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Symposium Question and Answer Session

SYMPOSIUM QUESTION AND ANSWER SESSION

Raquelle de la Rocha (University of California at Los Angeles School of Law): Will there be anything in the *Restatement* to warn lawyers about the interjurisdictional differences on the law governing lawyers? As a former prosecutor for the state bar in California, I have the impression that lawyers generally, because of the way they are trained in law school, fail to distinguish between the Model Rules and the disciplinary rules of the jurisdiction in which they practice. They may make a similar mistake with the *Restatement.* Moreover, many states currently lack a good treatise on the law of professional responsibility in that jurisdiction. Practicing lawyers in those jurisdictions are especially likely to mistakenly rely on the *Restatement* as a guide to what they should actually be doing.

Professor Wolfram: Anyone who picks up a restatement with the belief that it will tell him what the law of a particular state is ought to go back to law school. (Except in the Virgin Islands, where the constitution provides that the common law of the state consists, believe it or not, of the most recent edition of the restatement on the subject.) In any other jurisdiction, it seems to me that any lawyer ought to know the limitations of the restatements. However, I will go back and perhaps include a warning on that subject in the introductory notes (which of course no one ever reads).

Restatements have more influence in some jurisdictions than in others. California, for instance, seems to believe that law stops somewhere this side of the Sierra Nevada mountains. There is very little cross fertilization between California law and that of other jurisdictions. And as I read California cases, there is not much reference to restatements either. So mistaken reliance on the *Restatement* will not be a general problem — at least I hope not.

Ms. de la Rocha observes from her experience as a bar prosecutor that many lawyers tend to do very poor research and rely on inappropriate sources as law. That problem is clearly not limited to lawyers who come before bar discipline groups — probably a pathological subset of all lawyers. Even the average lawyer has a great deal of difficulty approaching the subject of the law governing lawyers as if it were law like anything else. Indeed, that problem is one of the inspirations for this restatement. We want the *Restatement* to let lawyers know that they are just citizens of the United States like anyone else when it comes to legal regulation of their conduct. In that sense, this question touches upon a very pervasive problem which, as I said, is one of the reasons behind the *Restatement.*

Eugene F. Scoles (University of Oregon School of Law): I add my voice to those who say that the *Restatement* should represent a start toward improving the law. The difference between this *Restatement* and, say, the *Restatement of Agency* is that the latter does not affect us directly as practitioners. As a result, we are more likely to be open-minded about its recommendations, and more able to go beyond them. But bar discipline committees, courts, and legislatures, all composed largely of attorneys, are likely to read the *Restatement of the Law Governing Lawyers* more

narrowly. Unless we are driven to do otherwise by the public, we are are more likely to look upon the *Restatement* as the ceiling on the law in this area.

The solution may be to insert in the *Restatement* a suggestion as to how the law might go for the further improvement of the profession. For instance, I know that it is commonly agreed that the ECs of the Code of Professional Responsibility were not very effective. But at least they were a start. And it seems to me that, rather than capping developments in this area, the *Restatement* should encourage them.

Professor Wolfram: I disagree neither with Professor Scoles's suggestion that the *Restatement* be broadened to include recommendations for new directions, nor with his concern that the *Restatement* could become a kind of concretizing agent that would disrupt and retard the reform of the legal profession. However, one of the greatest frustrations of being a Reporter is that I have never been, and will never be again, in a situation where I have had so little freedom in what I put on paper. All ideas included in the *Restatement* have to be, to some extent, corporate ideas.

I think in the end you will probably see some things in the reporter notes that aren't there now. Not that I am hiding anything, but when the battle is done, for example on screening, I may recommend that we put into the reporter's notes some words of our own — some personal view of how the law ought to tend. It is very difficult to get anything done when the result must be approved by a Council of 52 members, if I am counting accurately, and a membership of over 2500 members. It is very difficult to get a correct outcome with such a corporate enterprise.

In short, I am sensitive to what you say. I would hate to see reform of the legal profession stop with whatever we think is the *Restatement of the Law Governing Lawyers*. I wouldn't be in the enterprise if I thought it would. I think, as with many of the past restatements, the law will take account of this *Restatement*, but flow right past it where law review articles, scholars, practitioners, and the sound wisdom of judges have indicated that it should.

