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## Legal Ethics and Law Reform Advocacy

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# ARTICLE

*Jeffrey W. Stempel\**

## Legal Ethics and Law Reform Advocacy

**Abstract.** Social activism, particularly law reform, has long been an accepted, even revered part of the lawyer’s identity. However, modern developments such as nation-wide firms, the economic importance of client development, and aggressive attempts by clients to deploy attorneys as de facto, undisclosed lobbyists have put substantial pressure on the traditional vision of the attorney as a “lawyer-statesman” or someone who “checks clients at the door” when participating in law reform activities. Furthermore, law reform activism on behalf of one client (or prospective client when attorneys use their law reform lobbying as part of their marketing strategy) poses a real danger of injury to other law firm clients. The latter may lose cases influenced by Restatements, Model Acts, Committee Reports, or White Papers produced by law reform organizations.

Law reform organizations have paid insufficient attention to the problem of the partisan participant, and the legal profession has failed to sufficiently appreciate the positional and institutional conflicts created when lawyers engage in politico-legal activism on behalf of clients. Both problems undermine the lawyer-statesman ideal and create impermissible positional conflicts of interest disserving clients.

Lobbying surrounding the American Law Institute Restatement of the Law of Liability Insurance (RLLI) exemplifies both problems and the profession’s insufficient response to date. Recognition and appreciation of the problem demonstrate the need for a new regime of increased disclosure (to clients, law

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reform organizations, and the public), scrutiny, and enforcement of neutrality and conflict norms. If properly observed, a heightened appreciation of the problem would likely require lawyers and firms to decline certain engagements or at least obtain the consent of those potentially adversely affected.

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## I. INTRODUCTION

Since perhaps even before the founding of the United States, the legal profession has participated in politics, public policy, and “the law,” narrowly defined. In *Democracy in America*, Alexis de Tocqueville observed that in the U.S., nearly every political question tended to become a legal matter eventually.<sup>1</sup> Although perhaps not strictly empirically accurate, de Tocqueville’s observation summarizes well the degree of involvement traditionally exercised by lawyers in America’s polity. Many presidents have been attorneys,<sup>2</sup> as have a large number of federal, state, and local

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1. Or, more completely:

There is hardly any political question in the United States that sooner or later does not turn into a judicial question. From that, the obligation that the parties find in their daily polemics to borrow ideas and language from the judicial system. Since most public men are or have formerly been jurists, they make the habits and the turn of ideas that belong to jurists pass into the handling of public affairs. The jury ends up by familiarizing all classes with them. Thus, judicial language becomes, in a way, the common language; so the spirit of the jurist, born inside the schools and courtrooms, spreads little by little beyond their confines; it infiltrates all of society, so to speak; it descends to the lowest ranks, and the entire people finishes by acquiring a part of the habits and tastes of the magistrate.

ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 441 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (1835).

2. Although only six presidents have formal J.D. degrees—Theodore and Franklin Roosevelt (Columbia), Richard Nixon (Duke), Barack Obama (Harvard), Gerald Ford and Bill Clinton (Yale)—many other have some form of law degree (e.g., the Bachelor of Laws of William Howard Taft, who was Chief Justice) with others (most famously Abraham Lincoln) having at least studied or read law and practiced as attorneys. Other lawyer-presidents include John Adams, Thomas Jefferson, James Monroe, John Quincy Adams, Andrew Jackson, Martin Van Buren, John Tyler, James Polk, Millard Fillmore, Franklin Pierce, James Buchanan, Rutherford B. Hayes, Chester Arthur, Grover Cleveland, Benjamin Harrison, William McKinley, William Howard Taft, Woodrow Wilson, Calvin Coolidge, and Harry Truman. See Chelsea Beran, *Before They Were Presidents . . . They Were Lawyers*, L. TECH. TODAY

officeholders, despite some decline in recent years.<sup>3</sup> Lawyers continue to heavily populate the ranks of lobbyists, political operatives, and sociopolitical activists.<sup>4</sup> But even if the fabled lawyer-statesman<sup>5</sup> is not as predominant as was once the case, the activist lawyer remains an important part of public policymaking.

In the two centuries since de Tocqueville wrote *Democracy in America*, changes in the practice of law and the politics of law reform have combined to change the manner in which lawyer activism takes place, arguably increasing lawyer conflict of interest and infidelity to the cause of law reform. Lawyers today seldom engage in solo practice confined to a particular locality.<sup>6</sup> Increasingly, law practice takes place in large, multi-office firms, a business model more likely to make one segment of the firm unaware of the clients and work of other segments of the firm despite modern conflicts-checking software.<sup>7</sup>

Even when counsel notes actual or potential conflicts, the increasingly profit-driven orientation of modern law practice may lead counsel to minimize them and forge ahead without client consent in the interests of maximizing revenue and in the belief that observed tensions in client interest do not rise to the level of an actual conflict. This practice is a particular

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(Feb. 15, 2016), <http://www.lawtechnologytoday.org/2016/02/before-they-were-presidents-they-were-lawyers> [<https://perma.cc/US8N-U7Z3>].

3. See Jeffrey W. Stempel, *Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values*, 5 NEV. L.J. 479, 480–88 (2004) (describing the declining influence lawyers have in politics).

4. The decline of lawyer representation in state legislatures has been particularly pronounced. Disturbingly so for those of us who think lawyers are generally good analysts and valuable additions to a deliberative political body. Fifty years ago, it appears a third or more of many state legislators were attorneys. By the 21st Century, it was unusual to have legislatures where more than a fifth of the members were lawyers. See *id.* at 484–85 (providing the percentage of attorney-legislatures in some states over several decades).

5. I use the term both because it has been popularized by Tony Kronman and because it serves as a shorthand reference for describing attorneys involved in public policy issues and public service. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). I use the term as coined despite its arguable gender bias.

6. See David Thomas, *Big Law Has Saturated the Biggest U.S. Cities. Where Is the Next Frontier?*, LAW.COM (March 2, 2020, 5:00 AM), <https://www.law.com/americanlawyer/2020/03/02/big-law-has-saturated-the-biggest-u-s-cities-where-is-the-next-frontier/> [<https://perma.cc/54E6-YPK8>] (observing how Big Law firms are expanding into secondary legal markets such as Phoenix, San Diego, Nashville, Las Vegas, and others by merging with smaller local firms).

7. See *id.* (“To say the legal business in the United States is only in New York or California or Chicago or Washington . . . is simply false and misunderstands the breadth of how legal business is done, both inbound and outbound,” [Denton’s U.S. CEO Mike] McNamara says. “It is a far too limited view of where companies are spending on legal services.”).

danger when the arguable conflict occurs not in litigation but in what may broadly be labeled “law reform” activity.

By law reform activity, I mean the work of organizations seeking to improve the law either through clarification or revision. Examples of law reform organizations include local,<sup>8</sup> state, and national bar associations such as the ABA,<sup>9</sup> as well as national organizations such as the ALI<sup>10</sup> and NCUSL.<sup>11</sup> These are what might be termed “pure” law reform organizations widely regarded as neutral, non-partisan, and reliable.

Although attorney organizations such as the AAJ<sup>12</sup> and DRI<sup>13</sup> often provide useful information and analysis, they are at bottom advocacy groups that view legal issues from a, particularly, avowed perspective. Similarly,

8. For example, the New York City Bar Association, formally known as the Association of the City of the Bar of New York (ABCNY) regularly produces extensive committee reports and recommendations regarding legal doctrine and proposed changes in legislation and regulation. *About*, N.Y.C. B., <https://www.nycbar.org/about> [<https://perma.cc/RHT5-R6LB>]. It may be a bit misleading to describe the bar association of one of the world's largest and most influential cities (in which it has its own Midtown headquarters) as “local,” but similar activity is found on a reduced scale in cities throughout the U.S.

9. The American Bar Association regularly produces and revises model codes and model rules to govern the conduct of lawyers and judges, something it has done since the ABA Canons of Ethics were promulgated in 1908. *See, e.g.*, ABA Model Rules of Professional Conduct; ABA Model Rules of Judicial Conduct; ABA Standards Regarding Lawyer Discipline. *See Model Rules of Professional Conduct*, AM. BAR. ASS'N., [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) [<https://perma.cc/HZ4K-8TDC>].

10. The American Law Institute regularly produces Restatements of the Law and Principles of the Law that set forth suggested “correct” doctrine to guide courts. *See, e.g.*, RESTATEMENT (THIRD) RESTITUTION (2011); RESTATEMENT (SECOND) OF CONTRACTS (1981). *See also How ALI Works*, AM. LAW. INST., <https://www.ali.org/about-ali/how-institute-works/> [<https://perma.cc/A7KA-PXBX>].

11. The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission, regularly produces model acts that it then presents to state legislators, urging enactment. *See, e.g.*, Uniform Commercial Code; Uniform Arbitration Act. *See Overview*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/44AP-F6CF>].

12. The American Association for Justice, formerly the American Trial Lawyers Association, is an organization of plaintiffs' counsel committed to advancing the cause of personal injury plaintiffs. *See Mission & History*, AM. ASS'N FOR JUST., <https://www.justice.org/who-we-are/mission-history> [<https://perma.cc/87Q3-GGD4>].

13. The Defense Research Institute is an organization of defense counsel that includes attorneys who regularly defend claims against policyholders (often referred to as “panel counsel” as the attorneys are on an insurer's approved panel of attorneys for retention as defense counsel) and who regularly represent insurers in cases involving insurance coverage. *See About Us*, DEF. RES. INST., <https://www.dri.org/about/about-us> [<https://perma.cc/S67X-4FY9>].

organizations such as the ACA,<sup>14</sup> the Federalist Society,<sup>15</sup> the Lawyers' Committee for Civil Rights,<sup>16</sup> and even the sometimes shrill ATRA<sup>17</sup> often have valuable things to say—but such groups have a pronounced political slant that differentiates them from the classic good government or law reform organizations.

Although they are widely respected, I am placing organizations such as the ACLU,<sup>18</sup> the NRDC,<sup>19</sup> the EDF,<sup>20</sup> and “think tank” organizations such

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14. The American Constitution Association is a group of “progressive” lawyers whose goals generally include expansion of the legal rights of individuals vis-à-vis business entities and a more expansive role for government in the protection of individual rights and expanded government regulation. *See About ACS*, AM. CONST. SOC'Y, <http://www.acslaw.org/about-us/> [<https://perma.cc/AG67-4YDD>].

15. The Federalist Society is a group of “conservative” lawyers whose goals generally include protection of commercial activity, reduced liability and damages, constrained government regulation, and expanded executive powers. *See Our Background*, FEDERALIST SOC'Y, <https://fedsoc.org/our-background> [<https://perma.cc/3LCE-WZAT>].

16. The Lawyers Committee for Civil Rights Under Law is a civil rights organization with the avowed mission of seeking to secure equal justice under law for all through the rule of law by enlisting the aid of the private bar in litigation, with a particular focus of aiding African-Americans. *See Mission*, LAW. COMMITTEE FOR C.R. UNDER L., <https://www.lawyerscommittee.org/mission/> [<https://perma.cc/QVR8-V4EN>].

17. The American Tort Reform Association lobbies for “tort reform,” which in practice tends to mean lobbying for restricted tort liability. Among its activities is a yearly naming of “Judicial Hellholes”—jurisdictions regarded by ATRA as unduly pro-plaintiff. *See Judicial Hellholes Abuse Nation's Civil Justice System*, AM. TORT REFORM ASS'N (Dec. 10, 2019), <http://www.atra.org/2019/12/10/judicial-hellholes-abuse-nations-civil-justice-system> [<https://perma.cc/P4EG-QXPK>] (naming in its list of ten such “hellholes” California, Georgia, Louisiana, and Oklahoma). The American Legislative Exchange Council, or ALEC, operates in a similar ideological vein, promoting legislation favored by political conservatives. Its motto is “limited government, free markets and federalism.” *See About ALEC*, AM. LEGIS. EXCHANGE COUNS., <https://www.alec.org/about/> [<https://perma.cc/H5MU-WNGK>].

18. The American Civil Liberties Union, or ACLU, is a nonprofit organization founded in 1920 “to defend and preserve the individual rights and liberties” guaranteed to every person in the U.S. according to the Constitution and laws of the U.S. It is popularly known as an organization emphasizing free speech. *See About the ACLU*, AM. C.L. UNION, <http://www.aclu.org/about-aclu> [<https://perma.cc/3K5Q-2EWL>] (discussing the purpose of the ACLU).

19. The National Resources Defense Council, or NRDC, is an environmental activist group known for bringing litigation as a primary tool for promoting environmental protection. *See About Us*, NAT. RESOURCES DEF. COUNCIL, <https://www.nrdc.org/about> [<https://perma.cc/6T4Z-4JZA>].

20. The Environmental Defense Fund (EDF) is an environmental organization similar to the NRDC, *see supra* text accompanying note 19, but one known more for lobbying and position papers and less for litigation as compared to the NRDC. *See Our Mission and Values*, ENVTL. DEF. FUND, <https://www.edf.org/our-mission-and-values> [<https://perma.cc/LQ89-2VEY>].

as the Heritage Foundation<sup>21</sup> and the Cato Institute<sup>22</sup> into the interest group category. The Brookings Institution<sup>23</sup> and the Rand Corporation<sup>24</sup> often impact public policy but are better described as think tanks rather than as law reform organizations per se. Although both are less partisan, or agenda-driven than other advocacy groups, they are not really membership organizations in the same category as the ALI, the ABA, or other bar associations.

