

# Oklahoma Law Review

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Volume 46 | Number 1

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1-1-1993

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### Recommended Citation

Charles W. Wolfram, *Legal Ethics and the Restatement Process--The Sometimes-Uncomfortable Fit*, 46 OKLA. L. REV. 13 (1993),  
<https://digitalcommons.law.ou.edu/olr/vol46/iss1/3>

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# LEGAL ETHICS AND THE RESTATEMENT PROCESS — THE SOMETIMES-UNCOMFORTABLE FIT

CHARLES W. WOLFRAM\*

At focus in this article is a single element of the restatement process — the extent to which the *Restatement* comports with "legal ethics," a term I will have to define. As indicated by the title, I consider the fit to be an uncomfortable one at times. Discomfort stems from two root causes. First, as a deliberate policy decision, the American Law Institute has determined that the *Restatement* will not include any consideration of a nonlegal nature. The *Restatement*, as we have often had occasion to insist, is about law, and nothing else. Second, and perhaps more troubling, some of what the *Restatement* consequently will restate as law will and should disturb those who are concerned with legal ethics. Nonetheless, I will argue that tension, on both scores, is both inevitable and the product of a correct choice.

## *Defining "Legal Ethics"*

I should begin by being as clear as I can about what is covered by this excluded domain of "legal ethics." That is not a matter upon which one can be terribly clear, unless dealing in gross terms, as I am. All scholars in legal ethics have a well-founded understanding of what legal ethics is as opposed to law. However, they are also familiar with the fact that a considerable degree of grey surrounds many attempted definitions of the term. While there are important and subtle differences to be recognized for other purposes, for our present review I will simply define "legal ethics" as every sort of normative statement or quality ascription that one might apply to the actions of a lawyer or law firm *except* narrowly legal statements or ascriptions.<sup>1</sup>

Considerations of "legal ethics," for example, are concerned with personal ethics — the aspects of a life scheme which, at any moment, an actor employs to assess whether what she is doing as a lawyer is appropriate. "Legal ethics," in the broad sense I use the term, also includes scholarly analyses of the work of lawyers by professional moral philosophers — for example, the work of Professor David Luban

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1. My rough-hewn definition will remind you, perhaps, of Samuel Johnson's definitions of political parties: a Tory, Johnson wrote in his dictionary, is a member of Parliament opposed to the Whigs, and a Whig he defined as one opposed to the Tories. In both events, I trust you know something of what we mean. SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (1755) (entries for "Tory" and "Whig").

and Professor Alan Goldman and others who have recently made the practice of law their focus.<sup>2</sup> Such moral philosophers have attempted systematically to analyze the activities of lawyers in view of considerations of moral philosophy, by reference to principles of philosophy that transcend the practice of law. I also include as legal ethics whatever it is that often drives and defines the work of those legal-ethics committees who attempt to tell lawyers what to do, based often on unstated considerations of legal ethics that are different and disassociated from the prescriptive text of lawyer codes and norms derived from those texts. Those different norms somehow flow from the brow, as it were, of the committee members.

I also intend to include in my definition of legal ethics what is sometimes referred to as professional ethics. In fact, this may well be the same thing as the set of considerations to which I just referred, in the case of drafters of some ethics committee opinions. Professional ethics, as I use the term here, reflects a set of more-or-less shared professional ideals that lawyers in a practice community observe, and expect their peers to observe, in their practice and professional interactions. Such professional ideals are often inchoate and often place great stock in professional traditions, professional mythology, and economic, reputational, and similar parochial interests of lawyers as a distinct group. Sometimes the ideals are laudable; sometimes not. We have all heard lawyers make statements of the following kind: "I don't care what the law provides; I don't care what the lawyer codes say; I *feel* the following about the following problem." What ensues is a recital of a position and the reasons in support of it that have nothing to do with the commands of lawyer codes or other legally binding prescriptions. Whatever else the lawyer is saying, she is not talking about anything that is within the compass of the *Restatement*.

