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ALI and Parliamentary Procedure

By Member H. Mark Stichel, Gohn Hankey Stichel & Berlage LLP

Contrary to what non-lawyers may think about how lawyers act and structure their own affairs, it has been my experience that lawyers are less legalistic and rule-bound than lay people when it comes to conducting their affairs and meetings. For example, the Baltimore law club of which I am a member and whose membership includes many judges, was founded in 1923 and has been run informally without any written rules ever since. Although the ALI has more rules and structure than my law club, its various meetings operate relatively informally. Thus, I was somewhat surprised when during the discussion of the Model Penal Code: Sexual Assault project during the past year's Annual Meeting, Judge Lee Rosenthal, the presiding officer, had a parliamentarian at her elbow.

After the Annual Meeting, I did a number of Boolean searches in the Annual Meeting Proceedings that are available on Westlaw (2000 to 2014) to find any discussions of parliamentary procedure or objections to the conduct of a discussion during the meeting. There are a few passing references to Robert's Rules of Order, but no substantive disputes regarding parliamentary procedure. The discussion of the Employment Law project at the 2008 Annual Meeting and the discussion of capital punishment at the 2009 Annual Meeting are among the most spirited Annual Meeting debates I have witnessed during the nine Annual Meetings I have attended. I went back and read the Proceedings for those discussions. The most striking thing is that nowhere was there any strong opposition to the chair's stating rules for the debate and limiting speakers. The Corporate Governance project was one of the most contentious, if not the most contentious project in the history of the ALI. I read the discussion of the Principles of Corporate Governance at the 1992 Annual Meeting. Again, there did not appear to any opposition to how the chair decided to conduct the meeting.

ALI Council Rule 9.2 gives the President significant control over the conduct of the Annual Meeting. ALI Council Rule 9.3 defaults to the latest edition of Robert's Rules of Order if a matter relating to the conduct of the Annual Meeting is not governed by the ALI Bylaws or Council Rules. Robert's Rules of Order (11th Edition) differs from the ALI's Bylaws and Council Rules in that it states that debate be unlimited unless a motion to limit debate or suspend the rules is approved by a two-thirds vote. *See* Robert's Sections 15, 25, and 43. Under Council Rule 9.2, the President can set time limits for debate.

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THE PRESIDENT'S LETTER

Building American Institutions

We all know that in 1923 the most important legal figures of the time came together to form our American Law Institute. The original incorporators and leaders included Chief Justice and former President William Howard Taft, Charles Evans Hughes, later to become Chief Justice, former Secretary of State Elihu Root and Judges Benjamin Cardozo and Learned Hand. They not only literally formed the organization, they thought through the mission of the ALI, invented a process to deliver the much needed law reform in the first Restatements, and, importantly, thought about and made sure that their brainchild could do its work with a sound financial foundation.

Since then major legal figures have been in our leadership positions, as our Directors and as loyal members and active participants. Along with names like Herbert Wechsler and Charles Alan Wright, and Karl Llewellyn and Soia Mentschikoff, who conceived of and led the drafting of the Uniform Commercial Code, the great legal minds of each era have both been intellectual leaders and, as they could, personally looked after the financial means that allowed the Institute to flourish through Depressions, world wars, and other upheavals in our society.

As we look at our distinguished history, there is one figure in my life at the ALI who was key to our work, looked after our money as though it was his very own, and now has made his mark as one of our most generous donors. Bennett Boskey served as our Treasurer for 35 years. He invented the Boskey motion, which makes it practically possible for us to move forward with our work, taking into consideration improvements suggested and voted on at our Annual Meetings by the membership.

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MCG on Uniform Commercial Code Issues

Members are invited to join the Members Consultative Group for Uniform Commercial Code Issues. This new MCG will provide input to ALI on UCC-related issues from time to time, such as draft amendments to the UCC, proposed PEB Commentaries and Reports, and projects that may overlap or implicate the UCC.

To join the MCG, sign in to the ALI website and visit the Projects page (*www.ali.org/projects*). Click on Uniform Commercial Code" from the Projects list and select "Join MCG" on the right side of the page.

ALI Accessories Now Available

In response to member requests, we are offering ALI branded ties and scarves for purchase. These products, tailor made in the U.S.A. with the finest silk, will brighten up your outfit without overpowering it while signifying your membership in the Institute and commitment to our work.