In this Article, I will focus primarily on the pure or flagship law reform organizations. It is those organizations about which I am concerned, and it is those organizations that should be most concerned should their members participate in organization activities in order to serve or attract clients, rather than providing their best legal and policy analysis, unburdened by client interests or the prospect of pecuniary gain.

By contrast, what might be termed the “interest group” law reform organizations are generally identified as advocacy groups, and their work is evaluated through a prism of their avowed goals and perhaps even palpable partisanship. A DRI or AAJ position paper or lobbying effort may prove persuasive—but not because informed readers view it as coming from a neutral source or a consensus-building and balanced organization. Although the “brand” of these organizations may have a powerful signaling effect to their constituents, judges and policymakers are generally on notice of (and presumably on guard about) their partisanship.

The work of the pure law reform organization comes with an aura of authority, reliability, fairness, neutrality, and accuracy that interest group law

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21. The Heritage Foundation is a conservative research group known for promoting conservative public policy. See HERITAGE FOUND., <http://www.heritage.org/> [https://perma.cc/8DB7-U3MB] (“We are ramping up our efforts to get [Republican leadership] conservative policy solutions that will shrink the size of government, reform the tax code, dismantle Obamacare, and secure our borders.”).

22. *About Cato*, CATO INST., <https://www.cato.org/about> [https://perma.cc/G73X-TRP5]. The Cato Institute is a libertarian think tank founded by, among others, Charles Koch. Koch is the CEO of energy conglomerate Koch Industries and is known for promoting limited government. See Peter Bondarenko, *Cato Institute*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Cato-Institute> [https://perma.cc/5EEP-FLKC].

23. The Brookings Institution is a research group, founded in 1916, known for economic analysis and promotion of moderate to liberal public policy. *About Us*, BROOKINGS INST., <https://www.brookings.edu/about-us/> [https://perma.cc/4M5A-URB9].

24. The Rand Corporation is a nonprofit research organization initially created and funded by Douglas Aircraft Company to offer research and analysis to the U.S. armed forces. The group is viewed as tending to favor moderate to liberal public policy. *History and Mission*, RAND CORP., <https://www.rand.org/about/history.html> [https://perma.cc/3JQ9-L9PW].



reform organizations cannot claim. Historically, the work of the pure organizations is more likely to result in applicable law, through the enactment of model statutes and model rules or the adoption of the organization's suggested legal doctrine by courts.

Consequently, lawyer input regarding the work of these organizations must be as free as feasibly possible of partisanship on behalf of a lawyer's clients or self-interest. An ABA Model Rule or ALI Restatement section resulting from a member's<sup>25</sup> successful lobbying on behalf of a client or

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25. Lobbying activities by non-members is also problematic, as are non-member efforts to subvert the neutrality of the law reform organization's work and work product. See Elizabeth Laposata, et al., *Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1, 9–12 (2012) (explaining counsel attempted, with some success, to influence the content of RESTATEMENT (SECOND), TORTS § 402A by submitting position papers and letter briefs and by employing Restatement Reporters as consultants and expert witnesses). But see Lance Liebman & Roberta Cooper Romo, *The ALI's Response to the Center for Tobacco Control Research & Education*, 98 IOWA L. REV. BULL. 1, 1–2 (2013) (taking issue with assertion and defending ALI process); Keith N. Hylton, *Lobbying and the Restatement of Torts*, JOTWELL (Apr. 3, 2013), <https://torts.jotwell.com/lobbying-and-the-restatement-of-torts/> [<https://perma.cc/LW5E-KG9V>] (reviewing Laposata, finding argument that Restatement Reporter William Wade Prosser “caved in to tobacco lobbyists unpersuasive” but conceding that “[t]he Restatement process is vulnerable to lobbying.”). See also ROBERT PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* 305–39 (2012) (chronicling long-term tobacco industry efforts to obscure the dangers of smoking; ALI episode discussed at pages 332–34).

Although one may question whether the pure law reform organizations are sufficiently governmental to be subject to First Amendment doctrine, the strong free speech norms of the U.S. make it unlikely any of these organizations would refuse to consider commentary by non-members, which would probably be bad policy as well. I say probably because it is not altogether clear the additional information received from partisan organizations outweighs the misleading information they provide and the political pressure they place on members of the law reform organization.

As an example of the latter concern, consider a lawyer official of a law reform organization (e.g., an ALI Council member) who is a member of a law firm that does significant work for a corporate client. In addition to lobbying for the ALI—either itself or through a law firm, which is a particular problem if it is the Council member's law firm (more on this later in the Article)—the client may threaten the Council member's law firm with loss of business unless the Council member supports the client's position regarding particular Restatement positions. Although the Laposata, et al. article does not disclose such “billing mail” by Big Tobacco, it would not be farfetched to think that some of this may have occurred as part of Big Tobacco's overall full-court press to make § 402A less of a threat to the industry.

All this said, non-member lobbying of a decision-making body (e.g., Congress, ALI, a bar association) is a longstanding tradition that probably should not be terminated because the partisan information is normally filtered through the decision-maker's understanding of the goals of the partisan organization. By contrast, member efforts to influence the member's organization are generally viewed as being sincere, neutral and without guile. Consequently, they may have a problematic impact on the law reform organization's work if the member's activity is, in fact, party to a paid representation or effort to curry favor with a client or prospective client.

attorney efforts to attract particular clients is inconsistent with the professed neutrality and perception of such organizations.<sup>26</sup>

In addition, a lawyer's efforts to influence law reform organizations (either as a member or a non-member) can raise serious positional conflicts of interest if the lawyer or law firm has clients with different preferences regarding the product of law reform organizations. The mix of clients of a national law firm, or even a sufficiently large single office firm, may have diametrically opposed positions on an issue facing the law reform organization.<sup>27</sup>

For example, a law firm's Midwestern office may have a thriving insurance recovery practice while its East Coast office may be doing legislative work seeking to tamp down bad faith, unfair claims handling, and punitive damages exposure for insurer clients or the insurance industry<sup>28</sup> generally. As discussed below,<sup>29</sup> this situation should probably be treated as an impermissible positional conflict unless the respective clients give informed consent even without any involvement of law reform activity. Similarly, if lobbyist-lawyers turn their attention to obtaining pro-insurer rules from a law reform organization (such as the ALI *Restatement of the Law, Liability Insurance* (RLLI)),<sup>30</sup> this should also be treated as a positional conflict, because success here can be more adverse to the client than successful lobbying before a legislative or regulatory body or prosecuting litigation adverse to a client.

## II. POSITIONAL CONFLICTS, MATERIAL LIMITATION CONFLICTS, AND IMPUTED CONFLICTS AFFECTING LAW REFORM ACTIVITY BY LAWYERS

Most lawyer conflicts are subject to what appears to be adequate policing. First, there is the market for legal services. Clients, particularly sophisticated

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26. See *infra* Part II.

27. See *infra* Part I(A)(4).

28. Some may quibble or even quarrel with my reference to an insurance "industry," but I think it is accurate. Although the word industry tends to conjure images of smokestacks and assembly lines rather than documents and computers, insurance is without a doubt a large enough commercial enterprise to be termed an industry. See RICHARD V. ERICSON, ET AL., *INSURANCE AS GOVERNANCE* 3–6 (2003) (suggesting if insurance commerce was classed as a nation, it would be the third largest economy in the world); ANDREW TOBIAS, *THE INVISIBLE BANKERS* (1982) (noting the wide financial influence of insurance commerce).

29. See *infra* Part II.

30. RESTATEMENT OF THE LAW OF LIABILITY INSURANCE § 14A (AM. LAW INST. 2019). Described in more detail *infra* notes 65–67.

or experienced “repeat player”<sup>31</sup> clients, seek undivided, even enthusiastic loyalty from their attorneys. These clients are likely to be vigilant in detecting whether counsel is working for opposing interests in connection with a commercial undertaking or litigation.

Also, if a conflict arises in the context of a particular business transaction or lawsuit, other involved parties or counsel will often have an incentive to detect and challenge arguable conflicts. In litigation, there is also the presence of judicial officers (e.g., magistrate judges, clerks of court, judicial staff) that may notice and probe arguable conflicts.

However, these structural factors mitigating against undetected conflicts of interest may prove insufficient in the face of national law firms and geographic separation of different cases or business deals. Nonetheless, undetected or unpoliced direct conflicts of interest appear comparatively rare. Even lackluster or ethically challenged counsel normally avoid these types of conflicts. More troubling are the more subtle positional conflicts that may seem less likely to injure a client, at least not directly. Detection and appreciation may be even more difficult in the context of law reform activity by counsel.

#### A. *Positional Conflicts and Their Imputation to Law Firms*

##### 1. The Positional Conflict Concept

One leading commentator has defined a positional conflict of interest as existing when a lawyer or law firm:<sup>32</sup>

adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another present or former client, seeking an opposite legal result, *in a completely unrelated matter*. The classic positional conflict of interest arises in litigation when a lawyer or law firm argues for one interpretation of the law on behalf of one client and for a contrary interpretation on behalf of another client. Such conflicts may also arise in the lobbying context when the lawyer or law firm is arguing for a

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31. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 107 (1974) (distinguishing between litigants who are “one-shotters” and “repeat player” who often are involved in litigation, positing that the latter group amasses expertise and develops economies of scale and litigation systems providing substantial advantages); see also MARC GALANTER, *WHY THE HAVES COME OUT AHEAD: THE CLASSIC ESSAY AND NEW OBSERVATIONS* 15–76 (2014) (updating the analysis given in his 1974 article).

32. See MODEL RULES OF PROF’L. CONDUCT r. 1.10(a)(1) (AM. BAR ASS’N 2020) (stating when one lawyer is subject to a conflict, this conflict is imputed to his or her entire law firm).

particular change in the law for one client and in another representation is making a legal argument inconsistent with the position advanced for the first client. These conflicts may further arise in the transaction context when the lawyer or law firm drafts a particular arrangement for one client and for another client attacks the propriety of a similar arrangement.<sup>33</sup>

More succinctly, such conflicts, sometimes referred to as “issue” conflicts, have been defined as arising “when a lawyer’s successful advocacy of a client’s legal position in one case could be detrimental to the interests of a different client in another case.”<sup>34</sup>

In addition to obvious conflicts, such as when a law firm is representing a plaintiff and a defendant in the same case, there can be positional conflicts where a lawyer or law firm advocates inconsistent positions for different clients in different matters. There can also be positional conflicts where the firm lobbies for a legal position on behalf of one client that works to the detriment of another client. Historically, this type of lobbying positional conflict has been addressed in the context of direct efforts to influence legislative or regulatory bodies as part of a lawyer-as-lobbyist retention of the law firm.

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33. John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 460 (1993) (footnote omitted). Arguing such inconsistent positions in the same matter on behalf of a single client involved in that matter would presumably also fall below the standard of care expected of a reasonably competent attorney unless part of an effort by the lawyer to argue “in the alternative.” *Id.* But it would not be a conflict per se, only bizarre lawyering absent unusual circumstances justifying such a tactic. Hence Professor Dzienkowski’s emphasis on an attorney taking inconsistent positions in two separate matters rather than in the same matter.

To be clear, I take a somewhat more “high church” view of positional conflicts than Professor Dzienkowski. His position is that “[v]ery few positional conflicts will implicate the ‘directly adverse’ language of Model Rule 1.7(a),” and that “[m]ost positional conflicts will involve an examination of whether the conflict ‘materially limits’ the representation of one or both clients under Model Rule 1.7(b).” *Id.* at 521.

By contrast, I place more emphasis on Model Rule 1.7(a) in positing that because almost any legal-issue conflict can result in precedent adverse to a law firm client, there is very strong, albeit indirect, adversity between the two law firm clients and this adversity is sufficiently real that it should generally be treated as a direct conflict violating Rule 1.7(a). If the two (or more) cases in which counsel argues opposite sides of a legal issue cannot be sufficiently factually distinguished to ensure the precedent of Case *A* will not apply to Case *B*, client consent is required.

34. ELLEN J. BENNETT, ELIZABETH J. COHEN & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 148 (8th ed. 2015) (citing *Williams v. State*, 805 A.2d 880 (Del. 2002)); see also Helen C. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A “Foolish Consistency”?*, 111 PENN ST. L. REV. 1, 22 (2006) (reviewing the *Williams v. State* decision); Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 FLA. L. REV. 383, 384–85 (1999) (“The clients’ common lawyer is stranded between [law and public policy], facing a representation at odds with another position or interest that he represents.”).

In this Article, I am focusing on the type of positional conflict created when the lawyer, who is a member of a law reform organization, argues in favor of Position *A* under circumstances where the organization's adoption of Position *A* is likely to influence courts to the detriment of one or more of the law firm's clients.

## 2. The Profession's Lax View of Positional Conflicts

Positional conflicts are not as stark as conflicts in which the lawyer is helping to collect a debt for Client *A* in one case while attempting to thwart its collection efforts in a parallel case. But positional conflicts are conflicts nonetheless. As Professor Dzienkowski noted in his leading article on the topic a quarter-century ago, the legal profession was slow to recognize the problem and slower still to act, in both the academy<sup>35</sup> and among bar associations, regulators, and law reform groups.

