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# THE *RESTATEMENT* AND CONFIDENTIALITY

FRED C. ZACHARIAS\*

By the time this symposium goes to press, the ALI membership will have just discussed, and perhaps approved or amended, the *Restatement of the Law Governing Lawyers'* proposed chapter on attorney-client confidentiality.<sup>1</sup> In a separate piece,<sup>2</sup> I have already summarized the tentative draft, compared it against the Code of Professional Responsibility<sup>3</sup> and the Model Rules,<sup>4</sup> and analyzed the draft's proposed changes.<sup>5</sup> Because that analysis by now may be moot, it does not pay to reiterate it here.

In thinking about this symposium, though, I came to the conclusion that it is hard to find anything to say about attorney-client confidentiality that an audience of professional responsibility teachers and scholars does not already know. All in the field have already heard and read the debates on the confidentiality exceptions.<sup>6</sup> They teach the issues. What can I say that's new?

In an attempt to add something meaningful to the debate, I have decided to focus this piece on a question similar to the ones considered by Professors Wolfram<sup>7</sup> and Schneyer.<sup>8</sup> I will look at two of the more significant changes that the tentative draft

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1. *RESTATEMENT OF THE LAW GOVERNING LAWYERS* ch. V, topic 1 (Tentative Draft No. 3, 1990). Some of the ALI's tentative draft on confidentiality has been approved by the ALI members, while other subjects remain to be discussed at the ALI's May 1993 Annual Meeting.

2. See Fred C. Zacharias, *Fact and Fiction in the Restatement of the Law Governing Lawyers; Should the Confidentiality Provisions, Restate the Law*, 6 *GEO. J. LEG. ETHICS* 903 (1993) [hereinafter Zacharias, *Fact and Fiction*]. With the blessing of both the *Oklahoma Law Review* and the *Georgetown Journal of Legal Ethics*, the Georgetown piece expands upon the ideas expressed in this symposium and places them in the context of a symposium addressing the ways professional responsibility regulation might proceed a decade after the adoption of the Model Rules.

3. *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* (1969).

4. *MODEL RULES OF PROFESSIONAL CONDUCT* (1983).

5. See *infra* text accompanying notes 15-41 for a discussion of some of these changes.

6. Compare, e.g., MONROE FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975) (supporting strict confidentiality), Monroe Freedman, *Are the Model Rules Unconstitutional*, 35 *U. MIAMI L. REV.* 685 (1981), and Stephen Pepper, *The Lawyer's Amoral Ethical Role: A defense, A Problem, and Some Possibilities*, 1986 *AM. BAR. FOUND. RES. J.* 613 (same) with Robert Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 11 (1988) (discussing dispute about strict confidentiality outside of the criminal context), John T. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 *MICH. L. REV.* 1485 (1966) (urging limits to confidentiality), and Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150 (David Luban ed., 1983) (questioning strict confidentiality in civil cases).

7. Charles W. Wolfram, *Legal Ethics and the Restatement Process: The Uncomfortable Fit*, 46 *OKLA. L. REV.* 13 (1993) [hereinafter Wolfram, *Legal Ethics*].

8. Ted Schneyer, *The New Restatement and the Ethics Codes — Complements or Rivals?*, 46 *OKLA. L. REV.* 25 (1993).

of the *Restatement* includes and ask what kinds of changes a restatement justifiably may propose. More particularly, I will consider whether the ALI, in the draft sections on confidentiality, has acted in an appropriate way.

In his introduction, Professor Wolfram has already mentioned these subjects, by way of setting out his view of the role of the *Restatement of the Law Governing Lawyers*.<sup>9</sup> Professor Wolfram proffers the ALI's intent to confine the new restatement to reporting the law *as it exists* in the states.<sup>10</sup> That position is a bit surprising, for it is somewhat inconsistent with Professor Wolfram's own plan for the *Restatement*,<sup>11</sup> the ALI's public policy regarding restatements in general,<sup>12</sup> and, most importantly, the reality that law is often changeable and incapable of being restated in universally acceptable terms.<sup>13</sup>

One can interpret Professor Wolfram's comments in several ways. He may be acting in his capacity as a spokesman for the ALI membership and thus may have to take this public position to bolster the reputation and the potential persuasive effect of the *Restatement*. Alternatively, in the context of a casual symposium speech, Professor Wolfram inadvertently may have taken a position broader and stronger than he actually intends. It would, for example, be perfectly consistent with Professor Wolfram's earlier view for him to express a preference for "restating" existing law, *when it seems reasonable and possible*, while reserving the option to push the envelop in other situations. Or — and this would not surprise me, considering Professor Wolfram's original blueprint for the *Restatement* — Professor Wolfram's comments may have been addressing the limited situation in which only one version of the law exists to be restated, leaving the ALI the option of selecting the "best" rule whenever two or more lines of settled authority exist.<sup>14</sup>

In fairness to Professor Wolfram, I prefer not to put too much stock in his passing characterization of the *Restatement*. The work speaks for itself. I will consider the text of the draft, and try to draw from it some conclusions about what the *Restatement of the Law Governing Lawyers* does and about what it should do.

The two proposals I will focus on are section 117B and comment d to section 117B. Section 117B allows lawyers to disclose confidences to prevent crimes or

9. Wolfram, *Legal Ethics*, *supra* note 7, at 15 (discussing what "the *Restatement* is trying to be at its most fundamental level").

