Leave Your Clients at the Door

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Lowell Brennan always remembered how flattered he was the day Dean Robert Kendall suggested that he would be an excellent candidate for membership in The American Law Institute. They were at a Stanford Law School benefactor dinner—an annual event held, not at the law school’s bucolic Palo Alto campus, but at the downtown Union League Club for the convenience of the guests, hard by the offices of San Francisco’s elite law firms where so many of the law school’s successful alumni held leadership positions.

“I’d be glad to nominate you, Lowell. I think it’s just the kind of activity you’d enjoy.”

Lowell was so pleased, but couldn’t resist asking the next question, “What do you mean?”

“Well, I know how much you love the private practice of law, Lowell. But I always get the sense that if the salary were right, you would jump at the chance to join our faculty.”

“Am I that transparent?” Lowell replied.

“No. It’s just that I know there is an intellectual curiosity there. You are always one of the first to ask questions at our special lectures. You often have raised bigger public policy concerns in your discussions with me. And I don’t think anyone among our alumni writes more letters to the editor.”

“I do believe I would enjoy the Institute,” Lowell interrupted the uncomfortable flattery he had so deliberately evoked. “That would be great.”

“Then it’s a done deal. I’ll get Hank and Marion to second your nomination and in a year you’ll be in.” The Dean closed the conversation mentioning two prominent alumni of the law school who were at peer firms to Lowell’s firm, Powell, Mason & Geary, the third largest firm in the Bay area.

*Partner, Drinker, Biddle & Reath LLP.
Lowell had known of the Institute's work since law school. No one from his generation could complete the law school curriculum without being impressed with the influence of the Institute's work. The courses in torts, contracts, property, and the Uniform Commercial Code all reflected the impact that American Law Institute projects—particularly its perhaps wrongly named Restatements—had on the shape of the law. How often he had seen judges' opinions rely on Restatement black letter and comments to shape a decision, even to reject a clear line of authority in favor of a Restatement innovation. And though Lowell had never really focused on who was in the Institute, let alone how one gained admission, he was very much aware that it was an invitation-only membership organization that comprised the elite of academia, the judiciary, and the private bar. He also knew that the Institute's then Director was the legendary Herbert Wechsler, whose coursebook on Federal Courts had provided Lowell with his greatest law school challenge. One thing was certain: joining the ALI was right up there with Lowell's election to membership in the American College of Trial Lawyers in terms of polishing one's résumé.

Lowell could also remember vividly his first ALI Annual Meeting. It, like almost all Annual Meetings of the Institute, was held in the ballroom at the Mayflower Hotel in Washington, D.C., a quaint old facility far wider than it was long, with a vaulted white ceiling featuring delicate reliefs of classic figures, an altogether fitting decoration to complement the august proceedings below. The Reporters, the President of the ALI, and a few other senior figures were arrayed on the dais, the members sitting in simple chairs without desks packing every inch of the ballroom’s floor. On some days the ballroom floor was so crowded with members that some sought refuge watching the proceedings from the balcony that surrounded the entire room.

Only the six microphones strategically placed in the three aisles, each one numbered with a placard, prevented the arrangement from looking like a crowded lecture hall. Members dutifully lined up behind the microphones, regardless of who they were. Lowell had been stunned that you could have a member as distinguished as Judge Henry Friendly standing patiently behind a member who was a practicing lawyer from Topeka. The chair would recognize the speaker at microphone two, and that speaker then would identify himself, or herself (there were even a couple of women back then), by last name and state. It was all very democratic; no titles; just “Friendly, New York.” Each speaker was allowed five minutes, with a dutiful staff person signaling the time remaining by holding up colored cue cards. Lowell learned right away
that only the reckless would incur the wrath of the President by continuing to speak once the red card was hoisted.

The business of the Institute proceeded in a particularly deliberate way. The chair would announce the number of the Restatement section then under discussion. The Reporter would explain the section and highlight any issues that had been raised regarding its content. Then the matter would be open to the floor. The members were free to comment on the black letter or the comments. The Reporters might respond. If a member felt strongly that a change was necessary, a motion to amend was in order, to be debated and then voted by the membership. The chair would call for ayes and nays. If that left the chair in doubt, a show of hands would be called. If the chair still remained in doubt, the members would be asked to rise to vote one way or the other. The members would stand around self-consciously eyeing who was voting with them and who against, as the staff ran around the ballroom counting the standing mass. The chair would then announce the vote. If it passed, the motion would be adopted by the ALI. If not, the discussion would return to the section under discussion, finally concluding in a vote up or down. If the vote was affirmative, the section would become part of the Restatement. If not, the Reporters would return to the drawing board for a replacement, at which point the discussion would move to the next section.

