of conduct*. If the Rules of Professional Conduct are examined with this distinction firmly in mind, it becomes evident that the rules to which Professor Hazard referred all prescribe standards of conduct. Within this group of rules only Rules 1.1 and 1.3 are distinguished from the others by the fact that a decision of whether they have been violated always requires an analysis of whether the requisite standard of care has been met. There should be no objection to referring to these two rules in a negligence action, but it would not be of much help because they are so general. In contrast, a standard of care analysis is often not required in determining whether the other rules, those that describe the obligations set forth in section 28(3), have been violated.

As explained below, a somewhat similar, but not identical, analysis may be needed. The nature and scope of the fiduciary duty alleged to have been violated need to be described. And the question of whether the duty has been met may require reference to and explanation of how

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88. *See Anderson & Steele, supra note 62,* at 243-44. The same point is made in *Mallen & Smith, supra note 21,* § 16.23, at 486.

99. A view contrary to that set forth above may be found in Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys,* 9 *Ohio N.U. L. Rev.* 1 (1982). The author recognizes that the “Rules” are not to be viewed monolithically and considers how they might apply by examining them individually. He goes wrong, however, by following the examples of courts that have conflated the actions for negligence and breach of fiduciary duty. For example, he describes *Ishmael v. Millington,* 50 Cal. Rptr. 592 (Dist. Ct. App. 1966), as a “traditional negligence action.” *Id.* at 25. And well he might, given the court’s opinion. Plaintiff had agreed to an amicable divorce and, fully trusting her husband, agreed to be represented by the defendant, who had represented him and his business “for some time.” *See Ishmael,* 50 Cal. Rptr. at 594. The lawyer drafted a complaint for the wife and a property settlement evidently dictated by the husband. He regarded the arrangements as “‘cut and dried’” and “‘assumed that she knew what she was doing.’” *Id.* The trial court granted summary judgment because she had not relied upon her lawyer, only her husband. The property settlement gave the wife far less than she was entitled to under California law. The appellate court reversed. It referred to the conflict rules in the Code and described in the strongest terms the lawyer’s obligation to avoid conflicting interests unless there is informed consent after full disclosure. It even said that the general standard of professional care “falls short of adequate description where the attorney’s professional relationship extends to two clients with divergent or conflicting interests in the same subject matter.” *Id.* at 597. Nevertheless it treated the action as one for negligence. It even said that upon the trial after remand it would be a question for the jury whether the plaintiff was contributorily negligent (which, in that state at that time, would bar her action) for having relied solely upon her husband and accepting pro forma representation from her lawyer. *See id.* at 598.
lawyers customarily behave in similar circumstances.

Second, I respectfully disagree with Professor Hazard that the Reporters have taken adequate account of the relationship between the common law and the ethical codes. As I shall try to show below, they have failed to take advantage of the "Rule respecting Restatements," and they have given too much weight to the many decisions that have dealt both sloppily and incorrectly with the questions of whether and how the ethical codes—"and the common law rules they codify"—apply to the civil liability of lawyers.

It should not be left unsaid that one of the reasons for the many confusing and ill-reasoned opinions on this subject is that the contentions of the plaintiffs' lawyers and the testimony of their expert witnesses are too often not as well stated as they should have been. To take just one example, another much discussed recent decision is Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.,109 described by the court at the outset as a "civil action charging malpractice."110 The defendant law firm represented the plaintiff corporation and, at the same time, both of its principal shareholders. The firm also provided personal legal services to one of them. After the two shareholders became bitterly hostile and engaged in warfare over control of the company, the law firm nevertheless continued to represent them and the company, and subsequently, one of the shareholders against the other, now a former client. The enterprise foundered. This action, by the former client against the law firm, followed. The jury rendered a verdict for $2,600,000.102 The primary basis of the action was the law firm's breach of the fiduciary obligation not to represent conflicting interests, and the jury found that this was the proximate cause of the large financial loss.