For example, commentary to ABA Model Rule of Professional Conduct 1.7 at one time stated: "it is ordinarily not improper to assert [opposing or antagonistic legal] positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court."<sup>36</sup> The ABA has essentially continued to hold this position but with more nuance and without the "same court" criterion for finding conflict. Current Comment [24] to Rule 1.7 states:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not

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35. Arguably, the matter of issue or positional conflicts was not noted in publications prior to Professor Hazard's *Ethics in the Practice of Law*, which was, perhaps ironically, prompted by his concern about lawyers working toward law reform that would adversely affect their firm's clients. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 90–92 (1978) [Hereinafter HAZARD, *ETHICS*]. The Hazard & Hodes treatise on professional responsibility also noted the problem, but not at great length. See 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 1.07, at 1–26 (4th ed. Supp. 2019) ("In more recent times, intensifying since the last quarter of the twentieth century, enforcement of the law of lawyering by the courts has taken place principally in disciplinary proceedings brought under increasingly detailed and legalistic codes of professional conduct."); see also RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, *TRIAL ETHICS* § 3.4.3, at 84 (1st ed. 1988) ("When such a conflict arises because two clients have antagonistic interests regarding a legal question in different pending cases, it may be referred to as an *issue conflict*."). It appears that the issue received no extensive academic discussion until Professor Dzienkowski's 1993 article.

36. MODEL RULES OF PROF'L. CONDUCT r. 1.7 (AM. BAR ASS'N 1983) (Conflicts in Litigation). The comment was since removed as part of the Ethics 2000 revisions of the Model Rules.

create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.<sup>37</sup>

The ALI's *Restatement of the Law Governing Lawyers* took a similar view. A tentative draft of what is now Restatement § 209, cmt. f stated:

merely indirect precedential effect on another client's legal position does not constitute a conflict. Lawyers do not personally vouch for the soundness of their legal arguments. Thus, the lawyer's role in producing a precedent should play no proper part in the determination of whether one court should follow the precedent of another.<sup>38</sup>

The final version of Comment f is similarly dismissive of positional conflicts but stops short of immunizing positional conflicts in different courts. Instead, like the ABA Model Rules, it opts for a multi-factor balancing test to determine when counsel's opposing positions pose sufficient risk of harm to a client.

*f. Concurrently taking adverse legal positions on behalf of different clients.* A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues.

However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect

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37. MODEL RULES OF PROFESSIONAL CONDUCT r. 1.7, cmt. 24 (AM. BAR ASS'N 2020).

38. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 209 cmt. f (AM. LAW INST. Tent. Draft No. 4, 1991). The final *Restatement* was published in 2000.

include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If a conflict of interest exists, absent informed consent of the affected clients under § 122 [the client consent provisions of the Restatement that essentially mirror the requirements of ABA Model R. Prof. Conduct 1.7(b)], the lawyer must withdraw from one or both of the matters. Informed client consent is provided for in § 122.<sup>39</sup>

Contemporaneous with the Dzienkowski article, a 1993 ABA ethics opinion<sup>40</sup> took an even more tolerant view of positional conflicts, reasoning that positional conflicts were essentially no problem unless the lawyer or law firm took different positions in front of the same tribunal.<sup>41</sup> Although the ABA Committee did “not believe that a distinction should be drawn between appellate and trial courts,” it was comfortable overlooking such conflicts if the legal arguments were made in different jurisdictions.<sup>42</sup>

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39. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 128 cmt. f (AM. LAW INST. 2000). A revision was published in 2006 without substantial change to this section and commentary.

A moment's reflection is required regarding the 1991 ALI tentative position that a world of law firms taking the “single side” of a legal issue would be untenable as suggested by Comment f. The legal profession rightly celebrates an attorney's ability to see all sides of an issue or dispute, but this does not necessarily mean it should celebrate lawyers talking out of both sides of their collective mouths. Further, in practice the legal world largely does divide into plaintiff and defendant firms, policyholder and insurance firms, union firms and management firms, anti-regulatory firms and regulator counsel, prosecutors and criminal defense firms.

The division results in part from these firms, their clients, and courts taking positional conflicts more seriously than did the ALI and the organized bar thirty years ago but also results from concrete conflicts affecting clients with divergent interests. Even if ALI Comment f were persuasive at the time initially drafted (which I doubt), intervening developments have suggested that celebration of the attorney who can argue Position *A* on Wednesday and Position *Non-A* on Thursday is misplaced.

A lawyer who argues that the law imposes a duty of disclosure on an annuity salesman in Case *A* but simultaneously contends in Case *B* a similarly situated annuity salesman has no such duty will strike most observers, lay and professional, as duplicitous rather than flexible, clever, or creative.

40. See ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 93-377 (1993) [hereinafter ABA 377] (claiming positional conflicts were not an issue unless attorneys took contrasting positions when in the presence of the same tribunal).

41. See *id.* (“And if both cases should happen to end up before the same judge, the situation would be even worse . . . the persuasiveness and credibility of the lawyer's arguments in at least one of the two pending matters would quite possibly be lessened, consciously or subconsciously, in the mind of the judge.”).

42. *Id.*

However,

if the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.

If, on the other hand, the two matters will not be litigated in the same jurisdiction, the lawyer should nevertheless attempt to determine fairly and objectively whether the effectiveness of her representation of either client will be materially limited by the lawyer's (or her firm's) representation of the other.<sup>43</sup>

The ABA opinion then listed a number of factors for the attorney to consider in determining whether juggling the inconsistent legal arguments posed sufficient danger to the clients to require counsel to withdraw, including the importance of the legal issue, the likelihood that a decision on the issue in one court would impact a second court's decision, whether the attorney might "soft-pedal" one version of the argument if the other version was being maintained on behalf of a more valued client, and whether the firm might try to respond to any allegations of inconsistency by blurring the respective legal arguments and positions.<sup>44</sup> Even if these factors suggested a substantial conflict and significant danger to either client, the ABA opinion found the conflict waivable with informed client consent.<sup>45</sup>

The ABA Opinion was consistent with most of the state bar opinions of that period that had, like the ABA, viewed positional conflicts as less concerning than conflicts surrounding the more concrete adversity of lawyer representation in related cases or transactions.<sup>46</sup> The opinions either saw

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43. *Id.*

44. *Id.*

45. *See id.* ("[I]n the absence of consent by both clients after full disclosure, [the attorney] should refuse to accept the second representation . . .").

46. *See* Phila. Bar. Assn. Prof. Guid. Comm., Op. 89-27 (1990) [hereinafter Phila. 27] ("[I]t is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court."); *see* Cal. St. Bar. Comm. Prof'l Resp., Op. 108 (1989) [hereinafter Cal. 108] (discussing the issues of representing multiple clients in the same tribunal); *see* St. Bar of Ariz. Ethics Opinions, Op. 15 (1987) [hereinafter Ariz. 15] ("Appellate judges are presumably trained to recognize that advocates are often required to take positions contrary to those previously taken by their partners, when the interests of a client so



little danger to clients at all<sup>47</sup> or danger only if the law firm was maintaining opposing legal positions before the same tribunal,<sup>48</sup> sometimes only if before an appellate court.<sup>49</sup> The opinions were also concerned that positional conflicts are hard to detect at the outset of a matter, which raised concern that disqualification or bar discipline would be too harsh a penalty for a positional conflict that was not apparent when the law firm agreed to the representation.<sup>50</sup>

Prior to Professor Dzienkowski's extensive analysis, only the Michigan Bar took anything resembling a stand against positional conflicts, but this was in a matter that involved asserting contrary legal positions before the same court.<sup>51</sup> Thereafter, more jurisdictions displayed somewhat more

require.”). This trend continued even after the Dzienkowski article brought positional conflicts into the forefront. *See* Dzienkowski, *supra* note 33, at 474 (describing the different types of positional conflicts).

47. *See* Cal. 108, *supra* note 46 (suggesting positional conflicts pose less danger to clients than other conflicts); *see also* Ariz. 15, *supra* note 46 (same); Me. Bd. Of Overseers of the Bar, Prof'l Ethics Comm'n, Op. 155 (1997) [hereinafter Me. 155] (concluding a legal issue conflict alone is not an actionable conflict).

48. *See* Me. 155, *supra* note 47 (stating positional conflicts are impermissible only if inconsistent legal positions are asserted before the same tribunal); *accord* D.C. Ethics Op. No. 265 (1996).

49. *See* ABA 377, *supra* note 40 (explaining positional conflicts are only impermissible if inconsistent legal positions asserted before the same appellate court); *see also* Ariz. 15, *supra* note 46 (same); Phila. 27, *supra* note 46 (same).

50. *See* Me. 155, *supra* note 47 (discussing the difficulties of detecting positional conflicts on intake; disqualification after conflict became apparent could produce unfair results for counsel and clients seeking to retain preferred counsel).

51. *See* St. Bar of Mich. Ethics Opinions, Op. RI-108 (1991) (opposing attorneys presenting opposing legal positions before the same court). The case involved counsel (apparently not only the same law firm but also the same individual lawyer) arguing contrary legal positions on a point of domestic relations law in two separate divorce proceedings that had both been appealed to the state supreme court. The Bar found it was:

Not necessary to determine the exact point in time at which the representation of the client became “directly adverse” triggering MRPC 1.7(a), or “materially adverse” triggering MRPC 1.7(b), or when that adversity should have been apparent to the lawyer. We need only note on the facts provided, i.e., that the cases are both before the Supreme Court, and that effective advocacy on behalf of one client would contravene the position of the other. Under those circumstances a disinterested lawyer could not reasonably conclude that the representation of the client would not be adversely affected. Client consent, therefore, would not vitiate the conflict. Nor may the lawyer withdraw from one case without withdrawing from the other.

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Continued representation [of either client] in the event of consolidation under the facts presented is not ethically permissible, and the lawyer must withdraw from both representations. In so holding we are aware that the clients suffer greatly by having their successful and apparently

concern, at least rhetorically, but the overall stance of the organized bar remained tolerant of such conflicts.<sup>52</sup> Treatises,<sup>53</sup> casebooks,<sup>54</sup> and commentators expressed a larger concern, but only a few joined Professor Dzienkowski's relatively strong stance against positional conflicts.<sup>55</sup>

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sufficiently competent legal representation removed at the Supreme Court level. We see no way that result can be ethically avoided.

*Id.*

52. See Or. St. Bar, Formal Op. 2007-177 (rev. 2016) (describing how issue conflicts are not a separate category of conflict in the Oregon Rules of Professional Conduct); see also N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 826 (2008) ("[T]he burden of satisfying the 'disinterested lawyer' test in these cases will often be a high one.").

53. See W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES & EXPLANATIONS 387-89 (5th ed. 2016) (detailing the issues with an attorney's simultaneous representation of clients with adverse interests); *supra* notes 34-35; see also RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 1.7-6(o) (2012-2013) (addressing positional conflicts but dedicating only five pages of 1324-page treatise to the issue).

54. For example, the authors of *The Law and Ethics of Lawyering*, in its index, identifies only two pages (in a 1,262-page book) as dealing with positional conflicts, but this is unduly modest in that the casebook also reprints an edited version of *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, (discussed *infra* note 59), which may be the leading positional conflict case. GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 477-78, 468-76 (6th ed. 2017); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978). The authors correctly note there is a "generally permissive attitude of the ethics rules toward positional conflicts of interest" and that "[u]nlike other conflicts of interest, positional conflicts are rarely the subject of disqualification motions." *Id.* at 477. They appear to find this situation acceptable because "many lawyers and law firms worry about taking inconsistent positions simply as a matter of good client relations" and that market forces sufficiently curb abuses. *Id.*; Anderson, *supra* note 34, at 3.

Stephen Gillers's *Regulation of Lawyers: Problems of Law and Ethics* contains no significant discussion of positional conflicts per se, at least regarding legal issues, as opposed to contrasting legal positions affecting specific property or remedies as the authors of *The Law and Ethics of Lawyering* illustrate through their excerpt of *Fiandaca v. Cunningham*, in which legal aid lawyers sought to improve conditions at a state hospital in one case, while exploring a settlement to utilize a school for a women's prison in another case. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (10th ed. 2015); *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987). Gillers's book contains a positional conflict hypothetical problem ("Restraint of Trade") in which a law firm is arguing for different legal positions in different cases and the court's decision on the issue in one case will likely hurt another firm client in the other case. GILLERS, *supra* at 192-201.

55. To the contrary, commentators generally appear more concerned that a strong stance against positional conflicts will inflict a greater injury upon client access to lawyers of their choice or upon public interest lawyering than the existing risk of adverse precedent manufactured by a client's own law firm. See Anderson, *supra* note 34, at 3-4 (arguing that positional conflicts should not be treated as sufficiently serious to support disqualification of counsel); see also Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339, 2340 (1999) (using the term "doctrinal conflicts" to describe positional conflicts as the term is used in this Article); Richmond, *supra* note 34, at 386 (expressing concern that aggressive policing of positional conflicts unduly impinges on attorney prerogatives and can foster opportunistic behavior by clients and opposing parties and counsel). But see Esther F. Lardent, *Positional*

Moreover, bar associations appear to have rarely imposed professional discipline due to an attorney's positional conflict.<sup>56</sup>

Courts historically exhibited a similar pattern.<sup>57</sup> More recently, courts have begun to acknowledge the issue and have expressed concern previously lacking,<sup>58</sup> but have seldom found positional conflicts sufficient to require disqualification or sanction.<sup>59</sup> Thus, as of 2020, the legal landscape forbids

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*Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2286–87 (1999) (following the work of Dzienkowski in positional conflicts); Norman W. Spaulding, Note, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1408–09 (1998) (favoring a relaxed approach to positional conflict where attorney pro bono activity allegedly creates conflict and risk to client of pro bono attorney's law firm).