10. *Id.* at 16.

11. Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 202 (1987) ("[T]he reporters will attempt to offer more than a wooden recitation of law that is already incontrovertibly in place.") [hereinafter Wolfram, *Concept*].

12. See *infra* text accompanying notes 41-54.

13. See Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV 19, 24-26 (1929) (discussing and rejecting notion that there is a fixed common law applicable throughout the United States).

14. Wolfram, *Concept*, *supra* note 11, at 196 ("If courts in different states follow conflicting rules, the restatements seek to divine the better path, which is not necessarily the path more frequently trod."); cf. Wolfram, *Legal Ethics*, *supra* note 7, at 17 (suggesting that "[w]here there is a significant difference among the lawyer code formulations . . . we choose that formulation that seems to us to be the most reasonable and responsible," but also noting that this "leaves a great deal of the law well set in concrete.").

fraud that threaten third persons with financial harm. Comment d would let lawyers disclose to prevent future consequences of some past acts.

The reporters offer alternative versions of section 117B. Both — in contrast to the Model Rules<sup>15</sup> — would allow some disclosures to prevent financial harm.<sup>16</sup> This piece will not discuss the countervailing arguments concerning the substance of these alternatives, although personally I tend to sympathize with the *Restatement* positions.<sup>17</sup> What I want to analyze here is the reporters' rationale for "restating" as the law the position taken by the Kutak Commission,<sup>18</sup> that ultimately was rejected in the Model Rules.<sup>19</sup>

The reporters' justification is a three-step syllogism:

(1) Whether lawyers should disclose to prevent financial harm remains a matter of debate;

(2) We, the reporters, think section 117B is the best approach.

(3) Of the 35 or 36 states that have adopted a code since the Model Rules came into being, a minority has followed Rule 1.6's limited position, and many allow disclosure to stop financial harm.

15. Model Rule 1.6 provides, in pertinent part: "A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

16. Alternative 1 to § 117B provides:

Following an attempt by the lawyer, if feasible, to dissuade the client, a lawyer may use or disclose confidential client information if and to the extent the lawyer reasonably believes:

(1) The client intends to commit a crime or fraud that threatens to cause substantial financial loss; and

(2) The lawyer's use or disclosure is:

(a) Reasonably appropriate to prevent the act; and

(b) Necessary in view of the imminence of the substantial financial loss.

RESTATEMENT OF THE LAW GOVERNING LAWYERS § 117B (Tentative Draft No. 3, 1990) (alternative 1).

Alternative 2 to § 117B provides:

Following an attempt by the lawyer, if feasible, to dissuade the client, a lawyer may use or disclose confidential client information if and to the extent the lawyer reasonably believes:

(1) The client intends to commit a crime or fraud that threatens to cause substantial financial loss;

(2) The lawyer's services were employed in the client's course of conduct and the loss is likely to occur if the lawyer takes no action; and

(3) The lawyer's use or disclosure is:

(a) Reasonably appropriate to prevent the act; and

(b) Necessary in view of the imminence of the substantial financial loss.

*Id.* § 117B (alternative 2).

17. See generally Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (questioning rigid confidentiality rules of the Code of Professional Responsibility and Model Rules) [hereinafter Zacharias, *Rethinking Confidentiality*].

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Proposed Final Draft, 1981) (proposing rule permitting disclosure to prevent a client from committing a crime or fraud likely to cause substantial physical or financial injury).

19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). See *supra* note 15.

So, the notes suggest (although they don't quite say it) that the *Restatement* position actually reflects the current state of the law.<sup>20</sup>

The reporters are absolutely right to conclude that Model Rule 1.6 has not been met with a bundle of enthusiasm.<sup>21</sup> However, the same is true for the restatement position. Although only seven states have adopted Rule 1.6,<sup>22</sup> just six states have adopted the ALI approach.<sup>23</sup> That approach *was* presented to the states as an option by the Kutak Commission proposals.

It is obviously dangerous to rely on statistics, which have a potential for being misleading.<sup>24</sup> Yet we must consider the facts. If we look at what the states actually are doing, we see that the overwhelming majority of jurisdictions prefer more liberal disclosure exceptions than the *Restatement* suggests. The preference is manifested in one of two types of confidentiality rules. Thirty states hold to the Code of Professional Responsibility position that all future crimes are disclosable, regardless of the nature or extent of harm.<sup>25</sup> Six states use a Model Rule or *Restatement* provision and make some of the hitherto permissive disclosures mandatory.<sup>26</sup> In other words, forty-two jurisdictions reject Model Rule 1.6, but thirty-six of those

20. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 117B cmt. b, at 61 (Tentative Draft No. 3, 1990); *id.* § 117B, at 71 reporter's note.

21. Throughout this article, I equate positions taken by the ALI and the comments in the reporters' notes. As a technical matter, that is wrong, because the ALI insists that the reporters notes are nonbinding and may depart from the common law in a way the body of a restatement may not. See Wolfram, *Legal Ethics*, *supra* note 7, at 16-17. There is a real question whether readers, in their minds, can separate the text and notes in this way. See Schneyer, *supra* note 8, at 31-32 (questioning whether judges will honor the assertion that the reporters' notes are not part of the restatement). Even if they can, however, that would not undermine my approach here. That is because, in each example discussed, the notes purport to support the text rather than suggest why a different, hitherto unaccepted, rule should be adopted.