### *Exclusion of "Legal Ethics" from the Restatement*

Take all the preceding as an encompassing conversational description of what it is that the *Restatement of the Law Governing Lawyers* does *not* deal with. All that the *Restatement* deals with, then, is law. Now, excluding in that way all consideration of legal ethics from the *Restatement* may strike some observers of the restatement process as quizzical. Indeed, it strikes some of those observers as perverse. Yet this is clearly an important limitation on what we are attempting to do in the *Restatement*. Indeed, each tentative draft, preliminary draft, and council draft now being published in the project carries at its outset a kind of "surgeon general's warning" in a boilerplate paragraph early in the reporter's memorandum in the front matter of the draft. This boilerplate warning first appeared in Tentative

2. E.g., ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980); DAVID LUBAN, *LAWYERS & JUSTICE: AN ETHICAL STUDY* (1988); *THE GOOD LAWYER* (David Luban ed., 1984). For works by law-trained writers working from a similar perspective, see CHARLES FRIED, *RIGHT AND WRONG* (1978); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981); THOMAS L. SHAFFER & MARY L. SHAFFER, *AMERICAN LAWYERS & THEIR COMMUNITIES* (1991).

Draft No. 4 in 1991,<sup>3</sup> although it then simply documented what had been a practice for two or three years' standing in writing the *Restatement*.

Here is the text of the boilerplate warning from Tentative Draft No. 5 — the March 1992 document — and I can assure you that this language will appear in the reporter's memorandum in all subsequent drafts:

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 Comment do not discuss other important subjects, such as matters of sound professional practice or personal or professional morality or ethics. Such other non-legal considerations may be referred to in the Reporter's Notes, but those discussions do not, as is traditional, constitute the position of the Institute.<sup>4</sup>

The wording was worked out in notes that Professor Hazard and I passed back and forth during one discussion in which confusion on the subject had arisen. It was designed to address two issues that had proved nettlesome in our work to that point. One concern derived from our attempt in earlier drafts of the *Restatement* to make statements about what we called (in our parlance in earlier drafts, now abandoned) considerations of "sound professional practice." As many warned, Victor Levit among them, and as we eventually agreed, our ideas about what constituted sound professional practice did incur the rather significant risk that a court might misapprehend what we were saying and mistake sound professional practice pointers for statements of normative legal rules that were to be enforced, for example, in legal malpractice and other areas of lawyer liability.

A second and more pervasive problem, which even more insistently called for the boilerplate, involves ongoing confusion about what it is that the *Restatement* is trying to be at its most fundamental level. That problem in turn stems from two sources. I occasionally detect the belief on the part of participants or observers that the process of producing the *Restatement* is similar to the intensely political process within the ABA that produced, for example, the 1983 Model Rules of Professional Conduct.<sup>5</sup> A second and related source of potential confusion is the experience of

3. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 4, 1991) [hereinafter RESTATEMENT DRAFT NO. 4].

4. RESTATEMENT OF THE LAW GOVERNING LAWYERS at xxiii-xxiv (Tentative Draft No. 5, 1992); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS at xxiii-xxiv (Tentative Draft No. 6, 1993) [hereinafter RESTATEMENT DRAFT NO. 6].

5. For a perceptive examination of the ABA's process of generating the 1983 Model Rules of Professional Conduct, see Theodore J. Schneyer, *Professionalism as Bar Politics: The Making of the*

the ALI itself during the dozen years, now mercifully coming to a close, in which the Institute drafted the ALI Principles of Corporate Governance.<sup>6</sup> Unlike either of those efforts, however, the *Restatement* project was not intended as a reprise of either of those open-ended drafting exercises. We definitely are not working on a clean slate, as were the Kutak Commission and the ABA House of Delegates with the Model Rules and the ALI itself with the Corporate Governance project, unconstrained by anything other than internal group politics and a rough criteria of "adoptability" in the states. We have not set out to improve upon points settled in the lawyer codes or to make suggestions for their modification.<sup>7</sup> In short, the boilerplate language reflects the commitment of the *Restatement* to concentrate on restating existing "law" rather than on making bold new recommendations of brand new ways of regulating lawyer conduct to the states and other jurisdictions that govern lawyers.<sup>8</sup>

Resorting to metaphor, the *Restatement of the Law Governing Lawyers* attempts to restate the law of its subject in the same way that the *Restatement of the Law of Agency*<sup>9</sup> attempts to restate that important and very relevant body of law, in the same way that the *Restatement of Contracts*<sup>10</sup> purports to restate the body of the law of contracts, and so on. Some sections of the lawyers' restatement, very few as it turns out, focus on conduct governed only by provisions of the lawyer codes.<sup>11</sup> A few other sections deal with lawyer conduct regulated largely or entirely by statute or administrative regulation.<sup>12</sup> Except in occasional references in nonofficial

*Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989).