56. Because one should (according to the cliché) “never say never,” I use the word “rarely” because a thorough canvassing of the professional discipline of all U.S. bar associations is beyond the scope of this Article. Further, even a diligent state-by-state search would not capture private reprimands, making it impossible to declare that positional conflicts never leads to professional discipline. However, I have yet to find a state bar disciplinary sanction based solely on an attorney's positional conflicts.

57. See Anderson, *supra* note 34, at 2 (noting prominent attorney and former U.S. Senator Matthew Hale Carpenter argued “contradictory interpretations of the Fourteenth Amendment's privileges and immunities clause to the [U.S.] Supreme Court in two famous cases” without notice or criticism by the Court). Compare *Bradwell v. Illinois*, 83 U.S. 130, 138 (1873) (arguing the Clause prohibited exclusionary policies precluding a woman's bar admission), with *Slaughter-House Cases*, 83 U.S. 36, 58–61 (1873) (arguing Louisiana could establish a butchering monopoly and forbid others from practicing the trade). The cases were argued two weeks apart and the ruling in the *Slaughter-House Cases* favoring state authority in the face of constitutional challenge was adverse precedent leading to a loss for *Bradwell* when that opinion was issued a day later. See Anderson, *supra* note 34, at 3 (“The *Bradwell* decision relied almost exclusively on the precedent set in the *Slaughter-House Cases* one day earlier.”).

58. See *Williams v. State*, 805 A.2d 880, 882 (Del. 2002) (disqualifying attorney for positional conflict when attorney argued two contrary legal positions before the state supreme court, first asserting “great weight” should be given to jury's non-unanimous recommendation against death penalty but then arguing it was error to give such weight to jury recommendation in the second); *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 93, 100 (S.D.N.Y. 1972) (disqualifying counsel making inconsistent legal arguments in different antitrust cases in same jurisdiction but case arguably factually related due to client fear that one case would develop not just precedent but adverse evidence that could be used in other cases); see also Richmond, *supra* note 34, at 398–99 (noting *Estates Theatres* may better be classed as a fact conflict case rather than a legal issue conflict case as the ruling was decided pursuant to the ABA's MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(B) rather than the modern Model Rules of Professional Conduct, suggesting the opinion is not well regarded). Richmond also notes that *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992) is often regarded as a positional conflict case. Richmond, *supra* note 34, at 398. I regard *Maritrans* as better classified as a “playbook” disqualification case. See GILLERS, *supra* note 54, at 225–28.

59. See *In re Rail Freight Surcharge Antitrust Litig.*, 965 F. Supp. 2d 104, 118 (D.D.C. 2013) (rejecting disqualification motion attacking Latham & Watkins for defending Union Pacific Railroad in an antitrust case at the same time it was also representing, in unrelated matters, a shipper making an antitrust claim against the Railroad using different counsel than Latham but arguing that Latham's

extreme positional conflicts but grants lawyers a good deal of slack regarding moderate positional conflicts. In retrospect, the legal profession's tolerance of positional conflicts prior to the 1990s was ill-founded and has become less defensible over time. Even today, positional conflicts are often overlooked and unduly tolerated.

ABA Formal Opinion No. 93-377 acknowledged the force of the argument that advancing inconsistent legal positions could be as detrimental to clients as advancing contrary factual positions (e.g., that in Case *A* the person was not an employee and thus not entitled to overtime pay, and then arguing in Case *B* that a similarly situated person was an employee and could not sue in tort because of the worker's compensation bar to suits by employees).<sup>60</sup> But the Opinion disapproved of lawyers advancing conflicting legal positions only if this took place "in the same jurisdiction."<sup>61</sup>

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success in obtaining favorable law for the Railroad would redound to the detriment of the shipper); Fed. Defs. of San Diego, Inc. v. U.S. Sentencing Comm'n, 680 F. Supp. 26, 33 (D.D.C. 1988) (concluding no impermissible positional conflict where Defenders challenging sentencing guidelines in one case while a substantial number of its clients stood to benefit from continued use of guidelines under challenge). Mandatory application of the guidelines was eventually ruled unconstitutional in United States v. Booker, 543 U.S. 220 (2005). But see *Westinghouse Elec. Corp.*, 580 F.2d at 1322 (finding impermissible conflict where the Chicago office of Kirkland and Ellis represented plaintiff Westinghouse in antitrust action against Kerr-McGee and a dozen other energy companies at the same time its Washington, D.C. office was representing the American Petroleum Institute of which some defendant oil companies were members). Signaling its disapproval of the arrangement at the outset of the opinion, the court wrote that the case presented the issue of "whether the size and geographical scope of a law firm exempt it from the ordinary ethical considerations applicable to lawyers generally." *Id.* at 1312; accord Richmond, *supra* note 34, at 401 ("Kirkland's conflict of interest was, or should have been, obvious."). Like *Fiandaca* and *Martrans*, *Westinghouse* is perhaps better characterized as an actual conflict of direct factual adversity rather than a legal issue positional conflict case. See Richmond, *supra* note 34, at 402-03 ("*Westinghouse* evidences the practical problems that issue or positional conflicts pose for lawyers."); see also Anderson, *supra* note 34, at 19 ("The cases usually cited by commentators on positional conflicts actually present factual positional conflicts.").

*Fiandaca* is widely regarded as a positional conflicts case, which explains its presence in casebooks, but this strikes me as a mischaracterization. See, e.g., GILLERS, *supra* note 54, at 192-96. In *Fiandaca*, the New Hampshire Legal Assistance (NHLA) represented two classes of clients, female inmates and persons with mental disabilities. *Fiandaca*, 827 F.3d at 826. The defendant State offered to settle the prisoner litigation by offering use of a school already being used for the disabled, which prevented NHLA from arguing use of the facility that would imperil the settlement. *Id.* at 827. This is more accurately described as a concrete factual or remedial conflict involving use of tangible property and case resolution, rather than a clash of different legal arguments. Consequently, I do not regard *Fiandaca* as presenting a true "issue" conflict or positional conflict, at least as I am using the term in this Article. See Richmond, *supra* note 34, at 388 n.31 (appearing to classify *Fiandaca* as a fact-based conflict case rather than a legal issues conflict case).

60. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-377 (1993).

61. *Id.*

The same jurisdiction rationale for limiting the scope of positional conflict analysis made little sense in 1993 and makes no sense today. In a world where all precedent is widely available online, even if not “officially published” or controlling, a court’s decision regarding a legal issue remains *de facto* legal precedent, even if not controlling beyond its jurisdictional reach. The typical judge cares a great deal more about how other courts have ruled on a question than about academic commentary or public policy arguments made by counsel. In most cases, only clear statutory language or a clearly distinct fact pattern is likely to sufficiently reduce the risk that a law firm’s victory on a legal issue in Case *A* will likely impact Case *B*, a matter in which the law firm is making a diametrically opposite argument.

Where a lawyer plays a role in obtaining legal precedent in Court *X* that is favorable to Client *A* but that is adverse to Client *B* in Court *Y*, the lawyer has disserved Client *B* due to its work for Client *A*. This is a conflict—helping one client at the expense of another—regardless of whether the adverse precedent favoring Client *A* is controlling or merely available for use against Client *B*. Regardless of the jurisdiction involved, law firms should avoid positional conflicts and take them much more seriously than appears to be the case in practice today.<sup>62</sup>

### 3. Modern Law Practice and the Increasing Danger of Positional Conflicts

Ironically, the very thing that makes the problem worse—more far-flung branch offices of law firms—also tends to obscure the problem. If the same individual lawyer argued for Rule *X* in Case *A* for Client *A* and simultaneously argued for inconsistent Rule *Y* on behalf of Client *B* in Case *B*, observers would likely notice and appreciate the conflict. But because the inconsistency is produced by attorneys practicing in different offices of a law firm, the conflict can escape notice notwithstanding the national firm’s electronic interconnectedness and conflicts software (which will tend to miss positional conflicts more than it misses client identity conflicts).

Even a narrow reading of ABA Model Rule 1.10 makes the existence of the positional conflict clear. Rule 1.10 provides that:

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62. This type of conflict is in many cases waivable pursuant to ABA Model Rule 1.7(b), but both clients must be apprised of the situation and give informed consent confirmed in writing. And in some cases, such as when Case *A* is before the state supreme court which will decide the matter prior to a ruling in Case *B*, which is before a trial court in the same state, the conflict is much more acute. In my view, that sort of conflict is so concrete that it cannot be waived.

[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [Conflict of Interest] Rules 1.7 or 1.9, unless (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm[.]<sup>63</sup>

This is the rule that imputes individual attorney conflicts throughout the attorney's law firm, a rule designed to prevent lawyers from evading conflicts rules and dis-serving clients by merely having the disloyal activity performed by two different workers at the same entity. Because participation in law reform activities is part of the "personal interest" of an attorney, there is debate about the degree to which Rule 1.10 applies to episodes such as an attorney advocating for a particular restatement rule that is likely to affect a law firm client adversely. The personal interest exception to Rule 1.10 should apply only when a lawyer's participation in law reform activity is truly individual, personal, and genuine, rather than the result of specific retention or client development marketing efforts.

Perhaps even more troubling than inconsistent legal arguments from different law firm counsel in different cases may be a lawyer's advocacy before a law reform organization such as the ALI, the ABA, or a committee or task force. Such advocacy may result in a black letter restatement provision (or a rule, statute, or its equivalent), which will almost certainly be used against clients of the law firm.

#### 4. Potential Positional Conflicts in Law Reform Activity

Although perhaps not as obvious as the conflicts involving law firm representation of clients advancing conflicting positions in different cases, genuine positional conflicts may arise when lawyers in the firm engage in law reform activity. For example, Lawyer *A* from Big Firm may be active in seeking pro-insurer content of the RLLI while Lawyer *B* from the same Big Firm may be representing policyholders who will be adversely affected by Lawyer *A*'s success in making the RLLI more pro-insurer. As discussed below,<sup>64</sup> many of the attorneys who have advocated for pro-insurer content

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63. MODEL RULES OF PROF'L CONDUCT r. 1.10(a) (AM. BAR ASS'N 2020).

64. See *infra* Part III.

in the RLLI are members of large law firms that represent policyholders.<sup>65</sup> Surprisingly, this has not been identified (by the commentators themselves, their opponents, the Institute, or the media) as a conflict of interest.<sup>66</sup>

But this type of situation nonetheless poses a positional conflict of interest, at least in circumstances where the lawyer-member of a law reform organization is not speaking solely out of personal opinion but is being compensated for the lawyer's efforts to aid a party or industry in attempting to influence the work product of the law reform organization. This type of partisanship is impossible to justify if the lawyer's advocacy for a pro-insurer RLLI position does not stem from the attorney's personal beliefs but instead results from retention of the lawyer or firm by an insurer (or fellow traveler such as a corporation that may have an interest in the contract construction

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65. I know this because I have seen case reports in which partners of a lawyer attacking the RLLI were counsel of record for policyholders who presumably would prefer that the RLLI not contain the pro-insurer position sought by the partner participating in law reform.

During the RLLI process, I observed one partner in a large firm arguing vigorously and frequently for positions favorable to insurers. If adopted, these positions would have—in a case in which I was involved as an expert witness—hurt another client of the firm's efforts to obtain insurance coverage.

The pro-insurer law firm partners may be doing this solely out of personal interest and a sincere and heartfelt intellectual view that the pro-insurer position is better law. But, where members of a law reform organization devote scores of pages to commentary, I am skeptical this is done without official support from the firm either at the urging of insurer clients or a desire to develop greater business with insurer clients. Notwithstanding the legendary work ethic of many attorneys, it seems to me unlikely that active private practitioners will find the time to write lengthy commentary without some form of compensation other than internal satisfaction.

The same is true if a policyholder attorney or firm submits long white papers or similarly time-intensive efforts to impact the content of the RLLI. If this occurs, the same criticisms apply. In my experience, however, insurers are more likely to be "institutional" clients of particular law firms, while policyholder clients are more episodic in their use of a specific law firm for insurance recovery matters. In contrast, even a small insurer is more likely to regularly send business to a particular firm and thus, is in a position to assert more leverage on the firm for the cause of insurers regarding controversial portions of the RLLI.

Because of the volume of legal work an insurer can send to a favored firm, firms also have an incentive to take pro-insurer action as a means of gaining favor from insurers generally and demonstrating the law firm's support of the industry as a means of business development.

66. What might be termed as "the RLLI content battles," have received significant media attention. There has also been some commentary criticizing anti-RLLI lobbying—correctly in my view—as baseless, shrill, and unnecessarily invoking crisis rhetoric. See, e.g., Richard G. Johnson, *The ALI Hasn't Been 'Captured'*, WALL ST. J., July 7, 2017, at A.14 (responding to *Journal* editorial contending that "tort lawyers" had taken over the ALI concerning the RLLI). See Tiger Joyce, *Tort Lawyers Take Over the American Law Institute*, WALL ST. J., June 30, 2017, at A.15 ("Aspirations for American business leaders must include stopping the ALI's liability-expanding agenda and returning the organization to the laudable scholarship and evenhandedness of its past."). But it appears I am alone in suggesting that the lobbying surrounding the RLLI or law reform participation generally raises serious professional responsibility concerns.

or punitive damages portion of a Restatement on insurance). Even if the lawyer or firm is not formally retained nor paid for its particular advocacy regarding the RLLI (or similar law reform projects by other organizations), if the lawyer or law firm activities are part of marketing efforts hoping to draw business from insurers, the lawyer and law firm are conflicted.