The plaintiff argued, or at least the Tennessee Supreme Court said he argued, that the "Code of Professional Responsibility is the standard of care . . . and that proof of a violation of the Code is sufficient basis for liability."103 That enabled the court to announce that "[t]he initial inquiry, whether the Code is the standard of care in an action based on negligence, is answered by the Code itself."104 It cited the disclaimer in the preamble and went on to discuss at length the many decisions in other states that had held that a rule violation did not give rise to an implied claim for relief.

100. 813 S.W.2d 400 (Tenn. 1991).
101. Id. at 405.
102. See id. at 403.
103. Id.
104. Id.
Then the court explained that, the Code being irrelevant, the proper standard of care required for the lawyer was "that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys."105 The court then turned to whether there was any proof that this standard of care had not been met. The testimony of two experts was critical on this issue.

One of the experts was Professor Monroe Freedman, a participant in this Symposium, whose testimony was probably incorrectly summarized by the court. Fortunately, he has told us in a subsequent article what his testimony was.106 He testified that although he believed that a violation of the ethical rules prohibiting conflicting representation "should constitute malpractice per se," that this was a minority position.107 He said that, alternatively, these rules were "evidence of how a reasonably skilled and competent lawyer would act."108 The Tennessee Supreme Court translated Professor Freedman's testimony into an assertion that his opinion—that the lawyers in question had fallen below the standard of care expected of lawyers in Tennessee—was based upon his belief that "the Code is the standard of care."109

Although I applaud Professor Freedman for referring to the specific rules relating to conflicts of interest rather than generally to "the Rules," I believe he might have had more influence on the Tennessee Supreme Court by testifying as follows: First, he should have drawn a sharp distinction between "legal malpractice" and breach of the fiduciary duty to avoid impermissible conflicting interests. Second, he should have explained, with his customary cogency, that the conflict rules were not evidence of how a reasonably competent lawyer should behave. The Rules, rather, established a standard of conduct—based upon the common law and one that would have applied if the Rules had never been adopted—that had to be observed by both highly skilled, barely competent, and even incompetent lawyers alike. Once again, Lazy Seven is representative of many other decisions and opinions.

How, then, have the Reporters dealt with this messy body of law, and have they found the correct formulation?

105. Id. at 405-06.
107. Id. at 34.
108. Id.
109. Lazy Seven, 813 S.W.2d at 406.
3. The Structure of Chapter 4

To the confused state of affairs just described, the Reporters have added more confusion by making a quite unnecessary distinction respecting breaches of fiduciary duty. They do note the distinction between actions based upon negligence and actions based upon a breach of fiduciary duty. However, they introduce another quite unnecessary distinction—between breaches of fiduciary duty that are committed intentionally and those that are committed negligently—and make it a central feature of their analysis. This distinction is particularly inappropriate in a Restatement because there are no cases to support it.

a. Negligent Breaches of Fiduciary Duty

The Reporters find this concept in section 201 of the Restatement of Trusts which, somewhat circularly, defines a breach of trust. It is "a violation by the trustee [fiduciary] of any duty which as trustee he owes to the beneficiary."\(^{110}\) The comments to that section do explain that when a trustee’s breach results from a mistake of either law or fact, liability may depend upon whether he is negligent. He is not liable "if he acts with proper care and caution."\(^{111}\) Three illustrations are provided.\(^{112}\)

The fashion today is to construct the helpful illustrations that are staples of all Restatements upon decided cases. That was not the practice when the Restatement of Trusts was written. Moreover, the reporter’s note to section 201, notably, does not provide any support for these conclusions.\(^{113}\) Of course, it is hard to disagree with the Reporters. A trustee who has performed faultlessly in trying to fulfill his obligations shouldn’t have to pay if something unexpectedly goes wrong. One might quibble, however, with the standard of care that the comment calls for ("proper care and caution").\(^{114}\) That is pretty much the standard applicable in a negligence action against one who is not a fiduciary. Perhaps a fiduciary should be held to a higher standard, one of *ubierrima fides*, a Meinhard v. Salmon standard.\(^{115}\) Perhaps he should be

