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Caveat Lawyer: The Restatement of the Law of Lawyers' Invite to Rely Standard for Attorney Liability of Nonclients

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CAVEAT LAWYER: THE RESTATEMENT OF THE LAW OF LAWYERS' "INVITE TO RELY" STANDARD FOR ATTORNEY LIABILITY OF NONCLIENTS

Sean Pager

Everybody loves to hate lawyers. Nowadays, it's easier to sue them. The erosion of privity barriers has led to a dramatic growth in lawsuits filed against attorneys by third-party nonclients.[1] Courts in different jurisdictions have sanctioned such claims under variant theories of negligence and third-party beneficiary doctrines.[2] Specific rationales relied on by courts and commentators include a "balance of factors" test,[3] gratuitous undertaking or reliance, negligent misrepresentation,[4] professional negligence (malpractice), and fiduciary duties.[5] Courts have generally been careful, however, to circumscribe the resulting exposure that attorneys face under any of these theories.[6] One reason has been a fear of "indeterminate lia-

1. *See* Jay Feinman, *Attorney Liability to Nonclients*, 31 TORT & INS. L.J. 735 (1996) (stating that attorneys have become a preferred target for such economic negligence cases brought by third parties).

2. *See* 1 RONALD MALLEN & JEFFREY SMITH: LEGAL MALPRACTICE (3d ed. 1989), sec. 7.11–12 [hereinafter MALPRACTICE]; *id.* at 739–46. For a compilation of recent cases nationwide *see* Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client* (Supp. Sept. 1996); 61 A.L.R. 4th 464, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R. 4th 615 (Supp. Sept. 1996).

3. The balance of factors approach has its origins in a California case, *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958). The factors to determine whether a duty is owed include (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm, (3) certainty of injury, (4) proximity of causation, (5) the policy of preventing future harm, (6) the extent to which recognizing a duty for attorneys would impose undue burden on the profession. Lucas v. Hamm, 56 Cal. 2d 583, 87, 15 Cal. Rptr. 821, 364 P.2d 685 (1961).

4. *See* Feinman, *supra* note 1, at 740–46.

5. *See* John Sutton, Jr., *The Lawyer's Fiduciary Liabilities to Third Parties*, 37 S. TEX. L. REV. 1033 (1996).

6. *See* Douglas Cifu, *Expanding Legal Malpractice to Nonclient Parties—At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 15 (1989).

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bility" famously described by then-Judge Cardozo in *Ultramares v. Touche*.[7] This concern assumes added weight when one considers the special nature of the attorney-client relationship. Creating duties to third parties could detract from the attorney's proper focus on the client.[8] As such, normal liability principles "must yield to the higher priority given to the lawyer's duties to the client of loyalty and zealous representation, and to maintenance of confidentiality, avoidance of conflicts of interest, and open access to courts."[9]

This pattern of judicial restraint in the realm of third-party liability for attorneys, however, is threatened by the expansive language of the forthcoming *Restatement (Third) of the Law Governing Lawyers*.[10] While purporting merely to restate and codify existing case law—as befits such a widely relied-on authority—this *Restatement* makes a number of subtle departures. Drafted primarily by academics, the document follows the path of previous *Restatements* that have blended consensus with reform, attempting in discrete nudges to move the state of American law forward in chosen directions.[11]

The sections of the *Restatement* that govern lawyer liability to third parties provide a case in point.[12] Of particular concern is section 73, which establishes duties of care that lawyers owe to certain nonclients at the risk of malpractice.[13] Each of the section's four parts codifies a different theoretical basis for finding such a duty of care. Although most of these sections track existing case law in narrowly defining the context in which these duties apply, part two of section 73 stands out as an exception. It establishes an expansive composite duty using untested and potentially ambiguous language.[14] This article will argue that part two of section 73, in fact, represents a calculated departure from existing case law. Grounded in academic

7. *See* Ultramares Corp v. Touche, Niven & Co., 225 N.Y. 170, 79, 174 N.E. 441 (1931).

8. *See id.*; Cifu, *supra* note 6, at 15.

9. LAWYERS MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 301:602, Mar. 28, 1990, p. 57.

10. Although this is the first *Restatement* to cover this topic, the American Law Institute has designated it "Third" in keeping with the overall *Restatement* series now in its third revision. Unless otherwise specified, all future cites to the *Restatement* will refer to the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 8, March 21, 1997).

11. *See* Charles Silver & Michael Quinn, *Are Liability Carriers Second-Class Clients? No, But They May be Soon—A Call to Arms Against the Restatement (Third) of the Law Governing Lawyers*, 6 No. 2 COVERAGE 21 (1996).

12. *See generally* RESTATEMENT, ch. 4 (governing "Lawyer Civil Liability").

13. Comment a to section 73 notes that lawyers can incur liabilities to nonclients for grounds other than malpractice. For example, section 77 states that a lawyer owes additional duties of care to nonclients "when a nonlawyer would in similar circumstances." Other sources of liability include litigation sanctions, security legislation, and "acting without authority." This article only addresses liability under section 73.

14. *See* Sutton, *supra* note 4, at 1059 n.103 (describing language of section 73(2) as "too squishy to be of much aid").

theory instead of precedent, its provisions can be defended neither on positive nor normative grounds.

I. ONE OF THESE THINGS IS NOT LIKE THE OTHER: PART TWO IS OVERBROAD

Even a cursory reading of section 73 reveals a contrast between the broad language of part two and the other, more circumscribed, provisions of the section.[15] To begin with, the latter uniformly require actual knowledge by the lawyer of the circumstances giving rise to the duty.[16] By contrast, under part two, an attorney can incur liability merely by being deemed to have "invite[d]" reliance on his opinion or provision of services.[17] As will be argued below, the use of the term "invite" does not necessarily assume actual knowledge.[18]

Furthermore, the other parts of section 73 all contemplate the duty attaching to a specific nonclient who is identifiable at the time the duty

15. Section 73 provides as follows:

For the purposes of liability under section 71, a lawyer owes a duty to use care within the meaning of section 74:
(1) to a prospective client, as stated in section 27;
(2) to a nonclient when and to the extent that:
(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies, and
(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled protection;
(3) to a nonclient when and to the extent that:
(a) the lawyer knows that the client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient; and
(b) such a duty would not significantly impair the lawyer's performance of obligations to the client, and the absence of such a duty would make enforcement of those obligations unlikely;
(4) to a nonclient when and to the extent that:
(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
(b) circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify a breach or fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
(c) the nonclient is not reasonably able to protect its rights; and
(d) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
(5) to a nonclient [whom the lawyer knows to be in imminent bodily danger from a client].

16. *See id.* Parts three, four, and five expressly state that actual knowledge is required. *See id.* Part one pertains to prospective clients. It cross-references section 27, whose terms implicitly ensure actual knowledge in that the duty owed derives from the attorney's direct interactions with the prospective client in question. *See id.* at 1; sec. 27.

17. *Id.* at 2(a).

18. *See infra* notes 42–43 and accompanying text.

issues.[19] Yet, part two offers no such assurances on its face. The class of potential nonclients is curtailed only by a generic reference to "remote[ness]" determined by "applicable tort law."[20]

In addition, most of the other parts incorporate an element of necessity to limit their scope of application. Part 3(b) applies only where necessary to enforce client interests;[21] part 4(b) has the proviso that the "nonclient [be] not reasonably able to protect its rights";[22] and part five stipulates the nonclient be "unaware of the risk."[23] By contrast, part two operates on far more open-ended terms. It requires only that reliance be invited in any form and subsequently ensue for any reason, regardless of context.[24]

Finally, and crucially, the other parts have language designed to minimize conflicts with legitimate client interests.[25] Parts three and four expressly restrict their applicability to situations where "such a duty would not significantly impair the performance of the lawyer's obligation to the client."[26] Part 3(b) further limits its effect to cases in which "the absence of such a duty would make the enforcement of . . . obligations [to the client] unlikely."[27] Part two is alarmingly devoid of such language of limitation. This omission raises the potential for conflicts with the paramount duty that the lawyer owes to her client. Indeed, applying the principle of expressio unius, one might conclude that such conflicting duties are impliedly sanctioned.

