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LOBBYING AND THE AMERICAN LAW INSTITUTE: THE EXAMPLE OF INSURANCE DEFENSE

William T. Barker*

The American Law Institute is now engaged in the creation of the Restatement of The Law Governing Lawyers. Among the many topics that Restatement addresses is the law governing the obligations of defense counsel retained by a liability insurer to defend its insured.

It should be no surprise that this somewhat obscure topic is of intense interest to lawyers who regularly accept such retentions, to insurance companies who make them, and to lawyers who advise members

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Mr. Barker is a member of The American Law Institute. He is Chair of the Extracontractual Liability Subcommittee of the Insurance Coverage Litigation Committee of the Tort & Insurance Practice Section (“TIPS”) of the American Bar Association and was, until recently, Co-Chair of the Subcommittee on Bad Faith Litigation of the ABA Section of Litigation Insurance Coverage Litigation Committee. He is immediate past Chair of the TIPS General Committee Board and a former Chair of the TIPS Appellate Advocacy Committee.

Mr. Barker is also a Contributing Editor of Bad Faith Law Report, Editor Emeritus of Covered Events (newsletter of the Defense Research Institute (“DRI”) Insurance Law Committee), and a member of the editorial boards of Insurance Litigation Reporter and Defense Counsel Journal. He moderates the Illinois Insurance forum and co-moderates the Insurance Law (General) forum on Counsel Connect, an on-line service for lawyers. He is a member and past Chair of the Chicago Council of Lawyers’ Committee on Ethics and Professional Responsibility, a member of the IADC Special Committee on Professional Responsibility and the Chicago Bar Association Committee on Professional Responsibility. He is also a member of his firm’s Ethics Committee. See Jonathan M. Epstein, Note, The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm, 7 GEO. J. LEGAL ETHICS 1011 (1994) (recommending the use of an ethics committee or adviser in all law firms).
of either group on their rights and obligations. It is also a matter of some importance since a very large fraction of all tort litigation is funded by insurance, and insurance companies regard their traditional right to control the defense as an important means of controlling the costs which primarily determine the rates they must charge for liability insurance.

Upon learning that a draft of the Restatement asserted legal propositions which appeared to diverge from existing understandings within the insurance defense community, various members of these groups set out (individually and collectively) to persuade those formulating this Restatement that the drafts failed to reflect either existing law or the legitimate interests and practical needs of those purchasing and providing liability insurance.

The ALI and its Restatements are enormously influential in the courts. If the ALI is going to take a position on a matter you care about, it is likely to be much more effective to try to persuade the ALI to your own views then to later try to persuade courts, one by one, to reject a Restatement which takes an opposing view. That is especially so if, as I believe is true in this instance, you have strong, but complex, intellectual arguments. Most courts have intellectual capabilities far less impressive than the participants in the ALI process; courts also have less time and inclination to sort out such matters.

While it is inevitable that efforts will be made to persuade the ALI's decision makers, the efforts made on behalf of insurance defense generated some controversy.¹ I hope to show that the criticism of this effort was misguided. Some of the criticism was based on inaccurate perceptions of what had actually occurred. So, as a central participant I will set forth my own perceptions. Some of the criticisms raise legitimate process issues. But the effort was necessarily made in the context of existing ALI procedures. I will suggest ways in which those procedures could be improved and show that these improvements would ameliorate at least some of the concerns of those who criticized the efforts of the insurance defense community. Under the procedures in effect during the drafting of the Restatement of The Law Governing Lawyers, the efforts by practitioners to effectuate changes were made in an appropriate way.

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I. BACKGROUND: THE RESTATEMENT PROCESS

While Restatements are familiar, even to law students, as generally authoritative statements of what the law ought to be (and fairly reliable guides as to what it is in most places), relatively few outside the ranks of the ALI have much concept of how they are created. Certainly, it was a mystery to me when I embarked on this effort. I have recently become a member of the ALI, and I now have a sense of at least the formal process, though perhaps not of the practical operation. A brief sketch of that process is necessary to frame both the account of the events described herein and the discussion of process issues which follows that account.

A. ALI Structure

The ALI has roughly 3,000 members, primarily judges, law professors, and practitioners elected (for life) by the ALI Council, based on recognition in the profession of an outstanding record of achievement in the member's chosen area of the law and a commitment to participate in the work of the ALI. Certain judges, public and bar association officials, and law school deans are ex-officio members during their terms of office. The ALI Council is the equivalent of a board of directors, and its members are elected by the membership for staggered terms.

The Council appoints a Director, who has active charge of the Institute's work and has extremely broad responsibility for its intellectual products. The Director is a distinguished academic who serves for an

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2. See The Am. Law Inst., Bylaw §§ 2.01-02, reprinted in 74 A.L.I. PROC. 521 (1997) (regarding the election of members); The Am. Law Inst., Council Rules 1.01-02, 4.0, supra, at 529, 531 (regarding the election of members); The Am. Law Inst., Council Rule 6.00, reprinted in 74 A.L.I. PROC. 532 (1997) (setting forth the obligation of participation). A summary of these guidelines is printed on the form for proposing election of a member. The Council may terminate a member for nonpayment of dues or other good cause. See The Am. Law Inst., Bylaw § 2.04, supra, at 521-22.

