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Bismarck's Sausages and the ALI's Resatements

Charles W. Wolfram
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Charles W. Wolfram*

Those who are in the midst of writing a Restatement would, of course, be well-counseled to hold their fire about critiquing the process until the project has been finally approved. Nonetheless, in a spirit of reckless abandon, I wish to anticipate that happy and, I hope, imminent event and offer here one perspective on how the process has worked, or not, to this point in the course of serving as Chief Reporter for the Restatement of The Law Governing Lawyers of The American Law Institute. In doing so, I put us again in mind of the supposed words of Otto von Bismarck (I paraphrase): if you wish to enjoy either laws or sausages, don’t watch them being made. However, unlike sausages, neither statutes nor Restatements are elective consumables.

Statutes, if minimally constitutional, will be enforced by courts, however much a constrained litigant may protest. Restatements can have the same dire consequence—relied upon by a tribunal for a proposition that burdens a litigant in a proceeding no matter how strenuous the litigant’s argument that the Restatement provision in question has it wrong. Such realizations should serve to caution a Restatement-drafter who may otherwise be tempted to boldness. They also should require that, Bismarck notwithstanding, we feel free—if not, in-

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1. See Foreword to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS at xviii (Proposed Final Draft No. 2, 1998) (projecting that the draft was the last before final approval of the entire project and publication of the two-volume bound version); id. at xxiii (Reporter’s Memorandum joining in that hope). [Editor: On May 12, 1998, the ALI members gave final approval to the complete Restatement.]

2. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 190 (Suzy Platt ed., 1989) (noting that the saying is widely attributed to Bismarck, but unverified, and restating it as “[i]f you like laws and sausages, you should never watch either one being made”).
deed, occasionally compelled—to strip down the machinery of a Re-
statement’s production process to see whether the product it produces is
worthy of being served up to nourish the body politic.

It may help at the outset to attempt some understanding of what a
Restatement aims to be—at least in the view of the ALI. Important in
this respect is the history of the Institute, which was established with the
idea implied by the name of its founding committee, “The Committee
on the Establishment of a Permanent Organization for the Improvement
of the Law.”\(^3\) The ALI’s certificate of incorporation claims that “[t]he
particular business and objects of the society are educational, and are to
promote the clarification and simplification of the law and its better ad-
aptation to social needs, [and] to secure the better administration of jus-
tice.”\(^4\) Notwithstanding the rather clear implication that the work of this
organization would consist of more than meekly parroting existing law,
the ALI perennially witnesses struggles over the concept of a Restate-
ment.

Often heard in debates is the cry that the ALI should hew to the
majority of decisions.\(^5\) (This is often asserted without regard to the fact
that only a handful of jurisdictions has passed on the point in question.)
Opposed, of course, is the view—which we have striven to follow in the
Restatement of The Law Governing Lawyers\(^6\)—that a substantive posi-
tion in a Restatement is warranted as “restating” the law if it can be

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3. See Albert J. Harno, Legal Education in the United States 119 (1953); Herbert
   F. Goodrich, The Story of The American Law Institute, 1951 Wash. U. L.Q. 283, 283-86. It may
   also be interesting to note that the Institute originally was the idea of a group within the Associ-
   ation of American Law Schools, the legal academic group, and was to be composed primarily of
   academics to serve as a think tank. The committee set up to establish the group invited practicing
   lawyers and judges to join, which shaped the academic-practitioner-jurist cast that still character-
   izes the Institute.

   (1997). Among the notable incorporators were William Howard Taft, Charles Evans Hughes, and
   Elihu Root. See id.

5. At least one of the papers submitted in this Symposium takes that position. See Law-
   rence J. Latto, The Restatement of The Law Governing Lawyers: A View from the Trenches, 26
   Hofstra L. Rev. 697, 712 (1998) (“[W]here there is a significant majority position and a small
   minority position concerning a specific doctrine or principle, the Institute must, and does, adopt
   the majority position.”). That has never been and is not now the position of the ALI. See Herbert
   Wechsler, Restatements and Legal Change: Problems of Policy in the Restatement Work of The
   American Law Institute, 13 St. Louis U. L.J. 185, 188-90 (1968) (recounting series of exchanges
   between ALI Director and Council and DRI about the role of the ALI in drafting a Restatement
   provision, with the Council ultimately agreeing unanimously with the position of the Director that
   “we should feel obliged in our deliberations to give weight to all of the considerations that the
   courts, under a proper view of the judicial function, deem it right to weigh in theirs”).

6. See Charles W. Wolfram, Legal Ethics and the Restatement Process—The Sometimes-
rested on the support of at least one decision in an American jurisdiction. The Institute has occasionally departed from even that minimalist support position, as it did in adopting its disclosure-to-save-life provision at the 1996 Annual Meeting. And mini-debates will sometimes rage about what counts as minimalist support. Considered dicta? A reported trial court decision? A reported trial court decision in New York?