These items are available to ALI members to pre-order now and will ship this fall, just in time for the holiday season.

View details and order your limited-edition attire online at *www.ali.org/store*.

ALI AND PARLIAMENTARY PROCEDURE

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Bylaw 3.04 states that a majority vote at any meeting of the membership or session thereof is effective as action of the membership.

From the beginning of the Institute through the 1980s, discussions of projects at the Annual Meeting often would last for a whole day and sometimes more than a day. As more projects competed for time at the Annual Meeting, time became an issue. Geoffrey Hazard wrote in his 1985 Report of the Director:

> A related problem is the use of time for discussions both in the Council and at the Annual Meeting. In those deliberations by tradition we consider drafts section by section, and are fairly latitudinarian as to the limits of comment. Many members of both the Council and the membership at large have inquired whether there could not be more efficient use of time through better focus of discussion.

The Notice for the 1985 Annual Meeting included one innovation: members were invited to submit written motions in advance of the Annual Meeting. However, as the Director also noted: "such submissions did not preclude motions and suggestions from the floor in accordance with our traditional practices."

In 1985, the ALI Council appointed a Special Committee on Institute Procedures. The Committee was chaired by Gerhard Casper and its members were Michael Boudin, Roger C. Crampton, Ruth Bader Ginsburg, Conrad K. Harper, Betsy Levin, Hans A. Linde, Michael Traynor, George Wittenburg, and Charles Alan Wright. In 1986, the Council accepted a number of reforms suggested by the Special Committee on Institute Procedures, including the formation of what have become Members Consultative Groups and giving the President control over the agenda and conduct of the discussion at the Annual Meeting. A memo that Gerhard Casper wrote to the Special Committee also addressed parliamentary procedure:

> Professor Wright has called my attention to the fact that neither the Rules of the Council nor the Bylaws specify which parliamentary authority governs. One could argue that "through long-established custom" Robert's Rules control. On the other hand, it may be better to spell this out.

The Council also adopted Gerhard Casper's suggestion and explicitly adopted Robert's Rules of Order as ALI's ultimate parliamentary authority.

The time pressures on the Annual Meeting and discussion time that were felt in the 1980s are even more acute today. Given the number of active projects that are competing for discussion time at the Annual Meeting, discussions necessarily must be focused and compressed. Although Members Consultative Groups do not make any decisions binding on reporters or the membership, they have in substance replaced the day-long discussion of a project from an earlier age. In recent years, most MCG meetings have been accessible remotely and comments on projects are routinely posted to the ALI's website. Thus, notwithstanding what sometimes may seem to be strong control of discussion by the chair at the Annual Meeting, the ALI's longstanding tradition of latitudinarian comment persists, albeit sometimes in different forums. I believe that it is because of the participation of our members in project MCGs as well as the good will and mutual respect among the membership that we have been able to accomplish our work without resort to formal parliamentary procedure.

THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

Restatements and the Federal Common Law

Because of *Erie*, the phrase "common law" probably conjures in most lawyers' minds the idea of state common law. And, not surprisingly, the Restatements are generally identified with state common law rules. Indeed, our influence on state common law rules has been widely recognized since the publication of the First Restatement. Around the time of our 75th anniversary, Michael Traynor, then the ALI President, wrote about the Institute's "significant contributions to unifying as well as simplifying and clarifying the law, primarily (although not exclusively) state law." That story is now well known.

In this letter, I will focus on a different, less discussed front: federal common law. The ALI's influence on this front is more recent. For example, an electronic search of "federal common law" in Supreme Court opinions that also referred to "Restatement" or "Restatements" revealed that the first case to satisfy these two conditions was decided in 1953—and it was the only case from the 1950s. There were then two such cases in the 1960s, two in the 1970s, 13 in the 1980s, 20 in the 1990s, 10 in the 2000s, and, so far, eight in the 2010s. Approximately half of these cases were decided after 1994. In contrast, only 32% of all references to "Restatement" or "Restatements" can be found in cases decided after that date.

An analysis of decisions of the U.S. Courts of Appeals reveals a similar pattern. There, approximately half the cases referring to "federal common law" and "Restatement" or "Restatements" were decided after 1996. By comparison, only 37% for all Restatement citations can be found in cases decided since then.

