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Foreword

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FOREWORD

JUDITH L. MAUTE*

I. Symposium Issue on the Evolving Restatement of the Law Governing Lawyers

The University of Oklahoma Law Review is honored to publish this symposium issue. It was presented under the auspices of the Professional Responsibility Section of the Association of American Law Schools (AALS) during my term as section chair.¹ Although the project of writing the *Restatement* had been underway for six years, the section leaders perceived that very few professors or practicing lawyers were acquainted with it. We decided to fill this void by dedicating our 1993 Annual Meeting to a symposium on the *Restatement*. By doing so, we wanted to develop both a wider understanding of this important work-in-progress and to evaluate existing troublesome issues, in hope that thoughtful scholarly input could improve the final product.

We organized the symposium around several questions: What is the intended scope of the *Restatement of the Law Governing Lawyers*? Is it necessary? After all, the legal profession recently completed a widespread debate over ethics rules, culminating in adoption of the American Bar Association (ABA) Model Rules of Professional Conduct. Almost forty states have now adopted some version of the

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1. AALS is the national organization and accrediting body devoted to improvement of the legal profession through legal education and serves as the learned society for law faculty. ASSOCIATION OF AM. LAW SCH., 1992 HANDBOOK 1. The University of Oklahoma College of Law is honored that Dr. Rennard Strickland, director of the Center of Native American Law and Policies Studies, is President-elect of the AALS. He will preside in this important and prestigious position during the 1994 calendar year. Most AALS activity takes place within sections organized by substantive areas of law or other interests. The Professional Responsibility Section membership includes approximately five hundred law faculty who teach or write in this field.

Model Rules with local modifications.² What role would the *Restatement* play on issues addressed in the Model Rules?

We focused on two substantive issues, conflicts of interest and client confidentiality, which were debated intensely within the American Law Institute (ALI). Regarding conflicts of interest, section 204 permits a private law firm to create a screen, or wall of separation, between a lawyer whose prior representation creates a conflict, and the rest of the firm. The Model Rules and prevailing case law explicitly reject the use of private screens unless the tainted lawyer was disqualified because of prior government employment.³ By what authority does the ALI reverse the accepted view, and what prompted it to do so? Considerable controversy also surrounded the confidentiality provisions, and, more specifically, exceptions permitting disclosure of a client's intended crime or fraud in order to prevent death, serious bodily injury, or substantial financial loss. The proposed exceptions extend far beyond those allowed by ABA Model Rule 1.6(b), but rejected by many jurisdictions.⁴ Given the current disarray among states, what justifies the ALI to select its own normative vision?

We also wanted to address issues relating to criminal defense representation, a practice area often overshadowed by civil litigation and high dollar business transactions. Finally, we welcomed input on what the *Restatement* might do regarding lawyers' civil liability for professional shortcomings. The Model Rules have had limited impact in this area because of a clever disclaimer that rule violations do not give rise to a cause of action, or create a presumption that a legal duty has been

2. The Oklahoma Bar Association Model Rules Study Committee evaluated each rule, considered the extent to which it changed Oklahoma law, and whether it stated an appropriate legal standard. The committee proposed approximately 25 changes to the text or comments of the ABA rules. In November 1986, the Oklahoma Bar Association House of Delegates considered the rules and without significant debate, recommended adoption by the supreme court. In March 1988, the Oklahoma Supreme Court adopted the rules. 5 OKLA. STAT. ch. 1, app. 3-A (effective July 1, 1988); see JUDITH L. MAUTE, PRACTITIONER'S GUIDE TO THE OKLAHOMA RULES OF PROFESSIONAL CONDUCT (1989). The author served as *ex officio* reporter to the rules committee. Since 1988, Oklahoma has adopted several amendments, the most significant relating to confidentiality. See *infra* note 4.

3. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9 to 1.11 (1983, as amended).