3. See The Am. Law Inst., Council Rule 1.03, supra note 2, at 529 (regarding ex-officio members).

4. See The Am. Law Inst., Bylaw §§ 4.01-03, supra note 2, at 522-23 (setting forth powers and rule for the election of the Council).

5. See The Am. Law Inst., Council Rules 8.01, .07, supra note 2, at 533-34 (regarding the election and responsibilities of the Director). The breadth of the Director's responsibilities is as much a matter of practice as of formal rules. At the 1997 Annual Meeting, a somewhat strange parliamentary situation arose in which an adjournment for the evening was taken while a vote was in progress. (A division had been requested following a voice vote.) In explaining this situation the next morning, by which time a compromise had been worked out, ALI President Charles Alan Wright explained that it was the immemorial practice of the ALI that the Director is never out of order.
extended term. The Director ordinarily attends all meetings on ALI projects, and Council members may do so if they wish.

Each Restatement or other ALI project is placed under the charge of a Reporter or Reporters appointed by the Director with the approval of the Council. The Reporters are law professors who are experts in the area to be restated. The Reporters are assisted by Advisers, which are appointed by the Director, and which review the work of and consult with the Reporters. The Advisers are typically a small group, numbering a dozen or so, including some additional professors, with expertise or practical experience in the area of law which is the subject of the project. They have roughly Annual Meetings with the Reporters; these meetings seem normally to occupy about two days.

Each Restatement also has a Members Consultative Group, composed of all ALI members desiring to be members of that group. They also meet with the Reporters roughly annually, typically just after the meeting with the Advisers, and for only one day.

The ALI also has an annual four-day meeting of the full membership in May.

B. Creation of a Restatement

Once the scope and general outline of a Restatement have been arrived at, the Reporters produce what is known as a preliminary draft of a portion of the material. This is printed and circulated to the Advisers, the Members Consultative Group for that Restatement, and, I assume, to the Council. Shortly after circulation, those groups meet to discuss the draft with the Reporters. Anyone, whether or not an ALI member, with comments about a draft can always send such comments to the Reporters in writing. While the Reporters sometimes choose to defer to the weight of opinion expressed at one or another of these meetings or submitted in written comments, they are purely advisory. Indeed, the Reporters need not change anything and will generally do so only when persuaded that such change is proper.

If a preliminary draft (or a portion of such a draft) were found to be sufficiently problematic, a Reporter might choose to include that material in another preliminary draft before going further. But the norm is

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6. The current Director is Professor Geoffrey C. Hazard, Jr., who has served since 1984. His immediate predecessor was Herbert Wechsler, who served from 1963-1984.
8. See id. Council Rule 10.01, at 536.
10. See id. Council Rule 10.03.
for the Reporter to consider all of the comments received and formulate a council draft of the same material. Such a draft is printed and submitted to the Council. It is also circulated to the Advisers and the Members Consultative Group for their information. The Council may direct changes or simply ask the Reporters to consider comments made in the Council discussion. If the Council approves the draft, subject to such changes, the Reporters revise it appropriately and create a tentative draft for submission to the membership at the Annual Meeting.

Roughly two months before the Annual Meeting, the ALI mails to all members the tentative drafts which are on the agenda at that meeting. Members who wish to do so may prefile amendments and statements in support of those amendments. Copies of prefiled materials are made available to members at the registration desk of the Annual Meeting. Starting with the 1997 Annual Meeting, they have also been posted on the ALI website.11

Specific time at the Annual Meeting is allocated to each Restatement or other project which is before the membership. Within that time, there is an opportunity to discuss each section of the particular Restatement in turn, though prefiled amendments are given precedence over general discussion of the same sections. Amendments may be offered from the floor during the discussion. Each speaker is limited to five minutes (or three minutes if time is especially short), except that a member offering an amendment is entitled to close the discussion of that amendment. The President decides when to move on to the next section.12

If a satisfactory resolution has not been reached on a particular section, it can be recommitted to the Reporters for further consideration in light of the discussion. Subject to such recommittals and any amendments which may have been adopted, discussion of the particular Restatement ordinarily concludes with passage of a motion to approve the sections which have been discussed.13

The Reporters then move on to another portion of the material to be covered, producing a new preliminary draft to begin the cycle anew. Thus, Preliminary Draft No. 2 is typically not a revised version of Preliminary Draft No. 1, but an entirely new draft of different material. Recommitted material will return, sooner or later, and even approved material may return if later work or new developments indicate that

11. The ALI website can be reached at <http://www.ali.org>.
revision is in order. Creation of an entire Restatement takes years. The Reporters retain considerable authority to reformulate approved material to better express the analysis. Eventually, the material approved in a tentative draft returns as a proposed final draft, giving one last chance to rethink or adjust. As a result, the Reporters remain open to comments even after material has been initially approved, for even the most careful work may be improved.