Restatements, of course, are not constructed for the amusement of their builders. The belief and hope, inherent in the concept of a Restatement, is that a future tribunal would be well-advised to follow the course of doctrine recommended by the document. The ALI is entirely a private organization, and its products have no authority of their own. Thus, in restating a minority position (or, for that matter, in restating any position), the implicit endorsement of the Restatement is taken to be merely a recommendation to future courts to follow the prescribed rule. The specific recommendation varies, of course, depending upon the prior position of the tribunal reviewing the Restatement. For courts that have not yet taken a position on the point, the Restatement recommends how to deal with it. For courts that have previously taken a position in agreement with the Restatement, the implicit recommendation is to stay the course, perhaps providing additional or alternative rationale for the position and, at a minimum, the endorsement of the ALI for it. For courts that have taken a position in opposition to that of the Restatement, the implicit recommendation is to reconsider and, hopefully, to change course by adopting the recommended approach. To what extent

7. See Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers, 73 A.L.I. Proc. 305, 319-20 (1996) (detailing the vote to accept an amendment offered by Professor Monroe Freedman to what is now section 117A, adding permission for a lawyer to reveal confidential client information when reasonably necessary to save a life or prevent serious bodily injury, even if the threat is not produced by any wrongful act of the client). For the view that ample extant authority justifies the life-saving rule, see Monroe H. Freedman, The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be, 29 Loy. L.A. L. Rev. 1631 (1996). For a contrary view, see Wolfram, supra note 6, at 19-20 (arguing, in the context of the attorney-client privilege, that no decision permits disclosure in the absence of a showing of a wrongful client act).

8. Strange exceptions are the United States Northern Mariana and Virgin Islands where local statutes make a Restatement position binding on the territory’s highest court in the absence of contrary local authority. See 7 N. Mar. I. Code § 3401 (Supp. 1992) (“In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . .”); V.I. Code Ann. tit. 1, § 4 (1995) (“The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.”).
Restatements in fact exert the intended impact on courts is unknown and perhaps unknowable. Probably the impact is modest, although the landscape-altering effect of occasional Restatement positions provides caution. The most well-known case, probably, is the amended provision on liability for defective products inaugurated by the Restatement (Second) of Torts, which can fairly be described as launching—for better or worse (with undoubtedly some of both)—the products liability field of litigation.

It is now accepted in American law that such change-the-landscape decisions by courts, although rare, do occur in any field in which a court, as a practical matter, has discretion to reach different results on substantive issues, which is to say more or less in all fields. It might have been true at one time that potential, repeat-player litigants who might be burdened or benefited by a future judicial decision would not be motivated or disposed to take action to affect the result, unless the litigant was a party to the particular case raising the issue. The one conventional method by which a non-party could be heard on the question in the tribunal has been through the procedural device of submitting a brief as an amicus curiae. Another approach, rarely used, is for interested parties to sponsor academic research whose publication could possibly influence a tribunal's decision.9

Still another possibility is to attempt to influence the shape of a Restatement-in-the-making. Indeed, the ALI has not been a stranger to the attention of interest groups.10 That might be attempted by an interested party, for example, by retaining a lawyer to exert whatever pressure could be brought to bear on the Restatement process. If the lan-

9. A notable example is an article that was based on a research-for-fees report prepared for the Defense Research Institute ("DRI"). See Charles Silver & Kent Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 DUKE L.J. 255, 255 n.3 (1995) (indicating that the article was based on research compensated for by the International Association of Defense Counsel and the DRI); see also Charles Silver & Michael Sean Quinn, Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers, COVERAGE, Nov.-Dec. 1995, at 1, 4 (stating that the views expressed in the article were not approved by the DRI). An earlier example was a pair of articles published by distinguished legal scholars based on expert reports that they had submitted in litigation on the question of the use of jury trial in complex civil cases. See Morris S. Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. PA. L. REV. 829 (1980); Patrick Devlin, Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 COLUM. L. REV. 43 (1980).

guage ultimately adopted improves the position of a repeat-player liti-
gant in a future court, the effort may make economic sense—whether or
not the process or the result is desired by the ALI.