4. Rule 1.6(b) of the Oklahoma Rules of Professional Conduct recently was amended, reflecting ongoing consideration and refinement of the difficult policy issues concerning exceptions to confidentiality. The amended version includes a new subsection (b)(2), permitting disclosure as needed to rectify harm caused by the client's misuse of the lawyer's services. It provides, in *relevant part*:

(b) A lawyer may reveal, to the extent the lawyer reasonably believes necessary, information relating to representation of a client:

- (1) to disclose the intention of the client to commit a crime and the information necessary to prevent the crime;
- (2) to rectify the consequences of what the lawyer knows to be a client's criminal or fraudulent act in the commission of which the lawyer's services had been used, provided that the lawyer has first made reasonable efforts to contact the client but has been unable to do so, or that the lawyer has contacted and called upon the client to rectify such criminal or fraudulent act but the client has refused or is unable to do so.

64 OKLA. B.J. 436 (Feb. 13, 1993).

breached.⁵

Several prominent scholars agreed to address the annual section meeting and to prepare their remarks for publication in the *Oklahoma Law Review*. The distinguished panel included both persons actively involved with the *Restatement* project and thoughtful outside observers. This symposium issue contains polished versions of their remarks. The presenters were: Charles W. Wolfram, the Charles Frank Reavis Sr. Professor, Cornell Law School, Chief Reporter for the ALI *Restatement of the Law Governing Lawyers*, and author of a leading professional responsibility treatise; Professor Theodore J. Schneyer of the University of Arizona, the leading scholar on the politics and dynamic process of legal self-regulation; Susan R. Martyn, the Andersch-Fornoff Professor of Law & Values at University of Toledo, who serves as an adviser to the *Restatement*; Stanford Professor Kim A. Taylor, former director of the Washington, D.C., Public Defender Service; Professor Fred C. Zacharias of the University of San Diego, who has written extensively on issues of confidentiality; and Victor B. Levit, San Francisco practitioner, member of the *Restatement* consultative group, and noted author in the area of legal malpractice.

In 1986 the ALI undertook the ambitious task of assembling a comprehensive restatement of the law applicable to the practice of law. The *Restatement* encompasses the broad range of law affecting legal practice, whether expressed in the doctrines of professional discipline, evidence, agency, contracts, or tort.⁶ Initially, the project was expected to take at least five or six years.⁷ Now, after seven years, much work remains before presenting the *Restatement* to the ALI for final adoption. Hopefully, this will occur in the next three or four years.

This *Restatement* project follows the established ALI structure, consisting of a complex system of examining the substantive drafting in each tentative draft at multiple levels of review. The ALI's long history of producing authoritative and

5. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983). Courts are split on the effect of this disclaimer. *See, e.g.*, *Miami Int'l Realty Co. v. Poynter*, 841 F.2d 348 (10th Cir. 1988) (legal malpractice action based on breach of professional duty to client causing lost profits from time-share project); *Woodruff v. Tomlin*, 616 F.2d 924, 936 (6th Cir.) (violation is "some evidence" of required conduct), *cert. denied*, 449 U.S. 888 (1980); *Elliot v. Videan*, 791 P.2d 639, 642 (Ariz. 1989) (malpractice was not established by violation of Rules of Professional Conduct, but was evidence of malpractice); *Fishman v. Brooks*, 487 N.E.2d 1377, 1381-82 (Mass. 1986) (canon of ethics or disciplinary rule violation is not itself an actionable breach of duty to a client); *Lipton v. Boesky*, 313 N.W.2d 163, 166-67 (Mich. Ct. App. 1981) (violation creates rebuttable evidence of malpractice); *Carlson v. Morton*, 745 P.2d 1133, 1137 (Mont. 1987) (crux of decision in negligence suit relies on proof of breach of legal duty, not on breach of code of ethics); *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*, 750 P.2d 118, 123 (N.M. 1988) (violation does not give rise to private cause of action for damages against attorneys); *Lazy Seven Coal Sales v. Stone & Hinds*, 813 S.W.2d 400, 404 (Tenn. 1991) (Code of Professional Responsibility was not intended to establish a private cause of action for infractions of disciplinary rules but creates remedy solely disciplinary in nature); *Harrington v. Pailthorp*, 841 P.2d 1258, 1262 (Wash. 1992) (violation of Rules of Professional Conduct does not give rise to an independent cause of action against attorney); *Hizey v. Carpenter*, 830 P.2d 646, 654 (Wash. 1992) (experts on attorney's duty of care may properly base their opinion on attorney's failure to conform to ethics rule in action for legal malpractice).

6. Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 201 (1987) [hereinafter Wolfram, *The Concept of a Restatement*].

7. *Id.*

persuasive restatements depends upon the dedication of leading scholars, judges, and practitioners with relevant expertise to serve in various capacities — as chief or associate reporters, advisers, or members of the consultative group. First, the reporters produce a tentative draft for review and comment by the project advisers and consultative group. After further revisions from the reporters and approval by the advisers, the Institute council and membership review this draft and vote, first on individual sections and finally on the entire proposed restatement.⁸

This issue of the *Oklahoma Law Review* is the first symposium on the *Restatement of the Law Governing Lawyers*. As such, it serves an important role in the development of law. Lawyers from all fields of practice should acquaint themselves with the proposals and voice any concerns to those working on the project or to members of the prestigious American Law Institute. When finally adopted, the *Restatement* is likely to affect all practicing attorneys. Unlike the open-ended, democratic debates surrounding the Model Rules of Professional Conduct, the ALI restatement process is relatively closed, with limited input from the most distinguished (and elite) practitioners, judges, and scholars.⁹ Without fuller input, the final version may overlook some important issues. The following articles are presented to stimulate greater consideration of the *Restatement* among the practicing bar and scholars.

The *Restatement* is about law and not ethics. Professor Wolfram addressed what he describes as a sometimes uncomfortable fit between the *Restatement* and legal ethics. He defines the term "legal ethics" narrowly, to include any "normative statement or quality ascription that one might apply to the actions of a lawyer or law firm *except* narrowly legal statements or ascriptions."¹⁰ The uncomfortable fit occurs in restating well-settled law which professionals may regret for ethical reasons. Future drafts will contain the following disclaimer limiting the *Restatement* to questions of law and not ethics:

We take this occasion to remind readers that, as with all work on 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 are a statement of the law applicable in 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 Comments do not discuss other important subjects, such as matters of sound professional practice of personal or professional morality or ethics. Such other non-legal considerations may be referred to in the

8. *Id.* at 199.

9. See Theodore J. Schneyer, *The Restatement and the Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 27 (1993).

10. Charles W. Wolfram, *Legal Ethics and the Restatement Process — the Sometimes-Uncomfortable Fit*, 46 OKLA. L. REV. 13, 13 (1993) [hereinafter Wolfram, *Uncomfortable Fit*].

Reporter's Notes, but those discussions do not, as is traditional, constitute the position of the Institute.¹¹

Professor Wolfram gave two reasons why the *Restatement* limits its scope to law, and not ethics. First, it is limited so courts deciding questions of liability do not become confused and find that suggestions for "sound professional practice" constitute enforceable, normative legal rules. Second, the *Restatement* is *not* intended to reconsider the fundamental questions of professional ethics so intensely debated around the Model Rules. Rather, it aims to restate existing law, as articulated in most jurisdictions. Where the law is not settled, the reporter has discretion to recommend any common law proposition supported by existing case law.¹² In that respect, any restatement holds the possibility for significant law reform.

Professor Schneyer addressed the most basic question: Why have a *Restatement of the Law Governing Lawyers*? Prior restatements focused upon distinct areas of substantive law and were successful because of the strong commitment to disinterested legal craftsmanship. By contrast, this *Restatement* draws upon many diverse areas of law, bound together only by their application to the practice of law. He cautions that "intervening in the Balkans is often futile and always risky."¹³ Overall, he's not so sure it was a good idea.¹⁴ His metaphor to the international Balkans conflict nicely frames the issue. What are the consequences when an elite organization such as the ALI shifts the center of gravity in defining relevant law from the more inclusive and democratic processes of the ABA? He explores areas where the *Restatement* is a competitive rival to the Model Rules, as well as those areas in which they are complementary. In some cases, the *Restatement* overlaps with and diverges from the rule formulation, which could undermine the ABA's role as lawgiver. The Model Rules' reach clearly is not limited to issues of discipline; numerous provisions have their greatest application in other contexts.¹⁵