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111. *Id.* § 201 cmt. c.
112. A trustee authorized to invest in secured bonds discovers that a mortgage securing and investment was forged. He is not liable when a loss occurs. Purchase of a note thought to be secured by a first mortgage does not give rise to liability where a prior lien "had been improperly indexed in the registry and which with the exercise of reasonable care he could not have discovered." *Id.* § 201 illus. 2. Reliance on a court opinion is acceptable even if it is later overruled. *See id.* § 201 illus. 1-3.
113. *See id.* § 201 reporter’s notes, app. at 345.
114. *Id.* § 201 cmt. c.
liable unless he has taken extreme care to avoid injury. Such an analysis might allow proof of faultless behavior as a defense, putting the burden of proof on the defendant, as contrasted with an action for malpractice where negligence is an element of the plaintiff’s prima facie case. To be sure, the Reporters have fashioned a perfectly sensible illustration (No. 2 to section 72) of where a violation of the prohibition against conflicting representation should not give rise to liability for the resultant damage. That illustration is drawn from the Reporter’s imagination, not from any court decision.

What role an expert witness may play in action against lawyers is a controversial subject, and a full treatment is beyond the scope of this Article. Briefly, an expert’s testimony is always admissible, and perhaps essential, in actions for malpractice if the term is used, as it should be, to mean negligence. But some courts have said that in actions for breach of fiduciary duty expert testimony is inadmissible. For example, “[t]he standards governing an attorney’s ethical duties are conclusively established by the Rules of Professional Conduct. They cannot be changed by expert testimony.” But to say, as the court did, that expert testimony is inadmissible is quite wrong, because that conclusion rests upon the familiar error of viewing the Rules monolithically rather than indi-
vidually. Sometimes expert testimony is not needed; sometimes it is essential. Two examples make this point clearer.

Assume that a lawyer who has just settled a case for $400,000 tells his client that the settlement was for $300,000. He collects the money deducts his fee of one-third of the recovery, and pays the client $200,000. In the action that follows discovery, the plaintiff should not need to introduce expert testimony to prove that lawyers have fiduciary obligations to be honest with their clients, to safeguard their property, and not to cheat them and steal their money.

The second example relates to a young unsophisticated woman who is accused of possible criminal conduct in a high-visibility matter of national significance. Her lawyer talks freely to the press and appears on numerous television talk shows, selectively disclosing information that could only have come from his client. She is subsequently indicted, and although acquitted, incurred legal expenses. Her lawyer is found to have waived her attorney-client privilege. In a subsequent action, that waiver is alleged to have been unauthorized and the proximate cause of damage. In this case, testimony by an ethics professor should clearly be admissible to describe the scope of the privilege, and based upon prior testimony of the client and lawyer, to opine as to whether the waiver had been authorized. Testimony by an experienced criminal lawyer, to the effect that the lawyer’s strategy on his client’s behalf was brilliant and highly likely to succeed in avoiding indictment, should also be admissible, even though in this case it was unsuccessful. Other examples could easily be given.

b. The Relevant Black Letter of Chapter 4

For present purposes we need only look at six of the sections of Chapter 4. They are:

Section 71. Elements and Defenses Generally

In addition to the other possible bases of civil liability described in §§ 76A and 77, a lawyer is civilly liable to a person to whom the lawyer owes a duty of care within the meaning of § 72 or § 73, if the lawyer fails to exercise care within the meaning of § 74 and if that failure is a legal cause of injury within the meaning of § 75, unless the lawyer has a defense within the meaning of § 76.

Section 72. Duty of Care to Client

For purposes of liability under § 71, a lawyer owes a client the duty to exercise care within the meaning of § 74 in pursuing the client’s lawful objectives in matters covered by the representation and in ful-
filling the fiduciary duties to the client set forth in § 28(3).

Section 74. Standard of Care

(1) For purposes of liability under § 71, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances, unless the lawyer represents that the lawyer will exercise greater competence or diligence.