Professor Martyn: Your comment that the *Restatement* is going to be viewed as a ceiling by practitioners is, I think, correct. However, it is ironic or perhaps self-fulfilling that in the example of screening we view it as a fresh start to allow lawyers to expand these practices as they wish. This section amounts to a foot in the door to expand law which has so far been less sympathetic to the practitioner's viewpoint, and I think it is a patent example of the self-interest that you mentioned.

Whether that self-interest will be recognized later, as the *Restatement* is cited and relied upon, I don't know. But it is nothing new. Even in the beginning of the American law Institute, all of those august men felt very strongly that many other members of the bar just were not smart enough, or did not practice in the right area of the country, or lacked the right educational background to understand what the law really should be. Some of that attitude still exists in the ALI because it is an exclusive organization. I am happy to report that there is a greater diversity of viewpoint, but I am still disappointed that the debate doesn't focus, as I think it should, on ferreting out some of the latent self-interest of the members.

Roy D. Simon (Hofstra University School of Law): Professor Martyn has warned us about political infighting, and Professor Zacharias warned against new law in the guise of tradition. What are these forces doing to the law of malpractice? The

Model Rules don't address the question of legal malpractice, and lest anybody thinks they might, they have a disclaimer at the beginning about civil liability. The *Restatement of the Law Governing Lawyers* is unique among restatements because of the degree to which lawyers' self-interest is implicated. What forces are going to make the standards of competence high enough to protect the public instead of low enough to protect lawyers?

Mr. Levit: As I have indicated, the position of the *Restatement on the Law of Malpractice* has not been formulated. We simply have no idea what will be said, for example, in chapter 4, which deals with competence. Of course, there is already some authority dealing with these issues, but I cannot comment on what the *Restatement* will actually do until I see a draft.

I would hope that the *Restatement* process will not, in this or in any other area, succumb to the self-interest of attorneys. I personally have not seen that problem occur so far. Of the thirty advisers to the *Restatement*, there are only thirteen in private practice. The others are either law professors or judges.

I am also active in the American Bar Association, and I honestly think that the rules that come out of the American Bar Association reflect the self-interest of attorneys in private practice to a much greater extent than do those of the American Law Institute. That is just my personal observation, but it is based on ten years in the American Law Institute and a much longer period in the ABA.

I very strongly believe that the rules dealing with competence, for instance, will not be vitiated by the self-interest of practitioners in the ALI. As we have indicated, everyone involved in the project believes that the *Restatement* should incorporate an aspirational aspect. However, in the years before this *Restatement* is finally adopted, I think we will see much more involvement by the practicing bar than we have seen so far.

Professor Robert F. Drinan, S.J. (Georgetown University Law Center): I came here more or less convinced that the ALI's attitude on screening was appropriate, but my faith has been shattered by Professor Martyn and her dog. I would like to call on Professor Wolfram to restore my faith. Everybody has lived through this controversy for years and years, and I thought we had reached a happy compromise. How is this little puppy going to grow up?

Professor Wolfram: These dogs are beginning to remind me of the *New Yorker* feature entitled "Block That Metaphor." I am also reminded of the dogs that I have owned in my life; I stopped owning dogs when I became an adult and realized what a horrible mess they made. I would like to shift the metaphor, if I may, to something else.

I don't know how the screening rule is going to look when the courts get their hands on it. I think it will depend very much upon the jurisdiction. In the Sixth Circuit, the court is going to say the rule is horrendously restrictive, very unwieldy, and it will take a liberal approach to screening, as it has in the past. In Alabama, a recent BNA-reported case indicates that the Supreme Court of Alabama will take what the reporter's initial position was: absolutely no screening, ever. Of course, Alabama is a state that has very few large law firms. But I really do not know how the rule will be generally interpreted.