An opportunity to exert such pressure was obviously perceived by
members of the insurance industry with respect to the wording of sec-
tion 215 of the Restatement of The Law Governing Lawyers. The sec-
tion deals with, among other things, the conflict of interest problems of
insurance defense lawyers, particularly lawyers designated by an insur-
ance company to defend suits brought against a person insured under
one of its policies. Early drafts of the Restatement\(^\text{11}\) were obviously per-
ceived by many within the insurance industry as suggesting to courts
certain rules that, the industry feared, would burden insurers and their
designated counsel. Accordingly, a growing effort was mounted to exert
pressure on the Restatement process to alter the section.\(^\text{12}\) The extent to
which the effort was part of a coordinated campaign I do not know, but
various emissaries have purported to speak for all or many members of
the insurance industry in written and oral statements addressed to us
Reporters.\(^\text{13}\)

At one meeting in Washington, D.C. at the American Insurance
Institute—the largest trade association in the industry—a wide assort-
ment of insurance industry representatives filled a fairly large confer-
ence table at which Professor Morgan and I discussed the then current
version of the section. There seemed to be little disagreement among the
emissaries (and much disagreement with the Restatement text). Among
those present, and complaining about the text, was Ronald E. Mallen, a
California lawyer in an insurance defense firm and an ALI member,
who has written the standard treatise on legal malpractice,\(^\text{14}\) and who
had previously corresponded with the Reporters expressing his misgiv-

\(^{11}\) See Restatement (Third) of The Law Governing Lawyers § 215 (Tentative Draft
No. 4, 1991); Restatement (Third) of The Law Governing Lawyers § 215 (Tentative Draft

\(^{12}\) What follows consists only of highlights from the process starting in approximately early
1996.

\(^{13}\) Professor Thomas D. Morgan of George Washington Law Center (whom I did not con-
sult in writing this Article) has been the Associate Reporter most closely connected to Chapter 8,
the conflict of interest chapter in which section 215 appears. Because of his role, Professor Morgan
participated in meetings with insurance industry representatives and fielded some of their written
submissions. The informal arrangement that Reporters have followed from the beginning is that,
one a chapter is in tentative draft form—that is, submitted to an Annual Meeting for tentative
approval by the entire membership—I have assumed the more or less lead role in dealing with cor-
respondence and other attempts to change the document. Thus, with respect to section 215, Profes-
sor Morgan and I were the Reporters chiefly involved.

ings. We also received correspondence from a number of other insurance industry trade associations, most of which took the same position on issues. In political parlance, one can think of these efforts as the full-court press—a more or less concerted effort by spokesmen (there were no female lawyers involved) for the principal insurance-industry players.

Several other efforts were made, whether as part of the full-court press or otherwise. First, an “attack piece” article was published in Coverage, an insurance-lawyer publication of the American Bar Association, by two law professors attacking the Restatement’s position as expressed in the section.15 The article was alarmist and highly argumentative. It mischaracterized several aspects of the Restatement position and frontally called those within the ALI who were allied with the insurance industry to take up arms to defeat the section. Professor Morgan and I responded with, I trust, somewhat more moderation.16 In the end, the exchange of articles seems not to have influenced ALI members generally, at least to the extent that we have detected. On the other hand, the original article did perhaps serve as a kind of rallying point to invigorate interest among those ALI members whose important clients included insurance companies.

The high road was taken primarily by two individuals.17 One person was Robert E. Keeton, senior judge on the federal district court in Boston. Judge Keeton, a former professor at the Harvard Law School and an internationally recognized expert in the law of insurance, co-authored a standard treatise in the field,18 which is cited liberally in the notes to the


17. I pass by several individual interventions, including one by a Cornell Law School alumnus who chaired a Professionalism Committee of the ABA’s Tort and Insurance Practice Section (“TIPS”), which, as is widely known within the ABA, is the group strongly dominated by lawyers who represent the insurance industry. It competes with the Committee on Insurance Coverage Litigation of the ABA’s Section of Litigation, which is dominated by lawyers who represent insureds. The TIPS subcommittee had authored a report critical of an earlier version of section 215. A problem with the TIPS report and apparently endemic in the ALI’s process of repeated republication of drafts of a Restatement is that critics will often have in hand an earlier, and now-superseded, version. That has contributed to several instances of confusion in dealing with section 215.

1998 version of the section. Both in correspondence and in a long, private discussion with him prior to the 1996 Annual Meeting, we exchanged views extensively. We were told at the time (indeed Judge Keeton mentioned this in his conversation with us) that he had been approached by one or more lawyers who favored the insurance industry’s position to solicit his interest and to request that he contact us. Whether that initiative played any part in motivating Judge Keeton’s approach to us I have no idea. Certainly his knowledge of the field by itself would require that we listen to his views with great care. They would carry significant weight with any Reporter and presumably with most members of the Council and membership of the Institute.