6. The announced last tentative publication is ALI PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft, 1992).

7. A related question has bedeviled us in drafting certain sections: should the reporters draft the best possible version of language for black-letter principles, or should we confine ourselves largely to the formulations employed in widely adopted lawyer codes, no matter how defective those formulations might be? As a rule of thumb, we will follow lawyer code language if we restate a principle that is both universally observed in the states and stated in the same or substantially similar language in both the ABA Model Code and the ABA Model Rules. We also employ ABA Model Rules formulations that have been very widely adopted in the states. More precise tinkering with concepts that are thus unartfully expressed is done in the comments to the section. At the very least, that policy avoids creating the impression among lawyer code cognoscenti that variant language implies an intent to state a variant concept.

8. Compare Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325 (1987) with Roswell B. Perkins, *The ALI Corporate Governance Project in Midstream*, 41 BUS. LAW. 1195 (1986).

9. RESTATEMENT (SECOND) OF AGENCY (1957).

10. RESTATEMENT (SECOND) OF CONTRACTS (1979).

11. In fact, a post-symposium search of sections written to date indicates only minor and scattered provisions that fit the description in the text. For example, see RESTATEMENT DRAFT NO. 4, *supra* note 3, § 56(2) (duty of lawyer promptly to render full accounting to client on request). Almost every other section involves a legal rule that is enforceable also or only in civil or criminal litigation outside the context of professional discipline.

12. The most obvious example is the topic on the work-product doctrine, which is largely governed in the federal and most state systems by court rules or procedural statutes. See RESTATEMENT DRAFT NO. 6, *supra* note 4, §§ 136-143; see, e.g., RESTATEMENT DRAFT NO. 4, *supra* note 3, § 55 cmt. b (recognition of statutory retaining liens); *id.* § 214 cmt. a (recognition of statutes and regulations

reporter's notes, however, we do not purport to recommend change in either accepted statutory, regulatory, or lawyer code formulations or doctrine.

An exception to what one might otherwise take to be the overbreadth of that commitment concerns an important matter that is not an exception after all. Where there is a significant difference among the lawyer code formulations among jurisdictions — or in statutory or administrative formulations — we choose that formulation that seems to us to be the most reasonable and responsible in view of all relevant doctrinal and policy considerations. We do not do so gratuitously. A choice is inescapably forced upon anyone seeking to restate when the "law" of the several American jurisdictions differs. For us to have used as a rule of choice in restating the nation's law governing lawyers the view of the law stated in, for example, the ABA Model Rules would have been just as arbitrary (and often as misleading) as to have chosen to follow the law of, say, New York or California. Despite the variations that undoubtedly exist among the American jurisdictions, that approach still leaves a great deal of the law well set in concrete.

Also different, of course, are areas of the law governing lawyers that are controlled largely or entirely by common law. There we follow an important American Law Institute tradition and policy that, although still controversial, has stood for more than thirty years. A controversy erupted within the Institute in the late 1950s over the proposal of Professor William L. Prosser, then the reporter for the *Restatement (Second) of Torts*, to amend section 402A on products liability, as it is now called.<sup>13</sup> As a result of that controversy, it is now well settled (but hardly unchallenged) Institute policy that the reporter for a restatement may recommend any position on a proposition of common law that can be supported by resort to traditional common law materials. As some have put it, the ALI proceeds as if the entire United States were a single, unitary common law jurisdiction.<sup>14</sup>

Accordingly, if extant legal material anywhere in that very large jurisdiction supports a common law position, the reporters may urge it. It can, of course, be rejected in favor of a competing proposition similarly derived, but at least it is legitimate, according to this policy, to urge it upon the Institute. A prominent example of this approach is the formulation that the reporters recommended and, indeed, was approved in section 55 of Tentative Draft No. 4, which was just considered at the 1992 annual meeting.<sup>15</sup> In section 55, the reporters urged, and the

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providing stricter limitations on representations in private practice by former government lawyers); RESTATEMENT OF THE LAW GOVERNING LAWYERS at 72 introductory note (Tentative Draft No. 2, 1989) [hereinafter RESTATEMENT DRAFT NO. 2] (recognition of statutory definitions of attorney-client privilege).

13. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

14. Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 21 (1929) (quoting *Address of Elihu Root in Presenting the Report of the Committee [Organizing the Institute]*, 1 A.L.I. PROC. pt. II, at 48, 48 (1923)); WILLIAM DRAPER LEWIS, HISTORY OF THE AMERICAN LAW INSTITUTE AND THE FIRST RESTATEMENT OF THE LAW: "HOW WE DID IT," RESTATEMENTS IN THE COURTS 1, 2 (1945).

15. Section 55 first appeared in RESTATEMENT DRAFT NO. 4, *supra* note 3. It was approved at the May meeting in 1992. See ALI REP., October 1992, at 14.

ALI's council and members have tentatively approved, a position that very substantially narrows what most jurisdictions accept as common law retaining liens for lawyers. A large majority of American jurisdictions that have common law on retaining liens allow such liens a very broad scope.<sup>16</sup> A lawyer may grab and hold almost any property she comes into possession of that belongs to the client, in order to secure payment of the lawyer's claim for a fee. There is, however, common law authority in a small number of American jurisdictions, including California, that essentially states that there can be no common law retaining lien at all.<sup>17</sup> There can be consensual liens specifically contracted between client and lawyer and, of course, statutory liens, but no common law retaining liens. We have followed that minority view — and, I would argue, quite defensibly so. But we do so legitimately only because there is common law support, as I say, in the global or national American common law jurisdiction.

### *Where the Shoe Pinches*

If you are like most academics — who seem not to like the common law retaining lien — you might be wondering at this point what is so uncomfortable about the distance that the *Restatement* attempts to place between law and legal ethics. I can illustrate the discomfort by referring to two other areas of controversy: one that has already erupted and one that, I predict, even guarantee, will erupt. Both concern common law rules that probably must be treated as entirely well settled, but I think many of us regret them very much. I think, in short, that the law is wrong, although it is fairly clear to me that we must restate it as it exists. It is also my impression that we have encountered instances of this latter sort — where there is

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A bibliographic note: Keeping track of action on tentative drafts of the *Restatement* takes some digging. For the ALI's official purposes, the annual volume of the ALI Proceedings for the annual meeting consists mainly of a transcript of the discussion of each draft actually considered by the membership, showing the extent of coverage, motions to amend and the like, along with the votes taken on preliminary motions and each section. (An instance of such a process and citation to the 1991 volume of the ALI Proceedings is contained in *infra* note 33). Sometimes approval of a draft is by cumulative action on a motion made at the end of the period of consideration. Occasionally, approval is on a "rolling" basis, with acquiescence noted as the presiding officer passes the meeting from one section to another.

Unfortunately, an ALI Proceedings volume typically appears only after a long interval, usually only about the time of the following year's meeting. In the meantime, the next best source is the ALI's newsletter, the *ALI Reporter* (cited *supra*); each year the October issue highlights action taken at the preceding May meeting. Unfortunately, the *ALI Reporter* is often not included into the largest law school libraries' collection of reference works, although it is sent by the ALI to many of those libraries.

Less authoritatively but much more expeditiously, two publications of the Bureau of National Affairs law publishing company — *United States Law Week* and the *ABA/BNA Lawyers' Manual on Professional Conduct* — publish in their last issue each May a journalistic account, usually quite perceptive, of discussion and action taken at the ALI's annual meeting. However, the BNA coverage will inevitably contain gaps, particularly when the ALI splits its annual meeting into two sessions, as it has sometimes done in recent years in order to expedite consideration of tentative drafts in a large number of projects.

16. See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 559 (1986) [hereinafter, WOLFRAM, *MODERN LEGAL ETHICS*].

17. *Id.*; RESTATEMENT DRAFT NO. 4, *supra* note 3, § 55 cmt. b reporter's note.

dissonance between what the common law must be said to be and what I, at least, would have it be — as a matter of legal ethics in the broad ways that I originally defined it. Nor is the dissonance faint. I think instances of dissonance are common, even if not as common as are instances of agreement between common law formulations and legal ethics.