This lack of substantive limitations in part two becomes even more glaring when one considers that the policy interest in averting potential conflicts with the client would seem to weigh in favor of placing *greater* safeguards on the open-ended reliance-based duty that is envisioned. Whereas the interests of beneficiary-plaintiffs in parts three and four, for example, can normally[28] be assumed to coincide with those of the client proper, the

19. Part five explicitly requires an identifiable victim. Part one concerns a prospective client with whom the lawyer has direct dealings. Finally, parts three and four pertain to third-party beneficiaries who stand in a specific relationship to the client. *See* RESTATEMENT sec. 73. As such, there is not likely to be much doubt as to the identities of nonclients who could claim a duty under any any of these provisions, and in most cases one would expect the set of suspects to be limited to a single individual.

20. *Id.* at 2(b).

21. *See id.* at 3(b).

22. *Id.* at 4(b).

23. *Id.* at 5.

24. *See id.* at 2.

25. The exception is part one that deals with prospective clients. In this case, there is no built-in triangular relationship between attorney, client, and nonclient; thus the conflict does not arise.

26. *Id.* at 3(b), 4(d). Part five does put the attorney in opposition to the client, but only in cases where the client threatens to cause imminent bodily harm through criminal conduct, which is hardly a legitimate interest worth protecting. *See id.* at 5.

27. *Id.* at 3(b).

28. Admittedly, part four pertains to situations where client interests do appear to stand diametrically opposed to those of the beneficiary. However, this situation arises only because the client is breaching her duties as a fiduciary. When one conceives of the attorney's duties

duty in part two issues to a much wider set of claimants with potentially divergent interests. The inevitable conflicts that will result constitute the core objection to part two that this article advances.

II. PART TWO CANNOT BE RECONCILED WITH EXISTING CASE LAW

The reliance-based duty described in part two of the *Restatement* in fact represents a consolidation of several distinct lines of cases under a new composite duty. It holds an attorney accountable for malpractice liability to a nonclient when and to the extent that:

> (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies, and
> (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled protection.[29]

This one-size-fits-all formulation may have intuitive appeal; yet, the result is a duty whose scope exceeds the sum of its parts.[30] Moreover, even measured against any single line of cases, the *Restatement* arguably takes a broader view than that warranted by existing precedents.

A. *Opinions*

Cases addressing attorney liability for legal opinions on which third parties have detrimentally relied demonstrate a variety of analytic approaches. As with all third-party liability cases, a threshold issue is the barrier posed by the absence of privity of contract. Some courts reason that privity flows from the act of offering an opinion on which another relies.[31] Others conclude that such action creates liability independent of privity.[32] Some jurisdictions categorize the breach of the duty that results as legal malpractice;[33] some label it a breach of fiduciary duty;[34] while others rely on the

as being properly owed to the fiduciary in functional terms derived from the office and not to the occupant personally, the conflict becomes resolved. *See* Feinman, *supra* note 1, at 764–65.

29. RESTATEMENT sec. 73(2).

30. *See infra* notes 70–71, 87–96, 102–11 and accompanying text.

31. *See, e.g.*, Trust Co. of Louisiana v. N.N.P. Inc., 104 F.3d 1478, 88 (5th Cir. 1997) (privity created by rendering of opinion to third party); Crossland Savings FSB v. Rockwood Ins. Co., 700 F. Supp. 1274, 1282 (S.D.N.Y. 1988) (by furnishing opinion to third party, lawyer "engages in a form of limited representation").

32. *See, e.g.*, Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 110, 128 Cal. Rptr. 901 (1976) (balance of factors reveals duty despite absence of privity); Security Nat'l Bank v. Lish, 311 A.2d 833, 35 (D.C. App. Ct. 1973) (duty exists notwithstanding lack of privity).

33. *See, e.g.*, Courtney v. Waring, 191 Cal. App. 3d 1434, 43, 237 Cal. Rptr. 233, 38 (1987).

34. *See, e.g.*, Petrillo v. Bachenberg, 139 N.J. 472, 80, 655 A.2d 1354, 58 (1995); Alpert v. Shea Gould Climenko & Casey, 1988 WL 90922, 2 (N.Y. Sup. Ct.) (unpublished decision).

common-law tort of negligent misrepresentation.[35] However, courts are almost unanimous in limiting liability to cases in which attorneys offered an opinion for the specific purpose of inducing reliance in a targeted third-party audience, or else knew that their client had such intent.[36] Moreover, decisions frequently emphasize that in directing the opinion towards the third party, the attorney must have acted on behalf of her client.[37] In this way, courts ensure that, as in the case of third-party beneficiaries, attorney obligations remain properly aligned with client interests.[38] Indeed, some courts even analyze opinion liability under the rubric of third-party beneficiary analysis.[39] By contrast, the *Restatement* offers no such assurances in its text and accompanying comments.

1. The Black Letter

The wording of section 73(2) requires only that the lawyer "invit[e] the nonclient to rely. . . ."[40] Neither the text nor the comments that accompany section 73 define what it means to invite reliance. Moreover, the dictionary definition of "invite" yields an ambiguity. Invite can either mean (a) "to offer an incentive or inducement to: entice" or (b) "to provide opportunity of occasion: increase the likelihood of: open the way to."[41] The first of these meanings parallels the "intend to induce" formulations cited in the case law above. However, the second seems broader, in that it arguably eliminates any requirement of intent. Just as a woman might be said to

35. *See, e.g.*, Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230, 236 (Colo. 1995).

36. Many courts cite sec. 552 of the *Restatement (2d) of Torts* in this regard that restricts liability only to "a limited group of persons for whose benefit and guidance [the opinion provider] intends to supply the information . . . [and whose] reliance upon it in a transaction that he intends the information to influence." RESTATEMENT (SECOND) OF TORTS, sec. 552(2). *See, e.g., Mehaffy*, 892 P.2d at 236 (adopting *Restatement of Torts*). Other courts arrive at similar formulations based on local authorities. *See, e.g., Courtney* at 1444 (attorney knowledge that purpose of work product was to influence plaintiff's conduct is necessary prerequisite to establish duty in California case law). Arkansas has codified the "intent to influence" standard of duty by statute. *See* ARK. CODE ANN. § 16-22-310 (Westlaw 1995).

37. *See, e.g.*, Greycas, Inc. v. Proud, 826 F.2d 1560, 63 (7th Cir. 1987) (under Illinois law, plaintiff must prove purpose of attorney-client relationship itself was to benefit or influence the third party); Burger v. Pond, 224 Cal. App. 3d 597, 605, 273 Cal. Rptr. 709, 15 (1990) (intended influence must be an objective of service attorney was retained to perform); *see also* MALPRACTICE sec. 7.11, p. 387.

38. *See Crossland*, 700 F. Supp. at 1283 (describing how the risk of conflicting interests at all levels is minimized by assurance that client authorized that opinion be addressed to third party on client's behalf); *cf.* United Bank of Kuwait v. Enventure Energy Enhanced Oil Recovery Associates, 755 F. Supp. 1195, 1203-04 (S.D.N.Y. 1989) (liability denied for attorney misrepresentations made without client approval).

39. *See Trust Co.*, 104 F.3d at 1487-88 (describing duty arising where attorney contracts to provide opinion for the benefit of a third person).

40. *See* RESTATEMENT sec. 73(2)(a).