Though somewhat recent, the influence of Restatements on the federal common law is extremely significant. In fact, there are many instances in which the courts not only adopt a specific Restatement rule but also indicate that the Restatements are the way to determine the federal common law rules in a whole area. Three examples of this phenomenon follow.

RESTATEMENT OF CONFLICTS OF LAWS. The Second Circuit has said that "when conducting a federal common law choice-of-law analysis, absent guidance from Congress, we may consult the Restatement (Second) of Conflict of Laws," and that "federal courts frequently consult the Restatement (Second) of Conflict of Laws in crafting [federal common law conflict of law] principles." The Fifth, Sixth, and Eleventh Circuits have also indicated that they follow the Restatement in federal common law of conflicts of law. In a number of cases, the Ninth Circuit has stated directly that "[f]ederal common law follows the approach of the Restatement (Second) of Conflicts of Laws."

RESTATEMENT OF TORTS. This Restatement has been particularly influential under the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA). For example, the Fourth Circuit noted: "We think these principles, as reflected in the Restatement (Second) of Torts, represent the correct and uniform federal rules applicable to CERCLA cases." The Third Circuit has explained that "[b]y adhering to the rules set forth in the Restatement, we also further the interest in achieving uniformity in the articulation of federal common law that governs CERCLA's interstices."

RESTATEMENT OF CONTRACTS. The D.C. Circuit has noted the tendency of federal courts to follow the Restatement and indicated that it "would be inclined to fashion a federal common law rule" from the principles of the Restatement because they "represent the 'prevailing view' among the states." Similarly, the Federal Circuit has said that "[t]he Restatement of Contracts reflects many of the contract principles of federal common law," and the Fourth, Sixth, and Eleventh Circuits have all explicitly looked to the Restatement as a source for the federal common law of contracts. Earlier this year, the Ninth Circuit stated that "federal common law . . . looks to 'general principles for interpreting contracts.' Often, those general principles are found in the Restatement (Second) of Contracts."

The three preceding examples are not unique. For example, the Seventh Circuit has recognized that "in developing the federal law of agency, courts have relied on the Restatement of Agency as a valuable source for those general agency principles." It has also indicated that "[f]ederal common law tracks the consensus of states, which have developed the law of restitution. We therefore turn to the *Restatement of Restitution* (1937), which summarizes the dominant themes of state common law."

Similarly, the Supreme Court has noted that "[i]n determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency." More generally, after observing that "the courts of appeals have acknowledged that '[t]he universal starting point for divisibility of harm analyses in CERCLA cases' is § 433A of the Restatement (Second) of Torts," the Court proceeded to apply the Restatement standard in a CERCLA case.

The use of Restatements in federal common law cases raises some distinct issues. First, Restatements should be understood as being addressed to federal judges as well as to state judges, which many regard as our target audience. Moreover, with respect to decisions involving federal common law, as opposed to state law, Restatements are relevant to the work of the Supreme Court. And, for federal common law cases, Restatements face a different institutional context because there is a mechanism—review by the Supreme Court—for resolving conflicts that is lacking for state law. One traditional argument for the value is Restatements is that they promote the harmonization the law in a context is in which no state court has the institutional authority to effect such harmonization. It is therefore noteworthy that Restatements have become so important to the development of federal common law, where the Supreme Court can play the harmonizing role.

Editor's Note: A version of this Director's Letter that includes a bibliography of related material with links to relevant documents is posted on the News page of the ALI website: *www.ali.org/news*.

Fables In Law *By D. Brock Hornby*

U.S. District Judge D. Brock Hornby of the District of Maine is a member of the ALI Council. He wrote these Fables In Law for publication in The Green Bag. *They are reprinted here by permission. Look for additional chapters in upcoming issues of* The ALI Reporter.

Chapter 3, Legal Lessons From Field, Forest, and Glen

THE SORTING OF THE GOPHERS

In their first year of law school, Gophers jostled among themselves in figuring out who would succeed the most. Some Gophers regularly volunteered to speak on Professor Beaver's invitation, while others were silent unless called upon. At the time, the generally accepted wisdom among Gophers was that the ones always speaking were the brightest and most likely to succeed. Then came the papers to write and examinations to take, and to the surprise of many, some of the most loquacious did poorly and some of the silent Gophers received high grades and were recognized throughout law school as a result.