The first legal rule was captured in illustration 4 of section 132.<sup>18</sup> There we essentially sketched the facts of and reached the same result as the well-known Arizona decision, *State v. Macumber*.<sup>19</sup> Macumber was on trial for his life in a capital murder case. He wanted to call to the witness stand two lawyers who would testify that a former jointly represented client of theirs, now deceased, had told them in confidence that he (and not Macumber) had committed the murder for which Macumber was on trial. The Arizona Supreme Court held that the testimony was properly excluded by the trial court under the attorney-client privilege.<sup>20</sup>

Illustration 4 agreed that the *Macumber* holding reflected the law in the United States.<sup>21</sup> In fact, the *Restatement* apparently approved it, as well as a corollary, which stated that the lawyers involved were required to invoke the privilege themselves, on behalf of their deceased client, when called to testify and even if no one else objected or urged them to object.<sup>22</sup> For those who may have spotted the point, there is no issue in *Macumber* or the illustration of the crime-fraud exception to the privilege. What the deceased client had confessed to the lawyers was a past act already committed, not a future act, and therefore, under traditional doctrine, the communication was clearly outside that exception to the attorney-client privilege.<sup>23</sup>

18. See RESTATEMENT DRAFT NO. 2, *supra* note 12, § 132 cmt. e, illus. 4. Some people (I among them) would similarly question the Institute's position in *id.* § 111 cmt. b, illus. 1, at least in some imaginable instances. We there, essentially, state that the refusal of the lawyer in the Buried Bodies case to inform parents of a murdered young woman of the fact of their daughter's death and the location of her body was both defensible and required. The decision on which the illustration is based is *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga County Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (App. Div.), *aff'd*, 359 N.E.2d 377 (N.Y. 1976). The trial court quashed criminal charges against the lawyer filed under a statute requiring anyone knowing of the death of a person unattended by a physician to report the death, based on the attorney-client privilege. But the court noted that, if the indictment had been based on a charge of obstruction of justice, "the work of this Court would have been much more difficult." *Id.* at 803. For a bibliography of works discussing the case, see WOLFRAM, MODERN LEGAL ETHICS, *supra* note 16, at 664-65 nn.2-8. While the trial court's opinion might be read to suggest that the provisions of New York's then lawyer code imposed a duty to disclose, on reflection we concluded that no support for such a duty could be found in any lawyer code.

19. 544 P.2d 1084 (Ariz. 1976).

20. *Id.* at 1086. *But see id.* at 1087-88 (special concurrence of Holohan, J., and Cameron, C.J.).

21. See *supra* note 18.

22. See RESTATEMENT DRAFT NO. 2, *supra* note 3, § 115 cmt. c ("A lawyer generally is required to raise any reasonably available objection to an attempt by another person to obtain confidential client information from the lawyer if revealing the information would disadvantage the lawyer's client. . . .").

23. *E.g.*, RESTATEMENT DRAFT NO. 2, *supra* note 12, § 132 cmt. b; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL ¶ 18.03[07][a] (1992); WOLFRAM, MODERN LEGAL ETHICS, *supra* note 16, § 6.4.10, at 280-81.

I confess that our motives in choosing this particular illustration were mixed. I defended the illustration on the floor of the Institute on the ground that it captured in a compelling factual setting the legally defined operation of a number of relevant doctrines having to do with the attorney-client privilege. Moreover, I think the result in *Macumber* follows from well-settled American legal principles. But I also think the result stinks! Under no moral calculus that I can subscribe to is it supportable that the law should prefer protection of the confidentiality interests of a deceased and (at least according to the proposed testimony) self-confessed murderer over the interests of a live person threatened with execution for a crime he did not commit. Nonetheless, that seems to be the logic of the privilege in the United States. English law, by the way, agrees with the moral imperative I have expressed. In English courts, the "professional privilege" can be overcome in *Macumber*-type situations. Indeed, it can be overcome in any instance of criminal prosecution, including noncapital cases (which, of course, is what all prosecutions there are). The exception applies in any instance in which a solicitor (barristers never talk to clients about the facts) would be prepared to testify that a former client confessed to a crime for which another person is now on trial.<sup>24</sup> In short, my second motivation was to have *Macumber* do a *Bleak House* number on some applications of the privilege itself, portraying it as wooden and wrong in at least some of its extreme applications.<sup>25</sup>

My second example of what I am here calling the uncomfortable fit between law and legal ethics in the *Restatement* has not yet appeared in publicly available form, and perhaps never will. Nonetheless, with the exception of one of our colleagues whose views I agree with on nonlegal grounds, it has been relatively noncontroversial in meetings with the advisers and members consultative groups that have already reviewed a first preliminary draft dealing with the legal issues involved in

24. *R. v. Barton*, [1973] 1 W.L.R. 115. The point is well accepted in modern English evidence law. See generally M. N. HOWARD, *PHIPSON ON EVIDENCE* 20-25 (14th ed. 1990); COLIN TAPPER, *CROSS ON EVIDENCE* 399-400 (6th ed. 1985).