22. They are Alabama, Delaware, Kentucky, Louisiana, Missouri, Montana, and Rhode Island. Gathering the state of the law in the various jurisdictions can be a harrowing business. I and my research assistant have done the best we can for purposes of this article. We apologize in advance for mistakes that may result from the passage of time since our research concluded or from inaccurate reporting of state provisions in the literature.

In referring to state codes, I will not cite to each jurisdiction's provisions. Most can be found in the *National Reporter on Legal Ethics and Professional Responsibility*, which is organized by state, and through the *ABA/BNA Manual on Professional Conduct*, which notes recent changes.

23. They are Maryland, New Hampshire, New Mexico, Pennsylvania, South Dakota, and Utah. Maryland, Pennsylvania, South Dakota, and Utah have adopted a variation of alternative 2 to § 117B.

24. Many noted commentators have questioned the value of statistical analysis. As Mark Twain used to say, "there are three kinds of falsehoods . . . lies, damn lies, and statistics." Perhaps the most poignant practical application of the criticism is Yogi Berra's statistical approach to baseball. He claimed, "90% of the game is 1/2 mental."

25. They are Alaska, Arkansas, Arizona, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wyoming, and Wisconsin. Several of these states have made some disclosures mandatory, including Arizona, Florida, Illinois, Virginia, and Wisconsin. Michigan has adopted a variation of alternative 2 to § 117B.

26. They include Connecticut, Nevada, New Jersey, North Dakota, Texas, and Wisconsin. Connecticut, New Jersey, Nevada, and Wisconsin have adopted a variation of alternative 2 to § 117B.

want more disclosure than the *Restatement* would allow. Although the ALI position is a compromise, it is one that not many jurisdictions have accepted thus far.

This discrepancy between the "restated" law and the actual rules in the vast majority of states raises several questions. Should the ALI be trying to broker compromise among states that cannot agree on a single rule? Should the ALI adopt positions that the membership thinks are correct, but which do not reflect the actual law? And finally, in taking its positions, how candid should the ALI be about what it is doing?

Comment d, which would allow disclosures to prevent future consequences of some completed acts, raises similar questions. It seems to suggest a considerable change in the law. Consider illustration 1, which can be paraphrased simply as follows: A lawyer learns that a client corporation has committed the past crime of dumping toxic substances. The lawyer believes someone will be hurt in the future by the dumped substance. The *Restatement* says the lawyer may disclose to prevent or lessen the future harm to victims.<sup>27</sup>

Under Model Rule 1.6, the potential harm is not disclosable both because there is no criminal act left to prevent and because the harm is not imminent.<sup>28</sup> It is not disclosable under the Code of Professional Responsibility either, because the Code allows lawyers to disclose only when the lawyer learns of the client's intent to commit a crime in the future.<sup>29</sup> In illustration 1, the client has already done all it plans to do. The *Restatement's* apparent change in the law may be a drafting oversight that will be resolved in the final version; that is, the final draft may clarify that comment d is not meant to apply to fully completed acts. Unless the original position is amended, however, the ALI does seem to be proposing a major substantive and theoretical shift.

There is one argument for disclosability under the codes. The past crime of dumping might be considered an ongoing or future crime because it may turn into assault or murder at the point when someone is injured. But that interpretation is not consistent with the spirit of confidentiality that is embodied in the existing professional codes. The client in the illustration is a traditional client, talking with the lawyer about how to deal with past conduct for which the client may be

27. The full text of illustration 1 states:

At a meeting with engineers employed by Client Corporation, Lawyer learns that one of the engineers has violated a criminal statute by releasing a toxic substance into a city's sewer drainage system. From information available, Lawyer reasonably believes that the discharge will cause death or serious bodily injury, that the lawyer's disclosure of discharge will permit authorities to remove that threat or lessen the number of its victims, that the need to take preventive action is immediate, and that efforts to persuade responsible Client Corporation personnel to take corrective action would be unavailing. Although the act creating the threat has already occurred, the Lawyer has discretion to use or disclose under this section for the purpose of preventing the consequences of the act.

RESTATEMENT OF THE LAW GOVERNING LAWYERS § 117B cmt. d, illus. (1), at 65 (Tentative Draft No. 3, 1990).

28. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

29. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(3) (1969).

criminally punished. Under traditional reasoning, this client needs to be able to consult.<sup>30</sup>

The magnitude of the proposed change can best be understood by considering some examples of cases in which most current codes of professional conduct probably would insist upon confidentiality, but in which the *Restatement* might allow disclosure. Consider first the famous *Macumber* case:<sup>31</sup> A lawyer knows that his client has committed a murder for which an innocent man is about to be punished. For many commentators, *Macumber* is the paradigm case for confidentiality. The societal and third party interests in disclosure are enormous, yet allowing disclosure might prevent the client from telling the lawyer the truth. The traditional balance of interests concludes that encouraging frankness, enabling the lawyer to maximize his effectiveness, and opening the possibility that the lawyer can persuade the client to do the right thing warrants an assurance of confidentiality.<sup>32</sup> Comment d of the *Restatement* takes the opposite tack.<sup>33</sup>

There are many less dramatic examples. Consider, for example, a lawyer who knows that a client has embezzled money — arguably committing more fraud each day as interest is lost.<sup>34</sup> Or, consider the thief who tells his lawyer that he still possesses the fruits of his crime, thus violating concealing stolen property laws and, in the process, continuing to injure the victim.<sup>35</sup> One might conceive of these as ongoing crimes, but to do so robs society and clients of the benefits of confidentiality described above. For the most part, the existing codes resolve the balance in favor of encouraging the person who has committed a past criminal act to seek counsel.<sup>36</sup> The *Restatement* does not.