The process is an impressive one in which to participate. But it is largely invisible to those outside the ALI, unless they are academics in the relevant area or simply happen to learn of what is transpiring on a particular project.

II. WHAT HAPPENED ON INSURANCE DEFENSE?

A. Personal Background

My own interest in insurance defense is almost accidental. While I am an insurance lawyer, I defend insurance companies, not their insureds. Only rarely does my firm defend insureds under ordinary liability policies, and then usually not in the sorts of circumstances generating the traditional insurance defense relationship.

While still an associate, however, I became one of my firm's "experts" on matters of professional responsibility. A client later asked me to opine on whether an insured was entitled to independent counsel, not subject to direction by the insurer. This, I discovered, turned on conflict of interest questions similar to those I was dealing with on behalf of my firm.

I also discovered a lot of confusion and questionable thinking in the law and commentary on this subject. I was thus launched on a campaign of writing and speaking about the topic. Including my efforts in

14. I distinguish liability policies, under which the insurer assumes the "right and duty to defend," from indemnity policies, under which the insurer simply promises to pay for a lawyer hired by the insured. Directors' and officers' insurance is universally written in the indemnity form, and professional malpractice insurance is often written in the "right and duty to defend" form.


16. See Barker, The Right and Duty to Defend, supra note 15; William T. Barker, Insurance
the activities described in this Article, I estimate that I have devoted thousands of hours to this subject, of which no more than a handful, after the aforementioned opinion, have been billable to any client. Nor, with the exception of travel expenses provided by some of the programs at which I spoke, have any of my expenses been reimbursed by a client. For me, this has been purely an academic endeavor.

Of course I have a point of view, and that point of view reflects my understanding of what I think are the proper interests of liability insurers, many of which are my clients. But even law professors with no clients have points of view, and mine has never been concealed. At all points in the process, the views I expressed have been my own, not advocacy on behalf of a client.

B. The Problematic Draft

The Restatement of The Law Governing Lawyers first addressed the tripartite relationship (among insurer, insured, and the lawyer appointed by the former to defend suits against the latter) in a draft circulated in 1991. Though little noticed at the time, section 215 of that draft seemed to suggest that a liability insurer is not a client of the defense counsel it appoints to defend its insured and cast serious doubt on such an insurer’s right to control the defense. One of my partners, also an ALI member, belatedly gave me a copy of that draft in connection with my firm’s ethics work. I noticed the implications and began sounding the alarm.

Unbeknownst to me and those with whom I was in contact, section 215 had not been approved when first submitted; it had in fact been re-committed to the Reporters for further study.

C. The IADC/DRI Study and Initial Efforts to Persuade the Reporters

Part of the defense bar’s response to the concerns raised by the Restatement was the initiation by the International Association of De-


17. __See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (Tentative Draft No. 4, 1991).__

18. __See William T. Barker, ALI Draft Questions Insurer’s Right to Control Defense, 60 DEF. COUNS. J. 611, 612 (1993).__

19. __See id. at 611.__
fense Counsel ("IADC") and the Defense Research Institute ("DRI") of
the joint study of the duties of insurance defense counsel.20 I fully con-
cur with Professor Charles Silver's description of the intellectual rigor
and excitement of that study.21

As this work developed, the joint study Reporters, Professors Sil-
ver and Syverud, used its results to urge the ALI Reporters to reconsider
their positions and to recognize the long-established nature of the tri-
partite relationship and the rights and duties flowing from it. Addition-
ally, both insurance industry representatives and the organized defense
bar communicated directly with the Reporters.22

As Professor Silver recounts, these efforts bore some fruit, but all
of us in the insurance defense community were seriously disappointed
in the modesty of their effect.23 As he explains, we were gravely con-
cerned with the apparent implications of Council Draft No. 11,24 which
first came to our attention after it had already been approved by the
Council in October 1995.

20. This study is described by Professor Silver. See Charles Silver, The Lost World: Of Poli-
citics and Getting the Law Right, 26 Hofstra L. Rev. 773, at 774-77 (1998). The Restatement was
not the only reason for conducting this study. The Michigan Supreme Court had also rejected
the traditional understandings of the ethical duties of defense lawyers. See Atlanta Int'l Ins. Co. v.
Bell, 475 N.W.2d 294, 295 (Mich. 1991) (holding that an insurer that retains counsel to defend its
insured is either not a client of that counsel or is something less than a full client). If, as we
thought, those courts were wrong, we needed to develop the analysis to prove it. If there was at
least some merit to their position, we needed to determine how much and what its implications
were for the day-to-day conduct of insured litigation.