Professor Martyn focused on *Restatement* section 204, which directly conflicts with the Model Rules' prohibiting the use of private law firm screens to avoid disqualification based on a prior representation. She analogized section 204 to a mutt one adopts from the pound as a puppy: it draws from several genetic strains, but there is no way to predict which will become dominant as the dog (or the law) matures.¹⁶ She sketched the provision's development as framed by internal division among advisers. The final version reflects victory by the "pragmatic majority" over the "purist minority."¹⁷ She criticizes the debate for focusing on the wrong issues

11. RESTATEMENT OF THE LAW GOVERNING LAWYERS at xxiii-xxiv (Tentative Draft No. 5, 1992); see also Wolfram, *Uncomfortable Fit*, *supra* note 10. See *supra* text accompanying note 5.

12. Wolfram, *Uncomfortable Fit*, *supra* note 10, at 16-17.

13. Balkanization of the law is a term reflecting the extent of fragmentation and conflict among jurisdictions on any given issue.

14. Schneyer, *supra* note 9, at 26.

15. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.10, 1.13, 1.5, 1.8(a) (1983); Schneyer, *supra* note 9, at 29-30.

16. Susan R. Martyn, *Conflict About Conflicts: the Controversy Concerning Law Firm Screens*, 46 OKLA. L. REV. 53, 53 (1993).

17. *Id.* at 56.

and warns of an uncertain future.¹⁸ If private screening follows the genetic strain from securities law, it may impose endless duties of implementing and monitoring each screen and create the risk of civil liability and loss of fees if such measures are inadequate.¹⁹ The alternative is to live without the dog (private screens) and avoid conflicts of interest by taking greater care to preserve and nourish existing professional associations.²⁰

Professor Taylor identified several areas in the *Restatement* warranting more attention on problems peculiar to representation of indigent criminal defendants. Later drafts should intersperse additional illustrations and comments focusing on this unique practice context. For example, the *Restatement* should acknowledge the nonconsensual formation of the client-lawyer relationship and endorse adherence to established standards for appointment.²¹ Commentary should refer to the lawyer's duty to avoid case overloads that impair effective representation.²² Section 44(3)(g), permitting counsel to withdraw from "unreasonably difficult" representations, should recognize the inherent problems of mistrust and define appropriate efforts to improve the relationship before seeking to withdraw.²³ Institutional indigent defenders need guidance on handling conflicts between the individual and group interests of the clients they represent. Professor Taylor joined those who denounce the *Restatement* for replacing traditional espousal of zealous advocacy with a duty of reasonable diligence. "[Z]ealous representation does not necessarily invite wild posturing."²⁴ Especially in this practice context, the failure "to impress upon the lawyer that effective representation of an indigent accused requires that she [act] zealously . . . [may] prevent the client from receiving fair treatment in the criminal justice system."²⁵

Professor Zacharias criticized the manner in which section 117 purports to state the majority view on the limited exceptions to confidentiality, when in fact, it reflects the reporters' view of the "best approach."²⁶ This disguised reform effort conflicts with established ALI tradition of disinterested drafting. The advocacy approach used in drafting a relatively controversial position while appearing to restate the law will be readily apparent to the legal community and ultimately may detract from the overall value of the *Restatement*.²⁷ Instead, he prescribed a specially crafted drafting approach for when the *Restatement* seeks to reject a majority view: identify and explain why the ALI adopts a new position; demon-

18. *Id.* at 58.

19. *Id.* at 59; see also Monroe Freedman, *ALI to Clients: DROP DEAD!*, LEGAL TIMES, May 31, 1993, at 26.

20. Martyn, *supra* note 16, at 61.

21. Kim A. Taylor, *Reading Between the Lines: Indigent Defense Issues and the Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 63, 65 (1993).

22. *Id.* at 67.

23. *Id.* at 68.

24. *Id.* at 66.