41. WEBSTER'S THIRD NEW INT'L DICTIONARY 1190 (1993). A separate definition of invite concerns its formal meaning as applied specifically to social contexts, i.e., to invite someone to a cocktail party. *See id.*

"invite" unwanted advances by dressing provocatively, a lawyer might be deemed to invite reliance without intending to, merely by acting in a way that made such reliance foreseeable.[42]

At best, such ambiguity is troubling. This article will henceforth consider the scenario under which invite is understood according to its broader, intent-neutral meaning. As will be discussed shortly, there is evidence that courts are already reading section 73 in this light, fashioning a novel "foreseeable reliance" standard.[43] This interpretation represents a clear departure from existing law in most jurisdictions that reject foreseeability alone as a basis for imposing liability on attorneys to third parties.[44]

None of the illustrative cases cited in the reporter's note following section 73 support such a broad imposition of liability.[45] The only authorities to the contrary are found in Mississippi and New Jersey case law. Mississippi relied on statutory authority to reach its result.[46] In the case of New Jersey, the supreme court's adoption of a foreseeability standard as to reliance was itself based in part on the draft *Restatement*.[47] Neither case offers a compelling rationale to justify a broad reading of section 73.

In the Mississippi case, *Century 21*, a homeowner had sued an attorney on whose negligently prepared title opinion he had relied. Although the plaintiff had not been the lawyer's client, the Mississippi Supreme Court overruled previous cases barring such malpractice claims based on a 1990 statute abolishing the necessity of privity "in all causes of action for . . . economic loss brought on account of negligence."[48] The court determined that without a privity requirement, "the absence of an attorney-client relationship is merely one factor to consider in determining the duty owed. . . ."[49] Analogizing a title opinion to an auditor's report, the court concluded that a duty of care should be owed all foreseeable users who would rely on such work product to meet minimal professional standards. In extending malpractice liability to embrace such duty, however, the court carefully limited its holding to "attorney[] negligence in performing title work."[50]

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42. In addition, the meaning of "rely" can itself be taken to extremes. *See* Ellen Eisenberg, *Attorney's Negligence and Third Parties*, 57 N.Y.U. L. REV. 126, 160–61 (1982) (suggesting that a baby boy would have a reliance claim against his would-be parents' attorney for negligently processing adoption papers). Moving the standard from intended to foreseeable reliance would seem to encourage a broader construction to be placed on the root term by loosening the ties between cause and effect.

43. *See infra* notes 51, 58–64 and accompanying text.

44. *See* MALPRACTICE sec. 7.11-.12; *accord Burger*, 224 Cal. App. 3d at 606.

45. *See* cases cited in RESTATEMENT sec. 73, Reporter's Note, cmt. e.

46. *See* Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359, 373 (1992).

47. *See* Petrillo v. Bachenberg, 139 N.J. 472, 483–84, 655 A.2d 1354 (1995) (citing *Restatement* approvingly).

48. *See id.* (citing MISS. CODE. ANN. § 11–17–20 (Supp. 1990)).

49. *Id.*

50. *Id.* at 374.

Such a limited departure from the majority rule hardly countenances the wholesale expansion of liability embodied in the *Restatement*. Title opinions are objective, technical documents. The duty of care required to prepare them in a nonnegligent fashion is the same whether owed to a third party or to the actual client.[51] Thus, allowing expanded liability in such a case does not introduce any possibility of conflicting duties for the attorney. By contrast, the *Restatement* goes well beyond the objective context of title opinions to create liability for any form of opinion on which a nonclient might rely. In these wider contexts, the neat analogy of lawyering to accountancy breaks down, and the possibility of conflicting interests cannot be avoided.

The *Petrillo* decision in New Jersey illustrates the dangers in applying a foreseeable reliance standard derived from a broad reading of the *Restatement* to a more ambiguous fact pattern.[52] In *Petrillo*, an attorney representing the seller of real property sent the seller's Realtor excerpts from a soil engineering report. The excerpts indicated that the property had yielded two successful soil percolation tests, the minimum required by local authorities for a septic system. However, because only selected pages were excerpted from the original engineering studies, they gave the impression that there had been a total of seven tests, two successful, when in fact thirty had been performed (with twenty-eight failing). The excerpted report subsequently became part of the Realtor's sales packet.[53]

Meanwhile, the Realtor acquired the property directly and sold it to a third party. The same lawyer represented the Realtor in that transaction. A dispute arose after the sale and the third party named the lawyer in her lawsuit against the Realtor, based on the lawyer's alleged negligence in compiling a misleading summary of the soil tests.[54] The trial court dismissed the complaint against the lawyer for failure to state a claim. The appellate division reversed, and the supreme court affirmed.[55]

In holding that the attorney could owe a duty to the third-party buyer under these facts, the supreme court developed the notion of documents having an "objective purpose," such as the title report in the Mississippi case. It then reasoned that this purpose "and the extent to which others foreseeably may rely on [the document], determines the scope of a lawyer's duty in preparing such documents."[56] However, while the notion of an

51. This observation only holds for the technical aspects of the report. To the extent that such reports contain peripheral content that might mislead third parties independent of their intended recipient, the logic for extending a duty fails.

52. As noted, the *Petrillo* opinion explicitly relied on section 73 of the *Restatement* as an authority for its foreseeable reliance standard. *See* 139 N.J. at 483–84.

53. *See id.* at 475.

54. *See id.* at 475–77.

55. *See id.* at 474, 477–78.

56. 139 N.J. at 485.

objective purpose makes sense in the context of a title report whose purpose is uncontroversial and universally applicable, it makes less sense under the facts of *Petrillo* where the attorney's purpose in sending the Realtor the excerpted report is subject to question.[57]

Regrettably, the court dismissed such objections as irrelevant. It argued that "[a]lthough [the lawyer] might have intended only that the [excerpted] report would demonstrate only that the property had passed two percolation tests, his subjective intent *may not define* the objective meaning of the report."[58] The mere fact that the attorney "knew, or *should have known*, that [the Realtor] might deliver it to a prospective purchaser" was sufficient to create a duty of care, a duty determined according to the "objective" expectations of those purchasers who would foreseeably rely on its contents.[59]

This analysis represents a perversion of the rationale of *Century 21* and a dangerous departure from the principles of established case law. Unlike the title report scenario where the very nature of the document admits no possibility of a distinct subjective purpose, here objective purpose is determined by a retroactive appraisal of the circumstances in total disregard of subjective intent. Since an attorney can only guess at what this appraisal might be in the light of subsequent events, such an approach opens the possibility for an attorney to be blindsided by lawsuits filed by third-party plaintiffs.

There are some grounds for dismissing the alarming language used in *Petrillo* as dicta. Because the case reviewed a preverdict dismissal of claims, the court was construing evidence in the light most favorable to the plaintiff.[60] In a later passage of the decision, the court seems to return to an "intent to induce" standard in describing the evidence as permitting "the inference that the objective purpose of the report was to induce a prospective purchaser" and stating that the attorney's subsequent "involvement supports the further inference that [the attorney] knew that [his client] intended to use the report for that purpose."[61] If so, then *Petrillo* might not support a reading of the *Restatement* in which intent is not required. Such an optimistic reading seems betrayed, however, by the court's explicit

57. By contrast, the only other New Jersey case to employ this rationale of objective purpose involved a public offering statement whose content was regulated by state statute. *See* Atlantic Paradise Assoc. v. Perskie, Nehman & Zeltner, 284 N.J. Super. 678, 666 A.2d 211 (1995). Indeed, although the *Atlantic* court based its analysis on the foreseeable reliance rationale of *Petrillo*, *see id.* at 684–85, it could just as easily have found liability based on an implied duty of care read out of the statute itself.

58. *Id.* at 486 (emphasis added).

59. *See id.* at 486–87 (emphasis added).

60. *See id.* at 478.