I think the screening rule we now have can be seriously overread as permissive. I don't understand Professor Martyn to be doing that, but it can happen. When a lawyer looks at Rule 204 on screening, I don't think he will come away with a feeling that it is very permissive. Certainly no large firm will feel that way; the practitioners I have argued with feel that it is quite restrictive. Basically, it reiterates *Silver Chrysler*. It allows only a person who has very little confidential information of relevance to take the subsequent case. Courts are denying disqualification motions in those kinds of cases already. I think Professor Martyn is quite right — this is mainly a disqualification issue. It doesn't come up except in the pathological case of bar discipline.

I don't know whether that restores your faith. Section 204 is a compromise, as much of the *Restatement* is. But I think we have gotten it almost right for once, in the sense we allow very little screening.

Professor Drinan: Would you say that section 204 is *Silver Chrysler* and nothing more?

Professor Wolfram: It is not much more. It allows other lawyers in the firm to continue to represent where the so-called "tainted" lawyer has confidential information that — Professor Martyn quoted the words earlier — are "not likely to be of significance" in the subsequent case. That is more or less the holding in *Silver Chrysler*.

Professor Martyn: The example given in section 204 of an appropriate screen is, I agree, essentially the *Silver Chrysler* case. However, I think it is arguable that the standard in the *Restatement* also governs the *Nemours* case. The question of what information is not likely to be significant is a slippery one. One can argue either that the court in *Silver Chrysler* concluded that the lawyer had no information at all, or that it said the lawyer's was insignificant. It seems to me there is a difference between those two.

As I said before, I view this rule as a foot in the door. I think this foot in the door is significant because the economic pressures of modern practice are going to push the bar and the the judicial branch to recognize screens in more and more cases. It is true that some courts are prohibiting screens completely. But as early as 1964, a Yale Law Journal survey of law firms indicated that these rules were the most often breached in practice. Lawyers were not aware of conflict of interest rules and were breaching them right and left. Screening, even then, was something lawyers assumed they could do without reading the rules.

Professor Lee Pizzimenti is currently doing another empirical study along these lines. The preliminary results indicate, at least so far, that lawyers still think they are free to screen in cases where no court would ever allow it. They try to screen not just in former-client cases, but even in simultaneous conflicts of interest. What I am worried about is whether that is really the kind of world we want to live in, and whether we really want the kind of regulation that will follow.

Jennifer Lyman (American University, Washington College of Law): I don't usually consider myself conservative, but I have to admit that this conversation pushes me in that direction. It is disturbing to hear what the *Restatement* reporters apparently consider useful guidelines. A phrase like "information likely to be

significant" is not only inherently vague, but will be interpreted by the very people most interested in never, ever finding significance.

Another problem arises in the panel's discussion of cross-examination on testimony a lawyer "knows to be false." My experience in practice under Professor Taylor's direction and my experience in running a clinic as a professor is that the average person, the average law student, even the practicing lawyer is likely to misconstrue that phrase. It is a year-long process to get law students to understand that they can raise a defense even if they know (i.e., think) that the facts alleged by the defense are not what "actually happened" in the case.

Overall, I think that we are running in a very problematic direction when we use terms so subjective and so difficult to interpret in a document as potentially powerful as the *Restatement.* We are creating a great potential for causing serious problems that may never even surface in the courts.

Professor Martyn: The language of the section on screening — "not likely to be significant" — is actually black letter, not a guideline. However, I do agree that it invites practitioners to rationalize: "Well, I do have information, but it is not likely to be significant. In fact, it is completely insignificant. Besides, I can't remember it anyway." Thus, the section does invite a screen in cases where perhaps it will not be allowed. I share your concern on that point.

On the other hand, in defense of the restatement process, I think that this section is a fairly accurate restatement of what the cases allowing screening have said. And although it uses slippery language, I think it reflects the struggle in restating what the judges have meant when they have allowed screening, and does so fairly accurately.

Professor Schneyer: Whether the screening rule ultimately constrains law firms will depend much more on what judges say the rule means than on what admittedly self-interested lawyers say it means. Ultimately, lawyers are going to have to worry about what judges say, not what they themselves want.

Carl Selinger (West Virginia University College of Law): I'd like to comment on a question that's come up several times in this discussion: the question of how to restate bad law, if you have to do so.