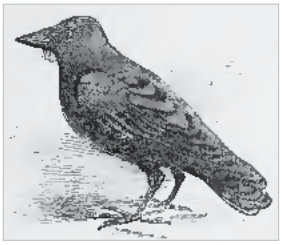
After law school, still a different Gopher-sorting process took place, with those who knew best how to maintain a professional relationship and inspire confidence gaining the most clients and prestige.

Moral: The best talkers aren't always the best students; the best students aren't always the best lawyers.

THE DESTRUCTION OF THE PORCUPINE

Turtle had finished her oral argument before the Three Vultures. They had pretty much made mincemeat of her and when it was his turn to respond, Porcupine stood up to continue what he hoped would be Turtle's complete destruction. As he began to pick up on some of the points the Three Vultures had made in challenging Turtle, Porcupine was dismayed to discover that the Three Vultures immediately turned upon him, and it was he who was destroyed. Waiting for their turn to be heard were Snake and Woodchuck. Woodchuck went first and suffered the same attack as Turtle. When it was Snake's turn, he said "I rest on my written brief unless the court has questions." There were none, and he sat down unscathed.

Moral: Sometimes it is better to say less.

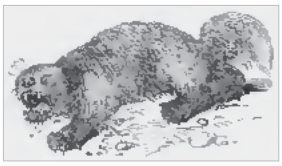


THE CROW'S COLD RECORD

The Three Vultures were reviewing Owl's decision in a hardfought controversy from the Forest Glen in order to determine whether Owl had behaved impartially and whether the evidence supported her decision. Crow had kept the record of the Glen controversy and certified it to the Three Vultures. Porcupine and Turtle were arguing the appeal, although neither had been present in the Glen for the trial. Porcupine pointed out that according to Owl, Chipmunk had said "I do not like red currants," whereas Crow's transcript showed that Chipmunk said "I do like red currants." Moreover, Porcupine argued that Owl had shown her partiality by treating Chipmunk disrespectfully, interrupting his testimony at one point to say "Well, things really are getting foggy now, aren't they!" Turtle had nothing to say in response to these points, and the Three Vultures reproved Owl in their decision. Those who were present in the Forest Glen, however, knew that a branch on which Crow was perched had snapped just as Owl reported what Chipmunk had said about red currants and prevented Crow from hearing the "not" that Owl heard. They also knew that in fact physical fog had rolled in heavily that morning, prompting Owl's comment about things getting foggy.

Moral: Never trust a cold or surprising transcript, especially when the advocates on appeal were not present at trial.

THE CONTINUATION OF CHAPTER 3 APPEARS ABOVE. PART 1 APPEARED IN THE SPRING 2016 ISSUE OF *THE ALI REPORTER*.



THE WOLVERINE'S LIBERTY

Following principles announced by the Three Vultures, Owl ordered Wild Boar to be confined for a prolonged time due to his repeated dangerous behavior, and the Three Vultures affirmed the sentence. Thereafter, Wild Boar took every opportunity to petition to reduce his sentence, but Owl and the Three Vultures regularly rejected his petitions.

As the number of creatures in the Forest grew, as they continued to misbehave as was their wont, and as the resulting punishments became harsher, more and more of the Forest creatures were confined for long periods of time like Wild Boar, and they also petitioned to reduce their confinements. Owl and the Three Vultures were frustrated by the resulting volume. They developed almost a visceral reaction against reexamining these punishments, especially because these were creatures who had already consumed hours of the tribunals' time, and their petitions were usually meritless and, on top of that, unusually difficult to understand. Therefore, the tribunals developed rules to prevent the already-sentenced creatures from bringing new petitions.

However, there came a time when the Three Vultures announced a new, more lenient, rule for future offenders like Wild Boar. Wolverine, a new offender, received this more lenient treatment, with a substantially lower sentence than Wild Boar. Wild Boar petitioned again, asking to have the more lenient rule retrospectively applied to him. Owl and the Three Vultures gave elaborate explanations why they would not reconsider Wild Boar's punishment. They believed that they were behaving responsibly, justly and carefully, preventing the Forest wheels of justice from becoming clogged through reexamination of cases. But every day Wild Boar saw Wolverine and fumed over the recognition that Wolverine had received a much milder punishment for the same conduct as Wild Boar. Wild Boar's family and friends also brooded over the inequalities, with a deep sense of injustice.