What became by far the most controversial personal contact occurred through the offices of Professor Geoffrey C. Hazard, Jr., the Director (that is, the executive director) of the ALI, as the 1996 Annual Meeting approached. He passed on to us a letter written to him on the subject of section 215 by a Chicago lawyer, William T. Barker. Mr. Barker represents insurance companies in his practice. We were unaware of Mr. Barker’s interest at the time. Indeed, his role was well-disguised by his correspondence and conversations with us Reporters, in which he referred to himself as a self-designated interested practitioner who spoke only for himself—perhaps literally true, but hardly forthcoming. In fact, as Mr. Barker would later brag in a self-serving (and typically long) memorandum to his insurance industry colleagues, he viewed himself as an insurance industry emissary spearheading a campaign to persuade the ALI to change its position on several important issues in section 215. According to one journalistic account: “The insurers and their lawyers wrote position papers, identified their supporters in the grass roots [of the ALI], approached key decision-makers through friends and colleagues, and even brought in a federal judge as an advocate to lend prestige and a sense of nonpartisanship to their efforts.”

The final large political effort made to influence the outcome of the discussion and vote on section 215 took the form of not-terribly-subtle pressure on ALI members who were considered susceptible to

22. Id. at 4.
persuasion by insurance industry figures. As the May 1996 meeting approached, a bid was made to influence many of the ALI's 3,000 members:

So earlier this spring [of 1996], several hundred ALI members received letters from the presidents of three major trade associations—the American Insurance Association, the National Association of Independent Insurers, and the Alliance of American Insurers—expressing the industry's concern with the wording of the provision in question.

The insurers also began a quiet get-out-the-vote drive, trying to find sympathetic ALI members and urge them to come to Washington in May [to attend the annual meeting at which a further revised version of section 215 would be considered]. (Only 10 percent or so of the ALI's members usually attend each annual plenary session, so every vote matters.)

While the intensity and deliberateness of the insurance industry's political approach to the ALI probably was not unprecedented, it was uncharacteristically audacious. Soon after the May 1996 meeting, Mr. Barker sent a memorandum outlining his self-described lobbying work to the executive committee of the International Association of Defense Counsel. (The document also soon found its way to the Internet, on the website of Counsel Connect, and from there was widely read by ALI members and lawyers generally. Several copies were sent to me, sometimes with hot words about my complicity in Barker's efforts, sometimes with an expression of sympathy for my having been misled.) In his memorandum, Mr. Barker described his past lobbying efforts and provided the following account of his intent to keep up his good work for the insurance industry: "As I am the only one from the insurance defense community who has been able to make much headway with the Reporters, I am assiduously cultivating my relationship with them and attempting to improve and protect what we had already agreed to."

It is probably fair to say that, more than any single event, publication of the Barker memorandum served to chill the insurance industry's influence, whatever it had been to that point. Among other things, needless to say, on seeing myself publicly described as the object of a calculated effort to assiduously cultivate a relationship, I have reverted to "Mr. Barker" from my customary, midwestern-derived habit of call-

23. But see infra note 44 (quoting the ALI bylaw requiring a quorum of one-fifth of ALI members at the Annual Meeting).
25. Id. at 5.
ing all people with whom I have dealings by their first names. Much more importantly, as will sometimes occur in reaction to audacious political moves, the Barker insurance lobbying produced a dogged determination on the part of many ALI members not to let the industry have its way. That determination may have been initially misread by the insurance lobbyists. About the time of the May 1996 meeting, Mr. Barker applied for membership in the ALI. Perhaps to his surprise, he was accepted—which is hardly routine, even for well-connected lawyers at prestigious law firms. He soon designated himself a member of the Members Consultative Group for the Restatement, a prerogative of any member. Thereafter, Mr. Barker has made himself prominent at Members Consultative Group meetings discussing subsequent drafts of the section, almost invariably with several fervent and equally vocal opponents from among the members attending, who have provided rebuttal. At least in those meetings—and quite apart from the merits of the substantive positions urged—it appears that the insurance industry’s lobbying effort has called forth what, as far as I know, is an entirely unorganized but vocal opposition to the effort. In effect, the way in which the lobbying has been handled has been at least somewhat counterproductive.

I forego any attempt here to rehash either the merits of various positions that we have taken in the Restatement on questions of the ethical duties of carrier-designated defense counsel, or the extent to which our emerging position was in fact significantly influenced by the insurance industry lobbying effort. Suffice it for present purposes to say that Mr. Barker and I negotiated a proposed amendment to present at the 1996 Annual Meeting that would have replaced certain language in the text of the comment to section 215 and at other points dealing with insurance defense issues. When I discovered, late in the process, that Mr. Barker was not a member of the ALI, he suggested that Ronald Mallen,

26. According to the ALI’s bylaws, an applicant must be nominated by a person who is already an ALI member, supported by seconding letters from two other members. See The Am. Law Inst., Bylaw § 2.06, reprinted in 74 A.L.I. Proc. 521, 522 (1997) (“To become an elected member, a person must be proposed in writing by a member, seconded in writing by two members, and recommended by the [Council] Committee on Membership. The Council may impose additional membership requirements.”).