With any Restatement including hundreds of sections and text running hundreds of pages, one can begin to appreciate what an acquired taste the participation in an ALI Annual Meeting could be: reading countless drafts, parsing the language, suggesting alternatives, participating in endless debates, and sitting on hard chairs among other similarly inclined pedantics. Lowell had to admit it took a certain type, but he knew there was a breed of lawyers who delighted in being part of this high priesthood. And he was quite pleased to be among the elect. Indeed, it called to mind for Lowell a collection of cloistered clerics off in a distant abbey praying in some exotic language. The members traversed this path because they thought they were influencing public policy. Not directly, of course. What the ALI issues, Lowell recognized, for all its formal procedures, could simply sit on a library shelf accumulating dust. But, in fact, the Restatements were cited by courts again and again. And the promise that the present issues before the Annual Meeting would, in turn, become persuasive authority in the future justified the effort.

One of the precepts of the ALI Lowell learned in the admissions process was that it was not good enough just to belong. Each prospec-
tive member was asked to commit to making a real contribution, not only because the organization was so small—less than 2,000 members—but also because ALI membership was viewed as more than just another merit badge to be worn proudly. If the work of the Institute was going to be successfully completed, everyone had to pitch in.

This proved no hardship for Lowell. He joined a number of the Restatement’s consultative groups, collections of Institute members who traveled at their own expense to meetings at ALI headquarters in Philadelphia to meet with the Reporters of these projects, outstanding academics who actually drafted the language of the texts. These meetings provided Lowell with an opportunity for input at an earlier stage than when the general membership ultimately was presented with complete drafts for final Institute approval.

Because Lowell spent hours reading the proposed text before the meetings were held and was not at all reluctant to share his views when the consultative groups assembled, Lowell often saw his suggestions or some slight variant thereof work their way into successive drafts. Though some of Lowell’s partners grumbled at both the time and expense that Lowell’s dedication to the ALI entailed, he never flagged in his enthusiasm and even delight at grappling with some of the thorniest issues of the day, particularly on those projects which were close to Lowell’s areas of practice expertise—corporate governance, complex litigation, and remedies.

Thus it was with special enthusiasm that Lowell signed up in 1987 for the consultative group of the Restatement of The Law Governing Lawyers. Here was a project right down Lowell’s alley. He had been particularly active in the unsuccessful efforts in California to get that state to adopt the new ABA Model Rules of Professional Conduct. As a result, he also found himself on the speaking circuit explaining the benefits of the new rules in other states, where his efforts were more successful. This had led to a few appearances at the Law School and a small cottage industry for Lowell of advising other law firms on ethics issues.

Lowell, as a result, was irritated when one of his colleagues, the firm’s new CFO, questioned yet another non-remunerative project on Lowell’s part. “Is this really necessary?” the CFO had asked when the first expense report from The Law Governing Lawyers project crossed his desk.

“What do you mean?”
“Well, Lowell, this firm has been underwriting your frolics and detours for some time now. Is there no limit to these extracurricular activities?”

Lowell was both defensive and angry. “Is this the kind of appreciation I get? A firm of our stature and size should be thrilled that I am willing to dedicate hours to the improvement of the law. It’s the least we can do. And I don’t see anybody else volunteering.” Lowell knew he sounded too hard.

“But the only way you get to do this glamorous work is if the rest of us put in our time on billable work.”

“That’s it. That’s what’s wrong with this place. The day you discovered that the revenue from every additional billable hour goes right to the bottom line was the day this firm lost its way. I’m proud of what I do, and I’m going to keep on doing it. It’s only because of work like the ALI that Powell, Mason has saved itself from becoming just another business obsessed with the bottom line.”

That bitter interchange ended the discussion that day. But it continued to irritate Lowell that this was the way the CFO and, he was afraid, a lot of his other colleagues really thought about his spending valuable, potentially billable time on such endeavors. Lowell’s quotation from the preamble of the Model Rules of Professional Conduct that “as a public citizen, a lawyer should seek improvement of the law” simply fell on deaf ears in an era where too many were worried that Powell, Mason’s profits per partner might fall below Pillsbury, Madison’s, while too few cared that the firm’s pro bono hours vastly surpassed its powerhouse rival.

 Nonetheless, Lowell was not at all displeased when he received the phone call. At the time, by pure coincidence, he was dictating a letter to Pat Cunningham, the Chief Reporter of the Restatement of The Law Governing Lawyers, addressing the issue of what Lowell thought was a misguided, newly crafted exception to the confidentiality section permitting mitigation of a client fraud. The thirty-third floor receptionist walked back to Lowell’s office to say she had an urgent call from Glen Gross, General Counsel of Powell, Mason’s largest client, the Heritage Insurance Company.

“I’ll finish this later, Nancy,” Lowell observed as he picked up the handset, wondering what could warrant such an interruption.

“Lowell,” Glen began, sounding out of breath, “so glad to reach you.”