Consider the example of RLLI Section 21, which provides that where an insurer is properly required to defend a single potentially covered claim in a multi-count complaint, the insurer must defend the entire lawsuit and cannot later seek reimbursement of the defense expenditures made on behalf of claims in the lawsuit that were not potentially covered under the policy.<sup>67</sup> If Lawyer *A*, either as part of planned marketing and business development or on behalf of a paying insurer client, lobbies against the provision and in favor of adoption of the position that the insurer should be able to recoup defense expenditures made in connection with uncovered claims, Lawyer *A* is working against the interests of the law firm's policyholder clients, who may frequently find themselves in lawsuits where at least one but not all of the claims in the complaint are potentially covered.

Obviously, a policyholder facing such an action would prefer to tender defense of the matter to its insurer and receive a complete defense of the lawsuit without rebating to the insurer some portion of the defense costs associated with non-covered claims. Because the typical liability policy states that it defends "suits" against the policyholder (and not just individual "claims" against the policyholder),<sup>68</sup> the policyholder has a pretty good argument that it should not have to pay the insurer for any portion of the defense, which is considered indivisible by most courts ruling on insurance coverage matters.

Perhaps unsurprisingly, the strength of this argument persuaded the RLLI Reporters, ALI Council, and ALI Membership to support a Restatement provision providing for no recoupment of defense costs by insurers absent a clear agreement to this effect or in exceptional circumstances. RLLI Section 21 is a provision favoring policyholders—but does so based on policy language and the background, purpose, and function of liability insurance rather than any unwarranted favoritism of

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67. See RESTATEMENT OF THE LAW OF LIAB. INS. § 21 (AM. LAW INST. 2019) ("Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not obtain recoupment of defense costs from the insured . . .").

68. See Insurance Services Office, Commercial General Liability Policy No. CG 00 01 12 07 (2006), reprinted in JEFFREY W. STEMPEL, PETER N. SWISHER & ERIK S. KNUTSEN, PRINCIPLES OF INSURANCE LAW App. D (4th ed. 2011).



policyholders over insurers. Nevertheless, the ability of a law firm's policyholder clients to enjoy the benefit of this provision would be negated if another lawyer in the firm had successfully convinced ALI to reverse or delete RLLI Section 21. The policyholder clients of the law firm would presumably object to this advocacy if they were aware of it. More than that, they would prefer that the law firm they pay to prosecute insurance recovery matters advocate for the provision—and not advocate against the provision due to an effort to please the law firm's insurance clients (or prospective clients)—and prefer that the law firm not accept a retention from insurers that is adverse to the policyholders.

Policyholder and insurer clients of the law firm may be willing to consent to such positional conflicts. In the absence of consent, it seems clear that a lawyer's law reform advocacy done to aid one type of law firm client (insurers) that is detrimental to another law firm client (policyholders) violates Rule of Professional Responsibility 1.7. This should be acceptable to the law reform organization, if at all, only if the advocating lawyer is genuinely expressing her analysis of a legal issue with no marketing or compensatory motives. Even where her advocacy for insurers is unsuccessful, her commentary against the resulting provision and fomenting of additional criticisms may provide considerable aid to the law firm's insurer clients at the expense of the law firm's policyholder clients.

For the most part, the ALI and other law reform organizations generate "soft" law. Their work product does not itself create positive law but produces a body of rules and norms courts are free to accept or reject. However, even an unsuccessful lobbying effort based on positional conflict may create a record that persuades courts not to follow the Restatement provision or other soft law. This, in turn, may produce precedent harmful to other clients of the law firm, which should be recognized as a violation of Rule 1.7. Although it would raise howls in the halls of Big Firm Land, a situation like this supports an argument that the Client of Lawyer *B* has grounds for a malpractice suit against Big Firm because of Big Firm's disloyalty in working to further the cause of a different client of Big Firm.

That the cases are separated in time and space does not change the fact that Big Firm put itself in a position where it was certain to hurt one of the two clients. Lawyer *A*'s victory for the insurer Client did not create binding precedent against Big Firm Client *B*. However, Lawyer *A*'s work did, in fact, hurt Client *B*—and this injury was completely foreseeable. A competent law firm assumes that opponents of its clients will locate precedent adverse to the clients no matter where the precedent is generated.

Ethical law firms should take no part in creating that precedent or the soft law that may produce such precedent unless this results solely from the personal analysis of the individual attorney participating in law reform activity.

B. *Material Limitation Conflicts and Law Reform Activity*

ABA Model Rule of Professional Responsibility 1.7, which is substantially the same form in all states, provides that an attorney should not represent a client when the representation is “materially limited” by duties to another client or the attorney’s own interests.<sup>69</sup> As noted above, Rule 1.10 provides that when one lawyer is subject to a conflict, this conflict imputes to his or her entire law firm.<sup>70</sup>

The ABA Model Rules do not specifically define the term “material,” but commentary to Rule 1.7 provides a rough working notion of what is meant by the term:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>71</sup>

The interests-of-Client *A* versus interests-of-Client *B* scenario previously described could be described as a species of material limitation conflict rather than a direct conflict of goals across two ostensibly unrelated matters.

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69. See MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2020) (“A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”).

70. See *supra* text accompanying note 62.

71. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS'N 2020).

In addition, a material limitation exists if an attorney is forced to refrain from representing a client as zealously as would ordinarily be the case because of the attorney or law firm's duties to another client, even if the clash is indirect. For example, in the positional conflict hypothetical discussed above, an attorney in a firm regularly representing insurer clients should not be arguing against recoupment of such costs by insurers as part of counsel's strategy for drawing favorable attention from policyholder counsel clients. Worse yet is a situation where the attorney has been retained by policyholders to seek favorable law reform outcomes on their behalf despite the law firm's concurrent representation of insurer clients.

In the metaphorical crevice between a rock and a hard place, the law firm is materially limited from fully serving one class of clients, which violates Rule 1.7 (although the conflict is probably waivable).<sup>72</sup> Conversely, if other lawyers in the law firm make a full-throated argument in favor of their insurer clients seeking an RLLI provision favoring recoupment of counsel fees for insurers, this is an activity adverse to the firm's policyholder clients. The firm has engaged in an impermissible positional conflict if these activities result from business activity (i.e., client retentions or marketing efforts) rather than the personal interests of the attorneys involved.

Attorney or law firm interest in having a profitable practice can also create an arguable material limitation (or at least its close analog). For example, a lawyer or law firm may be very interested in cultivating a potential policyholder or insurer client. As part of its marketing strategy, it may deliberately engage in legal scholarship and law reform activism designed to catch the eye and win the confidence of such clients. Big Firm Lawyer *A*, a partner, may enlist several associates to facilitate commentary in the law reform area as well as participating in organizations like the ALI, the AAJ, the DRI, or the Association of the Bar of the City of New York. Although Big Firm is not expected to bill anyone for this time, lead partner Lawyer *A* and others involved in the project record their time on the matter, and it is part of their annual assessments.

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72. Rule 1.7(b) provides that if the lawyer reasonably believes the conflict will not affect the quality of counsel's advocacy and the client gives informed consent confirmed in writing, the conflict can be waived. *Id.* r. 1.7(b). To be waivable, the conflict must not be direct. *Id.* r. 1.7(b)(3). Because a positional conflict of the type discussed in the hypothetical in Part III.A, like most positional conflicts, is indirect and involves factually distinct matters, it would appear to be waivable pursuant to Rule 1.7(b). *Id.* r. 1.7(b).

Operating in this manner (which hardly appears like a far-fetched scenario in light of the business pressures on modern firms),<sup>73</sup> there is now a situation in which the law firm has arguably created its own material limitation (or the substantial equivalent)<sup>74</sup> on its ability to zealously represent any clients of the firm with interests adverse to the prospective clients the firm is trying to attract through its law reform activity. For example, while Lawyer *A* and his team are—with the express blessing of the firm's business plan—seeking to establish themselves as the champion of insurers in coverage matters, how likely is it that other lawyers in the firm will be going all out for policyholder clients to establish favorable precedent to use against the insurer clients the firm is trying to attract?

I do not mean to make too much of this sort of danger, which can, of course, also involve law firms fishing for large commercial policyholder clients at the expense of full-bore representation of insurer clients who may have annoyed the firm for years with their penchant for negotiating low hourly rates and close, even knit-picking scrutiny of billings. But it is a danger, nonetheless. As further discussed below, law firm business or client development is probably more problematic in that it effectively puts lawyers partially “on the clock” for a particular client or industry that the firm intends to please and from which the firm hopes to obtain future business. This removes the attorney's participation in law reform from the purely

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73. The once quaint idea that law was merely a learned profession and not a business has fallen by the wayside. Modern law practice involves marketing, attempts at efficient management, and attention to cash flow and profitability. As part of this modern practice, law firms seek to attract paying clients, a marketing strategy that ranges from outright advertising to simply doing excellent work that it hopes will be noticed (by opponents as well as current clients and observers) in order to generate future business. Along this spectrum falls attorney participation in organized bar and law reform activity as well as contribution to legal periodicals and legal debate as a means of standing out as an expert in a field. Law firms may also participate in “beauty contests” or “bake offs,” in which they compete with other firms for business by touting their expertise, which can include promoting the degree to which the law firm champions the legal positions of a prospective client such as an insurer, stock broker, bank, manufacturer, drug company or the like.

74. Where the law firm is attempting to attract potential clients rather than seeking to develop closer relations or more business with existing client, Rule 1.7 does not technically apply because the prospective client is just that—solely a potential client rather than an actual client. But the situation creates similar problems of disserving one client or set of clients in order to curry favor with others or because of responsibilities to others. In the latter situation of existing client development that includes law reform activity, this would appear to fit fully within Rule 1.7's prohibition on material limitation conflicts. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2020) (identifying Rule 1.7 applies to current clients and referring to separate provisions for former and prospective clients).

“personal” model that could arguably avoid a positional conflict or violation of the rules and norms of a law reform organization.

III. CLIENT-SUPPORTING PARTISANSHIP AND CLIENT-SEEKING  
BEHAVIOR AS BREACHES OF THE ATTORNEY’S DUTY  
TO A LAW REFORM ORGANIZATION

Even less appreciated than positional and material limitation conflicts are the legal ethics implications of participation in a law reform organization. Surprisingly undiscussed to date is the issue of the professional responsibility obligations of ALI members and non-member commentators in debating the RLLI. A similar silence attends the law reform efforts of bar organizations and other law and policy groups.

Conflict of interest Rules 1.7 and 1.10, of course, apply to legislative and law reform advocacy as well. However, they are complicated by the practical reality that society should generally want the legal expertise of the Bar weighing in on important legal issues, and by the well-established ALI norm (shared by the ABA and other bar associations) that members should “check their clients at the door” and say what they individually think rather than advocating positions to curry favor with clients. There is also the reality that after years or representing insurers or policyholders, attorneys tend to embrace client views and often honestly “believe” them.

Despite the need for law reform organizations to function with a wide range of input from various members, conflicts of interest need to be taken more seriously in law reform group advocacy. Where a member who has long identified with a particular client constituency (e.g., a career insurer-side coverage lawyer), it is perfectly fine for that lawyer to both comment on and attempt to change the RLLI to fit what she regards as the better rule—so long as this is her actual opinion and is not done as part of a retention to further client interests or as client development and marketing by the attorney. If the latter, the material limitation and positional conflict problems discussed above would appear to apply.

In addition, such cases would appear to fall squarely within Rule 1.10 and impute to an entire law firm because a lawyer’s paid service or marketing activity makes the lawyer’s law reform activity something other than merely a “personal interest” of the lawyer. This applies even if the lawyer so engaged in paid lobbying or unpaid but business-directed client development truly believes what he or she is saying about a law reform issue.

A. *Distinguishing Law Reform Lobbying From Lawyer Public Service*

Model Rule 6.3 permits attorneys to serve as an officer, director, or member of a legal services organization, even if that organization “serves persons having interests adverse to a client of the lawyer.”<sup>75</sup> However, the lawyer “shall not knowingly participate” in organization decisions that “would be incompatible with the lawyer’s obligations to a client under [conflict of interest] Rule 1.7” or in cases where the lawyer’s “decision or action could have a material adverse effect on the representation of a client of the [legal services] organization whose interests are adverse to a client of the lawyer.”<sup>76</sup>

Model Rule 6.4 specifically, if only sketchily, addresses the issue of “Law Reform Activities Affecting Client Interests” and provides that:

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.<sup>77</sup>

The disclosure requirement is one protecting against “the possibility that law reform organizations may be used as ‘fronts’ for private interests.”<sup>78</sup> But this seems an overly sanguine view of the Rule, which depends on self-policing and requires little specificity concerning the disclosure. Not only is client identification not required, but neither is there any requirement to provide any information regarding the magnitude of the client’s importance, whether the client is providing compensation, or whether the client has lobbied the lawyer to lobby the law reform organization.