I'm one of those who complained about the flat statement in the comment in Preliminary Draft No. 7, in 1991, that a lawyer may use cross-examination to try to discredit testimony that the lawyer knows is truthful. This issue is important because it really does call into question the purposes and limits of the adversary system. Where else in legal ethics do we tell lawyers that it's all right for them to actively "muddy the headwaters of decision," in Lon Fuller's memorable phrase?

The statement in the Preliminary Draft suggested that the issue is settled, when in fact there's rather little authority, and none that I know of outside of criminal defense. The statement conflicted with the most thoughtful discussion of the issue, in the original 1971 version of the ABA's Criminal Defense Standards, which condemned the practice of trying to discredit truthful testimony as unprofessional, and which stressed a public policy against discouraging truthful witnesses from coming forward — a policy that we all had to think about during the Clarence Thomas-Anita Hill hearings. And, as Tom Morgan pointed out, the statement

seemed to set the stage for a finding that a lawyer who did *not* try to discredit truthful testimony was guilty of professional malpractice or of providing ineffective assistance of counsel.

But the reporters have handled the issue much differently in their new November 16, 1992 Council Draft No. 9, and I want to compliment them on the way they've restated this bit of bad law, if it is the law. What they've done is to add a prefatory phrase that says that, "While many lawyers would refuse [to try to discredit truthful testimony] . . ., there is no legal rule prohibiting [it] . . ." That way of putting the matter is an accurate statement of the present situation regarding actual professional discipline; it keeps the issue open, and indeed invites future consideration; and it makes clear that lawyers really do have discretion today to go either way.

Professor Wolfram: Professor Selinger was one of several people who commented adversely on the seemingly flat-footed and apparently approving statement of the rule. I don't mean to promise that you will see the warning in succeeding drafts; that statement about "although many lawyers would refuse to do so" has drawn its own fire.

Professor Schneyer: I am not sure the historical trajectory is really on Professor Selinger's side. Consider what the ABA Criminal Justice Standards have said over the years about cross-examination. The early, patrician version of those standards suggested that lawyers should not cross-examine testimony they knew to be truthful, but that rule was eventually changed.

Donald Weckstein (University of San Diego School of Law): I would like to go back to Professor Simon's comment on the use of rules of ethics as a basis for civil liability, which I had hoped that Mr. Levit would address. Would it be appropriate for the *Restatement* to restate what I understand to be currently a minority rule, that codes of ethics should be used as a basis for civil liability? Professor Wolfram has apparently taken this position in his treatise and even earlier in an article in the South Carolina Law Review, despite the fact that the majority of the states and the codes themselves seem to reject that position. On the other hand, the minority rule is being followed in California at this time.

Mr. Levit has indicated that the *Restatement* has yet to take a position on the use of the codes for this purpose. But what should it say when it does take a position? Would it be appropriate, or even conceivable, for the *Restatement* to adopt the minority view, and and say essentially that the codes of ethics do not mean what they say, and that the majority of states are simply wrong?

Mr. Levit: I am going to pass to Professor Wolfram on the substance of the question. However, Professor Weckstein correctly states that there is a split of authority on the use of ethical rules and even sometimes disciplinary rules are used to establish liability in legal malpractice cases.

Professor Wolfram: The *Restatement* has not yet addressed that issue. When it does, there will be enormous controversy. I can confidently predict that no matter what the *Restatement* says, courts are going to do what they have always done. That is, courts have consistently ignored the prohibition against using lawyer code provisions for the basis for civil liability. Courts purport to follow it, but there are innumerable ways to circumvent it. Even in Washington, where expert witnesses

are not allowed to say that they are relying on the lawyer code and the court can't instruct the jury in lawyer code language, it is just a matter of semantics. The prohibition is a kind of backwater of the law that doesn't really make any substantive difference. It is crystal clear that in most jurisdictions innovative rules in lawyer codes sooner or later get enforced as liability rules, one way or another. Maybe not as the basis for liability across the board, but a basis nonetheless.

Professor Maute: As a matter of truth in advertising, I would argue that the rules should be the basis for liability. It seems the height of hypocrisy for us to draft ethical rules for ourselves that purportedly cannot be used as a basis for malpractice liability when we have so effectively used violations of other professional codes to establish other people's liability in other fields of law.