27. I recall hearing ALI Council members at a subsequent Council meeting discussing his application in the corridors in largely negative terms, but I was not part of the conversation and said nothing about it, nor was I asked for my views.

28. On a rough count, the Members Consultative Group for the Restatement are approximately 600, or roughly 20%, of the ALI’s entire membership.

an ALI member, could present it. Mr. Mallen did so, although with only a bit more than half-hearted support, expressing the view that the proposal still treated insurance defense lawyers too harshly. The amendment drew strong criticism from perspectives that suggested sentiments both for and against more rigorous restrictions on insurance defense lawyers. Several members in conversation expressed strong misgivings about the manner in which the amendment had been secretly negotiated. The upshot was that a motion to recommit section 215 carried by voice vote. A further reworking of the section and comment is returning to the members for the 1998 Annual Meeting.

Suffice it to say that I think we have it largely right in the version of the section that is going to the Institute for final consideration in May 1998 in Proposed Final Draft No. 2. There will undoubtedly be insurance industry misgivings about some of our positions, and some ALI members will probably harbor the thought that we Reporters have sold out to industry pressure and blandishment. While it is obviously self-serving, I will say that I think every change we made in the direction of the industry’s suggestions has reflected a better-educated understanding of legitimate insurance industry practices and a realistic acceptance of the needs of the industry in situations that are not threatening to policy holders. But the merits, for this occasion, are off the point. My more modest purpose here is to think again about Bismarck’s sausages remark in light of the visibly political nature of the insurance industry’s self-conscious attempt to influence the Restatement.

30. In moving the amendment, Mr. Mallen said: “I am the mover, but I am also the guardian of the motion, because the motion reflects the input of many in the insurance industry, defense lawyers, insurers, people outside the industry who have been working very hard with the Reporters over the last few weeks.” Continuation of Discussion of Restatement of the Law Third, The Law Governing Lawyers, 73 A.L.I. Proc. 367, 395 (1996).

31. See id. at 396 (“I would like to at least express on a personal level my views of the criticism [that others had directed to the compromise] and why I tell people I am only about 70 percent satisfied, but we are willing to live with what we have.”).

32. See id. at 398-99 (proposing “reputational interests” to be added to those considerations that the insured-client could assert in directing a lawyer to accept or reject a settlement offer); id. at 399 (expressing concern that a lawyer’s duty to the insurance company as client should yield to paramount duties owed to the insured as client); id. at 402 (objecting to the concept that the insured-client consents to the insurance-defense lawyer’s conflict through proffering defense to the company); id. at 403 (supporting prior speaker); see also id. at 404 (rejecting a motion to require explicit insured-client consent to the representation by a lawyer paid by the insurer on a vote of 80-110).

33. The primary speaker was Mr. Mallen, joined by Mr. Keeton. See id. at 406-08.

34. See id. at 414. Professor Charles Alan Wright, President of the ALI, who was presiding at this point, required no show of hands because the motion clearly carried.

The issue presented by the insurance lobbying effort obviously is not about writing letters to the Reporters. Letters, as we have continually urged ALI members, have had a much more profound effect than speeches that fill the volumes of *ALI Proceedings*. By their nature, letters permit a member to develop and refine a thought, to cite authority, and to argue specific language changes. I suspect I am like other mortals in my ability, on average, to retain and appreciate much more thoroughly a well-considered letter than a less well-considered set of extemporaneous remarks. Letters also can be, and are, shared with the other Reporters and with the Director to give the writer's views a broad reading and to stimulate other reactions than my own. Others—both ALI members and non-members—have, of course, written to us about section 215, some of them extensively.\(^\text{36}\)

The issue, to my mind, is also not about self-consciously organized efforts to affect changes in a Restatement draft. To cite only one example, a subcommittee of the ABA's Section on Business Law has met periodically for years to consider current drafts of the Restatement. (I am informed that all of its members are also ALI members. At least two are members of the Adviser group for the Restatement, and one is a member of the ALI Council.) While I have never met with the group, my co-Reporters have done so, and they have reported back interesting substantive discussions of important points that have occasionally led to changes as the draft has gone forward. But this effort strikes me as quite different from the insurance industry effort. The ABA group is both large and diverse, and it meets in public—at least in the sense that its meetings are open to other Business Law Section members or others attending the ABA meetings coinciding with which it meets. In addition, although this may be only a matter of personal style and taste on the part of its members (and on my own part), the group has been quite circumspect in making its views known to me or my co-Reporters. Indeed, as far as I have been able to tell, the only apparent outcome of its work that has been critical has taken the form of individual members of the group making motions to amend tentative drafts at Annual Meetings of the ALI.