21. The outcome of that study is embodied in Charles Silver & Kent Syverud, The Profes-
article written before the study was undertaken. See Charles Silver, Does Insurance Defense Coun-
sel Represent the Company or the Insured?, 72 Tex. L. Rev. 1583 (1994). While this is not the
forum in which to debate the merits, these articles are essential reading for anyone seeking to
grapple with these issues.

22. I also brought this issue to the attention of the Council of the ABA Tort & Insurance
Practice Section, an organization not limited to the defense bar, at the 1993 ABA annual meeting.
This resulted in a study by the TIPS Professionalism Committee and a report supportive of the
traditional tripartite relationship. This report was approved by the TIPS Council and its substance
was transmitted to the ALI Reporters by Hugh Reynolds, then chair of TIPS.

23. See Silver, supra note 20, at 774-77.

No. 11, 1995). We were unaware that, even before we saw this version, there had been some small,
but helpful changes made in the transition from the Council Draft to Proposed Final Draft No. 1.
1, 1996).
D. The Appeal to the ALI Membership

In Professor Silver's own words, he "came unglued." He initiated a campaign of strident attacks on the Restatement's treatment of insurance defense. Thus summoned to battle, I began searching for a way to proceed despite being hampered by my lack of knowledge of the ALI process.

Efforts to persuade the Reporters having apparently reached an impasse, the only recourse seemed to be a fight on the floor of the ALI. But it was unclear how such a fight might be waged. An insurance executive then provided me with a set of the transcribed proceedings of the ALI on this Restatement. Examination of the transcripts disclosed the procedure for amendments. With a few ALI members, most notably Ronald E. Mallen, in our camp, we proposed an amendment.

At my suggestion, a subcommittee of the American Insurance Association ("AIA") began looking for a way to address the Restatement problem and agreed that this would be the appropriate method. The AIA enlisted the National Association of Independent Insurers and the Alliance of American Insurers. They then tried to obtain lists of as many names and addresses of ALI members as possible, both to assist insurers in identifying potential friends who might be enlisted to support an amendment and to permit a mailing of any proposed amendment to ALI members before the Annual Meeting.

The Restatement and the effort to amend it were discussed in the Special Committee on Professional Responsibility at the IADC meeting in February 1996. We agreed that it would be desirable to have our amendment presented by someone not seen as personally interested and of some distinction in the field. I suggested Judge Robert Keeton, formerly a leading academic authority and one whose writings indicated fundamental agreement with our point of view. Dick Neumeier knew

25. Silver, supra note 20, at 782-89.
27. See Robert E. Keeton, Ancillary Rights of the Insured Against His Liability Insurer, 13 VAND. L. REV. 837 (1960); Robert E. Keeton, Liability Insurance and Reciprocal Claims Arising from a Single Accident, 10 SW. L.J. 1 (1956); Robert E. Keeton, Liability Insurance and Respon-
Judge Keeton somewhat and agreed to contact him. Professor Silver agreed to draft an amendment and supporting statement based on his existing critical analysis of the pending ALI draft.

The IADC Executive Committee and the leadership of the DRI began quietly organizing members of the defense bar within the ALI (a corporal's guard, alas). The DRI sent an “open letter” to the ALI requesting further study, and copies were later distributed at the ALI Annual Meeting.28

In March, I took Professor Silver’s draft amendment and supporting statement and prepared a new version, focusing more precisely on the matters of greatest concern and gearing the arguments to appeal to the expected audience. As modified in light of the comments by others, this ultimately became the amendment submitted to the ALI by Ron Mallen. It was actually a set of four amendments, submitted on a single page, accompanied by a twelve-page brief in support. Dick Neumeier provided a draft to Judge Keeton, seeking to enlist him as the leader of the effort.

Judge Keeton declined to undertake that role, pleading the press of his judicial duties and his need to avoid taking positions on issues which might come before him as a judge. But he spoke to Professor Geoffrey Hazard, Director of the ALI, at a meeting of Massachusetts ALI members in April. At that time, Judge Keeton suggested that there were problems with the treatment of insurance defense counsel and that the draft might better omit discussion of this topic unless further study were undertaken. He followed up with a memo to the Reporters, dated April 29, saying the same thing. This was the same as the most important proposal in our draft amendment. This was our first real breakthrough, as it gave Professor Hazard and the Reporters reason to take our concerns more seriously.

In the meantime, the insurance trade associations had mailed a copy of the amendment to all ALI members whom we could identify and contact by mail. The transmittal letter simply described the level of concern which the existing draft had created in the insurance industry and urged the recipient to review the proposed amendments and supporting statement.

Insurance industry personnel had also identified ALI members with

28. See Letter from the Defense Research Institute to The American Law Institute Membership (on file with the author).

sibility for Settlement, 67 HARV. L. REV. 1136 (1954); Robert E. Keeton, Preferential Settlement of Liability-Insurance Claims, 70 HARV. L. REV. 27 (1956). All interested in the law of liability insurance continue to profit from the insights of these pathbreaking articles.
whom they had contact (directly or through other members of their firms). They were sent individual letters, followed up by phone calls. The message of this broad campaign was simply to call attention to the fact that this important issue would shortly be coming before the ALI and to request that the arguments in support of the amendment be carefully considered.