61. *Id.* at 486–87. Note that under this rationale, the attorney seems liable for knowingly acquiescing in the client's intended inducement instead of directly inviting reliance himself. *See infra* notes 70–73 and accompanying text.

endorsement of foreseeable reliance as the governing standard in New Jersey.[62]

Yet, one might ask what harm is done by imposing liability in such cases. To be sure, attorneys may not always anticipate reliance by nonclients in executing their duties. Yet, so long as they perform these duties in a non-negligent fashion, why should they worry? After all, the *Petrillo* court reasoned, the attorney there could easily have avoided liability by sending the complete report or clarifying the omissions it contained.[63] Why should not the attorney pay the price for the loss suffered from his misleading work product? The answer depends on why the document is misleading. If, as in *Petrillo*, the deficiencies are determined solely with respect to some putative "objective" purpose based on a foreseeable audience of nonclients, this may conflict with the immediate needs of the client on whose behalf the attorney presumably acts. This may not have been the case in *Petrillo* itself.[64] Yet, one can easily envision alternate fact patterns in which such conflicts become acute.

Suppose, for example, that instead of soil percolation tests, an attorney's report details something of a confidential nature, e.g., financial data. Operating on a "need-to-know" basis, the attorney divulges as much information as necessary to serve the client's purpose. Why should the attorney be forced to breach confidentiality and divulge additional information to guard against the contingency that some foreseeable, but unintended, reader of the report might be subsequently misled? Note that the merits of the case differ under the erstwhile intent to induce standard. If a client—acting through his attorney—*intends* to influence a specific audience by selective dissemination of information, then fairness demands that this be done in a way that does not mislead.

The expansion of liability wrought by the *Restatement* is not confined to its use of "invite" instead of "intend." Under the broad duty recognized by part two, an attorney need not even invite reliance directly, but merely "acquiesc[e]" in an invitation issued by the client.[65] Like invite, acquiescence is nowhere defined in the *Restatement* text or comments. However, the dictionary meaning of "acquiesce" is "to accept . . . tacitly."[66] Although tacit acceptance might presuppose actual knowledge, the acceptance in

62. The court's precise formulation of this standard is that "the lawyer know, or should know, of [the nonclient's] reliance." *See* 139 N.J. at 484.

63. *See id.* at 487.

64. The scant facts provided in the opinion make such an assessment tenuous. There is at least the hint of a potential conflict. At a later stage, the original seller deliberately withheld the complete reports from the Realtor, pending negotiations over reimbursement of the engineering consulting fees. *See id.* at 476. The attorney's duty of loyalty to his original client would presumably have precluded his transferring the reports at that stage.

65. *See* RESTATEMENT sec. 73(2)(a).

66. WEBSTER'S THIRD NEW INT'L DICTIONARY 18.

question plainly refers only to the circumstances that constitute the client's invitation, and does *not* necessarily imply knowledge of the actual reliance that follows. All the lawyer has to do is acquiesce in client conduct that makes such reliance "foreseeable."[67]

Making matters worse, comment e, which accompanies the text of section 73 and addresses reliance under part two, states that "[a] lawyer's acquiescence in use of the lawyer's opinion may be manifested either before or *after* the lawyer renders it."[68] Permitting acquiescence to be manifested after the fact clearly envisions that third-party usage need not have been foreseeable at the time the lawyer rendered the opinion. As such, lawyers appear to have a duty to monitor affirmatively the content and dissemination of all prior opinions with a view to averting detrimental reliance by unknown and previously unanticipated third parties whenever circumstances could indicate the lawyer has "acquiesced," thus permitting such reliance to become foreseeable. Such a burden carries the standard of liability expressed in part two to new extremes.

Petrillo again serves as a cautionary example. In addition to faulting the attorney for failing to foresee that his report might mislead a prospective purchaser at the time he sent it, the court seems to hedge its bets by placing great emphasis on the lawyer's continued involvement with the eventual sale.[69] The court notes that the eventual purchaser-plaintiff had expressed "concern about percolation,"[70] the implication presumably being that this concern should have prompted the attorney to reflect back to the report he had sent eight months earlier and reevaluate it in light of this concern. In fact, the excerpted report may well have been but part of a pile of records that the lawyer transferred to the Realtor. The attorney had no knowledge that the Realtor had included the report in materials given to the plaintiff.[71] Yet, with the benefit of twenty-twenty hindsight, the court now suggests that his continued involvement in the sale constituted a form of acquiescence to the detrimental reliance that allegedly ensued. Plainly, acquiescence, like foreseeability, lies in the eyes of the beholder.

Another way in which the *Restatement* formulation departs from existing law pertains to the enforcement of the duty of care that it establishes. Even though a lawyer issues an opinion under circumstances that could give rise to a duty, not every third party who comes along has a claim on that duty. Many courts take a narrow view, requiring actual knowledge by the lawyer that a particular individual is relying on her opinion to trigger a duty to

67. Since the acquiescence pertains to the client's *invitation* to rely, this implicates the same foreseeable reliance standard, once removed.

68. *See id.* at cmt. e (emphasis added).

69. 139 N.J. at 486–87.

70. *Id.* at 487–88.

71. *See id.* at 494 (Garibaldi, J., dissenting) (quoting finding to that effect by the trial judge).

that third party.[72] The main exception are jurisdictions employing California's "balance of factors" approach that eschew such categorical requirements.[73]

The *Restatement* purportedly accounts for this variation by restricting recovery to nonclients who are not "under applicable tort law, too remote from the lawyer to be entitled to protection."[74] Here too, this generic limitation fails to take into account the special duties that attorneys owe their clients, by making remoteness the touchstone of third-party obligation and ignoring the possibility of adverse interests.[75] By contrast, even the comparatively liberal California approach balances foreseeability of harm against the countervailing risk of conflicts of interest.[76] And other jurisdictions impose an absolute bar on enforcing third-party liability where conflict issues might arise.[77]

In this respect, the Mississippi decision in *Century 21* can be partially reconciled with the established California approach that allows for liability where "the foreseeability of harm to the third party . . . is not outweighed by other policy considerations."[78] In the case of title reports, where there is no possibility of conflicting interests, such policy considerations do not intrude. Under the *Restatement*'s more general formulation, however, there are no such assurances.

2. The Comments

The broad language used in part two is only partly mitigated by the comments that accompany its text. Many of these comments appear to narrow

72. *See, e.g., Crossland*, 80 N.Y.2d at 384; *Trust Co.*, 104 F.3d at 1487; Austin v. Bradley, Barry & Parlow, P.C., 836 F. Supp. 36, 38, 41 (D. Mass. 1993).

73. *See* MALPRACTICE sec. 7.11

74. RESTATEMENT sec. 73(2)(b). Remoteness in some jurisdictions is itself determined by a foreseeability standard. The *Petrillo* court seems to have confused the two usages of foreseeability in its reliance upon Massachusetts authority to support its position. It cited language from *Norman v. Brown, Todd & Heyburn*, 693 F. Supp. 1259, 1265 (D. Mass. 1988), suggesting a foreseeability standard was applied in that case to determine if a duty was owed. *See* 139 N.J. at 482. However, foreseeability in Massachusetts instead serves as a limit of proximate causation and thus goes to the enforcement of an already determined duty. The ambiguous language taken from *Norman* originally came from *Capitol Indemnity Corp. v. Freedom House Development Corp.*, 487 F. Supp. 839, 842 (1980), which makes the issue plain. To first create a duty, however, Massachusetts requires the attorney have actual knowledge of the nonclient's reliance as *Norman* itself acknowledges. 639 F. Supp. at 1259.

75. Professor John Leubsdorf, the associate reporter for the *Restatement* and principal author of chapter 4 (which contains section 73), explained this provision at the recent ALI proceedings as "an issue of general tort law, not limited to legal malpractice. . . . The rule should be the same for lawyers as it is for accountants." *See* Proceedings of the 74th Annual Meeting of the American Law Institute, p. 311 (1998). As already discussed, this equation of lawyers with accountants ignores the special duties that attorneys alone owe to their clients.