“And to what do I owe this pleasure?” Lowell inquired, trying to calm Glen down.
“The boss just left my office.”
“You mean Mr. Tydings?” Lowell asked, mentioning the CEO of Heritage in the only way to which he was ever referred.
“Yep.”
“Are you in trouble?” Lowell questioned.
“No, not yet. But the boss was really brutal. Seems he heard from the CEO of Federalist Indemnity that The American Law Institute—he called it the American Legal “think tank,” but I think he meant ALI—is about to come out with new rules regarding our lawyers, a law of lawyering project he called it, in that disdainful tone we’ve all come to dread. The Federalist executive says it could cost our industry hundreds of millions of dollars. He didn’t know the details. Obviously I didn’t know either, but I told him my recollection was you belonged. Didn’t you tell me that once?”
“Yes, I am a member of the ALI,” Lowell answered proudly, “and I am a consultant to the Restatement of The Law Governing Lawyers.”
“That must be it. Well that’s perfect. You see the boss wants us to form a group to look into this, to make sure we don’t get hurt. I told him you would be perfect to lead the way. Can you do it? I’ve got to tell him today whether we’ve got our team in place.”
“Team?” Lowell wondered out loud.
“Yes. He wants a full court press. Lawyers from all the major carriers. But we’re to spearhead it.” Lowell winced at the mixed metaphor.
“And if you accept, you will be the captain. As an extra incentive I can tell you we will pay your usual hourly rate and they’ll be no nitpicking of your bills.”
Those were words Lowell never thought he’d hear from a Heritage in-house counsel. Three times in the last five years, Lex Audit, the feared bill review firm, had been sent to Powell, Mason by Heritage, generating new complaints about in-house conferences and Federal Express charges, seeking rebates for prior work. And just last year Heritage had “negotiated” a fifteen percent across-the-board discount in hourly rates, a unilateral move that had generated great dismay for Lowell’s partners.
“So, you’re going to retain us to make sure the ALI creates no mischief for the industry?” Lowell asked, then immediately worried that putting a fine point on it might jeopardize the engagement.
“Precisely. We’re going to pay you to do what I am sure you would have done anyway. We just want to make sure your dedication to your ALI work doesn’t, heaven forbid, get sublimated to your paying clients. And, Lowell, one more thing.”
"What’s that?” Lowell held his breath.
“You’ll have no budget for once. Whatever it takes. We’re relying on your good judgment.”

Lowell was truly delighted. Though he, too, had no idea what the ALI was doing in the area of insurance—that chapter had not yet been drafted—he was sure he could help. More important here was a direct opportunity to cash in on his ALI membership. With this assignment Lowell knew he finally had the perfect weapon to respond to his detractors. It was not unlike the time he collected an enormous contingent fee from the court for his pro bono section 1983 case against the child welfare system in South San Francisco: doing well by doing good—a half million dollar fee—had finally quashed, at least for a while, the gripe about “do-gooders” at Powell, Mason.

“What more do you know?” Lowell asked.
“Nothing. You’ve got it all. The rest is up to you.”
“Thanks, Glen. I appreciate the confidence. We’ll do a good job for Heritage.”

“Not just Heritage, the entire industry, Lowell. The entire industry.”

As Lowell put down the phone he could feel his pulse quicken, and he realized his left hand was cramped from holding the phone so tightly. What should he do first? Lowell decided to send out a conflicts memo to the firm. But instead of burying it in the firm’s end-of-the-day e-mail collection of new matters, Lowell chose to send this one out individually to each lawyer in a sealed envelope festooned with those wonderful blue “confidential” stickers. This way he was certain no one would miss the significance of the new engagement, particularly that Lowell was now capitalizing on his oft-criticized ALI commitment. That should silence his critics, at least for the length of the engagement, Lowell thought, as he proudly admired the stacks of individually addressed envelopes overflowing his out box.

Next he added a postscript to his already composed Wolfram letter, nonchalantly inquiring what, if anything, was happening in the drafting of future sections regarding counsel hired by insurance companies. But Lowell quickly realized that asking this simple question was not enough activity to demonstrate the sense of urgency he knew this assignment deserved. No, he could not wait for a leisurely Cunningham reply. He would have to spring into action now.

The problem was that he had no idea what it was he was gearing up to oppose. He had seen the ALI Reporters time and again get it all wrong. Their antipathy toward confidentiality was just one example,
Lowell ruminated, of their fuzzy-headed academic approach that failed to reflect the realities of the practice of law in the trenches. But he didn’t know how the Reporters had messed up this particular section. What he did know was that, as with all ALI projects, the text was the Reporters if, and only if, they could get it past the membership at an Annual Meeting.

That was it! The key was for Lowell to assure a result that was satisfactory to his client at the Annual Meeting. For sure, he would intercede as soon as the text was available in tentative draft form. He would attend the applicable consultative group meeting, he would lobby a few Advisers who would attend the smaller and far more influential Advisers meeting, he would call several friends who were on the truly prestigious Council where the draft would go last before it was considered by the membership. All of that would help. But the key in the end would be the membership vote.

Lowell’s recognition of this fact gave him the road map for an immediate response. First he would secure a membership list of the ALI. It had to be reviewed to locate friends of the industry. That shouldn’t be hard, Lowell thought. Though not all the practicing lawyers represented insurance companies, everyone represented clients who had to buy insurance. Surely the threat of higher rates, without more, would itself galvanize the attention of the captains of industry to call their outside law firms.