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:

(a) does not give rise to an implied cause of action for lack of care;
(b) does not preclude other proof concerning the duty of care in Subsection (1); and
(c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

Section 75. Causation and Damages

A lawyer is liable under § 71 only 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.

Section 76. Defenses; Prospective Liability Waiver; Settlement

(1) An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

... .

(4) Except as otherwise provided in this Section, liability under § 71 is subject to the defenses available under generally applicable principles of law governing professional negligence actions. A lawyer is not liable under § 71 for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule.

Section 76A. Civil Liability to Client Other Than for Malpractice

... .

(2) A lawyer is subject to liability to a client for injury caused by intentional breach of the fiduciary duties set forth in § 28(3) in the circumstances and to the extent provided by law governing intentional breach of fiduciary duties. 120

A few things are worth noting. Section 71, although part of

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120. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 8, 1997).
Topic 1, Liability for Legal Malpractice, refers to section 76A which is in Topic 2, Other Civil Liability. Section 72 states that a lawyer must "exercise care . . . in fulfilling the fiduciary duties to the client set forth in § 28(3)." Well, of course. But is that a meaningful or useful statement if it is meant to apply to intentional breaches? Suppose a lawyer, retained by a client to assist in the acquisition of control of a corporation through a tender offer, secretly buys large quantities of stock on the exchange, driving up the price. Is it sensible to say that he is liable for failing to "exercise the competence and diligence normally exercised by lawyers in similar circumstances" to avoid using confidential information so as to injure the client? Wouldn't it be better, given the confusion in this area, to say that he had breached the common law duty that is codified in Rule 1.8(b)? On the other hand, perhaps a precise parsing of the two sections means that the rules set forth in section 72 apply only to breaches of fiduciary duty that are other than those described in section 76A? In that case, section 74(1), constrained as it is by the opening phrase, would apply only to the portion that follows the first comma in section 71. That would not be the most felicitous drafting because it asks too much of the average reader.

More significantly, are sections 74(2)(b) and (c) properly part of the black letter at all? The black letter sections of a Restatement generally state principles or rules of substantive law rather than rules of evidence about how a violation of that law may be established. If the substance of these subsections were moved to the comments it would provide an opportunity to write more expansively, to incorporate some of the insights of the Director's Foreword, and perhaps even to distinguish between standards of care and standards of conduct. Comments f and g to section 74 are perfectly correct as far as they go, but they tend to deal with the simpler surface issues and they do not grapple with the difficult ones. Finally, since section 76(1) applies in terms only to liability for malpractice, is there a negative inference that an agreement that prospectively limits a lawyer's liability to a client for an intentional breach of one of the fiduciary duties set forth in section 28(3) is perfectly valid? One would hope not.

Returning to section 72, comment f and the associated reporter's note discuss fiduciary duties. Remarkably, since this section is limited to negligent breaches—leaving intentional breaches to section 76A—there is not a single authority in the reporter's note that even dis-
discusses the question of whether a lawyer is liable for a negligent breach for failure to satisfy the requisite duty of care. Nor are there any authorities illustrating a situation where a lawyer was absolved from liability because his breach occurred despite his acceptably careful performance. Nor is there any case that examines whether the applicable standard should be the one required in negligence actions (competence and diligence exercised by lawyers in similar circumstances) or some more stringent higher standard of care. Seven cases are cited in the reporter’s note. Six of them are straightforward examples of liability for intentional breach of section 28(3) obligations. The seventh, McDaniel v. Gile, imposed liability where a lawyer deliberately provided subpar performance when the client resisted his sexual advances. This case is probably best characterized as a rare example of an intentional violation of Rule 1.3, which requires diligence (not included within section 28(3)). It certainly is not an example of a negligent breach. Cited also in the reporter’s note were several articles, texts, and other Restatement sections. None of them discuss negligent breaches of fiduciary duty.

Illustration 1 to section 72 provides a useful example of what may be either a conceptual or semantic problem. It relates to a lawyer who accepts a conflicting representation which a routine conflicts check would have revealed. I regard this as an intentional breach of the fiduciary duty to avoid conflicting representations. But it can also be treated, and the Reporter appears to take this view, as a negligent failure to exercise the required due care to discover the existence of a conflict. This needs to be carefully sorted out.