25. *Id.*

26. Fred C. Zacharias, *The Restatement and Confidentiality*, 46 OKLA. L. REV. 73, 75 (1993).

27. *Id.* at 82-83.

strate why the respected membership agreed to abandon the prevailing view of state ethical codes; and substantiate its judgment by evaluating empirical data on how the state rules actually operate.²⁸

Mr. Levit surveyed the topics that will be covered in the pending chapter on malpractice. He predicted future developments on questions of civil liability relating to permitted disclosure of confidences and the whole conflicts area arising from screening, nonconsentable conflicts, and financial relationships between client and lawyer.²⁹

Lively audience discussion ensued from these thought-provoking presentations. Comments spanned the spectrum: will the *Restatement* impede future development in the law? What will become of Professor Martyn's puppy — is section 204 little more than *Silver Chrysler*?³⁰ How should the *Restatement* address the effect of ethical violations on civil liability? West Virginia Professor Carl Selinger shared his critique of tentative comment language regarding an advocate's effort to discredit the testimony of a truthful witness. For this symposium, he probed further into the policy and limited legal authority that permits discrediting in the context of criminal defense. He proposes inclusion of a comment stating "that existing law implicitly condemns the practice outside of criminal defense representation."³¹ ALI recognition that discrediting is illegitimate would boost confidence in the adversary system as an instrument of justice and make it clear that this practice has no place in civil litigation.³²

II. Significance of the Restatement

A. Advanced Stage of Legal Development

Although we will not see the final result for some time, the *Restatement* is immensely important, even while tentative in form. It represents a new maturity in the law of lawyering. Professor Nancy Moore argues that under the Model Rules, the legal profession has attained a very advanced stage of development among professions:

Indeed, codes themselves have been distinguished according to their stage of development. Typically, they begin as a simple set of ideas to which adherents aspire, then move to a "second-level" code, which

28. *Id.* at 83.

29. Victor Levit, *The Effect of the Restatement on Rules of Malpractice*, 46 OKLA. L. REV. 87 (1993).

30. *See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (leading case limiting when a lawyer is disqualified because of a former representation). The Tenth Circuit recently denied disqualification in a bankruptcy case where the substantial relationship test was satisfied, but the court determined the information was not sufficiently material to the current matter. *See SLC Limited V v. Bradford Group West, Inc.*, 999 F.2d 464 (10th Cir. 1993).

31. *See Carl M. Selinger, The "Law" on Lawyer Efforts to Discredit Truthful Testimony*, 1993 OKLA. L. REV. 99, 105 (1993).

32. *Id.* at 106.

contains more stringent language and is designed to be enforced, and finally advance to a "third-level," in which the standards for proper practice are so clearly laid out that "[w]hat is left is little more than a quasi-criminal code enforced by a professional society rather than a constitutional government." With the adoption and enactment of the Model Rules, the legal profession may be the first to achieve a true "third-level" code. (Indeed, given their unique legal status, the Model Rules might be fairly characterized as initiating a new "fourth-level" status, perhaps unattainable by any other professional code.)³³

All professions are subject to some law beyond that of their own codes. The extent of noncode law varies by profession and its depth of involvement in society.³⁴ Over two centuries, the legal profession has become involved in all facets of American life. It is hard to imagine any aspect of modern society that is not in some way affected by the long reach of the law. (Perhaps lawyer-bashing exists in part because the law and its practitioners are annoyingly ubiquitous.) Lawyers are at the heart of much lawmaking, whether through legislation, regulation, or litigation. Disputes frequently arise about the scope, effect, and consequences of lawyer involvement, thus producing a far-ranging law of lawyering. Many diverse strains of law exist, primarily having in common their connection to the practice of law.³⁵

The *Restatement* represents the next developmental stage. As contrasted with ethics codes, which define permissible standards of conduct, the *Restatement* attempts to combine the diverse judicial, statutory, and code formulations into one comprehensive document. The mere undertaking of this project reflects the ALI's judgment that the Model Rules left many important issues unresolved and a continuing need to reflect upon the law of lawyering.³⁶

The *Restatement* seeks to further professional education by addressing gaps in lawyers' understanding of the law as it applies to their practice.³⁷ Lawyers unfamiliar with this body of law act at their peril. Knowledge of the disciplinary rules is not enough. Under the evolving law governing lawyers, one's acts or omissions may result in criminal or civil liability or court-imposed sanctions. Unfortunately, many in the practicing bar lack sufficient working knowledge of this developing law.