But that wasn’t enough for Lowell—his mind raced toward developing a full-scale assault, a battle plan with Lowell as its general. Whatever vote the ALI would hold was more than a year away, maybe several. In that time, new members could be recruited to the ALI. Just at the last meeting he had been talking to Calvin Trueblood, the Membership Chair of the ALI. Calvin had explained the ALI’s interest in recruiting more women, minorities, and younger members. That led Lowell to joke that the ALI was the only place, other than his mother’s apartment house in Palm Beach, where Lowell was still among the younger people. Lowell then had mentioned the lack of in-house counsel in the ALI. Now would be a great time to follow up on Trueblood’s encouraging responsive words, particularly if those in-house counsel could just happen to come from the insurance industry.

Lowell was back on the phone to Glen within hours, full of ideas, anxious to schedule a meeting, unashamed that all this activity was taking place without knowing what the problem was. Glen, in turn, was delighted by Lowell’s enthusiasm, eager to participate as well. Then and there the idea was hatched that an ad hoc effort, code named Project In-
tegrity, would be launched, with the first meeting of its industry participants tentatively scheduled for six weeks hence at the Greenbrier Hotel in West Virginia. Lowell and Glen agreed that the entire project should be kept a secret, a goal they expected to accomplish by characterizing the meeting as a legislative update for concerned members of the industry. They even decided that the group would invite a sympathetic Congressional leader as a cover for the real purpose of the small convention.

By the time the forty lawyers and insurance industry leaders happily transported their golf clubs to the Greenbrier’s salubrious mountain setting, and the bourbon and branch water or other appropriate libation had been sipped at the welcoming cocktail party, Lowell was fully prepared to preside. While he never did figure out how Federalist Insurance had managed to get such an early warning that trouble was afoot, and he still hadn’t seen the tentative text, he had learned the general outline of the Reporters’ proposal.

A week after Lowell wrote him, Cunningham had written back that this issue had been assigned to Assistant Reporter Melanie Henkin from whom Lowell could expect to hear shortly.

Within days Henkin called. “I understand you are curious about the third-party section,” she began.

Lowell paused, not understanding, uttering a tentative “Um.”

“The section that governs a lawyers’ duty to his client when he’s being paid by someone other than his client,” Henkin answered Lowell’s new question.


“Can’t even wait for the text?” Henkin chided.

“Sure I can. I just thought . . .” Lowell’s voice trailed off.

“Well, we’re working on it. I’ve only sent my draft to Geoff and the other Reporters,” Henkin replied, referring to Wechsler’s successor as Director of the Institute, the equally brilliant Geoffrey Hazard, a Professor at Penn Law School, and an expert on ethics himself.

Lowell said nothing, hoping Henkin would fill the vacuum without more prompting.

“It’s a difficult problem, Lowell,” Henkin accepted the bait. “Generally the third party stays at an appropriate distance. But not those darn insurance companies. As best I can tell, they get in the way of the attorney-client relationship all the time.”

“How do you mean?” Lowell asked, hoping his voice did not betray his avid interest.

“The insurance companies think they can control the lawyers just because they’re paying them. The problem . . .”
“Well they have a contract, you know. All they have to do is honor that.” Lowell interrupted, able to contain himself no more.

“Not if it interferes with the lawyer’s professional judgment,” Henkin shot back, clearly upset.

“Well, we’ll just have to wait and see,” Lowell tried to sound calm. “I’m sure we can write language that will balance the interests,” Lowell concluded sounding his most reasonable.

“May I remind you, Mr. Brennan, the Reporters write the language, and I think you have identified precisely the problem. The interests should not be balanced. It’s the interests of the client that must be paramount.”

Lowell thought to himself they are both clients, but decided a polite disengagement was the best he could achieve under the circumstances. For the moment he had heard all he needed to know. Federalist could well be right. Real danger for the insurance industry lurked in new rules that undermined the way insurance companies did business. Whatever Lowell could do with his hearty band of Greenbrier attendees would be well worthwhile under the circumstances.

By the end of the two-day meeting, Project Integrity had taken on real form. An ALI membership offensive would be launched with at least twenty in-house counsel targeted as new members, though the task of finding a different sponsor and different seconders for each—sixty ALI members in all, lest anyone think the campaign was orchestrated—remained yet to be accomplished. But the framework was complete.

In addition, each of the forty attendees had agreed to scour the lists of ALI members, particularly those known to be regular attendees, so that key clients of each could be identified. The hope was if every ALI member received letters from five different clients as well as a well-reasoned appeal from Lowell right before the key meeting of the membership, success could be, if not assured, certainly made far more likely.

Glen was thrilled with the result of the Greenbrier conclave. Glen was sure Mr. Tydings would be thrilled as well. And all of that left Lowell ebullient when he accepted congratulations for his imaginative leadership as the golf awards were handed out at the closing cocktail party. “This ought to put those fuzzy-headed Reporters in their place,” Perry Richter, General Counsel of Federalist, remarked as he drank a toast to Lowell and his future success at the Mayflower Hotel in Washington.