In contrast, the insurance industry campaign provides a useful op-

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36. For example, Professor Nancy J. Moore, who is both an Institute member and a member of the Adviser group for the Restatement, sent us in August 1997 the manuscripts of two articles on subjects dealing with the section, and which have subsequently been published. See Nancy J. Moore, Ethical Issues in Third Party Payment: Beyond the Insurance Defense Paradigm, 16 REV. LITIG. 585 (1997); Nancy J. Moore, The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?, 4 CONN. INS. L.J. 259 (1997-1998).
portunity to consider the extent to which the ALI is susceptible to interest-group political influence of the more overt type. A related question is whether the ALI would be well-advised to adopt additional institutional mechanisms to deal with such pressures, to the extent they exist.

I start, as would most ALI members, with one of its cherished traditions—that all ALI members leave their clients at the door. This approach is hardly unique to the ALI. Most other law reform groups attempt to instill in members a similar approach. It is commonly discussed, for example, among ABA groups dealing with such issues as the judicial selection process. For the ALI, the principle serves several important purposes. It at least conveys to ALI members the institutional hope that they will make an effort to maintain objectivity, to the extent that is humanly possible, as they consider, discuss, and vote on Restatement proposals. It conveys to judges and others who would treat the ALI’s work as authoritative that the ALI makes an effort to maintain objectivity in its work. It may occasionally provide comfort to an ALI member who may thus be emboldened to take a public position contrary to the interests of a client, armed now with the ALI’s own endorsement of his or her intellectual independence. It is, of course, only a principle and could hardly be enforced as a rule.

Rarely, if ever, have I witnessed an ALI member so oblivious to the principle as to publicly admit that a position is being urged on behalf of a client. And, unconfessed, an offense against the principle would be impossible otherwise to detect with confidence. But to conclude that violations of the principle are entirely undetectable or not subject to sanction would also be a mistake. I have seen several outbreaks in the course of ALI discussions that indicated rather clearly that members

37. A more Machiavellian, covert political effort could, of course, have been entirely successful. The insurance industry, for example, could have had a fronting ALI member propose a “safe” industry-approved amendment to the 1996 Annual Meeting with insurer-influenced ALI members voting uniformly for it. I am unaware, of course, whether such a covert effort has been made with respect to other issues raised by the Restatement, and have had no inkling that such action has been attempted in this case.


To maintain the Institute’s reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. Members should speak and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest. It is improper under Institute principles for a member to represent a client in Institute proceedings. If, in the consideration of Institute work, a member’s statements can be properly assessed only if the client interests of the member or the member’s firm are known, the member should make appropriate disclosure, but need not identify clients.

Id.
thought that a speaker was grinding too narrow a point on his or her axe, possibly for the benefit of a client. The suggestion has always been resisted by the speaker being attacked, but the possibility of such a suggestion probably serves as a significant deterrent to any speaker who is at risk of being identified as a proponent of a particular client's point of view.

Let me hasten to add that I do not claim that the objectivity principle is never violated within the ALI. If nothing else, the familiar human difficulty in separating out the interests of one's friends and financial supporters from positions to which one is intellectually committed caution against such naiveté. My point instead is that the principle is symbolically important both to the ALI as an institution and to its members, and that it is worth working to strengthen and preserve, even admitting that instances of its violation may undetectably occur.

If, then, the principle is important, what is to be said of the ALI's apparently knowing willingness to accept as a member a lawyer, Mr. Barker, who continued to assert that he had political designs on the organization of a kind that, in my view, appear to be entirely inconsistent with the principle? For myself, had I been asked (again, I was not), I would have doubted Mr. Barker's at least instinctual capacity to abide by the principle. And his subsequent efforts at Members Consultative Group meetings seem a part of his pre-membership efforts on behalf of the insurance industry. While I have no information on why his membership was accepted, in retrospect it appears to have been entirely defensible, even masterful. Within the ALI, Mr. Barker has the same status as any other member—including with respect to his expected honoring of the objectivity principle. He makes his positions known in the same manner as all other members are entitled to do—no more and no less. The most important aspect of most of these opportunities (including with respect to continuing correspondence from him) is that the opportunities are public—at least in the sense that others within the ALI can hear them and react to them. In short, although the subject is probably more complex than my account allows, Mr. Barker has been somewhat neutralized in his influence by being accepted as an ALI member.