25. Although we differ on much else in the law of confidentiality (see *infra* note 27 and accompanying text), I here agree with the preferred position of Professor Monroe H. Freedman with respect to cases such as *Macumber*: where life is at stake, a general exception to confidentiality should be recognized, and it should not be limited to threats to life caused only by a client's intended wrongful act. See, e.g., MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 103 (1990). In working on revisions to what are now sections 117A and 117B — the fraud exception to the agency-law prohibition against disclosing a client's intent to commit a future crime or fraud — we have revisited the extent to which a lawyer may reveal otherwise confidential information in order to save lives. Although the matter is complex, we will probably recommend that the Institute follow the narrow exception stated, for example, in Model Rule 1.6(b) — recognizing a lawyer's right (not duty) to disclose only where the client's wrongful act threatens future loss of life or substantial bodily injury because of a client's wrongful act. For an earlier version of the section, see *RESTATEMENT OF THE LAW GOVERNING LAWYERS* § 117A(1) (Tentative Draft No. 3, 1990) ("discussion draft" of section providing for disclosure in life-threatening situations only when "the client intends to commit a crime or fraud that threatens to cause death or serious bodily injury"). In *Macumber*, by contrast, no wrongful act of the now-deceased client threatened the life of *Macumber*. It was only the logic of the law of confidentiality that precluded *Macumber*'s possible exoneration.

lawyer advocacy.<sup>26</sup> The question is much discussed in legal ethics classrooms but virtually ignored in reported decisions. The question is this: may (or must?) a lawyer cross-examine a witness where: (a) the lawyer can effectively impeach the testimony on credibility or similar grounds, but (b) the lawyer knows the testimony to be entirely truthful? A standard illustration is one Monroe Freedman used back in 1966 and has repeatedly employed since then.<sup>27</sup> A casual-bystander witness testifies truthfully in a criminal prosecution that she saw the accused at a certain intersection at an early hour of the morning while walking her dog.<sup>28</sup> The evidence is highly probative of guilt of the accused because it places the accused, only five minutes after the commission of a horrible crime, at an intersection a block away from the scene of the crime, which was committed in the early hours of the morning when few other people were about. The problem for the witness (and the prosecution) is that the witness is elderly, speaks haltingly, perhaps in the foreign accents of a disfavored minority group, and wears thick glasses (which, nonetheless, adequately correct her vision).

We have taken the position in early drafts that the lawyer may attempt to cross-examine the witness and may attempt to persuade the fact finder not to accept the known-to-be-true testimony. Much can be said on moral grounds about the proper legal result.<sup>29</sup> Nonetheless, I think we have got the law right — the law does provide that the lawyer is at least permitted to cross-examine a known truthful witness. The practice of lawyers is rather uniformly to attack truthful testimony, when doing so is to a client's advantage, and no extant legal material of a common law sort indicates otherwise.

26. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 152 cmt. d (Council Draft No. 9, 1992) ("[T]here is no legal rule prohibiting a lawyer from cross-examining a witness with respect to testimony that the lawyer knows to be truthful."). Council Draft No. 9 contained the text of a proposed chapter on lawyer advocacy. We are currently considering combining that material with material in Preliminary Draft No. 8, from 1992, on assisting clients in matters outside litigation. The revised or combined chapters will appear in preliminary draft form, according to present plans, in early 1994.

27. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474 (1966); MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 48 (1975); MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 113-14 (1990).

28. The illustration formed the basis for one of Professor Freedman's "three hardest questions." See *supra* note 27. Professor Freedman's version of the illustration has the accused innocent of the crime, guilty only of being in the wrong place at the wrong time. The morally more difficult version of the illustration occurs, of course, when the client-defendant is guilty.