76. *See supra* note 3.

77. *See* Lamare v. Basbanes, 418 Mass. 274, 76, 636 N.E.2d 218 (1994); United Bank of Kuwait v. Enventure Energy Enhanced Oil Recovery Associates, 755 F. Supp. 1195, 1203–04 (S.D.N.Y. 1989).

78. St. Paul Title Co. v. Meier, 181 Cal. App. 3d 948, 951, 226 Cal. Rptr. 538, 539 (1986).

the scope of meaning of the text; yet on closer inspection, their wording proves less than airtight. For example, on the conflict of interest issue discussed above, comment e only states that a "lawyer's client *typically* benefits from the nonclient's reliance [on opinions] . . . and recognition of such a claim does not conflict with duties the lawyer properly owed to the client."[79] Such a general observation followed by a conclusory assertion is hardly reassuring. Instead, an adequate alignment of interests should be made a formal prerequisite to sanctioning extracurricular obligations.[80] As noted above, many jurisdictions do so by stipulating that duties to third parties can only arise when the lawyer is acting on the client's behalf.[81]

Comment b, which lays out the rationale underpinning the entire section, does acknowledge that imposing liability to nonclients "could tend to discourage lawyers from vigorous representation."[82] Yet, again, such a generalized statement of concern is no substitute for specific doctrinal protections built into the black letter law.

Another apparent discrepancy between the comments and text concerns the nature of the duty that arises under part two. The introductory text governing section 73 as a whole refers to "a duty to use care within the meaning of section 74."[83] The duties invoked in section 74 are those of diligence and competence.[84] What does this mean for opinions given to third parties?[85]

Comment e tells us that "the cause of action ordinarily is in substance identical to a claim for negligent misrepresentation."[86] This comment would be a lot more helpful, however, without the qualifier "ordinarily."[87] It is possible to envision malpractice claims under part two based on opinions that go beyond simple allegations of misrepresentation. If the duty of

79. *See* RESTATEMENT sec. 73, cmt. e. (emphasis added).

80. Another section of the *Restatement* regulating evaluations undertaken for use by third parties does require that the lawyer keep client interests foremost and "obtain consent after consultation." RESTATEMENT sec. 152. Yet, section 152 merely supplies a rule of professional guidance without consequence in determining liability under section 73.

81. *See supra* notes 38, 39 and accompanying text.

82. RESTATEMENT sec. 73, cmt. b. The comment also suggests that this concern be kept in view when applying section 73. *See id.*

83. RESTATEMENT sec. 73.

84. *See id.* at sec. 74(1).

85. This issue was raised during the recent ALI proceedings; therefore, it is possible further changes may be forthcoming to clarify the matter. *See* Proceedings of the 74th Annual Meeting of the American Law Institute, p. 329 (1998).

86. *Id.* at sec. 73, cmt. e (citing RESTATEMENT (SECOND) OF TORTS, secs. 552–54).

87. The comment also states that "the duty of a lawyer providing an opinion is ordinarily limited to using care to avoid making or adopting misrepresentations, and does not require the lawyer to use care in preventing misrepresentations by others even in documents that the lawyer has helped to draft." *Id.* This still leaves open the (nonordinary) possibility that a lawyer might incur liability for failing to use care in ways that do not involve misrepresentation.

care under section 74 is read broadly, an attorney, in framing her opinion, might become obligated to consider, diligently and competently, the wider interests of any third parties whose reliance he or she might be inviting. Failure to use care in tailoring such an opinion to suit the needs of this audience might thus incur liability, even without the opinion being factually misleading.

There is some indication that such a broad, indeed virtually untenable, duty was not intended under part two. As comment e proceeds to discuss specific disclosure and due diligence requirements to avoid making misrepresentations, it cross-references comment c of section 152 for more particulars.[88] Comment c explores a lawyer's duty to third parties within the context of a formal evaluation, akin to an opinion letter. Here we learn that a lawyer should render "a fair and objective evaluation," but that in doing so, "a lawyer does not undertake to advise the third person except with respect to the questions actually covered by the evaluation."[89]

Relying on such guidelines to determine the contours of a lawyer's duty to third parties may be workable in the case of the formal opinion letters discussed in section 152. Opinion letters constitute a statement of legal findings provided by an attorney on behalf of his client providing specific assurances to a third party contemplating entering into a business arrangement with the client.[90] Typically, the parties involved agree on parameters as to the scope of the opinion in advance. Moreover, an intricate set of professional rules has developed to govern these cases.[91] If section 73(2) pertained only to opinion letters then much of its ambiguity would be resolved, for almost by definition, opinion letters fall within the "intent to induce" standard of current case law.

Here again, the comments accompanying section 73 create an impression at odds with the actual text. Comment e makes consistent references throughout the comment to "opinion letters" in its examples of ways in which reliance duties may occur.[92] In addition, almost all of the illustrative cases cited in the reporter's note to comment e also involved opinion let-

88. *See id.* (citing sec. 152, cmt. c).

89. *Id.* at sec. 152, cmt. c. *Cf.* Geaslen v. Berkson, Gorov and Levin, Ltd., 200 Ill. App. 3d. 600, 609–10, 581 N.E.2d 138 (1991) (stating same rule).

90. *See generally* James Fuld, *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 Bus. Law. 1295 (1978).

91. *See, e.g.*, Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Account of the Section of Business Law of the American Bar Ass'n*, 47 Bus. Law. 183 (1991).

92. *See* Restatement sec. 73, cmt. e and Reporter's Note. At the ALI proceedings last year, Prof. Leubsdorf similarly characterized part two as "basically the opinion letter situation." *See* Proceedings of the 74th Annual Meeting of the American Law Institute, p. 310 (1998).

ters.[93] Yet, nowhere do the *Restatement* comments explicitly limit the scope of section 73(2) to formal opinion letters or their functional equivalents.[94] Moreover, the plain language of the text itself makes no distinctions as to the type of opinions to which it applies. It only requires that an attorney invite reliance on his opinion, any opinion, in any context.

In this expanded universe of opinions, the guidelines derived from section 152 become problematic. What does it mean to say that an opinion must be "fair and objective" when it might be relied on by an unknown and unintended audience in a different context than it was issued? Who decides what the scope of the opinion actually covers? From whose vantage point should its content be analyzed and under what time frame? We saw in *Petrillo* that applying concepts like "objective purpose" is fraught with peril given a convoluted and ambiguous set of facts. How can a practicing attorney who lacks the omniscient view of the courts, not to mention the benefit of hindsight, possibly make sense of his or her obligations under these standards?

These ambiguities reflect the conceptual tensions derived from importing negligent misrepresentation analysis into malpractice law. This difficulty is by no means unique to the *Restatement*. Courts commonly assume that the two causes of action are identical.[95] For most opinion liability cases, the results may indeed prove synonymous. However, given the expanded "foreseeable reliance" standard of liability imposed by the *Restatement*, problems at the margin become accentuated.

A further point of uncertainty in part two concerns the nature of the third-party reliance required in order to trigger an obligation. The text provides only that, following an invitation, "the nonclient so relies."[96] Comment e, however, indicates that the reliance should be reasonable.[97] One can assume that an objective standard of reasonableness is invoked.[98] However, this sets up an additional theoretical dilemma in that the frames of reference by which the reasonableness and foreseeability of reliance are judged might prove partially incompatible.[99]

93. The handful of cases cited in the reporter's note that do address opinions issued in less formalized contexts nonetheless all involved instances where reliance was intended by the issuer of the opinion. *See Courtney*, 191 Cal. App. 3d at 1434; *Security*, 311 A.2d at 833; Capital Bank & Trust Co. v. Core, 343 So. 2d 284 (La. Ct. App. 1977).