30. For a full discussion of the traditional justifications of strict confidentiality rules, see generally Zacharias, *Rethinking Confidentiality*, *supra* note 17.

31. *State v. Macumber*, 544 P.2d 1084 (Ariz.) (holding information about other suspect's innocence subject to attorney-client privilege), *cert. denied*, 439 U.S. 1006 (1976).

32. See Zacharias, *Rethinking Confidentiality*, *supra* note 17, at 358-61 & nn. 31-38.

33. Interestingly, the reporters proposed including an illustration based on *Macumber* in the section defining confidentiality. The membership considered the paradigm case "offensive," and ordered it removed. See 5 ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 158, 159 (1989) (describing debate on and ultimate rejection of the *Macumber* illustration). One thus can see that, in proposing the exception encompassed by comment D, the membership is serious about changing confidentiality's scope.

34. Cf. Los Angeles County Bar Ass'n, Comm'n on Legal Ethics, Op. No. 267 (Jan. 26, 1960), in 38 L.A. BAR BULL. 103, 104-05 (1963) (stating that under strict California confidentiality rule, a lawyer representing a guardian who admits previously embezzling funds from her ward may not disclose the guardian's plan to file a fraudulent accounting because this future act is an offshoot, or ramification, of "[the] past crime of embezzlement"); Ala. State Bar, Op. 82-623 (n.d.), excerpted in ABA/BNA MANUAL ON PROFESSIONAL CONDUCT, Ethics Ops., at 801:1034 (stating that a lawyer may not disclose that a client previously made misrepresentations about property ownership in a bankruptcy proceeding even if the consequences upon the potential distributees has yet to be felt).

35. N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. No. 405 (Aug. 13, 1975) (stating that a lawyer for a client who admits a previous larceny may not disclose the client's ongoing crime of concealing stolen property because disclosure "would connect the client with the past crime of larceny [and] . . . in essence would constitute the disclosure of a past crime").

36. See J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 363

What is important for my purposes is not whether one agrees with the substance of the *Restatement's* proposed exceptions. My question is about the way the changes are coming about. In both examples I've discussed — section 117B and comment d — the *Restatement* asserts new positions, while appearing to be restating the law. There are other instances of the same phenomena throughout the confidentiality sections of the draft.<sup>37</sup> The *Restatement* expands the scope of confidentiality, while claiming to use the Model Rules definition.<sup>38</sup> The *Restatement* sometimes would allow lawyers to reveal confidences without permission when disclosure will not harm the client.<sup>39</sup> It may expand when lawyers may disclose in self-defense.<sup>40</sup>

All of these changes may be substantively correct. But it seems clear from a process perspective that the reporters are doing more than simply restating the existing law. Professor Wolfram's introduction and good intentions aside, in the confidentiality sections at least, the *Restatement* is advocating a relatively controversial (if not entirely new) position. It is proposing model provisions that, apparently, the ALI hopes will be adopted uniformly. Even if that is an appropriate agenda for the ALI, one must still ask whether it is appropriate for the *Restatement* to take positions without clearly identifying them and volunteering which are new.

That leads us back to questions posed by the presentations of Professor Schneyer and Wolfram. "What is the ALI?" "Why the restatements?"

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Like many institutions, the restatement process has, of late, been subjected to some revisionist history.<sup>41</sup> But if we look at the early history honestly, it is clear what the

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(1976) ("When an attorney has been advised by his client of continuing aspects of a past crime, any disclosure of such information . . . would inevitably result in the disclosure of the past crime itself or at least some aspect of it. . . . [E]thics opinions construing the Disciplinary Rules and the former Canons have been virtually unanimous in holding that the attorney must not disclose the client's criminal conduct").

37. For a full discussion of the following and other hidden changes in the *Restatement*, see Zacharias, *Fact and Fiction*, *supra* note 2, at 905-12.

38. The *Restatement's* definition of confidentiality includes anything learned from or "about a client or a client's matters" if the lawyer learns the information "during the course of the representation . . . or at a time before the representation begins or after it ends. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 112, at 26 reporter's note (Tentative Draft No. 3, 1990). The definition of Model Rule 1.6 is limited to matters relating to the representation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

39. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 111 (Tentative Draft No. 3, 1990) (forbidding disclosure of confidences only "if there is a reasonable likelihood that doing so will adversely affect a material interest of the client or if the client has directed that the lawyer not use or disclose it").

40. Under Model Rule 1.6(b)(2), lawyers may disclose to protect themselves in official proceedings brought against the lawyer. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983). Section 116 of the *Restatement* allows such use whenever a lawyer "reasonably believes necessary in order to defend the lawyer against a charge by any person that the lawyer . . . acted wrongfully." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 116 (Tentative Draft No. 3, 1990). The *Restatement* thus seems to advance the stage at which the self-defense exception can be triggered.