E. The Apparent Settlement

When the proposed final draft was distributed to the ALI members in early April, I noted the changes from the council draft. These were designed to accommodate some of our concerns. These changes suggested to me a new understanding of the Reporters’ views. The Reporters might offer more flexibility than previously encountered if our practical concerns were addressed within the Reporters’ theoretical framework (instead of trying to get them to reconsider the framework).

The theoretical difference concerned the application of the traditional restraints on control by third-party payors to insurance defense representations. In our view (which I think has been traditional, but only implicit in the cases), these restrictions only apply to payors who are not clients. So we had focused on trying to persuade the Reporters that insurers are (or, at least, may be) co-clients of the insureds defended at their behest. But the Reporters were, and remain, committed to the view that these restrictions apply even to co-clients. The flexibility was in how the restrictions apply.

The Reporters were attempting to shape the application to protect interests which they recognized as legitimate. It now seemed to me that they simply lacked the specialized practical knowledge necessary to do this adequately. And we had not been as helpful as we might have been in addressing these practicalities, because we had thought co-client status would avoid any need to address them. Could we now solve our problems within the Reporters’ framework? I prepared a set of revisions to the Restatement along these lines as a possible basis for discussion with the Reporters, though with little hope that they could be considered at this late stage.

Professor Hazard responded to Judge Keeton’s communication by saying that he would consider whether the subject should be dropped or deferred. Meanwhile, IADC Executive Director Dick Hayes had been exchanging messages with Professor Hazard, whom he had known for

some time. Dick mentioned that I had prepared materials on this issue. Professor Hazard and I have previously worked together on behalf of my firm, and he expressed a desire to see what I had prepared.

Professor Hazard passed my draft revisions on to Professor Charles Wolfram, the Chief Reporter for the Restatement of The Law Governing Lawyers. Professor Wolfram found these a significant improvement on the Proposed Final Draft and prepared a revised version of section 215 based largely on them. After some modest tinkering, this became the Proposed Movants’-Reporters’ Text, submitted to the ALI Annual Meeting as a substitute for both the original draft and the Mallen amendment.

There was considerable confusion engendered by the last-minute substitution of the new draft. There was also resistance by some to the extent of the acceptance of our positions by the Reporters. An amendment was offered to modify the draft in a way hostile to the traditional nature of the tripartite relationship. The amendment was defeated 110-80. Section 215 was then referred back to the Reporters for further study and to be subjected to further review under the usual ALI process for drafts.

F. The Renewed Effort to Persuade the Reporters

In the aftermath of this effort, I became a member of the ALI. While the Reporters had intended to circulate a new draft of section 215 in the summer of 1996, other matters took priority, and no new draft emerged until August 1997 when the Reporters circulated a preliminary draft to the Advisers and the Members Consultative Group.

In the interim, the Association of American Law Schools (“AALS”) held a program at its 1997 annual meeting on Lawyers and Insurers: The Struggle for Control and the Power to Regulate, the product of which is a collection of papers on the verge of publication in the Connecticut Insurance Law Journal.

31. See id.
Preliminary Draft No. 13,\textsuperscript{34} published shortly before the scheduled September meetings of the Advisers and the Members Consultative Group, largely reverted to the unsatisfactory language in Proposed Final Draft No. 1, abandoning most of the improvements in the Proposed Movants'-Reporters' Text. At the September 5, 1997 Members Consultative Group meeting, which I attended, the comments on section 215 were largely hostile to the traditional arrangements, even in forms modified to provide better assurance of informed consent by the insured.

Starting before that meeting and continuing through most of September, I directed a series of lengthy letters to the Reporters (copying numerous interested parties, including leading critics of the positions I advocated). In these letters, I argued for corrections of the objectionable provisions in the preliminary draft and responded to the various arguments marshaled against my positions.

The Reporters, after considering all of the input received on Preliminary Draft No. 13, prepared a revised version, Council Draft No. 13,\textsuperscript{35} which was submitted to the ALI Council at its meeting in late October. While not ideal, I and those I consulted concluded that it had removed most of the significant practical problems. I have so advised the Reporters, though requesting some "technical corrections."

Council Draft No. 13 was approved by the Council, subject to revisions in light of its discussion. Those revisions have become Proposed Final Draft No. 2.\textsuperscript{36} My requested "technical corrections" were accepted (except where rendered moot by other changes). I am content with (though not entirely enthusiastic about) the version of section 215 which will go before the ALI membership.

\textsuperscript{34} See \textit{Restatement (Third) of the Law Governing Lawyers} § 215 (Preliminary Draft No. 13, 1997).
III. WAS THERE ANYTHING WRONG WITH WHAT HAPPENED ON INSURANCE DEFENSE?