Surely, the ALI process of generating a Restatement is hardly artful or even inartfully democratic. The ALI is a private organization that determines its own membership, and at that confers membership for life. It has made only partial strides in opening its membership to lawyers (and note, only lawyers) from broadly diverse backgrounds, practice areas, economic situations, and geographic areas. It can hardly
claim to speak for the body politic, despite the fact that its work is specifically designed to affect the body politic in the most direct way possible for legal prescriptions. Its processes are highly imperfect. Perhaps its chief imperfection is its hardy devotion to amateurism. Only Reporters and, to a lesser extent, members of the Advisers group to a Restatement are consciously selected on the basis of prior demonstration of competence, or even interest, in the substantive area to be covered by the Restatement. (The familiarity of even some Advisers may be based on a single, known incident, perhaps long past in their lives.) Aside from a small permanent professional staff (which, in any event, seems to have very little say on substantive matters), the ALI functions as an association of part-time volunteers—volunteers who, in certain instances, work with incredible persistence and dedication to further its projects. If the ALI triumphs in a substantive area, it is then the triumph of amateurs and part-timers. Viewed realistically, the goal of the ALI's initial academic founders to establish a true research organization has been realized only modestly by the ALI's structure and procedures.

The structure and rules of the ALI would also seem to make it a remarkably easy target for external political influence. The text of a Restatement, I say with humility, is largely the product of the Reporter. The Reporter must answer, of course, to a group of Advisers, but their oversight is incomplete. Limitations of time and expertise will always be a constraint for most Advisers. To the extent that individual Advisers are intimately familiar with a field, they bring both strength and weakness to deliberations. Their familiarity may lend a kind of "insider" aura to discussions, but it does not always illuminate them. Because the Adviser group is small by design (in order to encourage responsibility in studying texts and depth of discussion), its membership may be correspondingly limited in its experience, insights, and points of view. Again, because Advisers are entirely volunteers, one could hardly insist upon or expect uniformly high levels of preparation for meetings or pervasive impact on a Reporter's product.

Control beyond the Adviser group is exerted much more broadly by a Members Consultative Group that is now set up for each Restatement. 39 Large and growing, 40 the self-selected membership 41 of the group

39. An ALI invention of a decade ago, the idea of a Members Consultative Group was inaugurated with the group that has accompanied the Restatement of The Law Governing Lawyers. I confess that I was initially dubious about the value of the newly established group, beyond providing a perhaps illusory opportunity for more direct participation by ALI members. In retrospect, the group has proved extremely important for the Reporters.

40. See supra note 29.
can be deceptive. Meetings are very well-attended, but only by the standards of a voluntary organization. Perhaps one-third of group members will attend a meeting to discuss a draft—a figure which is remarkable in a voluntary organization, considering that members must forego at least a day of remunerative work and often incur substantial travel time and expenses that are not reimbursed (other than by a token box lunch). Other members seem to have joined the group primarily to obtain copies of early drafts of the Restatement, perhaps for the information of their firm or for their scholarly interest, and never or rarely appear at meetings. Meetings of the group are, however, both lively and highly informative. On a minute-by-minute basis, meetings of the Members Consultative Group have probably exceeded those of any other group with which we have met in terms of the depth and range of important new insights. Although the group is self-selected, and only from within the existing membership of the ALI, and because there is no quorum rule governing its meetings, one may doubt whether the expressed views of its membership accurately reflects even the views of the membership of the ALI. But, in fact, the tenor of discussion at Members Consultative Group sessions has often (although hardly invariably) foreshadowed with considerable accuracy the kind of discussion that a provision will excite at an Annual Meeting of the entire membership on the same matter.

Beyond meetings of the Reporters, the Director, and both the Advisers and Members Consultative Group, a draft is further revised and then submitted to the Council of the ALI in a council draft. The ALI’s Council also functions with a loose quorum rule and has often passed motions directed to the Restatement by split vote of far less than its full membership. Indeed, at least one of its long-time members I do not recall ever seeing in attendance at a meeting, and several members attend only sporadically. Quite beyond the burdens imposed on Advisers and Members Consultative Group members, members of the Council are expected to be prepared to discuss as specialists a large stack of drafts on a bewildering variety of subjects that are considered at each of their

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41. See The Am. Law Inst., Council Rule 10.03, supra note 38, at 536 (“Any member of the Institute may join a members consultative group, the meetings of which may be held with some or all members . . . .”).

42. See The Am. Law Inst., Bylaw § 4.09, supra note 26, at 523 (“One-third of the Council members eligible to vote constitutes a quorum for a Council meeting, but one-third need not be present at all times.”).

43. The ALI’s Council consists of both voting members and non-voting, emeritus members who are entitled to attend and discuss drafts. See The Am. Law Inst., Council Rule 9.01(E), supra note 38, at 535.
substantive meetings. I strongly suspect that most Council members do not read all drafts. This is hardly surprising, reflecting only the inherently impossible demands placed on public-spirited men and women who all lead very active professional lives. It also might be that the Council members whom I have missed at meetings have made a conscious decision to focus their time and efforts on drafts of other projects that they personally consider more important or more familiar. Because the group is asked to vote, including on amendments that any member may propose, there seems to be a necessary tendency on the part of many members to base their vote only or largely on the discussion at the meeting, typically compressed because of time constraints, and their general regard for the views of the few individual Council members who speak for and against. Some Council members seem to command much more respect than others, a respect that is hardly always proportional to either sheer brain power or degree of acquaintanceship with the material.