Moral: Injustice looks different depending upon which end of the telescope you are using.

THE OWL'S DELUSION

From time to time, Owl was asked to speak at meetings of the Forest Glen advocates. She delighted in the glowing introductions she received, and in how the advocates applauded her talks, laughed at her stories and seemingly hung on her every word. As the years passed Owl decided that she had developed remarkable skills as a raconteur and public speaker. Behind her back, however, Fox, Snake and the other advocates talked about how insufferable Owl had become.

Moral: Be skeptical of compliments from those who want something from you.

THE HERON'S VISIT TO THE MOUSE

The management committee had a difficult topic to take up with one of the law firm partners. Committee chair Frog, being an older gentleman, sent the partner a written memo. Centipede, also on the committee but somewhat younger, sent an email. Toad, the youngest, sent a text message. None of them actually spoke directly to Mouse, the object of their concern. Mouse put Frog's written memo on her desk and every morning when she came in, it irritated her and she became more intransigent about the management committee's request. She printed Centipede's email to the same effect and also re-examined it on her iPad. Similarly for Toad's text message on her cellphone. Heron, on the other hand, finally went to speak to Mouse. Heron watched Mouse's reactions to what she had to say, modulated her tone-of-voice and modified some of her statements accordingly. Heron and Mouse came to an understanding. But Mouse refused to speak to Frog, Centipede, and Toad.

Moral: Face-to-face communication remains the best way to convey difficult information.

Criminal Trial Manual Updated

The Institute discusses the forthcoming publication of the Trial Manual for the Defense of Criminal Cases (6th Edition) *with authors Randy A. Hertz and Anthony G. Amsterdam of NYU School of Law.*

The *Trial Manual*, published by The American Law Institute Continuing Legal Education (ALI CLE), is an update of the widely used how-to guide for handling criminal court cases last published in 1988, which was a joint project of the American College of Trial Lawyers, National Defender Project of the National Legal Aid and Defender Association, and ALI-ABA Committee on Continuing Professional Education.

For those unfamiliar with previous editions, what is the goal of the *Trial Manual for the Defense of Criminal Cases*?

The primary goal of the manual has always been – and continues to be – to serve as a resource for criminal defense lawyers at the trial level. It covers the information a defense attorney has to know, and the strategic factors s/he should consider, at each of the stages of the criminal trial process. It is organized for easy access by practitioners who need ideas and information quickly in order to jump-start their work at any given stage. For example, an early chapter canvasses the three common situations in which a defense attorney enters a criminal proceeding – when s/he gets a call to represent someone who has just been arrested and is still in police custody; when s/he gets an inquiry from or on behalf of someone who may be "wanted" by the authorities; and when s/he is appointed or retained to represent a defendant at the defendant's initial court appearance. Taking each of these scenarios, we go step-by-step through the things that the attorney will need to know, decide, and do, in order of immediacy but with an eye to which actions will have the most important long-run consequences.

As another example, instead of organizing our analysis of search-and-seizure law in the way that a doctrinal treatise would, we start it off with a list of questions about the nature of the police activity that a client or a witness recounts to the defense attorney. Did this case involve an on-the-sidewalk accosting, questioning, pat-down, and arrest? Or did it involve a vehicle stop? Or police entry into a building or dwelling unit? For each situation, the manual steers the reader to a subsequent detailed discussion of the legal, factual, and tactical issues potentially implicated.

At the macro level, the manual tracks the handling of a criminal case from the point at which defense counsel picks it up – his or her initial dealings with a client, police and prosecutors – through investigation, discovery, pretrial motions, plea bargaining, suppression and other pretrial hearings, trial preparation, trial, sentencing, and post-verdict motions. We've designed the table of contents and the index so that practitioners can zero in immediately on what they need to ask, find out, and think about at each specific stage.

The book also can be of use to other people who want summary or detailed information about how the criminal trial process works: – appellate defenders; postconviction lawyers; civil lawyers who handle false arrest cases and various claims relating to the criminal justice system; law students; academics; news reporters.

How have criminal trials changed since the last edition was published (1989)? What segment of criminal defense has changed the most, as far as case law is concerned?