The next two years were filled with great success on the battlefield, if not good fortune with the ALI Reporters. Eighteen new insurance company counsel were elected to membership in the ALI. That three
were women and two minorities just added to Lowell’s ability to con-
gratulate Calvin Trueblood on his membership initiatives. Even more
important, Lowell now possessed a list of at least five major corporate
clients, sympathetic with the insurance industry, for each of almost
1,000 ALI members. This represented more than half of the non-
academic, non-judicial ALI members and reflected literally hundreds of
hours of tedious work, comparing New York Law Journal and American
Lawyer client lists, “Big Deals,” “Big Suits,” and other coverage in the
legal press with the ALI membership list.

The latter was secured in the only part of the plan about which
Lowell was just a little embarrassed. Early on, Lowell realized the ALI
simply didn’t publish a list of members with addresses. This meant
Project Integrity faced a Herculean task of searching for addresses of
thousands of lawyers. To avoid that burden, Lowell offered to help with
a fundraising effort in honor of retiring ALI President Roswell Perkins.
He even suggested that Powell, Mason would handle the mailing, an ac-
tivity that assured the precious list with addresses would arrive in the
form of the coveted mailing labels from the ALI.

On the substantive side, Lowell’s efforts were significantly less
successful. At every juncture he attacked the content of the various
drafts. From the Tentative Draft No. 12, which contained the first itera-
tion of proposed section 215 “Lawyers Paid by Third Parties,” until
Council Draft No. 9, the version that went to the ALI’s Governing Body
in November 1997, six months before the Annual Meeting of 1998, and
at two junctures in between, Lowell urged language that would recog-
nize that the insurance company that hired the lawyer was a co-client
and had the right to place restrictions on the scope of counsel’s work,
whether the insured approved or not. “Otherwise the insured will have
no incentive to limit the expenses counsel can run up,” Lowell argued to
the Reporters and Director Hazard, not only at the meeting of the con-
sultative group, but in correspondence as well. “These open-ended obli-
gations simply are not in the contract of insurance. And, frankly,”
Lowell repeated more often than he could count, “this is not a Restate-
ment of Insurance Law.”

But the Reporters remained obstinate, not least because there were
many in the consultative group who saw what was being argued by
Lowell and the collaborators Lowell had enlisted to his team as a sig-
nificant change designed solely to benefit the insurance companies at
the expense of the insured. This left Lowell recognizing that his original
instincts had been correct. The only way to save the industry on this is-

issue was to implement Project Integrity at the 1998 Annual Meeting.
Lowell immediately started drafting language acceptable to his client. After Glen approved of both the revised text and comment, Lowell circulated it to the other Project Integrity group members to assure he got it right. The last thing Lowell needed was to lose votes among his core group.

Once that was in place, another Project Integrity meeting was held. Lowell had learned there was yet one more meeting of the ALI membership committee before the Annual Meeting. The group identified a few additional friends of the industry whom they could try to squeeze in under the wire. Lowell reminded the group that the vote on this section could be very close and getting a few more sympathetic lawyers into the organization and present in the Mayflower ballroom could be the difference between success and failure.

The lists of client contacts were also refined. It had been six months since it was first compiled. A little more intelligence was now available. No one wanted to take the chance that one key client, who could be most persuasive, would fail to reach his outside counsel.

The Project Integrity group spent hours discussing timing. All amendments submitted before a certain date would be distributed to the members as they arrived. This provided a great opportunity to reach the right people. The problem, however, was that if Project Integrity surfaced too soon, the opposition might have a chance to organize. This had to be a well-orchestrated campaign that was designed to look like no campaign at all.

“You remember Corporate Governance,” Lowell had remarked, referring to a controversial ALI project that culminated in 1994. “The fact that everyone knew the Business Roundtable had organized around the derivative suit provisions led to vigorous debate and serious erosion of support, not on the merits, but because of the lobbying campaign. We must avoid the appearance of that kind of an effort at all costs.”

“Then what do you suggest?” one of the lawyers inquired.

“We’ll send our proposal directly to each member. If we mail first class on a Wednesday, everyone will receive it just as they are leaving for the meeting. Just like the Monday TV ads, right before an election, we’ll leave the other side no time to answer.”

“You might miss some people,” Glen observed.

“Well, we’ll bring copies to the meeting. Put them out on the little tables ourselves. Maybe we should use a day-glo color to make sure no one misses it.”

“You could slip them into the rooms, too,” a voice in the back offered.
“What a great idea!” Lowell exclaimed. “The ALI takes over the Mayflower. We can put something in every room. I guess a few guests will be surprised to receive our impenetrable prose, but so what?”

“Maybe we should give out shots of whiskey?” someone asked. The whole room broke into laughter and the meeting ended with the Project Integrity group convinced they were on their way to victory.

The pieces started falling into place even before the meeting. The President sent out the final invitation to the membership scheduling the Restatement of The Law Governing Lawyers for consideration all day Thursday. Perfect, Lowell thought. A day of maximum attendance. By Friday too many members leave early to get home and Lowell would have been afraid he would have lost some vital voters. Lowell was so pleased he didn’t notice the President’s message until he received a panicked call from Glen.

“Do you think he’s on to us?” Glen inquired.

“Who?” Lowell asked, clueless as to what Glen was referring to.

“Charles Alan Wright,” Glen answered referring to Perkins’ worthy successor as President.