41. See N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 56 (1990) (suggesting that commonly accepted descriptions of the goals of the ALI founders are misguided). Even those who dispute the true intentions of the founders,



restatements were all about. The founders of the ALI proposed the original restatements in order to respond to a growing, overwhelming, and "indigestible mass" of law.<sup>42</sup>

To understand that goal, one has to consider what's bad about a "mass" of law. After all, without it, lawyers and law professors probably would be out of a job. As the founders of the ALI saw it, lawyers and judges had become intimidated. They had no time to research and read all the relevant statutes and cases. Their response was to focus on the few authorities available in their own jurisdictions, to the exclusion of all others. The founders feared that this practice caused a loss of perspective, because the few state authorities might be idiosyncratic — out of kilter with the general common law.<sup>43</sup>

The founders hoped to solve the problem by identifying principles accepted throughout the United States. They expected the restatements to isolate not just majority rules, but rather legal norms that judges and lawyers could use as a backdrop in evaluating their own jurisdictions' case law.<sup>44</sup> The reason the founders thought they could achieve this was because the original ALI was a body of highly respected intellectuals — ranging from Supreme Court justices,<sup>45</sup> to leaders of the bar,<sup>46</sup> to some of the best law professors alive.<sup>47</sup> Moreover, the ALI's resources

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however, concede that they were forced to compromise any desire to propose changes in the law. *Id.* at 74-83. Hidden agendas aside, the restatements were to "promote the clarification and simplification of the law." William Draper Lewis, *How We Did It*, in ALI, HISTORY OF THE AMERICAN LAW INSTITUTE AND THE FIRST RESTATEMENT OF THE LAW 1 (ALI ed., 1945); see also A. James Casner, *Restatement (Second) of Property as an Instrument of Law Reform*, 67 IOWA L. REV. 87, 88 (1981) (noting that the first ALI director restricted the restatement process to determining "what the law is"); cf. W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 27-28 (1985) (discussing history of debate over purpose of the original restatements).

42. Lewis, *supra* note 41, at 1 (discussing contemporary sense that the "growing indigestible mass of decisions" threatened the continuance of our common law system of expressing and developing law"); see also Norris Darrell & Paul Wolkin, N.Y. ST. B.J., Feb. 1980, at 99 (describing how "uncertainty and complexity" of the common law "made it impossible to advise persons of their rights and . . . created delay and expense"); Keyes, *supra* note 41, at 24 (discussing goal of reducing mass of case law); Warren A. Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A. J. 317, 318 (1962) (same).

43. See, e.g., Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15 (1987) ("[T]his codification of the common law was intended to create an edifice that would make it unnecessary to refer to the larger underlying body of case law."); BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 4-5 (1924) (noting that most important justification for the restatements was the multitude of cases and judges' inability to cope with that multitude).

44. RESTATEMENT OF PROPERTY at viii-ix (1936) (stating that restatement's goal was to provide a "correct statement of the general law of the United States" as a means to help judges and practitioners cope with "the ever increasing volume of cases"); *Address of Elihu Root in Presenting the Report of the Committee*, 1 A.L.I. PROC. pt. II, at 48, 48, 51 (1923) (noting that "the vast multitude of decisions . . . was reaching a magnitude which made it impossible in ordinary practice to consult them" and expressing expectation that the ALI could establish a "practical *prima facie* statement" of the common law).

45. The attendees at the founding conference included Chief Justice Taft, and Justices Holmes and Sanford. See Lewis, *supra* note 41, at 3. Benjamin Cardozo was a strong proponent of the ALI. See *infra* text accompanying note 71.

46. Among the practicing bar, Draper Lewis saw no person more influential than Elihu Root. See Hull, *supra* note 41, at 74-87 (describing process of wooing Root); Lewis, *supra* note 41, at 4-5 (describing importance of Root to the enterprise). Lewis promptly enlisted him as the ALI's first

enabled it to attract the finest scholars as reporters<sup>48</sup> and to provide them with all the technical assistance they would need. The founders thought that if the well-respected people associated with the project could identify rules as accepted principles and put their authority behind the principles, the world would trust the product.<sup>49</sup>

The reporters for the early restatements zealously protected that aura of trust. They repeatedly refused to use the restatements to do more than "restate" the law. When an issue was controversial, they tended to note that fact and either avoided taking a position, or offered alternative approaches.<sup>50</sup> So it went through the first set of restatements.

By the time of the second restatements, several things had changed. First, the original restatements were complete. To write a second round just to update recent developments would have been, at the least, boring for the next set of reporters.

Legal reasoning as a whole also had matured. The notion of law evolving over time had firmly taken hold. That affected the original assumption that there was a law which was capable of being "restated."

Third, the few original restatement provisions that had proposed something new, like section 90 of the *Restatement of Contracts* on promissory estoppel,<sup>51</sup> had significant influence on the courts. That whetted the appetites of subsequent drafters to have an impact on the law.

Finally, and maybe most importantly, a vast legal reporting system had come into its own. Cases now were digested, indexed, and cross-referenced. The mass of cases actually had increased, but it was no longer indigestible.<sup>52</sup> Judges, lawyers, and clerks could access and deal with it. That made restatements in the original form less important — just another treatise, or secondary source.