94. *Cf.* Fineman, *supra* note 1, at 756–60 (drawing distinction between the clear duty created by issuing an opinion letter and the more tenuous obligation for other less formal representations made to third parties).

95. *See Greycas*, 826 F.2d at 1563–64.

96. RESTATEMENT sec. 73(2)(a).

97. *See id.* at cmt. e.

98. This is at least the more optimistic reading.

99. Although the invitation to rely is to be judged "objectively" according to its foreseeable effects and the reasonableness of the third-party reliance is similarly "objectively" viewed, there remains a theoretical discontinuity based on the positional asymmetries between the

B. *Provision of Services*

The problematic aspects of imposing liability for opinions under part two are largely duplicated in the context of provision of services. Since the *Restatement* does not define "other legal services" as used in part two, one can assume the phrase serves as a catchall encompassing most anything a lawyer does qua lawyer.[100] As such, the same questions arise as to what constitutes an invitation and what duties become implicated upon acceptance through reliance. The *Restatement* comments here offer little guidance in this respect, noting only that "the analysis is similar" to the case of opinions.[101]

Yet, when one deals with malpractice liability in the context of services, the analogy to negligent misrepresentation actions—already tenuous with respect to opinions[102]—breaks down entirely.[103] This makes the nature of the duty owed even less clear-cut. In simple cases involving technical undertakings such as registering a title, the duty of care might be objectively defined.[104] Such tasks resemble opinion letters in that the expectations are clear for everyone. In more complex transactions, the roles played by the various parties and their respective counsel may become nebulous. As one court observed: "It is not unusual for the attorney representing one party to prepare the instruments which are to be signed by all parties."[105] Does such conduct invite reliance? If so, how does one define the "fair and objective" parameters of the duty created when one party relies on another's lawyer to protect the first's interests?[106]

Imposing a duty of competence defined solely by third-party expectations might commit the lawyer to pursue actions incompatible with client

relevant actors. What is foreseeable as considered from a lawyer's viewpoint may differ from the response that can be predicted for a particular audience, especially when that audience is not identified in advance. Again, whose viewpoint controls?

100. Indeed, even this definition may be too narrow. Comment e plainly contemplates that a lawyer might also be liable for nonlegal services. *See* RESTATEMENT, sec. 73, cmt. e ("When a non-client is invited to rely on a lawyer's nonlegal services, the lawyer's duty of care is determined by the law applicable to providers of the services in question."). *But see Petrillo*, 139 N.J. at 493 (Garibaldi, J., dissenting) (arguing that *Restatement* rule should not apply to nonlegal services such as copying a soil engineering report).

101. *See* RESTATEMENT, sec. 73, cmt. e.

102. *See supra* notes 89–97 and accompanying text.

103. This follows from the obvious fact that services, involving conduct, not communication, cannot misrepresent anything; they are either done, or not done, with respect to a standard of care.

104. *Cf. Simmerson*, 149 Ga. App. at 479–80.

105. Bergman v. New England Ins. Co., 872 F.2d 672, 675 (5th Cir. 1989).

106. The danger here far exceeds that present in the opinion context because the alleged service commitments are likely to not be defined in writing and to be far more open-ended and proactive. Under the *Petrillo* approach, by inferring tacit understandings from circumstantial evidence to arrive at an "objective" reading of foreseeable reliance, the scope of the duty owed could be limited only by a plaintiff lawyer's imagination.

interests. Yet, the *Restatement* provisions offer little assurance that lawyers do not unwittingly "invite" just such a conflicting obligation. Moreover, the fact that a single standard governs third-party reliance as to both services and opinions allows the analytic boundaries between the subject matter to become further blurred.[107]

One additional point of uncertainty is whether an attorney's invitation to rely on her services needs to be offered directly to a potential claimant. Current case law on gratuitous undertakings—the main doctrinal vehicle for recognizing service liability—suggests such a limiting requirement.[108] All of the illustrative service cases cited in the reporter's note involve instances where the attorney had dealt directly with the third party claiming the reliance.[109] Nothing in the text or comments of section 73, however, restricts application of the rule to situations of direct dealings. To omit this requirement forfeits an important doctrinal protection against conflict of interests.[110]

C. *Adverse Parties*

Courts considering attorney liability to nonclients have been unanimous in denying claims brought by opponents in litigation.[111] The potential for interest conflicts is simply too great.[112] Although part two makes no special provisions in this regard, the *Restatement* does address the issue in a general comment applicable to the entire section. Comment c states categorically that "[a] lawyer representing a party in litigation has no duty of care to the opposing party. . . ."[113] However, it crafts an exception to this rule for "unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement."[114]

Such an exception makes intuitive sense if limited to formal opinion letters. There is a value to encouraging settlements, and if an opinion by counsel warranting certain legal findings will facilitate that process, then

107. A lawyer's offer to perform a stated service for a nonclient might be interpreted as voicing an opinion that such a service constitutes an appropriate solution to the nonclient's needs. Conversely, a lawyer stating an opinion to a nonclient recommending that certain legal measures be undertaken might be deemed to have invited the nonclient to rely on the lawyer to provide those services.

108. *See* MALPRACTICE sec. 7.3.

109. *See* cases cited in RESTATEMENT sec. 73, Reporter's Note, cmt. e.

110. This safeguard is of special importance in the services realm because—unlike opinions—gratuitous undertaking liability is not always premised on a lawyer acting to further her client's interest. Typically, the lawyer offers to perform a service for the third party as a courtesy. A rule of direct dealings ensures that the lawyer controls the understanding of the service being offered, in order to preclude potential conflicts.

111. *See* MALPRACTICE sec. 7.10-.11.

112. *See id.*

113. RESTATEMENT sec. 73, cmt. c.

114. *Id.*

why not? As discussed, opinion letters represent a controlled "objective" context in which conflicts can be minimized. The problem comes if the exception for "unusual situations" is permitted any wider latitude. Because the pursuit of settlement negotiations at all stages of litigation is so common today, representations made in a strictly litigation context might then be characterized as "settlement opinions" and thus made actionable via this loophole. The reporter's note accompanying comment c cites no cases supporting its view.[115] Accordingly, any legal development in this area should be made with the greatest caution.[116]

The notion of adverse interests precluding liability has been widely applied in nonlitigation contexts as well.[117] Many courts hold that parties involved in arm's length transactions are barred from bringing third-party claims against the opposing counsel.[118] Comment c plays lip service to this rule, duly restating it, then appending the qualifier "except in the exceptional circumstances described in this Section."[119] Since liability to third parties in any context can *only* be incurred via "this Section," the exception appears to swallow up the rule entirely.

III. PROCEDURE, POLICY, AND PROPHYLAXES

A. *Procedural Protections*

The comments accompanying section 73(2) offer some procedural protection against the otherwise untrammeled obligations that part two establishes. Comment e states that a "lawyer may avoid liability to nonclients . . . by making clear that an opinion or representation is directed only to a client and should not be relied on by others."[120] Further limiting or disclaiming language can restrict liability as to contents.[121] However, once again this comfort proves misplaced as the comment proceeds to erode the protection such disclaimers offer by stating that their "effectiveness . . . depends on whether it was reasonable in the circumstances to conclude that those provided the opinion would receive the limitation or disclaimer and understand its import."[122] In other words, reliance by a suitably befuddled plaintiff can trump any disclaimer.

115. *See* cases cited in *id.*, reporter's note, cmt. c.

116. *Cf.* MALPRACTICE sec. 7.11 ("Although the particular activity in question may not be adverse, and may actually be beneficial, the appropriate inquiry concerns the purpose of the entire representation.").

117. *See* MALPRACTICE sec. 7.11.