“What do you mean?”

“Well, his President’s column this month warns members ‘The American Law Institute does, will, and should influence the development of the law only as long as it is clear to all that our end product is the honest conviction of disinterested people about what the law is and should be. Our only sure protection against those who would seek to sway us to serve particular interests is the independence and objectivity of our members. In that, as I said when I wrote before and as I still deeply believe, I have great faith.’”

“No. He does that every year now. Don’t worry. Our group is not going along with our amendments because of pressure from clients. They know we are right on the merits. Or they will after we explain it to them.”

“I sure hope you are right, Lowell. The boss calls me about this every day.”

When Lowell got to Washington and registered for the meeting, he was happy to see prepared for all meeting attendees a number of written amendments prepared in advance by members. He also noticed his amendment was separately available for distribution on the same table and, as he re-read his proposal, Lowell was pleased he had been persuaded to use white paper. The less conspicuous the better was his present view, now that the meeting was about to begin.

The first two days featured Restatements on Servitudes and Real
Property as well as the ALI’s Complex Litigation Project. While a few members commented on Lowell’s proposal, the only real attention it received was when the President announced at the request of the Reporters it would be specially calendared for 2 p.m. Thursday with forty-five minutes scheduled for debate.

The discussion of section 215 began exactly as scheduled. President Wright re-announced the rules of debate, presumably because the floor was now crowded with ALI members many of whom had obviously shown up just for this moment, with quite a few voting for the very first time. Lowell was surprised that at each door ALI staff members were checking badges, not only keeping the badgeless off the ballroom floor but even directing invited guests, those with red badges, to take seats in the balcony. “The only people permitted to vote are those with blue badges,” Wright sternly announced. “I would hope we can use the honor system as we have in the past.”

Wright also delivered a small introductory speech. “I read in today’s Wall Street Journal coverage describing this debate and a reference to Project Integrity.” Lowell winced. He had hoped Wright wouldn’t have learned about the piece which Lowell had done everything in his power to forestall. “Let me remind our colleagues that the ALI’s principle is that we leave our clients at the door. I would hope that no one would decide how he or she votes on section 215 or any other section of any Restatement because of pressure from clients. Mr. Reporters you may begin.”

Melanie Henkin started. “Section 215 has been through a number of drafts. The section we bring to you in its final form addresses a number of key requirements in the lawyer-client relationship among the insured client, the lawyer for the insured client, and the insurance company that hires the lawyer. First, there is only one client, the insured.

“Second, the insured must be contacted by the lawyer before the engagement begins and receive a full consultation as to how the lawyer plans to handle the representation. For example, it is at this juncture that the insured can be requested to approve the future settlement of the matter within policy limits without further notice. It is also where the lawyer must explain to the client the implications of any restrictions the insurance company might place on the lawyer’s services.

“Third, this section rejects any concept that the insured consented to anything about the representation in the original contract of insurance. In ninety-five percent of the cases, these are contracts of adhesion. In any event, virtually no insured reads the language relating to defense. And even if the insured read it, the language could never meet the
Model Rules requirement, adopted by this Restatement, of informed consultation.

"Fourth, the insurance company, as any third-party payor, may not interfere with the independent professional judgment of the lawyer."

"Speaker at microphone four," the President intoned.

At first Lowell Brennan didn’t realize that’s where he was. All he knew was that his hands were clammy and he wondered whether any words would come out when he opened his mouth. The silence was suddenly broken.

"Mr. Brennan," the President was annoyed.

Now Lowell was embarrassed. "Mr. President I rise to move the adoption of my amendment. Copies have been distributed to the members and I think are still available on the tables on either side of the podium."

A number of members raced to the front to secure the Project Integrity proposal. Not exactly a riveting start, Lowell thought.

"What the Institute confronts in section 215 is a clash between some academic ideal that our esteemed Reporters have crafted and the real world. No lawyer who currently represents insureds fulfills the rigid requirements of section 215. And should any misguided jurisdiction adopt section 215, the cost of insurance would soar. This proposal is an unwarranted attack on the insurance industry, seeking to regulate not the law governing lawyers but the positive law governing insurance. Only by adoption of our substitute," Lowell immediately regretted using the word "our," "will we avoid this unfortunate result."

Lowell sat down disappointed in his desultory presentation, though he was somewhat buoyed by the fact that so many members now stood at every microphone, including a significant number of the Project Integrity group.

The debate was both spirited and lengthy. There were invocations of the integrity of the lawyer-client relationship, references to the sanctity of contracts, a reminder to the membership that this was a rule with important application in contexts other than insurance, discussions of the concept of co-clients, descriptions of horror stories in which insurance companies had restricted depositions, barred in-house conferences among lawyers, established maximum hours, even ordered paralegals, rather than lawyers, to review documents for privilege. Lowell’s allies relied on the real world; the opponents shot back with the need for reform. Lowell thought his group was holding its own until one member brought up an embarrassing subject.