33. Nancy J. Moore, *The Usefulness of Ethical Codes*, in [1989] 1 ANN. SURV. AM. L. 7, 15.

34. Compare, for example, the medical and architecture professions: almost everyone obtains medical care sometime in their life, but relatively few persons elect to retain the services of an architect. The frequency and nature of medical services increase the risk of conflict, and hence prompts development of an exhaustive common law.

35. Schneyer, *supra* note 9, at 25.

36. Wolfram, *The Concept of a Restatement*, *supra* note 6, at 196. The *Restatement* project should not be taken as a hostile rejection of the Model Rules. Professor Geoffrey C. Hazard served as reporter to the ABA Commission on the Rules of Professional Conduct, and shortly after their adoption, became Director of the American Law Institute. The project undoubtedly reflects his judgment that the project was both justified and complementary to the ABA Rules.

37. Wolfram, *The Concept of a Restatement*, *supra* note 6, at 198-99.

Any restatement effort involves a dynamic relationship between the ALI and the courts, legislatures, and regulatory agencies. Although the ALI may give its blessing with the membership voting to approve the final version, it has no authority to make law. Even with the prestige of the ALI's past works, a given restatement provision serves only as persuasive authority and cannot bind local decision makers. State courts are free to adopt or reject any section. Prior restatements have drawn upon innovative state court opinions to fill a perceived gap in the law.³⁸

A dynamic relationship between state law and a restatement can move in both directions to produce law reform. This phenomenon may be occurring in Oklahoma, where a tentative *Restatement* provision has influenced judicial decision making. Tentative *Restatement* section 48(2)(b) permits a lawyer to loan or guarantee a loan to a client when necessary to enable the client to withstand delays in litigation and make settlement decisions on the merits and not because of financial hardship. Two Oklahoma Supreme Court cases question whether a lawyer can be disciplined for making humanitarian loans to clients. In *Oklahoma Bar Ass'n v. Smolen*,³⁹ the parties stipulated that prohibited loans were made and agreed to the sanction of public censure. Justice Yvonne Kauger, *sua sponte*, challenged the validity of Rule 1.8(e), the ethics rule prohibiting loans to litigation clients. Her dissent asserted that the rule unconstitutionally impairs access to courts by impoverished litigants and violated section 48(2)(b). Justices Wilson and Summers dissented without opinion. Justices Opala and Hodges concurred with the decision to censure, but urged the bar association to reconsider Rule 1.8(e) in light of the tentative *Restatement* provision. At the direction of the Oklahoma Bar Association Board of Governors, the Committee on Rules of Professional Conduct has given the matter extended consideration. In August 1993, the Committee presented without recommendation a proposed amendment fashioned after *Restatement* section 48(2)(b). Although the Board of Governors rejected the amendment, the issue remains alive with the supreme court.⁴⁰ Having given the bar an opportunity for considered legislative action, the possibility remains for the supreme court alone to amend the rule pursuant to its supervisory authority over the bar. The rules committee was aware of this risk and considered well spent its time in researching, investigating, and debating the issue. If Oklahoma Rule 1.8 is ultimately amended to permit loans to clients for necessary

38. The most notable analogous situation arose while the second *Restatement of Contracts* was underway. Professor E. Allan Farnsworth, reporter to the *Restatement of Contracts (Second)*, related a prior example of the interaction between the courts and the restatement process. In *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958), the California Supreme Court drew upon an obscure comment in the first *Restatement* as authority for using promissory estoppel as a consideration substitute, preventing revocation of an offer on which there had been substantial reliance. The *Restatement (Second)* codified the Drennan principle in section 87(2). See E. Allan Farnsworth, *Ingredients in the Redaction of The Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 7 (1981).

39. 837 P.2d 894 (Okla. 1992).