29. Model Rule 3.3(a)(4) states that a lawyer may not knowingly "offer" evidence that the lawyer knows to be false. (For those bothered by a possibly clumsy paraphrase, both "knowingly" and "knows" redundantly appear in the text of the rule.) By a subtle, but accepted, convention, the lawyer cross-examining a known truthful witness arguably does not fall afoul of the rule. It could be argued that evidence offered by the lawyer — that the witness is old, that the witness wears thick glasses, that the nighttime encounter was brief and under poor lighting — is all true. What is false (in all but certain, specialized legal senses) is the inference that the advocate is transparently seeking to suggest: that the witness is mistaken or lying in identifying the accused as the person in guilty proximity to the crime scene.

Here again, however, in my estimation the law is wrong, and very wrong. If one accepts the factual proposition, and of course not everyone does, that in practice a lawyer on occasion can differentiate confidently between the truth and falsity of testimony, then it seems to me that the law should be quite otherwise from what it is. The rule should be something like "a lawyer is prohibited from attacking testimony or other evidence that the lawyer knows to be both truthful and accurate."<sup>30</sup>

### *So Why Restate Bad Law?*

I will not pretend that I have sufficiently demonstrated either that lawyers should be permitted to testify to the confidentially confessed crimes of a now-deceased client for which an innocent person is on trial, or that lawyers should be prohibited from attacking known truthful testimony. If one happens not to agree that there is substantial dissonance in those two instances between what the law requires or permits and what legal ethics (as we define it for this purpose) would require or permit, I am confident that anyone conversant with problems in the field will with little difficulty be able to identify at least a small bushel-basketful of other examples of such dissonance. If I accurately perceive that such dissonance pervades the *Restatement*, why restate such law? Why not follow the advice frequently urged upon us reporters and simply ignore those points where the law is unfortunate? We could simply say nothing about it. Indeed, it is argued to us that there is something subversive to the interests of legal ethics in stating as law a proposition that one finds seriously offensive on the ground of legal ethics. If we refuse to give free publicity to such doctrines, some lawyers out there who do not know about them might misapprehend what the law is and therefore feel free to do what their (appropriate) sense of legal ethics would seem to require. Won't a restatement that restates such objectionable doctrine both confirm those lawyers who already conduct themselves in minimally legal but morally objectionable ways and even provide a basis for others to argue that such a course of advocacy should be required of all lawyers on the ground of competence, setting bad law in a kind of legal concrete?

All those objections may be well founded, at least in the sense that some such consequences may follow. Nonetheless, I believe that restating bad law is, where necessary because of the absence of any legal basis for doing otherwise, both justifiable and even beneficial.

On the heading of justiciability, I believe that we academics are in an important sense curators of the law. When we teach or conduct our scholarship according to a high standard, we face legal doctrine full-on, warts and all. We face it in all its inspiring glory, to be sure, but with all of its shortcomings as well. Like any other field of law, the law governing lawyers is hardly perfect in the sense of being fully integral with the moral values of most individuals. But the field will become no

30. The descriptive adjectives are not redundant. In my view, a prohibition against attacking evidence should apply only when the advocate knows that the evidence is both truthful, in the sense that the witness is not consciously misstating a fact, and accurate, in the sense that the fair inferences of what the witness is stating correspond to historical fact as the lawyer knows it or reasonably believes it to be.

better if it is portrayed — like one of Marie Antoinette's garden parties celebrating the imagined idyllic lives of French peasants — as if the law governing lawyers were free of serious flaws at a deep doctrinal level. Both the morally appropriate and the morally dubious should be portrayed as all courts apparently would apply the law, given present legal materials. Only in that way can the legal landscape be seen, both whole and accurately, for what it is. Only then can reformers, if there is to be reform, address what is wrong with lawyer regulation in light of what is right about it.