A major flaw in the structure of this chapter is in part the failure to distinguish the cases in which duty of care is the major issue and those

125. Strangman is said to hold that a lawyer may be liable for negligent or intentional breach without proof that a lawyer intended to injure a client. The plaintiff had invested in a corporation upon the recommendation of his lawyer, who failed to disclose that he was an officer of the company. The lawyer honestly thought, if mistakenly, that it was a good investment. See Strangman, 267 P.2d at 396. The formal holding was that the lawyer had breached the duty “owed to plaintiff as his attorney and confidential advisor and [was liable] for his active participation in an illegal transaction.” Id. at 398. To be sure, the court said that he was guilty of gross negligence in failing to reveal that he had a conflict. But loose talk does not convert an intentional breach into a negligent breach. See id.
that involve the violation of a standard of conduct. Equally important is the misplaced emphasis that follows from the decision to divide a single concept into two. Civil liability for breach of fiduciary duty is an important part of the law governing lawyers.\textsuperscript{126} Negligent breaches are given a starring role, even though they are involved in perhaps a handful of the written opinions. Intentional breaches, representing virtually all of the fiduciary duty cases, are given a walk-on role. The subject is found in a tag-along title and the comment is brief and conclusory. The roles need to be reversed. The law governing breach of the fiduciary obligations owed by lawyers to their clients is important enough and unique enough to deserve more than what the Director referred to as an “index section.”

The confusion engendered by the structure of Chapter 4 was largely responsible for a remarkable debate and vote at the 1997 Annual Meeting of the Institute. Sections 71 and 72 sailed through with only limited discussion and without reference to the fact that violations of fiduciary duty were treated as a subset of negligence. When section 76A was reached, however, a question was asked whether “intentional,” which was not defined, might be read to mean intent to do harm.\textsuperscript{127} There followed a somewhat amorphous discussion about intentional and negligent breaches in the course of which it was suggested that since section 76A wasn’t too important a section—an “index section” that only referred to other law without trying to define it—perhaps “intentional” should be dropped.\textsuperscript{128} After more confusing discussion, a motion to that effect was made. The Associate Reporter primarily responsible for the drafting of this chapter patiently explained that this would not be a good idea, and that negligent breaches were covered in section 72 and intentional breaches in section 76A, so that the word was needed.\textsuperscript{129} The Director ventured that perhaps the trouble was with the structure of the chapter and that it might be better if it were cast in terms of obligations to clients and obligations to non-clients. The Reporters tentatively disagreed but agreed to reconsider.\textsuperscript{130}

\begin{footnotes}
\footnote{126. Compare Kelly v. Foster, 813 P.2d 598, 601 (Wash. Ct. App. 1991) (“A review of the Rules of Professional Conduct will suggest that most cases of proven legal malpractice will involve a breach of one or more fiduciary duties.”), with Developments in the Law: Lawyers’ Responsibilities and Lawyers’ Responses, 107 Harv. L. Rev. 1547, 1558 n.1 (1994) (noting that the subject of a lawyer’s fiduciary obligations is not discussed because these result in a relatively small portion of malpractice claims).}


\footnote{128. See id. at 358-59.}

\footnote{129. See id. at 360-61.}

\footnote{130. See id. at 362.}
\end{footnotes}
braska made a perceptive comment to the effect that he was perplexed because he didn’t believe that striking “intentional” dealt with the problem that had been raised.\textsuperscript{131} Clearly, he was not the only one. Nonetheless, the motion carried, 119 to 107.\textsuperscript{132}

So, as things now stand, section 72 covers negligent breaches and section 76A covers negligent and intentional breaches. The Reporters must come up with a resolution that not only is consistent with the Institute’s decision but also makes sense.