None of these developments were lost on the ALI. In a policy drafted by Herbert Wechsler in the 1960s, the Institute authorized the reporters of the second restatements to propose minority rules on novel issues when two preconditions were

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(honorary) president.

47. For example, Arthur Corbin, Edmund Morgan, John Wigmore, and James Parker Hall. See Hull, *supra* note 41, at 70.

48. For example, Samuel Williston (contracts), Francis Bohlen (torts), Joseph Beale (conflicts), and Floyd Mechem (agency).

49. Darrell & Wolkin, *supra* note 42, at 139 (noting importance of "reputation" of the restatement drafters, members of the Advisory Council, and the ALI in helping the restatements "[speak] with authority"); Hull, *supra* note 41, at 74-78, 82 (discussing ALI founders realization that restatement needed to be backed by the "authority" of leading members of the bar as well as leading academics).

50. Casner, *supra* note 41, at 88 (noting that the reporters' adherence to the restatement principles "led to the use of caveats in which the Institute stated that it took no position in regard to [controversial] areas").

51. RESTATEMENT OF CONTRACTS § 90 (1932); cf. Covey T. Oliver, *The American Law Institute's Draft Restatement of the Foreign Relations Law of the United States*, 55 AM. J. INT'L L. 428, 434 (1961) (citing § 90 as a rare exception to the original restatement's policy of adhering to established law).

52. See Berring, *supra* note 43, at 23 ("[T]he comprehensive philosophy of reporting introduced by the West company had too deeply infected the habit and goals of American legal researchers" to allow them to rely simply upon principles noted by the restatement.).

satisfied: (1) the new approach represented a better rule than the old, and (2) the membership was convinced that the courts would adopt the new approach in the future.<sup>53</sup>

Hence, the second restatements took on a whole range of questions the first restatements might not have touched on the grounds that the law was unrepeatable.<sup>54</sup> We see the second restatements attaching case-appendices illustrating splits in the court. And we see notes, comments, and illustrations illuminating the debates and explaining why the ALI position should be chosen.

Today, we have entered phase three, inaugurated by the *Restatement of the Law Governing Lawyers*. Part of this restatement deals with traditional restatement subjects — like malpractice case law, evidentiary privileges, and the like. But other parts, such as the confidentiality sections, are novel in scope. They concern issues covered by professional codes, not just case law. These are codes that most states have debated not only recently, but also at great length.

Let us assume that it is a good idea for the ALI to concern itself with these topics. What are the ALI's choices in presenting disputed issues, like confidentiality, that are covered by the state codes? In the area of confidentiality, for example, one option is simply to present the majority rule. Currently, that would be the Code of Professional Responsibility rule. Second, the ALI could present, as alternative proposals, all rules that more than a few states have adopted. Another choice would be to pick a compromise position, for compromise's sake. Or, finally, the ALI could pick what the ALI membership determines is the best rule and then try to use the ALI influence to persuade states to adopt it. The last option seems to be what the ALI has chosen here.

But consider how the ALI is seeking to accomplish that task. In the political world we have created, the proposed restatement seems to be sneaking positions by. The draft tries to convince readers that its position is the majority position. It uses illustrations that change the law, but characterizes the illustrations as reflecting traditional rules.

It may be true that presenting a matter to get one's way is very lawyerly. The advocate's approach probably comes naturally to the legally trained membership of the ALI. But that does not make it the most sensible approach in a restatement context.

Even though I agree with much of the draft, I am troubled by the ALI's advocacy on these controversial confidentiality topics. My concern, in no small measure, derives from my belief that the ALI cannot get away with the approach. Too much attention has been paid to confidentiality issues to expect that the legal community will fail to notice the hidden changes.<sup>55</sup> If the advocacy element in the confidential-

53. See Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J 147 (1969) (describing policy and its adoption).

54. See Darrell & Wolkin, *supra* note 42, at 142 (stating that the "Restatement, Second, anticipated some remarkable changes in the law," such as strict tort liability (RESTATEMENT (SECOND) OF TORTS § 402A (1964)) and the landlord's implied warranty of habitability (RESTATEMENT (SECOND) OF PROPERTY §§ 5.1 to 5.5 (1976)).

55. See authorities cited *supra* note 6.

ity sections is noticed, that may affect how the legal world views the *Restatement* as a whole.<sup>56</sup>

Is there an alternative? Given the split among the states, can the *Restatement* address confidentiality in a more useful way? It is beyond dispute that states take positions all over the lot on the issue of confidentiality. If Professor Wolfram truly sees his task as confined to restating the law, he is in an impossible position because there may not really *be* a law that is restatable.

My view is that the ALI should accept that reality, when it is the reality, and cease pursuing a utopian, and impossible, result. Instead, the ALI should use its unique resources to seek, in some way, to improve upon the consideration the states gave the professional codes. In order to do so, the ALI must specially craft its approach.