"Do you realize these insurance companies have full-time lawyer
employees who pretend they are in law firms, conjuring up firm names and cushy firm letterhead with a listing of these staff lawyers looking for all the world like they are law firm partners. The practice not only violates 4.1, as a misrepresentation to the client, but it cries out for the requirements we talk about here to protect the client/insured.”

Lowell’s stomach did a double flip. How he hated this practice by the insurance companies. He knew there was no defense to it. If he rose to defend it, he would lose all credibility. But from the nods of the audience as White from Pennsylvania spoke, he knew the argument had hit home.

“Mr. Brennan, do you care to close?” the President asked, interrupting Lowell’s cogitation.

“Yes, Mr. President,” Lowell sprang to his feet, deciding to ignore the last argument.

Lowell’s close was better than his opening, punchy, couched in terms of the ethics rules, concluding with an assertion “that the Institute’s finest hour was when its conscientious members come together to debate great public policy issues. This is one of those hours. I know our members will do the right thing.”

Lowell quickly sat down, visibly relieved that it was over. Now it was time for Project Integrity to reap the rewards, if any there were to be, of all the detailed work that had been undertaken for months.

“All those in favor of the Brennan motion say aye,” the Chair announced. A deeply masculine “aye” crossed the room. How Lowell hated to go first on voice votes; the initial decibel level simply set the bar for what was to come.

“All those opposed, nay,” the President intoned.

This was clearly louder, Lowell thought. He instantly shouted “Division,” a call that was echoed by a few others. Lowell stared at the President. It was his call and for once the President looked like he couldn’t decide whether to do an actual vote.

“The Chair is in doubt,” Wright announced staring directly at Lowell, his demeanor clearly perturbed. Thank God the Chair doesn’t vote, Lowell thought.

The Chair then called for the ayes to rise, which they did. As Lowell looked around he saw many of his favorite colleagues firmly planted in their seats. How disappointing. Then he reminded himself that it didn’t matter whose vote he got; just so long as the motion passed. One thing was clear from the visual survey; it was going to be very close.

The Chair then had the ayes sit and the rest of the room rose, as
ALI staff ran around the ballroom clickers in hand. Lowell spotted nine votes he lost including Dean Robert Kendall. Lowell sure hoped Kendall didn’t regret his original invitation to Lowell to join the ALI.

Once that counting was complete, everyone relaxed while the eight counters’ scores were tabulated. Lowell’s nervousness was reflected in an incipient headache, but he managed some small talk with a few colleagues, feigning nonchalance. It was the first time Lowell wondered if anyone else was being paid to sit in this crowded room.

“The aye votes are 373. The nay votes are 358. The ayes have it. The motion carries. Mr. Reporter, section 216.”

The Chair’s last words coincided with the beginning of a round of applause, the first Lowell had ever heard at an ALI membership meeting and one he immediately regretted. Similar feelings were evoked by the sudden exodus from the room of hundreds. How embarrassing that it appeared members were just there for this item, Lowell thought, yet he joined the surge to the door, anxious to be the first to tell CEO Tydings the good news and reap the congratulations he so eagerly anticipated. The need for approbation simply overwhelmed Lowell’s sense of propriety.

Tydings was delighted. So was Glen Gross.

“They’ll be an industry award for the effort Lowell,” Gross offered. “You deserve it for being such a great professional.” Hearing these words removed any lingering remorse or regret over what had transpired, and Lowell immediately started crafting the memo he would send around his firm to remind his partners how he had parlayed his ALI membership into a lucrative and successful professional engagement.

Lowell’s unalloyed satisfaction was only enhanced when one month later he received a call from Glen.

“I’ve got a special assignment for you, Lowell. It’s right down your alley.”

“What’s that?” Lowell asked, perhaps sounding too eager.

“Heritage has a casualty subsidiary in Texas called Abilene Insurance. They’ve got a bad faith case where they just took a big verdict. Fifty-five million.”

“Wow!”

“One issue—the big issue—is the way the lawyer handled the case. He never really talked to the insured, just the adjuster. Like we always do. Like section 215 allows us to.”

“How can I help?” Lowell asked.