I suggest that the Director was right and that a restructuring is desirable. I would not, however, depart so radically from the present draft as his proposal would require. I would simply abandon the division of fiduciary breaches into two parts. Such a revision would take the following form:

\textbf{TOPIC 1. LIABILITY FOR LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTY}

Section 71. Liability for Failure to Exercise Duty of Care

A lawyer is civilly liable to a person to whom the lawyer owes a duty of care within the meaning of § 73 or § 74, if the lawyer fails to exercise care within the meaning of § 75 and if that failure is a legal cause of injury within the meaning of § 76, unless the lawyer has a defense within the meaning of § 77.

[The comments would require some, but not very much, revision. Malpractice would be defined to exclude breaches of fiduciary duty.]

Section 72. Liability for Breach of Fiduciary Duty

A lawyer is civilly liable to a client, to whom the lawyer owes the fiduciary duties described in § 28(3), and has breached any of those duties, if that breach is a legal cause of injury within the meaning of § 76, unless the lawyer has a defense within the meaning of § 77.

[This would be the place for a comment that would set forth the substance of the Director’s remarks in his Foreword to Tentative Draft No. 8. Some of the material from comment f to § 74, suitably revised, might be used here. But the revision would be significant. The comment now assumes and asserts that the rules are helpful in determining what standards [of care] lawyers must observe. I would hope that the revised comment would explain, instead, following the Director’s remarks, why certain rules are useful in that they are essentially codifications of common law principles that establish standards of conduct.

\textsuperscript{131} See id. at 363.
\textsuperscript{132} See id. at 364.
A revised comment to § 76A would be moved to the proposed new § 72. The comment would also discuss the extent to which a breach that occurs despite faultless conduct is excused. Perhaps it would also discuss whether the standard of care is identical to or higher than the standard set forth in § 75 (now § 74).

Section 73. Duty to Client
For purposes of liability under § 71, a lawyer owes a client the duty to exercise care within the meaning of § 74 in pursuing the client's lawful objectives in matters covered by the representation.

[The comments would be unchanged except for the deletion of comment f.]

Section 74. Duty to Certain Non-Clients
[Unchanged from the present draft of § 73, except for cross-references.]

Section 75. Standard of Care
For purposes of liability under § 71, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances, unless the lawyer claims special expertise or the client agrees that a lesser level of competence will be exercised.

[Comment f would be revised to reflect the deletion of what is now § 74(2) and would, I hope, explain why consideration of a violation of a rule may be affected by the particular rule that has been violated. Surely the discussion of the impact of the Rules upon the standard of care would be clarified by the fact that it applied only to malpractice and not to breaches of duty.]

Section 76. Causation and Damages
[Unchanged from present § 75, except for the addition of "or of a fiduciary duty" after "a duty of care." Some revision of the comments might be needed to reflect the fact that it would apply also to what, in the current draft, is called intentional breach of fiduciary duty.]

Section 77. Defenses; Prospective Liability Waiver; Settlement
[Unchanged from present § 76. I suggest, because of the expectations created by reading § 71, as well as because of the order of the terms in the title, that Section (4) be put first and renumbered (1), and the other sections be renumbered. The new subsection (1) would read:}
(1) Except as otherwise provided in this Section, liability under §§ 71 and 72 is subject to the defenses under generally applicable principles of law governing professional malpractice and breach of fiduciary duty actions. A lawyer is not liable under § 71 or § 72 for any action or inaction the lawyer reasonably believed to be required by law, including a rule governing professional conduct.

Section 76A. Civil Liability Other Than Malpractice

[Subsection (2) would be dropped and some revision of the comments would be needed.]