118. *See id.*

119. *See* RESTATEMENT sec. 73, cmt. c.

120. RESTATEMENT sec. 73, cmt. e.

121. *See id.*

122. *Id.* "The relevant circumstances include customary practices known to the recipient concerning the construction of opinions, and whether the recipient is represented by counsel or a similarly experienced agent." *Id.*

Even if judges were to attempt to give such disclaimers more force by interpreting the exception narrowly, the procedural safeguard remains imperfect. In a large corporate law firm, many such disclaimers will likely be reduced to standardized boilerplate language that almost any plaintiff could reasonably disregard. Moreover, given that reliance on opinions or services under part two is not restricted to invitations made in writing, the opportunity to append a disclaimer may be limited as a practical matter. A similar difficulty may arise when the client issues the invitation (with the attorney's acquiescence).[123]

On the other hand, in certain situations, disclaimers are independently required as a matter of professional ethics. Examples where such obligations arise include entity representation[124] or dealings with unrepresented parties.[125] In these cases, the provision or omission of appropriate warnings arguably should be explicitly factored into a determination of third-party liability. Section 73 makes no such differentiation.

B. *Policy Concerns*

The comments accompanying section 73 offer little by way of justification for the rather drastic standard of liability that the section imposes. Comment b, entitled "Rationale," makes only the bland statement that nonclients "will foreseeably be harmed by inappropriate acts of the lawyers[, and h]olding lawyers liable for such harm is sometimes warranted." To begin with, one should note that "inappropriate" is used here in conclusory fashion. The liability under section 73 is not premised on fraud or any other intentional, unethical conduct. Therefore, the inappropriate acts to which this argument refers entail, at most, instances of negligence.

In determining the consequences of a lawyer's action that harms nonclients, the default position must be that liability is generally not warranted for mere negligence. Absent some special circumstance, lawyers—just like any other citizen—owe no duty of care to strangers. The special circumstance that section 73(2) contemplates involves reliance. Yet, reliance flows from the victim, not the alleged tortfeasor, so why should this count? The

123. One commentator takes a different approach suggesting that a rule that would limit an attorney's exposure to third parties be based on the attorney's documentation of discussions addressing third-party issues with the client. *See* Nancy Lewis, *Lawyers' Liability to Third Parties: The Ideology of Advocacy Reframed*, 66 OR. L. REV. 801, 833–36 (1987). The idea would be that the client's informed consent would transfer third-party liability from attorney to client. At least one court *has* recognized the availability of redress elsewhere as a factor in determining whether to sustain liability by the attorney. *See* Trask v. Butler, 123 Wash. 2d 835, 843–44, 872 P.2d 1080, 1084–85 (1994). However, as a practical matter, allowing liability to hinge procedurally on such documentation would seem both unduly onerous for conscientious attorneys and subject to manipulation by unscrupulous ones.

124. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d).

125. *See id.* Rule 4.3; *accord* RESTATEMENT sec. 163 (governing dealings with unrepresented parties).

key to part two is that the lawyer *invite* reliance. This voluntary action by the lawyer both creates and legitimates an expanded civil obligation, i.e., the duty to avoid inflicting negligent harm.

Under a foreseeable reliance standard, however, the lawyer's "invitation" need not be deliberate. The lawyer assumes an affirmative duty to anticipate reliance and take appropriate precautions. In essence, this creates a duty to anticipate a duty. Failure to do so constitutes a kind of meta-negligence.

What justifies this rather extraordinary expansion of traditional principles of tort liability? The discussion in the literature of the rationale behind third-party liability pulls out the usual chestnuts that appear to justify any expansion of malpractice liability: the fact that attorneys are better situated to absorb the risk professionally and financially;[126] the moral imperative of favoring an innocent nonclient over a negligent attorney; and the desirability of incentives to improve the standards of practice in the profession.[127] One commentator also suggests that forcing attorneys to consider third-party interests will make the practice of law more ethical and less adversarial, thus raising the profession's image in society.[128]

All of these concerns can be opposed by equally compelling counterarguments. The presence of malpractice insurance acts as a buffer cushioning attorneys from direct pressure to improve their quality of practice.[129] Particularly in a case such as section 73, where indeterminate liability and conflicting obligations place attorneys in a no-win situation, attorneys might just pass on the added costs to their clients and to the general public.[130] Nonclients may actually suffer a reduced quality of services in the form of highly equivocal opinions laden with caveats and qualifiers.[131] Furthermore, encouraging nonclients to rely on an opposing attorney might reduce their incentive to seek the benefit of their own counsel.[132]

As for improving the profession's image, section 73(2) does not apply to litigation, the primary adversarial arena on which the public image of lawyers hinges. Moreover, as a general matter, the wisdom of relying on tort law as an instrument to achieve social change is questionable. Studies have shown that the enforcement of tort liability is highly erratic[133] and have

126. *See* Eisenberg, *supra* note 43, at 127–31.
127. *See* Lewis, *supra* note 125, at 832–36.
128. *See id.* at 832–33.
129. *See* Cifu, *supra* note 6, at 23.
130. *See id.*
131. *See id.* at 24.
132. *See* Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Ct. App. 1981)
133. *See, e.g.*, Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 PA. L. REV. 1147 (1992) (showing that only a very small fraction of people with meritorious claims bother to enforce them).

suggested that it has only marginal systemic effects and that its costs far exceed the benefits.[134]

However, the most fundamental objection to expanding liability to third parties is the troubling implications that such a policy holds for the attorney-client relationship. Court after court have held that in cases where the possibility of conflicts arises, obligations to third parties must yield to the higher priority that society places on an attorney's paramount duties to her client.[135] As the California Supreme Court stated over two decades ago:

> Recognizing a liberal duty to third parties would inject undesirable self-protective reservations into the attorney's counselling role. The attorney's preoccupation or concern with the possibility of claims based on mere negligence . . . by any with whom his client might deal "would prevent him from devoting his entire energies to his client's interests. . . . The result would be "an undue burden on the profession" . . . and a diminution in the quality of the legal services received by the client.[136]

That court recently reiterated its uncompromising stance toward upholding the undivided loyalty an attorney owes to his client as against third-party interlopers, albeit in a slightly different context.[137] Other jurisdictions have echoed their agreement.[138] In addition to ensuring loyalty and zealousness by attorneys, serious issues as to client confidentiality hang in the balance.[139]

The strong public policy interest in protecting these fundamental values of legal representation from conflicts clearly trump concerns over third-party reliance. Any enforcement mechanism to protect the latter, therefore, should err on the side of underenforcement whenever potential conflicts surface.[140] Although the *Restatement* comments acknowledge this risk, nei-

134. *See, e.g.*, Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558 (1985).

135. *Cf. supra* quotation accompanying note 10.

136. Goodman v. Kennedy, 18 Cal. 3d 335, 134 Cal. Rptr. 375, 556 P.2d 737 (1976) (internal citations omitted); *accord* Fox v. Pollack, 181 Cal. App. 3d 954, 961–62, 226 Cal. Rptr. 532 (1986) ("strong public policy in maintaining and enforcing the fidelity and duty of the attorney toward the client militates against the imposition of a duty to nonclients. . . ."). *See also* Cifu, *supra* note 6, at 19 ("If a duty of care were owed to nonclient third parties, an attorney concerned with his or her own personal liability might, despite the unethical nature of the advice, counsel a client not to proceed with a difficult or unique transaction, out of fear of potential liability to third parties. Similarly, an attorney may understandibly be tempted to insert a choice of law clause into a contract between the client and a third party selecting the law of New York or another privity state [solely] out of concern for his or her own potential liability. . . .").

137. *See* Flatt v. Superior Ct., 9 Cal. 4th 275, 290, 36 Cal. Rptr. 2d 537, 885 P.2d 950 (1994).