First, and most obviously, the *Restatement* should explain why any new position it adopts is appropriate. To be helpful, the *Restatement* has to demonstrate why the ALI's respected membership of judges, lawyers, and scholars all agree that it is correct to quit the majority approach. In contrast, if the members simply seem to be voting personal preferences or adopting reporters' preferences, why should any jurisdiction that has recently debated the issue defer?<sup>57</sup>

Second, the ALI should recognize that most states adopted their codes based solely on an instinct about how the ABA models would work. Since then, quite a number of empirical studies have been published on the operation of the rules.<sup>58</sup> I suggest that it would be fruitful for the ALI to collect and rely on that type of information, because it adds something new to the debate.

Why would I place this burden on the ALI, rather than the states themselves? The answer lies in a combination of the ALI's historical function and the nature of the resources at its disposal. As a neutral, intellectual body guided by academic reporters, the ALI can evaluate the data impartially. Perhaps more importantly, the ALI has the financial wherewithal and the ability to draw on the goodwill of the type of scholars who would be needed to conduct empirical research.<sup>59</sup>

56. The ALI has always been aware of this danger, prompting members to caution against any departure from the historical mission of restating black letter law. See, e.g., Statement of Fred B. Helms, in 42 A.L.I. PROC. 346 (1965) ("I thought the purpose of the Institute was to state the law, as it is and not what we should desire it to be"). In 1965, the year in which the ALI seriously started to debate a new policy for writing restatements, see *supra* text accompanying notes 52-54, Laurent Varnum stated:

[T]he more the Restatement tends to outrun or to predict or to try to state what the law ought to be, the less the legal profession tends to accept it as a true statement of what the law is, and the more will the Restatement be vulnerable to attack by those who disagree with its conclusions.

42 A.L.I. PROC 355 (1965).

57. Cf. Fred B. Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A. J. 152, 153 (1970) (arguing that restatements' proposals of small minority positions "may possibly lose the hard-won preeminence they have so justly deserved").

58. See, e.g., Zacharias, *Fact and Fiction*, *supra* note 2, at 928 n.117.

59. See *id.* at 920, 929 (discussing financial resources of the ALI). The ALI, too, seems to be suffering some squeeze in these harsh economic times. Yet its most recent annual report suggests that the organization is financially sound. The ALI's scholarly projects are funded by a combination of

In addition to gathering empirical information in its purest sense, the ALI is in a position to collect factual data concerning the actual operation of different categories of rules. A few states have put into practice aberrational confidentiality provisions. In Brandeis's words, these states have offered themselves as "laboratories."<sup>60</sup> They offer the ALI an opportunity to evaluate the actual effect of new and different approaches.

For example, California insists on absolute confidentiality.<sup>61</sup> What impact has California's rule had? In a recent case, the San Diego County Bar issued an ethics opinion adhering to the position that a lawyer may not disclose a client's intention to kill a codefendant who had agreed to cooperate with the prosecution.<sup>62</sup> The case undermines the assumption of many observers that states with strict rules don't mean what they say. The ALI is in a position to collect such extreme cases and use them to focus the debate on whether we truly can or want to live with the results of strict confidentiality doctrine.

At the other extreme, New Jersey and a few others have a mandatory disclosure rule.<sup>63</sup> These put to the test many of the important factual hypotheses of the more traditional confidentiality rules.<sup>64</sup> The ALI's brain trust is both capable of and well suited to evaluating the results of the test, insofar as judgments can be made at this date. How have the rules been administered? Has any negative effect on the legal system or on the use of lawyers been documented?

Relying on this kind of empirical and factual information — information that states have not previously had before them — can enhance the influence of the ALI's proposals. In other words, the ALI's method of persuasion would confirm the legal community's inclination to pay respect to the ALI position.

Finally, as a mixed group of judges, lawyers, and scholars, the ALI is well situated to identify changes in the legal profession. What I find perhaps most surprising about the *Restatement* chapter on confidentiality is not that it includes

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earmarked endowments, general endowments, and a general fund that supplements the revenues from those endowments. Last year, the *Restatement* project's expenditures of nearly half a million dollars were supported by \$294,000 in endowments and a \$177,000 transfer from the general fund. The general fund retained a balance of nearly five million dollars, and took in revenues exceeding expenses of \$477,000. *See Report of the Treasurer, in ALI, ANNUAL REPORT 43 (1992).*

60. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (discussing importance of allowing states to "serve as a laboratory and try novel social . . . experiments").

61. CAL. BUS & PROF. CODE § 6068(e) (West 1993); *see also* San Diego County Bar Ass'n Legal Ethics & Unlawful Practices Comm., Op. 1990-1 (1990) (stating that California lawyer may not disclose client's intent to kill third party).

62. San Diego County Bar Ass'n Legal Ethics & Unlawful Practices Comm., Op. 1990-1 (1990).

63. *See, e.g., ILLINOIS RULES OF PROFESSIONAL CONDUCT* Rule 1.6 (1990); *NEW JERSEY RULES OF PROFESSIONAL CONDUCT* RPC 1.6 (1984).

64. *See Zacharias, Rethinking Confidentiality, supra* note 17, at 361-70 (questioning the empirical basis for some of the factual assumptions underlying confidentiality rules). Indeed, to the extent less stringent confidentiality rules have not had significant effect on clients' use of lawyers, that may give support the proposition that under some circumstances strict confidentiality rules are unconstitutional. *See also* Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 637-43 (1990) (discussing relevance of factual information to issue of constitutionality of confidentiality rules).

new ideas. Whenever one puts imaginative scholars like Chuck Wolfram, John Leubsdorf, Tom Morgan, and Linda Mullenix in the same room, one has to expect that.<sup>65</sup> Rather what surprises me is that the proposed restatement seems to buy completely into the mindset of the professional codes. The *Restatement* accepts all the old assumptions: all lawyers are the same, and confidentiality is the same, no matter who is practicing, what she's practicing, or where she's practicing.