40. See, e.g., *Oklahoma Bar Ass'n v. Carpenter*, 64 OKLA. B.J. 2002, 2006 (June 26, 1993) (Kauger, J., dissenting) (stating that "the provision of humanitarian, non-interest bearing loans to clients does not warrant discipline").

living expenses, this Oklahoma experience will achieve national prominence exemplifying the dynamic relationship between the restatement process and state law.

B. Making Explicit the Distinction Between Law and Ethics

As Professor Wolfram discusses, the *Restatement* deals with law and not ethics. By explicitly distinguishing between the two, the *Restatement* performs an important educational function for the legal profession. In defining the extensive body of existing law, the *Restatement* directs lawyers to evaluate with legal analysis many issues that previously have been dismissed as imponderable ethical matters about which reasonable minds can differ.

Many lawyers do not understand the important distinction between "law" and "ethics." Law creates binding obligations with formal sanctions for noncompliance.⁴¹ By contrast, ethics relate to questions of moral judgment, including both personal ethics and the discussion of moral philosophy as it relates to the profession. Ethics are not subject to formulation as narrow legal statements.⁴²

Lawyers' colloquial use of the term "ethics" coincides with this distinction. Discussion of ethical questions may provoke lofty considerations of virtue, but not discrete legal principles that demand reasoned analysis about whether the proposed course of conduct is legally permissible. Law sets boundaries that cannot be crossed without the risk of adverse consequences. By defining a question as one of ethics, many lawyers are oblivious to the possibility that case law, rules, or statutes may address the situation and set limits on permissible conduct. Such labeling preserves for lawyers vast discretion to do what they want, unimpeded by legal constraints. Thus, resolving a question of ethics is often reduced to gut reaction. Years of practice tend to toughen one's moral sensibilities, with the result being that very little causes moral discomfort.⁴³ Accordingly, lawyers can find justification to pursue almost any chosen course of action, while seldom pausing to consider whether the analysis must at least begin with examination of the applicable law.

41. *Webster's New World Dictionary* defines "law," in relevant part, as "3. something that gives binding force to a law, or secures obedience to it, as the penalty for breaking it, or a reward for carrying it out. 4. something, as a moral principle or influence that makes a rule of conduct, a law, etc. binding." WEBSTER'S NEW WORLD DICTIONARY 788 (2d coll. ed. 1982).

42. *Webster's* defines "ethics," in relevant part, as "1. the study of standards of conduct and moral judgment . . ." *Id.* at 481; see also Wolfram, *Uncomfortable fit*, *supra* note 10.

43. See, e.g., Diane E. Ambler, *The Securities Bar, Lateral Hiring Conflicts*, INSIGHTS, June 1992, at 7 (conflicts of interest analysis often rests on little more than gut reaction); see also JOHN WILLIAM CORRINGTON, *THE SOUTHERN REPORTER* (1981) (a collection of short stories about ordinary practicing lawyers). In one passage, an elderly gentleman lawyer describes to a young associate the callousness that comes from years of practice:

One of the results of aging in the law is that you are not easily gotten to. By the time you have been at it thirty or forty years, you have done so many things no one should have to do that something has drained out of you, to be replaced with the law, like a creature trapped in mud which is hard pressed for a long, long time, leaching away the soft parts, making everything over. In stone.

Id. at 69; see also Judith L. Maute, *Book Review*, 37 OKLA. L. REV. 635, 637 (1984).

The confusion between law and ethics is at least partly attributable to the history of professional regulation and the ethical discretion given to lawyers under the prior codes. The 1908 ABA Canons of Professional Ethics represent a typical first stage of development, focused mostly on listing a simple set of aspirational ideals.⁴⁴ The ABA gave little thought to the need for possible enforcement mechanisms. Unwritten but shared notions of professionalism encouraged voluntary compliance; those who deviated from the ethical precepts risked professional ostracism. For the next sixty years, the law developed slowly. As expected, the Canons were seldom used for discipline. Sparse dicta scattered among reported decisions sketched some basic principles derived from agency, tort, contract, and constitutional law. Relatively few cases addressed the propriety of a lawyer's conduct in the context of liability or discipline.