138. *See, e.g.*, Logotheti v. Gordon, 414 Mass. 308, 311–12, 607 N.E.2d 1015 (1993); *Crossland*, 700 F. Supp. at 1282–83.

139. *See* MALPRACTICE sec. 7.11-.12.

140. An analogy might be made to the "actual malice" standard applicable to libel of public figures. The Supreme Court here deliberately imposed a higher bar on liability than would otherwise be warranted in order to preserve a buffer against the possibility that overenforcement might chill public debate. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

ther the text nor comments of part two offer specific doctrinal mechanisms to control it. The attorney-client relationship is simply too important to risk experimenting upon with the untested and overly broad standards of section 73(2).

One could, of course, make the argument that the current model of attorney-client relations itself has outlived its usefulness and needs to be reconsidered. Its essential bipolar premises derive from litigation; yet, nowadays lawyers increasingly play a counseling role that emphasizes bridge building between different constituencies in which the old labels of friend versus foe no longer apply. Moreover, just as corporations face growing pressure to look beyond the short-term dictates of shareholder values and embrace broader community values, so too lawyers have been charged with a higher responsibility than single-minded devotion to client welfare.[141]

There is nothing wrong with having this debate. Many of the principal authors behind the *Restatement* are respected academics who have taken scholarly positions in favor of a broader conception of the attorney's role.[142] However, the debate should be conducted openly, and changes to existing law—if any—need to be clearly mapped out and enacted in comprehensive fashion. By any of these criteria, section 73(2) represents an unwelcome development.

To be sure, a lawyer's interactions with third parties constitute an important facet of any reconceptualized "broader role" for lawyers to play. Yet, it is only one piece of a larger puzzle. Expanding the scope of third-party liability makes lawyers accountable for new duties without modifying the old ones to compensate. Such piecemeal tinkering with standards of professional responsibility threatens to discredit the project of reform.

Even in the best case, tort law is a rather blunt instrument for engineering social change. The text and comments of section 73(2) do little to ensure precision. Adopting a single umbrella formulation to unify the divergent strands of existing case law has resulted in overly broad language that aims indiscriminately at uncertain targets. The supporting commentary serves to obscure the effects of this untested language, giving the

141. *See, e.g.*, William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that lawyers should seek to "do justice" instead of merely opportunistically advancing client interests).

142. *See, e.g.*, John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825 (1992); Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quarter: An Extended Analysis*, 25 HOFSTRA L. REV. 1041 (1997); Hazard, *Triangular Lawyer Relations: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987). As mentioned, Prof. Leubsdorf was the associate reporter for the *Restatement* and author of its chapter on Lawyer Civil Liability. Prof. Hazard's only formal involvement with the *Restatement* was ex officio as director of the American Law Institute. However, as an authority on legal ethics, he doubtless had a hand in the drafting process, and he participated actively in the ALI proceedings on lawyer liability. *See* Proceedings of the 74th Annual Meeting of the American Law Institute, pp. 310–29 (1998).

appearance of fidelity to existing case law, while perpetuating crucial ambiguities.

Such ambiguity extends even to a pivotal term of the text itself—the meaning of "invited" reliance. Allowing invitations to be predicated solely on the basis of foreseeability would hold lawyers to an unprecendented standard of metanegligence. Equally troubling is the confusion over the standard of care that would be required. Read broadly, section 73(2) affords third-party nonclients a duty of care defined by the same legal standards of malpractice as that owed to clients—effectively transforming third parties into quasi-clients. The *Restatement* attempts to cabin such quasi-relationships through contextual constraints based on a highly tendentious notion of "objective purpose." Yet, the genie once let out of the bottle will not be so easily contained.

The predilection of the principal *Restatement* authors for dabbling in quasi-client metaphysics has been commented upon already in other contexts.[143] Manipulating such theoretical abstractions might make the stuff of fine law review articles; however, it has no place as a substantive standard to govern professional decisions made in the rough and tumble world in which law is practiced today. There is a virtue in certainty—a virtue of which the current draft *Restatement* proves alarmingly deficient.

C. *Prophylactic Rx: Limiting the Damage by Judicial Construction*

Some might object to the preceding analysis as overly alarmist. After all, just because New Jersey and Mississippi courts have adopted a foreseeable reliance standard does not mean that others will follow. The text of the *Restatement* is still amenable to a narrower construction, reading "invite" in line with the established "intent to induce" test. One could likewise take the commentary that follows at face value to impose limitations on the text—in essence, ignoring the adverbs such as "typically" or "ordinarily" that preserve loopholes. Additional safeguards could also be incorporated from preexisting common law. For example, courts should decline to permit liability whenever the possibility of a conflict of interests arises.

A further innovation that courts might pursue would be to eschew the one-size-fits-all approach that section 73(2) introduces and to develop doctrinal distinctions between types of third-party reliance that deserve different treatment. For example, attorneys should owe a higher protective duty when they know they are dealing with a nonclient who is without the benefit of counsel. Similarly, family relations of clients should merit greater consideration than business partners in arm's length negotiations.

The context in which the reliance occurred might also factor into the nature of the duty that results. In cases such as an opinion letter, where

143. *See* Silver & Quinn, *supra* note 11, at 22.

the attorney, acting in furtherance of the client's interest, deliberately offers counsel to nonclient beneficiaries, the broad duties of care defined by professional negligence standards could be implicated. In other cases, absent privity, the attorney's duty would be limited to a warranty against negligent misrepresentation.[144] With respect to services, malpractice liability for gratuitous undertakings should extend only to discrete tasks whose satisfactory completion can be objectively appraised, or, alternately, would rest on the creation of an independent attorney-client relationship with the third party.[145]

With a combination of limiting constructions and common law accretions, section 73(2) may thus prove workable after all. But such a solution is hardly foreordained. The courts of Mississippi and New Jersey have pointed the way down a slippery slope. The bar and the judiciary elsewhere need to be alert to the dangers.

IV. CONCLUSION

In sum, section 73(2) threatens an unwelcome inflation of existing liability standards for third-party reliance. Its stripped-down formula and untested language bear the hallmarks of a document grounded more in academic theory than common sense. Despite the reassurances by the comments that accompany it, the *Restatement* offers plaintiffs' attorneys a plethora of loopholes by which to bring lawsuits under innovative theories. At best, these ambiguities will open the door to much unneeded litigation. At worst, attorneys will face the specter of indeterminate liability and unavoidable conflicts. Instead of restating the law, part two of section 73 in fact represents an alarming departure. It is the drafters of this *Restatement* who have misstated the law, but innocent attorneys will suffer the consequences.

144. For cases on the other extreme, where the lawyer offers a gratuitous opinion in circumstances demonstrating the *absence* of any client interests, a full-blooded malpractice standard of care could, of course, be safely imposed without prejudice to client interests. Such liability lies outside the scope of section 73, however. *See* RESTATEMENT, sec. 73, cmt. a (cross-referencing section 42).

145. Gratuitous undertaking theory had its origins at a time when attorney-client relationships could only form under classical contract conditions of offer and acceptance. Yet today, the *Restatement*'s own low threshold for recognizing attorney-client relationships seems to undercut the whole logic for retaining broad, yet ambiguous standards of care owed to "quasi-clients." Why allow a robust standard of liability to nonclients based on section 73(2) reliance when, under slightly different conditions, reliance can give rise to a full-blooded attorney-client relationship? *See* RESTATEMENT sec. 26 (stating that attorney-client relationship can form when "a person manifests to a lawyer the person's intent that the lawyer provide legal services . . . and . . . the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide services"). *Cf.* Moore, *supra* note 8, at 698–701 (suggesting that rather than stretch third-party doctrines to encompass ambiguous situations, a more acceptable solution would be simply to recognize a full-fledged attorney-client relationship, allowing practitioners the certainty of knowing where they stand).