After approval by the Council, a draft is revised still further for presentation at a forthcoming Annual Meeting—which nominally includes all ALI members. The quorum rule governing Annual Meetings is minimal. In fact, far fewer than half of ALI members will attend the meeting, which by tradition is held in May, in Washington, D.C., and at the Mayflower Hotel. Member attendance at sessions of the Annual Meeting at which the Restatement has been considered has varied significantly, and not only by the degree of interest and controversy generated by the text being considered. As with any organization, agenda control can be central. For years, the meetings were scheduled for four days, ending on Friday afternoon. Whatever draft was being considered on the last afternoon was often reviewed by fewer than one hundred members, notwithstanding that amendments could be offered and debated and binding votes taken. The Restatement has had to take its turns on the agendas of Annual Meetings, and it has occasionally been debated with such a withering membership in attendance.

The picture I paint is one of an institution whose inevitable imperfections are such that it seems readily susceptible to bold attempts to manipulate a Restatement product. Why should not any potential con-

44. According to the ALI's bylaws, a quorum for any session of an Annual Meeting “is established by registration during the meeting of one-fifth of the voting members.” The Am. Law Inst., Bylaw § 3.02, supra note 26, at 522.

45. See id. Bylaw § 3.04 (“A majority vote of members voting on any question during any meeting or session is effective as action of the membership.”).
sumer of a Restatement fear that the product beneath the casing may be seriously contaminated?

Perhaps, in the end, the difference is that sausage is made in private while Restatements, when well-made, are made in public. In short, the relatively public nature of each major step in the ALI process may be its best assurance of adherence to the objectivity principle. To be sure, the earliest drafts are circulated only among Reporters and, if applicable, the Director, and they are hardly known to anyone else. But the course of any modern Restatement must thereafter find its way through at least four additional more or less public and highly critical airings. While the review and discussion of a draft with the members of a small (twenty or so) Adviser group may not warrant much confidence that the public will know of the draft, the concurrent review (always of the same draft) by the Members Consultative Group is an entirely different matter. This much larger, self-selected group can include all spectrums of opinion within the ALI, including those members who may have deep misgivings about the direction a Restatement and its drafters might take. While the draft considered by the Members Consultative Group is always called “preliminary,” that does not prevent its wide dispersal among academic lawyers, practitioners, and judges. Several major law libraries now maintain collections of preliminary drafts. The public nature of the preliminary draft document can now be augmented by posting it on the Internet, as is now being done with projects recently initiated. The ALI has in recent years stood ready to sell copies even of preliminary drafts to any inquirer.

The Restatement process also facilitates systematic review beyond the ALI. The tortuously slow pace at which a Restatement is produced does create multiple occasions for broad public consideration of the issues raised by the section. Several scholarly groups have considered the Restatement, and one such meeting specifically addressed section 215, including as principal speakers at least two persons who spoke for the insurance industry point of view. The scholarly and practitioner attention thus devoted to issues and language in the Restatement has pro-

46. The Westlaw on-line database service of West Publishing Company carries copies of Restatements, but only those finally approved appear in its “Law Reviews, Practice Guides, Legal Texts & Periodicals” database under the heading “Restatements of the Law & Uniform Laws.”

47. The Restatement’s first preliminary draft was produced in 1986. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Preliminary Draft No. 1, 1986). With luck, the final two-volume work will be published officially in 1999. See supra note 1.

48. I refer to the January 1997 meeting of the Section on Professional Responsibility of the Association of American Law Schools, which consisted of a series of papers on ethical issues involved in representing an insured.
vided further opportunity both for education of ALI members about issues and for the Reporters to sharpen the draft. While there is nothing in the ALI's constitutive documents so indicating, current Director Professor Hazard has repeatedly, personally and enthusiastically endorsed the notion that Reporters should meet with as many groups and participate in as many public discussions of a Restatement-in-process as possible. The objective goes beyond public relations, although it may include that. Broad and repeated public discussion of Restatement drafts both legitimates the process by requiring detailed public defense of its provisions by its Reporters and provides multiple opportunities for the Reporters to become educated about both facts underlying a particular problem area to which they may not previously have been exposed and concepts and attitudes that previously may also have eluded them.

Like many other long-standing and successful organizations, the ALI at times seems to work well in spite of itself. While no single inspired genius could possibly lay claim to all important features of its structure and process, the composite wisdom of many fine minds who have cared deeply about the quality of its products has created an organization that may, for its time and in this place, work about as well as is realistically imaginable. Political sorties against a Restatement draft may again be launched, but it seems that, muddling along, the ALI can absorb, deflect, and neutralize at least the most ham-fisted of those efforts.