Is then the restating process a regressive process, an anti-reformist exercise, as many have thought, or is it something else? The question and the attempt to answer it are problems of long standing. I have heard it said in conversation, for example, that at least one of the justices of the Warren Court had an invariable policy, enforced upon his law clerks, of refusing to cite any of the ALI's restatements because of this justice's belief that the ALI represented primarily backward forces in American law. On the other hand, some of the most well-known controversies in the ALI's history have revolved around ALI proposals that could not be considered anti-reform by any measure. Let me only bring to mind, again, the adoption of Professor Prosser's section 402A of the torts restatement. By most accounts, section 402A, for good or for ill or for much of both, was a principal impetus to unleashing the torrent of decisions in state supreme courts that led to the present contretemps in the law of products liability — the concept of liability without fault for defective products. To choose a much more contemporary example, much of the work of the ALI on the Corporate Governance project,<sup>31</sup> just being completed, can hardly be considered other than reformist. In fact, at least one legal historian who has appraised the ALI's restatements concludes, to use my own words, that at least the early efforts were a conspiracy of reform-minded law professors, judges, and lawyers to reshape American law according to largely progressive ideals.<sup>32</sup>

Whatever the ALI's past history, how should the *Restatement of the Law Governing Lawyers* be judged — reformist, regressive, or otherwise? I for one am quite content to leave the ultimate judgment to history, including whatever history ensues of judicial acceptance or rejection of our work.<sup>33</sup> I am persuaded that an

31. See *supra* notes 6, 8.

32. N. E. H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *LAW & HIST. REV.* 55 (1990).

33. Some stirring among courts has already occurred. A recent example are the several opinions in *Oklahoma Bar Ass'n v. Smolen*, 837 P.2d 894 (Okla. 1992), in which a divided court held that the court should accept a stipulated agreement that a lawyer should be publicly disciplined (censured) for providing funds for living expenses to clients who, according to the court's statement of the stipulated facts, "were destitute, without other means and resources or credit to obtain loans for sustenance during the pendency of their disability and in many cases could not work because of their injury." *Id.* at 895. A dissenting opinion urged that Oklahoma consider adopting the position taken in the *RESTATEMENT DRAFT NO. 4*, *supra* note 3, § 48(2)(b), that a lawyer should be permitted to make or guarantee a loan to an existing client for living expenses in extremely needful circumstances. *Smolen*, 837 P.2d at 900-01 (Kauger, J., concurring in part and dissenting in part). A special concurrence agreed that the court should consider

overly or overtly reformist mindset would be an exercise in futility. Most obviously, the membership of the Institute and the processes of the ALI would not permit an aggressive reshaping of the American law governing lawyers. Even if, improbably enough, one believed that marches could be stolen on an insufficiently vigilant ALI membership, I believe that the membership of the ALI rather accurately, and on most matters, reflects the mindset of judges in courts of last resort in the states. Judges could not be collectively fooled into believing that the law governing lawyers is other than what it is — an imperfectly realized body of law that in some important respects is out of line with what considerations of legal ethics would have it be. In no sense will the *Restatement*, even if followed in all the states, complete the work of reform of the legal profession. That work, and the work of this section and its members, will hardly come to an end following the four or five more years of work on the *Restatement*. In a way of viewing it, the *Restatement* does not even clear away all of the underbrush. But it at least may serve to indicate where the underbrush needs the further attention of would-be reformers of our profession. In that perhaps modest way, the *Restatement* will have aided the work of reforming the American legal profession.

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adopting the *Restatement's* position, but only after the final text of the *Restatement* had emerged. *Id.* at 906 (Opala, C.J., concurring).

In events that probably occurred too near the time of the Oklahoma court's decision on July 14, 1992, the position in the RESTATEMENT DRAFT NO. 4, *supra* note 3, § 48(2)(b), was the subject of a motion to delete at the 1991 annual meeting on the afternoon of Thursday, May 16. *See* ALI, PROCEEDINGS 1991: 68TH ANNUAL MEETING OF THE AMERICAN LAW INSTITUTE 518-21 (1992). The motion lost by a vote of 78-74. An ensuing motion was made to require the lawyer not to make or discuss the loan before the lawyer is retained. *Id.* at 522. It carried, by a vote of 75-74. *Id.* at 525. A subsequent motion to recommit the section was defeated by voice vote, *id.* at 529, and the section was tentatively approved as amended, *id.* at 531. This matter is obviously one on which lawyers have sharply differing views and beliefs. My personal view is that the *Restatement* position is sound. It is followed in Minnesota, a hotbed of innovative and middle-of-the-road lawyer rules, and a few other states. *See id.* at 519 (remarks of Professor Kenneth E. Kirwin on the Minnesota experience); RESTATEMENT DRAFT NO. 4, *supra* note 3, § 48 cmt. d reporter's note (citing relevant, recent authority in California, Minnesota, North Dakota, and Texas).