“Handle the appeal. Explain that the judge’s charge violates section
215. This will be a first test of the ALI’s influence.”
   “I’m not a Texas lawyer. They’ll eat me alive.”
   “No. No. No. This is an appeal. Who better to explain section 215 than you. You’ll be great, Lowell.”
   It was intriguing, Lowell thought; he did know more than anyone about section 215. “Okay. I’ll be glad to do it,” Lowell answered. “You’ll get me local counsel?”
   “Of course. And whatever else you need. This is another no budget assignment, believe me. Mr. Tydings really cares about this one.”
   Lowell threw himself into the matter with his usual vigor, even more enthusiastic because it was a chance to implement his own work. “Imagine being able to cite section 215 to support our position on appeal,” he observed to one of the numerous associates he enlisted. “It’s sort of like being a retired judge who relies on his own opinion to support his arguments as a lawyer.”
   The brief was filed on a timely basis, and Lowell welcomed the complimentary call he received from Glen shortly thereafter. “Great job, Lowell. Great job. The whole industry is watching and I’m sure they won’t be disappointed.”
   “Now, now,” Lowell answered. “Don’t go jinxing us. Remember we lost in the court below. Such disasters may be the beginning of every successful appeal, but they hardly guarantee it.”
   Lowell debated whether he should actually argue the case, but his reluctance evaporated when Glen announced he was traveling to Austin to watch Lowell perform. “We’ve shared this odyssey so far. There’s no stopping us now,” Glen told Lowell one week before the big event. “Remember this is Austin, not Amarillo.”
   Lowell felt confident the day of the argument, or at least as confident as he ever got in these situations. He, of course, could eat nothing, and he must have retied his tie four times trying to get the knot just right, as if the future of the insurance industry would turn on the way the silk folded. Lowell’s anxiety was heightened when he was approached by a reporter from Bloomberg Business News who was covering the argument for the wire service—but then calmed a little when he saw how gently the three-judge panel drawled at the first two sets of lawyers. Southern courtliness at its best, Lowell thought.
   The argument in fact began well enough. Lowell was graciously welcomed by the Chief Judge and his initial presentation went smoothly. Lowell almost wished the panel were a little hotter as he strained to remember his original outline without looking down at his notes.
Lowell would always remember what happened next. Lowell asserted, “And no less an institution than The American Law Institute, Your Honors, has considered these issues and adopted section 215 which completely supports appellant’s position. The Institute brings together some of the best thinkers in our profession—teachers, judges, lawyers. It’s judgment is entitled to great weight.”

“Are you a member of this Institute?” Judge Howell inquired, looking over his reading glasses and down at Lowell.

“Yes, sir.” Lowell felt like a third grader.

“Well then, you were complimenting yourself, I reckon,” the judge continued.

“Not really, Your Honor, I was more thinking of some of the others.”

“Ever heard of Project Integrity,” Judge Wallace, to Judge Howell’s left, asked not even looking at Lowell.

Lowell froze. What was this? Project Integrity had not been mentioned in any of the briefs. How did they know about this? Lowell felt trapped, but he knew this was no time to lie.

“Yes, sir,” Lowell answered.

“And what was Project Integrity?”

“It was an effort by some members of the ALI to assure that the Institute didn’t do something ill-advised in the area of third-party payments of lawyer fees.” Well maybe a little shading of the truth was okay, Lowell quickly rationalized his answer.

“And was it supported by the insurance industry,” the judge was relentless.

“Indirectly, Your Honor. Some of us represent insurance companies.” Lowell was sure he would go to jail for that answer.

“Mr. Brennan,” the judge simply announced Lowell’s name.

“Yes, sir.” Lowell was back in kindergarten.

“I don’t get it. You come here from San Francisco to convince us Texans to adopt some Law Institute something or other rule governing insurance companies on the ground that we southerners ought to be impressed that all them intellectuals up there know what is best for the poor folks that buy insurance policies. And you come into this courtroom and talk about professors and judges and smart lawyers like you. Is that right?”

“Yes, sir,” Lowell answered, realizing there was no place to seek refuge now.

“Well, Mr. Brennan, fortunately I got me one of them smart northern boys—Jeff Smith—from Columbia Law School as a clerk. And
young Jeff runs a Lexis check on your Institute and lo and behold we find the *Wall Street Journal* article about Project Integrity. And we learn that this section 215 on which you so heavily rely as precedent—when I went to law school precedent was cases—anyway, we learn it was not adopted because some fancy pants group I wouldn’t be inclined to listen to anyway thought it was a good idea, but because the insurance industry conducted a massive lobbying campaign to get it adopted.

I ask you, Mr. Brennan, now that your precedent has been shown for what it is, can you think of one reason why we ought to show the slightest respect for the Institute or this section 215? One reason?"

“Because it’s good policy?” Lowell sounded so tentative he was surprised he could be heard.

“We think not,” this was Judge Howell again. “No policy that leaves the real client—the insured—unprotected by her lawyer is satisfactory or fair. And we don’t believe that Institute of yours would think so either if its processes had not been corrupted by your lobbying, Mr. Brennan. You may have been able to persuade them. But you haven’t persuaded us. The decision of the court below is affirmed. An opinion exposing section 215 for what it is will follow shortly. Have a safe trip home, Mr. Brennan.”

Lowell gathered his papers as quickly as he could, dropping his pen in the process. They had not even heard the rest of his argument, nor anything from the other side. He just wanted to disappear, a view that was only confirmed when Glen refused to make eye contact with him.

They walked out of the courthouse together in total silence, Lowell fighting back tears as his mind insisted on comparing the delight of his ALI victory nearly a year ago with the devastation of today.

“There’s going to be hell to pay,” were Glen’s first words.

“I know,” Lowell replied.

“I don’t think you do,” Glen answered.

“What d’y’ mean?”

“I mean Tydings will look for a pound of flesh. He’ll conclude our entire strategy was a failure from the beginning. My job, your fees, everything will be on the line. The man hates to lose.”

As Lowell quickly jumped into the rental car for the ride to the airport, depression swept over him. He’d lost the case, he might not be paid, and the next issue of the *American Lawyer* would describe how he had destroyed the essential principles of The American Law Institute.