An objection that may be lodged against a reordering of this kind is that it departs too much from the decisions of our highest state courts to be acceptable as a Restatement. The Reporters have expressed this view. I respectfully disagree. Although there are scores of cases that talk bewilderingly about how the ethical codes may or may not be used in determining whether a lawyer has fulfilled the necessary standard of care when he deliberately and intentionally violated a fiduciary obligation to a client, there are plenty of others that apply the more sensible analysis that the breach of one of a lawyer’s fundamental fiduciary obligations does not require an inquiry into whether he has exercised “the competence and diligence normally exercised by lawyers in similar circumstances” to avoid that breach. Many are cited in the reporter’s notes to section 72, comment f; section 74, comment f; and to section 76A, comment d. An examination of Professor and former Director Herbert Wechsler’s formulation of the “Rule respecting Restatements,” cited previously, should persuade anyone that this objection is not

133. “My catalogue is long, through every passion ranging,” but here are a notable few: Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994); Gerdes v. Estate of Cush, 953 F.2d 201 (5th Cir. 1992); Avianca, Inc. v. Correa, 705 F. Supp. 666 (D.D.C. 1989), aff’d, 70 F.3d 637 (D.C. Cir. 1995); Elliott v. Videan, 791 P.2d 639 (Ariz. Ct. App. 1989); Mirabito v. Liccardo, 5 Cal. Rptr. 2d 571 (Ct. App. 1992); David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339 (Ct. App. 1988); Goldman v. Kane, 329 N.E.2d 770 (Mass. App. Ct. 1975); Owen v. Pringle, 621 So. 2d 668 (Miss. 1993). But see Shaw v. Everett, 582 So. 2d 195, 198 (La. Ct. App. 1998) (holding that after finding a lawyer liable to a non-client for breach of a professional duty, “[t]he same duty risk analysis of any action in negligence must be applied”). In the well-known case of Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992), the court found that the defendant law firm had breached the common law fiduciary obligation to avoid representing conflicting interests while insisting that the rule of professional conduct restating that obligation was wholly irrelevant, relying, of course, upon the infamous Scope Note, see supra p. 722. At least that analysis enabled the court to apply a correct rule of law. Sargent v. Buckley, 697 A.2d 1272 (Me. 1997), comes closer. The court reversed the dismissal of a claim that a lawyer had breached a fiduciary duty when he represented a client against a former client in a substantially related matter. The duty was held to be one of common law and that reference to the codification in the Maine Bar Rules was acceptable “merely as evidence of the applicable standard of care.” Id. at 1275.
sound. When the case law has bred two rules, one promoting confusion and the other orderly thought, a Restatement should embrace the latter, whatever the numbers that result from a nosecount of the cases.

III. CONCLUSION

The views set forth above reflect strong disagreement with one part of the work of the Reporters and, less directly, with the Advisers and members of the Council who have supported them. This disagreement should not be misconstrued as reflecting any lack of respect or admiration for the Reporters or their several Advisers. Their massive endeavor has consumed a substantial part of their time for more than a decade. They have earned the thanks of the profession and even wider recognition than they already enjoy. That well-deserved thanks, however, need not extend to uncritical endorsement of every particle of their work, and especially to their insistence upon making an unnecessary distinction that adds confusion to an already confused area.

Breaches of fiduciary obligations are increasingly the basis for the civil liability of lawyers and law firms. A careful analysis of the nature and elements of a lawyer's fiduciary obligations to clients in the litigation context is therefore an integral part of a Restatement of The Law Governing Lawyers. It is too important a part to be summarily treated in an “index section” that does little more than refer to another body of law. The present draft of Chapter 4, moreover, by treating the rarely if ever encountered negligent breach of fiduciary duty as an important basis for civil liability, carries with it an unnecessary and confusing standard of care analysis that clouds, rather than clarifies, the law. The long-standing policies of The American Law Institute in formulating Restatements permit the overriding of the regrettably large number of decisions in this area that rest upon erroneous analysis and are sometimes incorrectly decided. A simpler and clearer restructuring of Chapter 4 would go far toward bringing coherence and order to this disordered part of the law.134

134. The Institute encourages the submission in advance of the Annual Meeting of motions to amend a draft to be considered at the meeting. A motion to amend Chapter 4 substantially along the lines suggested in this Article was submitted on April 9, 1998, after the Article was completed. At the Annual Meeting of the Institute on May 12, 1998 the President announced that the Reporter had agreed to restructure the chapter in the manner suggested. The final draft of the Restatement was approved at the meeting, subject to that restructuring and other editorial changes and is expected to be published in early 1999.