The first half of that question alone tempts us to give you the kind of 40-volume answer anticipated by the famous Ph.D. thesis proposal submitted by an ambitious history graduate student, "The influence of the Eighteenth Century on the Nineteenth." We'll resist that temptation and give you the short version.

A whole lot has changed – more even than you might imagine if you were revising a quarter-century-old academic treatise or deskbook for judges. Suppose that you are writing for trial judges. The Supreme Court of the United States hands down a decision relaxing the restrictions on certain sorts of police interrogation or evidence-seizure practices. Your revision describes this ruling and tells your reader/judges that it requires them to deny defense suppression motions that they would previously have granted. So the result has changed: the defendant loses. But in our book, we don't want the result to change. We don't want the bottom line to be that the defendant loses. So we have to address alternative – often more complex – ways in which defense counsel can deal with the fall-out from the Supreme Court decision. Are there alternative legal/analytic or factual approaches that will enable the defense to obtain suppression of the same incriminating evidence? Or, at the least, are there sufficiently colorable arguments regarding the scope of the Supreme Court decision so that a defense suppression motion can be expected to improve the defendant's bargaining position in plea negotiations? And if not, what potentially winning approaches can defense counsel take to litigating a case in which evidence will be available to the prosecution that would have been suppressed in 1989 or in 2000?

The interconnectedness of legal, factual and tactical aspects of criminal trial defense work makes the second half of your question difficult to answer. Changes in one doctrinal sector or at one stage of the criminal trial process have strategic implications that spread broadly across other sectors and stages. Numerous U.S. Supreme Court decisions regulating state and federal criminal procedure have sent these broad reverberations through the length and breadth of criminal practice. And that, of course, is only a part of what has changed since 1989. New police investigative tools and new forensic technologies, new bodies of information generated by the internet, new methods of record-keeping, new modes of presenting evidence at hearings and trials, more diversity in the composition of trial juries, changes in judicial attitudes toward particular sorts of criminal charges, defendants, and complainants – all of this impacts the whole web of defense practice.

It's clearly complicated. So, are there any areas that you'd particularly flag as sites of major departure from the ways in which you addressed criminal-defense practice in the Fifth Edition? Any trends in the law or in the circumstances surrounding the commission of criminal offenses and the prosecution of criminal charges that you thought particularly important from the standpoint of a 2016 readership?"

Well, all those trends interact, and the ramifications range from trivial to huge. In discussing the importance of attorney visits to the sites of arrests, the 1989 edition gave, as an example, the scenario in which a defense lawyer, personally viewing the scene of an arrest, is able to detect that the arresting officer's purported observations of the defendant's activities is implausible because the officer's line-of-sight would have been blocked by a telephone booth. The telephone booth had to be replaced by a street-construction barrier in 2016: There no longer are any urban street-corner phone booths – or at least any we can find. What also replaced the phone booth, of course, was an extensive analysis of judicial decisions dealing with cellphone searches and seizures and some discussion of authentication requirements for the admission of internet postings into evidence.

The best we can do in answering your question is to give you a few examples of subjects that are either entirely new or re-imagined from scratch in the *Trial Manual 6*:

(a) *Our discussion of sentencing law:*

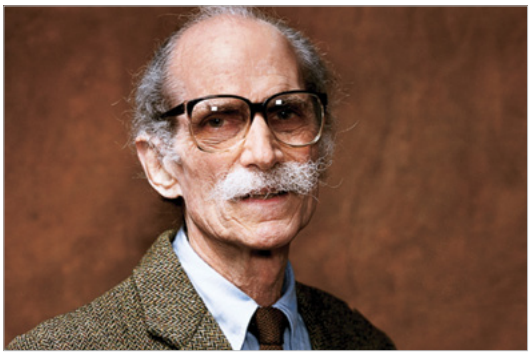
In the past two and a half decades, criminal sentencing has changed substantially as a result of the widespread adoption – by the federal government and many States – of determinate sentencing formulas, often called "sentencing guidelines." Defense lawyers who practice in guidelines jurisdictions need to be familiar with Supreme Court and lower court decisions that regulate these sentencing practices. Equally important, they need to develop a new array of strategies and techniques for dealing with sentencing factors and preparing effectively for sentencing, which often requires careful planning and skillful action during plea bargaining with the prosecutor, in interacting with the presentence report writer in the period leading up to sentencing, and during the sentencing hearing itself. This new edition of the book covers the relevant case law, describes the new types of sentencing procedures, and presents an inventory of steps defense counsel should consider taking at each of the relevant stages to secure the best possible sentence for his or her client.