This last item may seem pedestrian or too invasive of attorney-client privilege, but it is perhaps the fact one would most like to know in order to assess the genuineness of a lawyer’s law reform activity—maybe even more than law firm billings of clients. Clients can vary dramatically to the extent

75. MODEL RULES OF PROF’L CONDUCT r. 6.3 (AM. BAR ASS’N 2020).

76. *Id.*

77. MODEL RULES OF PROF’L CONDUCT r. 6.4 (AM. BAR ASS’N 2020). The lone Comment to the Rule further provides that “[i]n determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7.” *See* MODEL RULES OF PROF’L CONDUCT r. 6.4 cmt. 1 (AM. BAR ASS’N 2020) (stating the disclosure provided should also be “appropriate”).

78. HAZARD ET AL., *supra* note 54, at § 53.3.

they appreciate and tolerate the law reform or other outside activities of their lawyers. Some clients are relatively lax or even enlightened in that they respect counsel's right to express views that are at odds with the prevailing views of the client. Other clients demand conformity, or at least will not permit outward nonconformity, and are likely to pull business from a law firm that appears insufficiently loyal and in sync with its world view. Some of these clients not only set a tone but also demand action on behalf of the client's interests.

There are few, if any, reported cases applying Model Rule 6.4, and only two state bar opinions address the scope of the Rule.<sup>79</sup> Both opinions involved quite benign situations<sup>80</sup> that did not present the type of studied industry attempts to influence ALI work experienced during the Corporate Governance project,<sup>81</sup> the *Restatement of Torts* regarding tobacco,<sup>82</sup> and the RLLI. But in addition to whatever strictures are established by the Rules of Professional Responsibility, are the rules of law reform organizations themselves.

The tension between attorney involvement in law reform and attorney support for clients addressed in this Article is somewhat different than what appears to be the primary situation addressed in Rule 6.4. Rule 6.4 seems aimed at lawyers serving on city councils, on school boards, in state legislatures, on planning commissions, and in similar situations in which the lawyer is part of a relatively confined voting group subject to observation and recording. By contrast, I am focusing in this Article on lawyer members

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79. See ANNOTATED MODEL RULES OF PROF'L CONDUCT r. 6.4 at 508 (AM. BAR ASS'N 2007) ("Not surprisingly, there are no reported decisions disciplining a lawyer for violating the operative part of Rule 6.4. Two ethics opinions, both dealing with adoption reform, do make use of Rule 6.4.").

80. See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 93-176 (1993) (stating an attorney may form an organization of adoption lawyers with the goal of influencing adoption legislation); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 91-27 (1992) (providing where assistant state's attorney may in his capacity as president of a genealogical organization, petition the legislature to change law regarding access to birth records even though the county clerk, who is technically a client of the attorney, opposed the change).

81. The ALI Principles of Corporate Governance project, which developed during the 1980s and early 1990s, featured significant participation and lobbying by attorneys representing businesses seeking more favorable rules for incumbent corporate management in the document. See Jeffrey W. Stempel, *Hard Battles Over Soft Law: The Substantive and Political Implications of Controversy Surrounding the American Law Institute Restatement of the Law of Liability Insurance* 22 (July 31, 2019) [hereinafter Stempel, *Hard Battles Over Soft Law*] (unpublished manuscript) (on file with author).

82. See Elizabeth Laposata et al., *supra* note 25, at 5 (arguing the Tobacco Institute and its lawyers influenced the Restatement principles, which "demonstrates the ALI's failings . . . [and] its Restatements cannot be viewed as unbiased authoritative documents.").

of the ALI, a bar association rules revision committee, or even a judicial task force/study commission or the full bar association.

In this latter group of situations, the attorney is part of a much larger group where votes are not recorded, and the law reform organization is sufficiently large that press or community scrutiny of any one member is unlikely. In the situations addressed in this Article, the attorney member is not one of a select group of decisionmakers but instead is attempting to influence a select group of decisionmakers (e.g., Reporter of a Restatement, the ALI Council). If the attorney's efforts stem from the attorney's personal analysis of a legal issue, the participation—even if extremely slanted in favor of a particular stakeholder interested in the outcome—falls within the zone of good faith participation in the law reform endeavor. But if the lawyer's activity is part of billable client retention or an attorney or law firm marketing effort, the lawyer's participation becomes excessively and impermissibly partisan.

B. *Organizational Attempts to Control Member Partisanship: The ALI Example*

Law reform organizations are not blind to the problem. The ALI, for example, has in its various rules and procedures several admonitions against lobbying the organization on behalf of a client, including an entire Conflict of Interest Policy which encompasses both direct economic interest (e.g., possible benefit from a business relationship with ALI) and conflicts based on client interests.<sup>83</sup> There is also a set of rules applicable to the Directors and Reporters that cautions them to “perform their responsibilities with the objectivity expected of legal scholars” and to “exercise sensitivity to the risk and appearance of conflict of interest in their work for the Institute.”<sup>84</sup> This Policy Statement states that a “risk or appearance of a conflict of interest arises when formulation of text, Comment, or Illustration could advance a

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83. See AM. LAW INST., CONFLICTS OF INTEREST POLICY § II (2009), [https://www.ali.org/media/filer\\_public/5d/b7/5db71e75-62a8-43b1-956c-98a4854d72f9/conflictspolicy.pdf](https://www.ali.org/media/filer_public/5d/b7/5db71e75-62a8-43b1-956c-98a4854d72f9/conflictspolicy.pdf) (adopted by resolution of the Council on Oct. 23, 2009) (“the participation of an officer or Council member in the consideration of an ALI project should be based on personal and professional experience and conviction, without seeking to advance the economic, political, or client interest of the officer or Council member or of his or her clients, family members [defined as grandparents, grandchildren, or closer], or other persons with whom the officer or Council member has a business, institutional, or other relationship.”).

84. AM. LAW INST., POLICY STATEMENT AND PROCEDURES ON CONFLICTS OF INTEREST WITH RESPECT TO INSTITUTE PROJECTS B. 1 (2010), [https://www.ali.org/media/filer\\_public/13/6e/136e2528-3be7-4b65-beb0-9d59f5c7b403/conflicts-of-interest-with-respect-to-institute-projects.pdf](https://www.ali.org/media/filer_public/13/6e/136e2528-3be7-4b65-beb0-9d59f5c7b403/conflicts-of-interest-with-respect-to-institute-projects.pdf) (approved by the Council on May 16, 1994, and amended by the Council on May 17, 2010.)



position taken by the Director or Reporter in another engagement on an issue within the scope of a pending Institute project.”<sup>85</sup> In addition:

Members of an Advisory Committee, a Members Consultative Group, and the Council should observe the policies stated [in Paragraph B.1] of these procedures . . . [and] should observe the policies of Rule 6.4 of the ABA Model Rules of Professional Conduct when discussing proposals for change in the language of a draft.<sup>86</sup>

Most prominent of the ALI admonitions is perhaps Rule 4.03 of the ALI’s Rules of Council regarding Obligations of Institute Members. The Rule provides:

[i]n communications made within the framework of institute proceedings, members should speak, write, and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest. It is improper for a member to represent a client in Institute proceedings and such conduct constitutes good cause for termination of Institute membership under Rule 5.02. 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.<sup>87</sup>

The ALI conflicts rules have been criticized as weaker than that of other organizations, but the ALI rules are hardly insubstantial. Fairly applied, these rules would appear to prohibit members from acting as undisclosed paid advocates for insurers, policyholders, or other interest groups before the ALI and would also appear to bar undisclosed marketing or client development efforts by members in their participation in ALI projects such as the RLLI.

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85. AM. LAW INST., POLICY STATEMENT AND PROCEDURES ON CONFLICTS OF INTEREST WITH RESPECT TO INSTITUTE PROJECTS B. 2 (2010), [https://www.ali.org/media/filer\\_public/13/6e/136e2528-3be7-4b65-beb0-9d59f5c7b403/conflicts-of-interest-with-respect-to-institute-projects.pdf](https://www.ali.org/media/filer_public/13/6e/136e2528-3be7-4b65-beb0-9d59f5c7b403/conflicts-of-interest-with-respect-to-institute-projects.pdf) (approved by the Council on May 16, 1994, and amended by the council on May 17, 2010); *see also* AM. LAW INST., *supra* note 83, at 2 (noting “[t]he risk and appearance of conflict are most likely to arise from engagements that involve legal advice, opinions, expert testimony, or participation in briefing, argument, or the development of legal strategy.”).

86. *Id.* at 8 (approved by the Council on May 16, 1994 and amended by the council on May 17, 2010).

87. AM. LAW INST., RULES OF COUNCIL 4.03 (2007), [https://www.ali.org/media/filer\\_public/fe/85/fe85ca3f-df50-4103-a745-631147e90c4d/council-rule-403.pdf](https://www.ali.org/media/filer_public/fe/85/fe85ca3f-df50-4103-a745-631147e90c4d/council-rule-403.pdf) (as adopted in May 2007; last amended as of May 18, 2016) [hereinafter RULES OF COUNCIL 4.03].

What is lacking, however, is a degree of compulsion in these ALI procedures. Members are essentially subject to an imprecise honor code in which the members call their own balls and strikes. One need not be a cynic to expect that such a regime will not produce a great deal of voluntary disclosure, let alone recusal or restraint in advocating positions that may aid a client (perhaps at the expense of another client). As discussed below, the situation requires not only more awareness of the problem, but also stronger, less discretionary rules aimed at reducing conflicts of interest and bringing those that cannot be eliminated into the sunshine.

#### IV. ATTACKS ON THE ALI LIABILITY INSURANCE RESTATEMENT AS AN ILLUSTRATION

Aspects of the debate regarding the RLLI reflect the problem of involvement in law reform by attorneys who are quite aware of the consequences of proposed law reform for their respective firms and clients. The RLLI began as a “Principles” project in 2010 and was converted to a Restatement in 2014.<sup>88</sup> Along the way, it has garnered increasing attention

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88. Restatements, of course, are well known to law students and lawyers because of the popularity of the Restatement of Contracts and the Restatement of Torts, both of which are frequently cited in judicial opinions and are often reprinted (at least in part) in materials assigned for law school classes. A Restatement is designed to collect and synthesize the law of a given area. In addition to Torts and Contracts, the ALI has published Restatements regarding Judgments, Conflict of Laws, Foreign Relations, and other areas of law. The format for a Restatement is that of “black letter” sections setting for a Rule, followed by Comments and Illustrations, followed by the Reporter’s Note, which is something of a mini-treatise collecting caselaw regarding the black letter sections and commentary.

Restatements were among the first projects undertaken by the ALI, which was formed in 1925 by prominent lawyers, judges, and academics seeking improvement of American law. The Institute’s leadership has been and continues to be a “Who’s Who” of American Law and includes luminaries, such as Columbia Professors Herbert Wexler and Lance Liebman, Yale and Penn Law Professor Geoffrey Hazard, NYU Law Dean Richard Revesz, former ABA President Roberta Cooper Ramo, and noted Judges Louis Brandeis, Learned Hand, Henry Friendly, Lee Rosenthal and David Levy. Membership is by election and is limited to 3,000 persons (there were 2,812 elected members as of May 2017). In addition to producing the Restatements and Principles projects, the ALI promulgates model statutes and conducts continuing legal education programs.

A Principles project is distinguished from a Restatement in that the former is less tethered to existing law and has greater freedom to adopt an approach regarded as superior, even if such an approach lacks support in existing law or has even been rejected by courts. However, a Restatement need not adopt as a rule only positions embraced by the majority of courts. The ALI discussed its process quite eloquently in the ALI’s Revised Style Manual (Jan. 2015), a portion of which regarding the “Nature of a Restatement” is excerpted at the beginning of the current Draft of the RLLI. Summarizing, the Institute noted “Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently

and opposition from the insurance industry, as reflected by industry efforts to derail the project and to label any resulting document as unduly pro-policyholder. The criticism is overblown, if not entirely incorrect. The

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stands or might appropriately be stated by a court.” RESTATEMENT OF THE LAW OF LIAB. INS. at x (AM. LAW INST., Proposed Final Draft No. 2 Apr. 3, 2018) (boldface removed). A Restatement rule should have at least some support in caselaw but need not be the majority rule. Rather, in examining the legal landscape, the ALI may embrace the judicial approach viewed as superior even if it is the minority rule, even a distinct minority.

A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what [former ALI Director and Columbia University law professor] Herbert Wechsler called “a preponderating balance of authority” but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles.

The Restatement process contains four principal elements. The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outmoded or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

*Nature of a Restatement, reprinted in* RESTATEMENT OF THE LAW OF LIAB. INS. at x–xi (AM. LAW INST., Proposed Final Draft No. 2 Apr. 3, 2018).

Where a Restatement adopts a minority rule or modified or hybrid rule or expresses some creativity in attempting to improve the law as well as to synthesize it, this is not disregarding the law but simply a recognition that “what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.” *Id.* at xi.

Ironically, when insurers have complained about an RLLI draft by stating that an RLLI position will damage insurance markets, cause substantial increases in premiums, make insurance less available or the like, they have done so without marshalling empirical evidence. But insurers are the entities with the greatest access to underwriting, claims, loss, pricing, and profitability information—much of which is proprietary and not available to scholars or the general public, including the ALI. Such deafening silence in this regard seriously undermines insurance industry claims about deleterious impact from the RLLI—or for that matter any legal rule insurers regard as favoring policyholders. If a pro-policyholder rule actually does adversely affect the insurance business or the fortunes of insurers, the insurance industry should be able to produce at least some evidence in support of this contention.

RLLI reflects mainstream approaches to insurance issues.<sup>89</sup> Several of the provisions, in fact, take demonstrably pro-insurer positions,<sup>90</sup> and the document as a whole is not unduly slanted to either policyholders or insurers. Despite this, many insurers, and lawyers representing insurers, have attacked the RLLI with an antipathy normally reserved for third-world dictators.