Would not the *Restatement* be an ideal place to introduce some recognition that the term lawyering is shorthand for a variety of professions? There are differences among law firm lawyers, corporate counsel, and solo practitioners. Their clients vary in sophistication and expectations, and often exhibit disparate ability to protect their own interest in confidentiality. The importance of protecting the clients vis-à-vis third parties thus may vary.

Similarly, it is not gospel that lawyers should act identically when serving in different capacities. Consider, for example, the lawyer who acts as a bank's agent in completing government disclosure reports, as in the now infamous *Kaye, Scholer* case.<sup>66</sup> Even if the adversarial ideal supports strict confidentiality for lawyers in litigation, it may not justify allowing a bank to avoid its own reporting obligations in the regulatory setting. The bank's choice of a lawyer to represent it in making legally required responses may justify the government in viewing the lawyer more as the bank's alter ego than its legal advocate.

Finally, because perspectives on confidentiality may vary among subgroups of lawyers, a single set of confidentiality rules may be applied unevenly.<sup>67</sup> Criminal defense lawyers and transactional real estate lawyers may reasonably have different views of their obligations. Although they may not admit it in public, many lawyers clearly assume the existence of these differences.<sup>68</sup> Once the reality of the differences is acknowledged, rule makers may come to see the benefits of writing more nuanced rules.

65. Professors Leubsdorf, Morgan, and Mullenix are the associate reporters working on the Restatement.

66. See 8 ABA/BNA MANUAL ON PROFESSIONAL CONDUCT 77, 109, 264 (1992) (discussing implications of settlement between the Office of Thrift Supervision and *Kaye, Scholer* law firm for firm's failure to disclose its client's misleading answers to government regulators). The OTS position in the *Kaye, Scholer* case squarely raises the issue of whether lawyers who represent regulated industrial clients before the regulating agency have different obligations than when acting as litigators in court.

67. See Fred C. Zacharias, *The Theory and Specificity of Legal Ethics Codes*, 69 NOTRE DAME L. REV. —, — n. 104 (forthcoming Nov. 1993) (discussing importance of recognizing subgroupings of lawyers).

68. That is seen, vividly, in a misguided response by a real estate lawyer to a survey on confidentiality. "Confidentiality," he said, "doesn't apply to me because I don't practice litigation." See Zacharias, *Rethinking Confidentiality*, *supra* note 17, at 393 n.24. It is also reflected in the statement of the divorce lawyer who asked by Austin Sarat whether privilege posed a problem for Sarat's sitting in and observing the lawyers interviews with clients. "Mr. Sarat," the divorce lawyer reportedly said, "it would be a privilege to have you observe." Speech by Austin Sarat at the 1989 AALS Convention (Jan. 1989) (reporting on study subsequently published as Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1669-87 (1989).

I do not know precisely how to reconcile the differences among lawyers and their perspectives for purposes of confidentiality. Yet it is clear to me from the *Kaye*, *Scholer* developments and from cases like *Tarasoff v. Regents of the University of California*<sup>69</sup> and *Nix v. Whiteside*<sup>70</sup> that the world of professional responsibility is changing. Lawyers and the codes are going to have to come to grips with those changes. What better body than an integrated ALI to give the legal community a push.

A key moment leading to the creation of the ALI was a speech by Benjamin Cardozo. He said:

The American Law Institute . . . is the first cooperative endeavor by all the groups engaged in the development of law to grapple with the monster of uncertainty and slay him. Its work will be a scientific and accurate restatement of the law. It will be invested with unique authority, not to command but to persuade. It will embody a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation. If these men cannot restate the law, then the law is incapable of being restated by anyone.<sup>71</sup>

Cardozo and the ALI founders conceived the ALI as an organization of experience. It was to be a body of teachers and mentors — wise people joined to help us, the less worldly practitioners, judges, and academics. The ALI's teachings were to help us cope when the law was in disarray, were to give us a push when the law was in a rut.

The ALI does not accomplish its functions, even as amended over time, when it advocates instead of teaches. It cannot teach by hiding or sliding by the facts. When the ALI fails to be forthright, even if only in small respects or isolated instances, its entire project cannot help but lose respect. That would be sad, because the *Restatement of the Law Governing Lawyers* has much to add.

69. 551 P.2d 334 (Cal. 1976) (holding psychiatrist liable for failing to disclose the fact that his client posed a physical threat to third party); cf. *Hawkins v. Department of Rehabilitation Servs.*, 602 P.2d 361 (Wash. Ct. App. 1979) (distinguishing *Tarasoff*, but suggesting that attorney liability also might be possible). Were lawyers to become liable for failing to disclose client information, their view of their obligation of confidentiality to clients would undoubtedly be affected.

70. 471 U.S. 1034 (1986) (questioning "pure" adversarial theory of lawyers' role).

71. CARDOZO, *supra* note 43, at 6-7.