The effort to influence the content of section 215 had two components: the effort to persuade the Reporters and the effort to persuade the membership to overrule the Reporters. So far as I know, the former is uncontroversial.

Even scholars as distinguished as ALI Reporters cannot know everything. In particular, being academics, they are likely to be very strong on theory and knowledge of the cases, but much weaker on practical problems and concerns which may not be apparent in the reported cases, but are known to specialized practitioners. Even on theory, they may fail to understand the implications which other bodies of law, outside their own expertise, may have for problems where that body of law interacts with the one they are trying to “restate.” With insurance defense, for example, the problems lie at the intersection of insurance law and professional responsibility, and the need to satisfy both sets of concerns may require extra complexity in the rules to be “restated.” Yet the Reporters are experts in professional responsibility, with little or no background in insurance.

Consequently, the Reporters need all of the information about practical concerns and all of the analysis they can get, and those trying to advocate particular views are excellent (though possibly incomplete) sources. Ideally, all viewpoints will be ably advocated, and the Reporters will be able to make an informed judgment, drawing upon their own expertise to evaluate the arguments presented. But even if some viewpoints are less ably represented or unrepresented, the Reporters are still better off receiving as much information and argument as possible. That will leave fewer gaps which must be filled by the Reporters themselves.

My impression is that the Reporters and the ALI generally share my view that efforts to persuade the Reporters are thoroughly welcome. At least in theory, efforts to save them from “errors” they are about to commit should be especially useful.

Of course, not all such efforts are equally welcome. Reporters are people, too. They are also academics of considerable stature in their respective fields. Such stature is conducive to (perhaps justifiably) large egos. Public criticism, especially criticism which suggests that they may be less expert that they are reputed to be, is likely to be poorly received by its subjects. Such was the case with Professor Silver’s attacks on the

37. Personally, I am confident that it does require extra complexity. But whether that is so goes to the merits, and this is a discussion of the process.
positions taken by the Restatement and the Reporters. But that is a personal issue, not an institutional one, though there is undoubtedly some tendency for the institution to rally behind its own. And the problem is self-limiting: the very hostility such criticism engenders in its targets impairs its prospects of persuading them, and persuading the Reporters is the way to best advance your views with the ALI. Professor Silver’s articles, while offensive to some, were not an improper way to argue for change. At worst, they were counterproductive.

The problem, if there was a problem, was with the appeal to the membership. Yet appealing to the membership cannot be wrong in itself. The membership, after all, is the final democratic authority within the ALI. The members could have entrusted final authority to the Reporters or the Council, but they have not. Indeed, the fact that drafts must be reviewed by a variety of members, with diverse perspectives, is one of the strengths of the process.

While the membership is the final authority, it is not easy to get a complex argument before that body. At the time Proposed Final Draft No. 1 came before the membership, there was no institutionalized way to inform members, before they arrived at the Annual Meeting, what disputed issues were likely to be discussed at the meeting. Thus, members who might be interested in an issue (if they knew it would be presented), might fail to attend for lack of notice.

Nor was there an institutionalized mechanism for delivering the substance of a proposal and an argument in support before members arrived at the Annual Meeting. This limited the opportunity for study, reflection, and consultation. And the time constraints on floor debate make it almost impossible to communicate a complicated argument on the floor unless the audience is at least generally familiar with the issue being debated.

These limitations reinforced the already considerable inertia created by member deference to the expertise and judgment of the Reporters and the Council. As we viewed the situation, the only way to have a fair opportunity to get the considered judgment of the membership on the insurance defense issues was to inform the membership, and to do so at a time when interested members could still arrange to participate in the deliberations and decision making.

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38. See supra note 26. As Professor Silver’s writings (and my own, for that matter) readily confirm, critics of the Reporters may also have large egos. It is not my purpose here to discuss the manner in which Professor Silver’s criticisms were expressed, although I agree wholeheartedly with the substantive points he made.

39. See The Am. Law Inst., Bylaw § 3.04, supra note 2, at 554.
That was the genesis of the mass mailing. Because it went to all
ALI members whose addresses we could locate, any who supported the
Reporters' draft were equally notified of the impending struggle. Sim-
ply as a matter of effective advocacy to this audience, the content of the
mailing was highly analytic, explaining why the language proposed by
the Reporters (a) was questionable and (b) would have significant ad-
verse impacts.\footnote{See supra note 28.} Realizing the difficulty of convincing the membership
that the Reporters were wrong, we did not try to argue that. Rather, the
proposal argued (as Judge Keeton did independently) that the ALI ought
to refrain from endorsing a questionable position which would have
these sorts of impacts and ought, instead, simply to remain silent on the
issue.\footnote{The Reporters have since pointed out to me that, given the total architecture of the rele-
vant portions of the Restatement, silence on insurance defense issues would also have been dan-
gnerous to the interests of the insurance industry and defense bar. On reflection, I agree that this
was so. But that is beside the point for present purposes.} So neither the mailing nor its content seem subject to legitimate
criticism.