In addition to the formal process of distributing and discussing drafts within the Institute, the ALI maintains a record of the Restatements and projects on its website, to which both members and non-members may post comments. The RLLI was subject to more than 200 comments<sup>91</sup> and more than thirty-five motions regarding portions of the drafts.<sup>92</sup>

As is typically the case with Restatements, after meeting with Advisers and the Members Consultative Group (MCG), the RLLI Reporters revised the then-current draft and presented a “Council Draft” to the ALI Council, which reviews, discusses, and then votes upon the Restatement sections

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89. See generally JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL & KNUTSEN ON INSURANCE COVERAGE §§ 14A.02, 14A.04 (4th ed. 2016 & Annual Supps) (describing political and jurisprudential battles surrounding the RLLI and assessing its provisions, concluding that the RLLI as a whole reflects mainstream legal doctrine). I have been one of the Advisers on the RLLI (there were roughly forty others as well so this is hardly deep “insider” status), and consequently may be affected by what cognitive scientists might term confirmation bias (looking at the world with an unconscious desire to have perceived empirical evidence validate one’s pre-existing opinion) or status quo bias (having an ingrained preference for the current state of affairs) (although this is not quite apt because the RLLI did not become the formally adopted status quo of the ALI until 2019, after my participation ended. But the ALI and its Restatements are to some extent *the* status quo in U.S. law). Despite this, I think my analysis of the RLLI and its relation to existing insurance law is empirically accurate and generally in accord with those of major treatises, including those written by policyholder and insurer counsel.

90. See, e.g., Jeffrey W. Stempel, *An Analytic “Gap”: The Perils of Relentless Enforcement of Payment-by-Underlying-Insurer-Only Language in Excess Insurance Policies*, 52 TORT, TRIAL & INS. L.J. 807, 808 (2017) (criticizing RLLI § 39’s treatment of attachment of excess liability insurance policies where underlying limit satisfied by policyholder payments rather than payment by underlying insurer); Jeffrey W. Stempel, *Enhancing the Socially Instrumental Role of Insurance: The Opportunity and Challenge Presented by the ALI Restatement Position on Breach of the Duty to Defend*, 5 UC IRVINE L. REV. 587, 592 (2015) (urging adoption of earlier draft of RLLI section regarding remedy for breach of the duty to defend that was revised to favor insurers in final version of RLLI).

91. See STEMPEL & KNUTSEN, *supra* note 89, at § 14A.01 n.10. Between January 1, 2014 and July 15, 2017, there were 231 comments submitted regarding the RLLI. Stempel, *Hard Battles Over Soft Law*, *supra* note 81, at 28 n.61. Comments submitted prior to 2014 have not been retained on the website. In addition, persons interested in the RLLI frequently make direct contact with the Reporters but do not send their comments to the ALI for posting. But whatever the final tally, it is clear that the RLLI has received substantial scrutiny and commentary.

92. See STEMPEL & KNUTSEN, *supra* note 89, at § 14A.01 n.11. The Project Page for RLLI was taken down after final approval of the document, but motions remain on file with the ALI.

before it. The RLLI was discussed at five different Council meetings between 2012 and 2018.<sup>93</sup> After approval by the Council, the relevant portions of a Restatement are put before the ALI membership at its Annual Meeting. Meetings are held in May, with roughly three-fourths of the meetings in Washington and the rest being held in San Francisco to facilitate the attendance of members residing in the West.

At the Annual Meeting, Restatement provisions are discussed seriatim before those on the floor, and members are permitted to offer amendments and commentary. Votes are taken on the proposed amendments, while the Reporters generally consider commentary for potential editorial changes after the Meeting. The proceedings are transcribed and published by the Institute, which provides something of a legislative history regarding review of a restatement. “The RLLI was subject to discussion at the 2012, 2013, 2014, 2015, 2016, 2017, and 2018 Annual Meetings, with final approval at the May 2018 Annual Meeting.”<sup>94</sup> The RLLI was formally published in September 2019.

During its development, many hours of lawyering were devoted to attacks on the RLLI.<sup>95</sup> Much of the anti-RLLI commentary could fairly be described as “trashing” the project rather than reasoned commentary examining its specific provisions.<sup>96</sup> The bulk of this appears to have come from non-members who are not technically bound by the obligations to the organization or the norms of the organization. Some of the non-members who engaged in an inappropriate commentary (either as commentators or orchestrators of the commentary) were attorneys, which implicates professional responsibility concerns. Lawyers are not only client advocates, but also officers of the court who are subject to a web of rules<sup>97</sup> mandating that their activity be fair, reasonable, and nondeceptive.

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93. See STEMPER & KNUITSEN, *supra* note 89, at § 14A.01 (describing, at some length, controversy surrounding the RLLI and the nature and volume of commentary submitted to the ALI).

94. *Id.*

95. See generally *id.* at § 14A.04 (discussing the insurance industry’s opposition to the RLLI and observing insurers produced most of the commentary and criticism surrounding the RLLI).

96. See *id.* (explaining oppositional attacks, stating the RLLI was “greatly at odds with American law.”).

97. See 28 U.S.C. § 1927 (2018) (providing for sanctions where attorney arguments are sufficiently unfounded and deemed to be vexatious); FED. R. CIV. P. 11 (requiring claims and contentions have evidentiary and legal support); FED. R. APP. P. 28 (requiring the same for appellate briefs); MODEL RULES OF PROF’L CONDUCT r. 3.3 (AM. BAR ASS’N 2020) (requiring candor); *Id.* at r. 3.4 (requiring fairness to opponents and others).

Realizing that others may disagree, I regard a good deal of the criticism of the RLLI from insurers or insurer affiliates<sup>98</sup> as misplaced, misleading, unfair, and unreasonable.<sup>99</sup> To the extent attorneys were involved in such lobbying (and it appears there was attorney involvement even in commentary ostensibly made by laypersons or non-members),<sup>100</sup> one may legitimately ask whether such defective (even if effective)<sup>101</sup> advocacy is consistent with counsel's role as an officer of the court. Although law reform organizations like the ALI are, of course, not literal courts, they are respected expert bodies seeking to render determinations akin to those of courts and may be more influential than many (probably most) court decisions.<sup>102</sup>

In this Article (and in general), I am less concerned with the conduct of lawyers who are not members of a law reform group and more worried that lawyer members might too frequently succumb to client relations, business, marketing, and affinity pressures that in turn will impact their participation in law reform projects so that they are not truly independent advocates or critics of a Restatement but instead become the functional equivalent of lobbyists inside the temple.

Also problematic are situations where member attorneys of the law reform organization engage in what might be termed "defective" commentary (in that, for example, it is misleading, exaggerated, distorts the truth, or invokes crisis rhetoric without basis). Although attorney attacks on RLLI positions were less shrill and more reasoned than those of laypersons and non-members, some of the commentary arguably sunk to the defective level.<sup>103</sup>

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98. See STEMPER & KNUTSEN, *supra* note 89, at § 14A.04 (reviewing and responding to insurer criticism of the RLLI); see also *id.* at § 14A.07 n.275 ("Of the motions made regarding the RLLI, the vast majority have been made by insurers or affiliates. Of the comments made regarding the RLLI, more than 80 percent have been made by insurers or affiliates.").

99. See *id.* at § 14A.04 (stating several reasons why criticism of the RLLI was inappropriate).

100. See *id.* at § 14A.04[B][2] n.244 (describing an anti-RLLI letter written by a state regulator that appears to have been heavily influenced, if not drafted, by counsel representing insurers opposing the RLLI).

101. As exemplified by recent world politics, politicians may find exaggeration, hyperbole, fearmongering, and falsehoods to be effective electoral tools for victory. But an attorney's use of such tactics in litigation or lobbying violates a lawyer's duties to the legal system.

102. See Elizabeth Laposata et al., *supra* note 25, at 3–8 (noting prominence and influence of the ALI).

103. See STEMPER & KNUTSEN, *supra* note 89, at § 14A.04 n.230 (providing an example of a prominent attorney criticizing the RLLI as a clear warning shot for those in attendance). This is not to say that the commentators—however much I dislike their style—are necessarily incorrect in their

A particularly glaring example of defective commentary was the letter signed by six governors that asserted promulgation of the RLLI (2018 version) would wreak havoc with the economies of the states in question (Iowa, Maine, Nebraska, South Carolina, Texas, and Utah).<sup>104</sup> Sadly, two of the signing governors (South Carolina's Hendry McMaster and Greg Abbott of Texas) are attorneys, with Abbott being a former state Supreme Court Justice.<sup>105</sup> One would have hoped for more from this group of powerful government officials. Additionally, some member attorneys made comments or authored critiques outside the ALI process. Some of these comments contain similar shortcomings.<sup>106</sup>

#### V. ATTEMPTING TO AMELIORATE THE PROBLEMS OF CONFLICTED LAW REFORM ADVOCACY

Drawing the line between what constitutes permissible law reform advocacy and impermissible conflict of interest can be difficult. Enforcing any standard that is not ludicrously lax (treating positional conflicts as permissible) or ham-handedly harsh (barring private practitioners from membership in a law reform organization or requiring recusal whenever a client or potential client is affected by the group's activity) is at least as difficult. Nonetheless, attorneys can take modest steps beyond the current status quo to partially ameliorate the problem.

One easy line to draw is at the point of compensation and client retention. An attorney should not open a file and bill a client for any attorney efforts to make a law reform project (rules, restatement, proposed legislation) more client-friendly or to thwart adoption of a law reform proposal. This practice is simply inconsistent with the fair playground rules of a law reform organization. It is not enough for an attorney to not bill the client for time physically present at organizational meetings or similar organizational functions yet bill the client for time or effort spent submitting comments, making motions, lobbying other members in isolated communication, or

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criticisms. But there is a "right" way and a "wrong" way of commentary and argumentation. The former involves accurate portrayal of the provision under review and accurate presentation of facts, precedent, law, and policy as well as measured assessment of any asserted detriments of a law reform project asserted by the commenter. Many of the anti-RLLI commentary fell short of that standard, and was misleading regarding the provisions at issue, prevailing law, and suggested impact if the commentator's position was not accepted by the ALI.

104. *See id.* at § 14A.07 n.268 (listing governors who signed the letter in opposition of the RLLI).

105. *Id.*

106. *See id.* at § 14A.02 n.20 (providing examples).

organizing efforts to impact law reform outcomes. *Any* attorney compensation for this type of activity is improper and violates the norms of the ALI as it would with similar organizations.

Using the RLLI again as an example: if the law firm of the member attorney (Lawyer *A*) who is being compensated by insurers also represents policyholder clients (even in a distant branch office) that will be harmed by the “adverse precedent” of pro-insurer RLLI provisions sought by the retained attorney, the law firm has a positional and material limitation conflict. Similarly, if Lawyer *A*'s efforts to obtain more pro-insurer content of the RLLI are not part of a paid representation, but are part of a reasonably ascertainable client development/marketing effort (as opposed to Lawyer *A* taking this on during evenings and weekends out of personal passion),<sup>107</sup> Lawyer *A*'s firm should not simultaneously be representing any policyholders who would benefit from a different approach to the breach of defense issue.<sup>108</sup>

In addition to presenting a classic positional conflict (albeit substituting Restatement provisions for litigation), the sort of lobbying or marketing activity described above also constitutes improper partisan participation in that it cases the member in the role of a client (or prospective client) advocate rather than a dispassionate, neutral member participating in good faith in the organization's work.

Realistically, members of law reform organizations bring with them their substantive views of law and policy, which are shaped by their experience. A lawyer who has worked as coverage counsel for insurers for three decades is unlikely to believe that policyholders need increased protection against the avarice of insurers. A lawyer who has spent those same thirty years suing insurers for bad faith is unlikely to believe in constricting such potential liability.<sup>109</sup> But the ability of these “partisans in practice” to engage in good

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107. For example, if the law firm is providing Lawyer *A* with associates and staff doing significant work (e.g., a lengthy research memorandum designed to influence the ALI), this would, in our view, be a sufficiently formal firm undertaking and client development effort that would be the equivalent of paid work for a client. This undertaking should trigger a conflict of interest analysis, even if there are not actual billings to an insurer client. Billed or not, these efforts would be adverse to Big Firm's policyholder clients and are a conflict of interest.

108. It is also probably an impermissible conflict if Big Firm is representing claimants who would benefit from the faster and more certain insurance coverage provided by a rule that precluded coverage defenses when an insurer is in breach of the duty to defend.

109. To a large extent, however, a premise of law reform organizations is that members can set aside the wishes of their clients or the economic interests of their practices and assess proposals fairly. For example, an insurer's lawyer may by day assist clients by successfully arguing that an insurer can



faith debate over draft Restatement provisions and comments or civil rules reform should not be further hindered by permitting such lawyers to be compensated for work with the law reform organization, or by the prospect of generating business by showing fealty to one group of litigants.

The ALI has a rule in place (Rule 4.03) that sets essentially this exact standard, but suffers from shortcomings.<sup>110</sup> First, it could be more direct and specific. Second, more structured disclosure and certification could back the rule. Third, the rule needs more aggressive policing. Current Rule 4.03 states that it is “improper for a member to represent a client in Institute proceedings” but does not require certification of compliance with the rule by the member.<sup>111</sup> Although a member tempted to violate the rule might submit an untrue certification, taking an oath or making a similar affirmation is generally accepted as having a sobering effect that increases the likelihood that the person taking the oath will tell the truth and perform an assigned duty.