The 1969 ABA Code of Professional Responsibility — the second level of code development — represented an important step in defining enforceable duties. Its tripartite structure attempted to isolate obligations of virtue (or legal ethics) from binding statements of law. Narrow statements of law, the violation of which would subject a lawyer to discipline, were contained in the Disciplinary Rules (DRs), whereas the aspirational statements were contained in Ethical Considerations (ECs).⁴⁵ Despite the drafters' good intentions, the line between law and ethics often blurred. Sometimes courts borrowed from the Ethical Considerations to determine legal obligations. At other times the Disciplinary Rules were ambiguous, giving the lawyer much discretion to decide whether or not a rule should apply. Thus, it was sometimes uncertain whether the resolution to a question was one of law or of ethics. Lacking both a coherent and identified body of law defining lawyers' obligations outside the disciplinary context, and a clear understanding of the existing rules, many lawyers regarded the ethical codes as minor impediments. Lawyers were not yet accustomed to analyzing questions arising under the Code as matters of law, evaluated with the familiar tools of research and legal reasoning.

Starting in about 1970, the development of the law of lawyering quickened. With much greater frequency, courts used the Code as authority for imposing discipline or in determining other disputes regarding lawyers' conduct. Disqualification motions based on conflicts of interest became a popular strategy to disarm an effective litigation opponent. This heightened activity provoked a new level of serious scholarship concerning legal ethics.

Although the Code was a significant improvement over the 1908 Canons, brief experience revealed several problems. Some provisions were vague or triggered circular reasoning; gaps caused courts to borrow from the aspirational Ethical Considerations; the advertising restrictions were soon found unconstitutional. In an important article, Professor Thomas Morgan criticized the Code's misplaced priorities, in which the interests of lawyers and the legal profession received top priority,

44. See *supra* note 30 and accompanying text.

45. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981).

followed by the client's interests and, last, the public interest.⁴⁶ Meanwhile, the Watergate Scandal provoked strong public reaction against the legal profession and internal reflection about why so many lawyers were involved with the illegal conduct. The ABA responded to these developments in two ways. First, in 1974 it mandated that accredited law schools require students receive instruction in the duties and responsibilities of the legal profession.⁴⁷ Second, in 1977 it created the Commission on Evaluation of Professional Standards (commonly known as the Kutak Commission), which produced the Rules of Professional Conduct, and eventually adopted in 1983.

Both efforts have had a tremendous effect upon the legal profession. All who graduate from an accredited law school have received some training in the law of lawyering. Wide variance exists among instructors, but at least the recent generations of lawyers are aware that "legal ethics" involves more than a gut reaction. Those who graduated since adoption of the Model Rules have an even stronger orientation to analyze "ethical" problems as also raising questions of law susceptible to traditional research and analysis.

The Model Rules set forth lawyers' minimum legal obligations as "black letter law" in a restatement format. They are "user-friendly" in organization and format, containing terminology that uses legal terms understandable to the average practitioner. Critics lament that they eliminate Ethical Considerations, or any other discussion of professional goals and aspirations. One could say that "the only thing missing from [our code of ethics] is the ethics."⁴⁸ While one may wish for other mechanisms that will instill shared professional values, experience has shown that this function does not mix well with the need for clearly articulated, enforceable rules of conduct.

The ABA and local bar associations continue to seek more effective ways to identify and promote discussions of professionalism and true ethical concerns. However, great diversity exists among American lawyers based on locale, size and type of practice; applicable legal constraints vary accordingly. Above all else, lawyers need to know the law which impacts upon their daily practice. Personal and professional ethics may prompt them to comply voluntarily. Whether it is high moral standards or aversion to sanctions that motivates compliance, the end result is ultimately what counts. Together with the Model Rules, the *Restatement of the Law Governing Lawyers* will help educate the practicing bar about the legal risks they encounter.

46. See, e.g., Thomas Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

47. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 (1992). Current legal education provides limited exposure through a required course in "legal ethics" that includes some combination of the following topics: the current ethics code, moral philosophy; and the diverse strands of law governing lawyers.

48. Moore, *supra* note 33, at 15 (paraphrasing Cebik, *Ethical Trilemmas*, 1 ETHICAL PROBS. IN ENGINEERING 18 (2d ed. 1930)).