The concern of those who criticize the appeal to the membership
seems to be based upon a perception that the insurance industry used its
economic power to exercise undue influence. Yet, so far as I know, the
only message ever conveyed was that this was an issue of importance to
the industry, that the arguments in the mailing should be carefully con-
sidered, and that attendance at the meeting could be important if the
member agreed with the arguments.\footnote{Of course, attendance at the meeting could be important if the member disagreed with
the arguments. But that was obvious. And members opposed to the amendment might well have
regarded the effort to amend as a sufficiently uphill fight as not to warrant special efforts to attend.
In any event, they clearly had the information needed if they wished to do so.} Certainly, I cautioned all with
whom I spoke that anything more forceful would likely be counterpro-
ductive, given ALI sensitivities.

All of these messages seem entirely proper. None asks that the
member disregard the ALI tradition of leaving clients at the door. In-
stead, they seek to utilize the attorney-client relationship to gain enough
attention to get the substance of the argument considered. To be sure,
most lawyers are more sensitive to the legitimate interests of their cli-
ents than to those of parties with which they have no relationships. In
part this results from the fact that lawyers have greater familiarity with
the problems of their clients and so recognize the ways in which partic-
ular rules of law may exacerbate those problems. It also reflects natural
human sympathies.
Appealing to such sympathies seems to me a perfectly fair way to partially counter the considerable suspicion and hostility which insurance companies encounter virtually everywhere. That also results from natural human sympathies, to those who seek payment or other benefits from insurers.\footnote{I am not arguing that insurance companies have never done improper things, though I would argue (in a more appropriate forum) that they are commonly held in lower esteem than they deserve.}

My point here is that even insurance companies have legitimate interests, and they have some difficulty getting attention in arguing for those interests. Such difficulties are especially great when the forum is the ALI and their adversaries are ALI Reporters, whose opinions are given great weight in internal deliberations. So insurers have little choice but to turn to those most likely to understand and agree with their position when seeking support in a dispute with the Reporters. And there is nothing wrong with their doing so.

ALI members promise to leave their clients at the door. But they do not (and should not) promise to ignore legitimate interests simply because their clients are among those holding such interests.

IV. REFLECTIONS ON THE DIFFICULTIES OF RESTATING THE LAW

Professor Silver offers regulatory capture as an explanation for what he sees as otherwise unsupported resistance to his powerful arguments.\footnote{See Silver, supra note 20, at 789-99.} I do think that at least a version of regulatory capture helps explain certain persistent themes in state and local bar ethics opinions. The members of the committees, like everyone else, are likely to be especially susceptible to high-minded arguments for the protection of third parties (here insureds) when it happens that acceptance of such arguments will also be beneficial to their personal interests or those of their friends. (Such members may also be crassly self-serving, but I think self-deception is more common than self-admitted greed.)

But I put no stock in regulatory capture as an explanation for what happened with section 215. There simply are not enough ALI members who personally, or through their firms, are interested in the fees to be gained from insured litigation. The ALI is drawn from a more "elite" segment of the bar, which is one reason relatively few of its members have much instinctive understanding of the issues presented by insurance defense.
What I see, instead, is the power of conventional wisdom, coupled with an entirely proper concern for the interests of unsophisticated and powerless insureds. In this instance, I think the concern was misguided or attracted to methods of protecting those interests which are only superficially appealing. But that is a problem of ignorance, not of improper motivation, and ignorance is the simpler hypothesis.

That ignorance was hardly surprising. Much of what the early drafts of section 215 said reflected, at least to a considerable degree, views common even among insurance defense lawyers. These views were formed from dicta in a fair number of cases. The dicta had originated in condemnations of practices which, from any perspective, were improper. What had been overlooked was that the dicta, if fully implemented, would have thrown the baby (cost-minimizing conduct of insured litigation) out with the bath water (abusive practices at the expense of insureds).

The cases containing these dicta had spawned reform which largely eliminated the sorts of practices specifically condemned. And the dicta themselves were understood within the insurance defense community in ways which tended to limit their potentially deleterious impact. Unfortunately, the reform was largely invisible to outsiders, and both academics and courts began taking the questionable dicta seriously enough to come to unsound conclusions. The Reporters had accepted that way of thinking and did not greatly change their general approach when confronted with the analysis that Professor Silver and I find compelling.

Prevalence of the conventional wisdom also explains both the resistance of the ALI membership to accepting the carefully crafted compromise worked out with the Reporters and the hostility encountered in the Members Consultative Group meeting last fall. Even in a body as devoted to law reform as the ALI, there is a lot of conservatism. After all, many of the very instruments of reform are still called “Restatements.” Conservatism preserves error as well as sound rules. It especially does so where the rule in question is seen (incorrectly) as protecting legitimate interests.