Courts implicitly take this view by requiring that witnesses take an oath or affirmation. The U.S. Congress takes a similar view, not only swearing witnesses before a hearing but also requiring witnesses to complete and sign a form that seeks to identify possible conflicts and requires the witness to acknowledge that materially false testimony constitutes perjury.<sup>112</sup>

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have no bad faith liability in the absence of coverage (the doctrine in many states), but support an organization proposal that does not impose this requirement, reasoning that even in the absence of coverage, insurers may mistreat policyholders in a manner reflecting bad faith and entitling the policyholder to a remedy.

110. RULES OF COUNCIL 4.03, *supra* note 87.

111. *Id.*

112. *See* Truth in Testimony Disclosure Form (on file with author). The Form requires the witness to provide basic information, an advance copy of planned testimony, a resume, an acknowledgment of perjury law, and list:

any federal grants or contracts (including subgrants or subcontracts) related to the hearing’s subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract . . .

[as well as]

any contracts or payments originating with a foreign government and related to the hearing’s subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contact or payment.

Disclosure Form at p. 1. *See also* Rules of the House of Representatives, Rule XI ¶ 2(g)(5) (listing the requirements of a witness appearing in open meetings and hearings).

Although not a panacea, a certification requirement should discourage conflicted or unduly partisan member participation at a relatively low cost. The certification need not be onerous and could be as short as a single page (the congressional form is two pages). Organization members could require execution of the form regularly, before meetings where a matter is to be discussed, and contemporaneously with any written comments submitted.<sup>113</sup>

Organizations should reject comments or motions unless a certification accompanies them that the submitter has not been retained or compensated by an interested party, nor has engaged in any activity before the law reform group with the hope of gaining favor with clients or prospective clients. To avoid such conflicts and violations of organization rules occurring *sub silentio*, organizations like the ALI or the ABA could make it a required part of any commentary or motion directed toward a Restatement that the commentator or movant identify any client retention, compensation, client development, or marketing initiative of the attorney that relates to the topic of debate, comment or motion.<sup>114</sup>

Alternatively, if lawyers “on the clock” are permitted to participate in a group’s law reform activity (either as members or non-members submitting

113. The form might look something like the following:

I, \_\_\_\_\_ certify that my participation regarding [the organization work] is entirely due to my individual and professional interest in the matter and that any views I express are solely my own and are not designed to favor the interests of any clients or prospective clients of mine or my law firm. I have received no remuneration from anyone that is in any way connected to my participation and am not advancing positions or argument for the purpose of ingratiating myself with any interest group or recruiting any possible clients.

114. For example, law reform organizations might require certification in addition to the type discussed in the prior footnote as something of a “belt and suspenders” approach to putting members on notice of required behavior. Such a disclosure form might read as follows:

In approaching my participation in consideration of [the organization’s work regarding a particular topic or project], I disclose that my law practice involves representation of persons or entities with an economic interest in the subject matter at issue. During the past five years, approximately \_\_\_ percent of my time and \_\_\_ percent of my income has come from these persons or entities that can generally be described as \_\_\_\_\_ [e.g., insurers, insurance brokers, policyholders, stock brokers, labor unions, manufacturers, software companies, the entertainment industry; law enforcement; criminal defendants].

Although this disclosure need not be articulated orally, having these disclosure forms submitted and kept on file would likely have a disciplining impact on members and remind them of their duties to the organization. In addition, the materials should be available—at least to other members as well as to organization leadership—so that possible outside influences can be investigated.

commentary or participating in discussion and debate), there should be a certification that the attorney's law firm has performed a conflicts check that includes an examination of possible positional conflicts and obtained waivers where necessary if such waivers are permissible.<sup>115</sup>

The certifications and disclosures of attorneys (both member and non-member) should be available to the public. The ALI provides that disclosures submitted by Reporters as to their engagements as consultants are available "upon request" by the public, although "for confidentiality reasons, parts of the disclosures may be redacted or withheld."<sup>116</sup> This is an improvement over the traditional norm of having Reporters on an honor system or informal discussions regarding disclosure. The system can be improved by placing this information, however redacted,<sup>117</sup> on the organization's website<sup>118</sup>—and certainly could be expanded to include all the member and non-member commentators. In addition, where an organization such as the ALI has sufficient influence on public policy, posted commentary should be available for viewing by the public as well as the membership.

To be sure, this would add a layer of bureaucracy to the process. But the stakes are important, and the additional costs are not likely to be substantial, even if the additional record-keeping may seem initially irritating to the organization's staff. Further, lawyers should not view any required disclosures or certifications as mere window-dressing or forgettable paperwork. Greater knowledge about the background of commenters will

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115. As a practical matter, a law reform organization cannot refuse to accept commentary from individuals or groups interested in its work. But an organization can refuse to seriously consider commentary if those submitting it fail to make requisite disclosures of interested clients and the terms of their retention.

116. Laposata et al., *supra* note 25, at 52–54 (quoting AM. LAW INST., *supra* note 83).

117. The privacy concerns regarding some aspects of disclosure, particularly the more comprehensive disclosure provided by Reporters as compared to members, are legitimate, which requires care to avoid excessive redaction.

118. The ALI has already made significant strides in this direction in recent years. For example, comments on a Restatement or Principles project are all posted to the project's website, which is available for viewing by Institute members. The ALI also posts commentary directed to the ALI through less formal means—such as comments submitted directly to the Director with the understanding the commentary will be published. The "Six Governors" Letter (*see supra* notes 104–105) is an example; the ALI has posted these for viewing.

A discerning reader can often ascertain the orientation of a commentator in that certain law firms are known as plaintiffs' firms, defense firms and the like. But the more routinized disclosures and certifications proposed in this Article would reduce uncertainty and provide more information for assessing the commentary. Disclosure or certification forms could presumably be posted with the commentary at relatively little additional expense.

aid both law reform organizations and the public in assessing commentary and determining the final form of Restatements, proposed rule changes, model legislation, and the like.

One weakness of almost any disclosure regime is that it is unlikely to adequately capture informal advocacy by interest groups and their lawyers (whether members or not). Partisan lawyers and positionally conflicted lawyers are unlikely to be deterred from pressing client or industry concerns in phone calls, office visits, and side conversations during organization events that, by their nature, are difficult to detect and make transparent to outsiders. Although perhaps overkill, an organization like ALI should at least consider whether Reporters and Council<sup>119</sup> members should log and make publicly available records of these informal contacts. It would be more than a little interesting, for example, to know how many times insurer advocates informally contacted RLLI Reporters relative to consumer advocates. As previously noted, written comments on the RLLI were dominated by insurer advocates, by a roughly 4:1 ratio.

Critics of current ALI policy have argued that it should adopt protocols similar to those of the National Academy of Sciences (“NAS”), National Academy of Engineering, the Institute of Medicine (“IOM”), and those of the National Research Council.<sup>120</sup> These groups appear to require both broader and more broadly disseminated disclosure and forbid a wider range

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119. Although the focus of critics of the ALI's disclosure regime has been Restatement Reporters, *see* Laposata et al., *supra* note 25, at 26–27, 33–34, 36 (discussing tobacco industry connections to Torts Restatement Reporters William Wade Prosser, Aaron Twerski, and James Henderson), ALI Council members have power at least equal to and probably greater than most Reporters.

The Reporters, of course, have a strong influence in designing and shaping the “first drafts” of the various sections of Restatements and Principles, as well as influence in setting the discussion agenda with Advisers and the Members Consultative Group. But where a Restatement or Principles provision is contentious, the work of the Reporters, even if solidly supported by the Advisers, receives close scrutiny by the Council, a roughly sixty-member group of prominent judges, attorneys, and scholars who may have their own views on the subject and are consistently concerned that the work of the Reporters be well received by courts and the profession.

It is not unusual to have the Council make significant changes in the work of the Reporters. Less common is a change in the Council's work by the Annual Meeting Membership. Under these circumstances, whatever limits on Reporter behavior and whatever disclosures or certifications required of Reporters should probably be required of Council members as well.

120. *See id.* at 55–59 (discussing the various safeguards the National Academies take to limit impermissible influence on its members).

of financial ties to interest groups affected by the work of the organizations.<sup>121</sup>

The National Academies define “conflict of interest” as “any financial or other interest which conflicts with the service of the individual because it (1) could significantly impair the individual’s objectivity or (2) could create an unfair competitive advantage for any person or organization.”

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All members of NAS committees must fill out conflict of interest forms that ask for specific information about their financial interests and organizational affiliations upon appointment to a committee, and members must also update these forms whenever any of their financial interests or organizational affiliations change.<sup>122</sup>

The NAS conflicts policy appears closer to a bar, while that of the ALI is more a policy of (self-policing) disclosure with the view that the organization will be able to aptly discount member advocacy that might be tainted by conflicts or partisanship. The NAS disclosures apply more widely than those of the ALI and include disclosure regarding spouses and relatives, as well as requiring annual updates or updates upon changed conditions.<sup>123</sup>

Medical journal disclosures have also been suggested as an improvement over ALI policy. These disclosures often require authors to reveal the resources received from various sources that assisted in completing the work as well as financial relationships that “[c]ould [b]e [p]erceived [t]o [i]nfluence, or [g]ive [the] [a]pppearance of [i]nfluencing [s]ubmitted work” as well as “[o]ther [r]elationships [t]hat [r]eaders [c]ould [p]erceive as [h]aving [i]nfluenced, or [that] [g]ive [the] [a]pppearance of [i]nfluencing [s]ubmitted [w]ork.”<sup>124</sup> Interestingly, the medical profession has, in essence, embraced the “appearance of impropriety” as a type of conflict and a topic of concern while the legal profession removed this ground of lawyer and judicial disqualification from its ethics codes during the 1980s.

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121. *See id.* (creating required disclosures which ask that members who are involved in developing guidelines for the organization disclose the “nature, scope, duration, and monetary value” of ties to potential interest groups).

122. *Id.* at 55, 57.

123. *See id.* at 56 (comparing the policies of the NAS, IOM, and ALI regarding conflicts of interest).

124. *Id.* at 60.

This broader disclosure should be considered for law reform organizations but may be excessive given the shifting nature of a practicing lawyer's work and the episodic nature of academic consulting. On the proverbial other hand, however, it makes sense to inform the audience of a speaker's client or expert engagements. And it might be more than a little interesting to know whether judge-members of a law reform organization have been going to "educational" conferences sponsored by pro-plaintiff or pro-defendant interest groups.

Although the ALI, perhaps because of the prominence of Restatements and the notoriety brought by criticism of the tobacco industry influence on the Torts Restatements, has been a focal point of concern about politicization and member conflicts in advocacy, the problem is probably more pronounced in other law reform organizations. The ALI may have imperfect or insufficiently enforced conflict and neutrality rules, but many state and local bar associations often have none. One may be a member of a bar association or state supreme court committee without making any of the disclosures suggested in this Article and may be an active litigator for special interests impacted by committee work.

This is not to say that these committees, bar associations, or state courts are necessarily deceived. In a sufficiently concentrated legal community, organization or committee, members probably know a great deal about the ideological orientation of members as well as their legal practices or other sources of income and loyalty. That said, more stringent conflict prohibition and disclosure policies should replace the informalities of the organizations.

Rational analysis and debate that is unfettered by client interests and pressures should form the basis of law reform so that groups like ALI do not become the equivalent of a legislature beset upon by paid lobbyists. Members will, of course, have views forged over years of practice, but active formal representation or efforts to curry favor with an interest group at the time of participation should not shape those views. Just as important, members should not act in a manner violating the rules regarding conflict of interest.

## VI. CONCLUSION

For too long, lawyers have soft-pedaled the dangers of positional conflicts in general and largely ignored them in the context of law reform or similar public policy activity involving attorneys. Similarly, law reform organizations have been insufficiently vigilant in discouraging member partisanship in an organization activity. Both pose significant risks.

The first problem endangers law firm clients—or at least the clients who are on the short end of the stick when lawyers in the firm work to achieve bar association rules, restatement pronouncements or the like that favor other firm clients at the expense of the client who would prefer a different legal landscape. Although such conflicts are probably waivable much of the time pursuant to Rule 1.7(b), the firm client who is not getting the benefit of the firm's law reform advocacy should at least be informed and provided with the opportunity to consent—or seek the services of a law firm that does not work against its interests.

For decades, if not centuries, lawyers have prided themselves—perhaps too much—in a manner too inconsistent with the attorney desire to be seen as lawyer-statesman. The pride is justified to the extent it enables counsel to assess a claim clearly and dispassionately so that a client is well-served. It may, for example, be much better for a lawyer to counsel the client to quickly settle a matter rather than being told that a claim merits vigorous defense (and attendant billings). Flexibility, however, becomes betrayal when a law firm argues for Rule *A* or Doctrine *A* on behalf of one client to the detriment of other clients who would prefer that court reject Rule *A* and Doctrine *A*.

The second problem poses a risk not so much to clients, but to law reform organizations, the judiciary, and the public. Bar associations and groups like the ALI should be confident that when members advance or comment on organization work, they are doing so out of honest conviction, rather than a desire to curry favor with existing or prospective clients. Acceptance of any form of compensation in return for a member attorney's attempts to sway the work of law reform organizations should disqualify an attorney from future membership. Detection may be difficult, but this requires increased vigilance rather than de facto acceptance.