This was an area where the rhetoric of the courts had begun to drift into dissonance with the generally sound and efficient practices in common use. Yet the dissonance was only now becoming great enough to force attention to identifying the problems and trying to restore har-

45. See, e.g., Montanez v. Irizarry-Rodriguez, 641 A.2d 1079, 1084 (N.J. Super. Ct. App. Div. 1994) (“[W]hen the interest of the insurer and the insured differ, the insurance defense lawyer’s ethical duty of undivided loyalty to the client is owed to the insured.” (citation omitted)).
mony, while preserving the practices.

It was also an area which, until the IADC/DRI study and struggle over section 215, had never benefited from sustained academic attention or systematization. That made it easy for those expert in only one of the two relevant disciplines to overlook or misunderstand the complex interactions necessary to get the law right from both perspectives.

Fortunately, the very struggle provoked by this process has generated the sort of academic attention necessary to straighten the problems out. Professor Silver writes that the debate within the IADC/DRI committee forced us to think more deeply about these issues. And so it did. But the process did not stop there. The AALS symposium certainly forced my own thinking even deeper, and the debate at the Members Consultative Group stimulated even more insights.

Not only was this difficult intellectual work, it demanded close attention of able participants from multiple areas of expertise and with diverse perspectives. Regrettably, this sort of invaluable interaction between the practical and the theoretical is not as valued in academic legal circles as it once was. In today’s environment, restating the law in areas not already well-studied is a more difficult enterprise than it was when the ALI was formed.

Unless and until academic fashion changes again, this difficulty warrants special caution on the part of the ALI and its Reporters.

V. IMPLICATIONS FOR ALI PROCEDURE

A. Facilitating Internal Debate

Given the demonstrated importance of critical debate, it is troubling that there is so little opportunity for interchange among those submitting comments to the Reporters. In general, everyone who has something to say does so independently. Sometimes, of course, the submissions to the Reporters parallel debates conducted in print or in other public forums. Even that does not eliminate the utility of greater critical scrutiny of arguments made to the Reporters. Even after the intense and free-wheeling debate at the AALS meeting, much was added by the interchange stimulated by Preliminary Draft No. 13.

To facilitate critical scrutiny of my own comments on that draft, I took pains to copy those opposed to my positions on my letters to the Reporters. I was copied on at least one thoughtful response to my argu-

46. See Silver, supra note 20, at 789-99.
ments (from Brian Redding), to which I replied. This was a valuable aspect of the process, and it ought to be more frequent.

At one time, this sort of interchange would have been difficult to conduct unless one knew in advance who would be interested in participating. Even then, the logistics would rapidly become cumbersome if the group were very large. But technology has changed that. It would not be very difficult to establish an electronic bulletin board, including a library of all submissions to the Reporters, and offering the opportunity for debate. An example of such a debate took place, on Counsel Connect, concerning section 215.

But, dearly as I love Counsel Connect, it is a proprietary service, not open to all. I am no technical expert, but I believe that it might be feasible to provide a public (or ALI members only) forum for such debates as part of the ALI's existing website. I urge the ALI to consider this.47

Such a forum would also ameliorate an existing ALI problem. The scope of the ALI's efforts is severely constrained by a critical shortage of one resource: time at the Annual Meeting for the members to debate the products of the Reporters. If more of the debate were conducted in a way not requiring the members to be physically present, those debates could be both more extensive and more numerous than the Annual Meeting itself permits.

B. Minority Reports

Drafts of the Restatements generally go to members with nothing but the material approved by the Council. Only rarely, usually when the Council has overruled the Reporters or where the Reporters are divided among themselves, is any alternative language printed in a tentative draft.

I suggest that the membership should be informed more often of divergent views, where those dissenting from what a majority of the Council approved feel strongly about the issue. This would level the field, which now is very strongly tilted toward the Council's draft (and, therefore, usually toward the Reporters' draft). Only dissidents with considerable resources can make efforts like the one which the insurance defense community made on section 215. The cure for this inequality should not be suppression of efforts to persuade the member-

47. The Reporter for and Advisers to the ALI's Federal Judicial Code project currently utilize a list server to automatically disseminate communications to all members of their group. I propose an extension of that precedent.
ship. Rather, the cure should be facilitation of such efforts by eliminating some of the barriers which prevent most of those opposed to Council-approved drafts from effectively challenging those drafts.

Posting of prefilled amendments on the ALI website is a small step in this direction. Creation of a public electronic forum for continuing debate about ALI projects would be a larger step, even if formal minority reports were not printed in tentative drafts. I hope that this exciting opportunity to enhance the ALI process will be exploited.

VI. CONCLUSION

I am proud of my role in the effort to affect the Restatement’s pronouncements on insurance defense. I am pleased that the controversy stimulated such a wealth of scholarly attention to this previously neglected topic. And I hope that the ALI will find a way to replicate the benefits which this process had for the quality of the ultimate product.