(b) *Our discussions of the implications of new technologies for various aspects of criminal trials and criminal defense practice:*

In the past two and a half decades, criminal defense practice – like all legal practice and most of our daily life activity – has been profoundly changed by technology. The police and prosecutors now rely on a wide array of technological devices, fields of forensic science, and forensic experts to put criminal cases together and to present them in court. But technological advances also have revealed that much of what passes for forensic science nowadays actually is "junk science." This provides defenders with both an opportunity and a responsibility to uncover the flaws in prosecutorial expert evidence and to expose its weaknesses in court. Also, case law developments have created new opportunities for defenders to use experts of their own to mount effective attacks on common police investigative techniques like interrogations and eyewitness identification procedures.

But to realize these opportunities and to navigate these new dimensions of practice effectively, counsel will need to enlist the help of expert consultants

Randy A. Hertz



Anthony G. Amsterdam

FOR EACH SITUATION, THE MANUAL STEERS THE READER TO A SUBSEQUENT DETAILED DISCUSSION OF THE LEGAL, FACTUAL, AND TACTICAL ISSUES POTENTIALLY IMPLICATED.

and expert witnesses in the relevant fields. This new edition of the book provides defenders with a detailed guide for doing so. We talk, in each of the relevant parts of the book, about when and how defenders should think about using expert consultants and expert witnesses; the many functions that such experts can perform in a criminal case; the procedures for obtaining court funding for an expert and the case law that can be used to support applications for funding; how to attack prosecution experts at trial; and how to present defense experts effectively at trial.

This new edition of the book also deals with other important dimensions of technology. These include case law and practice pointers for dealing with searches and seizures of electronic evidence; video recording of interrogations; evidentiary hurdles in presenting or challenging

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CRIMINAL TRIAL MANUAL UPDATED

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the introduction of emails, texts, and social media at trial; and uses of technology in the courtroom to present evidence and exhibits more effectively.

(c) *Our discussion of the uses of narrative theory:*

Another of the big changes of the past two and a half decades is that lawyers are thinking in far more sophisticated ways about how to use storytelling and narrative theory to enhance their advocacy in – and out – of the courtroom. The new edition contains extensive new material spelling out the central concepts of narrative theory and suggesting how those concepts can be used effectively by defense attorneys in preparing for and conducting pretrial hearings, trials, and sentencings. In tune with this expanded focus on fact-litigating techniques, we have also expanded the book's coverage of numerous aspects of trial skills, providing detailed suggestions of techniques for defense use in cross-examination, direct examination, making objections, and presenting opening statements and closing arguments.

There has been an increase in the use of mediation and dispute resolution in the civil sector, and alternate resolution systems are becoming more common in the criminal sector as well. Does the Sixth Edition take this into account?

Yes, that's precisely right. We have made substantial revisions to reflect the expanded use of diversion in the criminal justice system. There is a new chapter devoted entirely to this subject. Equally important, we talk about diversion at each of the stages in the process where it may be available, and we explain how defenders can make the most of these opportunities.

The criminal justice system is known to be a very slow process, frustrating many defense attorneys as well as their clients. How can this manual be used to overcome obstacles created by a delayed trial?

We talk, of course, about speedy trial motions and other motions for combatting delay and for seeking sanctions for prosecutorial delay. We also provide case law support and practice pointers that can help in seeking the release of a client on "O.R." ("own recognizance") or low bond so that a client will not sit behind bars during the lengthy pretrial process, and we suggest bond reduction motions to secure a release when delay occurs. And, because cases will often take a long time despite a defender's best efforts, we talk throughout the book about how defenders can use the lengthy pretrial period as effectively as possible: what steps need to be performed at what stages, and how to guard against the problems that may stem from delay.

Project Spotlight

The Model Penal Code: Sentencing

By John Gleeson of Debevoise & Plimpton LLP, former United States District Judge in the Eastern District of New York and MCG Participant for the MPC: Sentencing project

Our nation is truly at a crossroads when it comes to sentencing policy. Since the adoption of the original Model Penal Code in 1962, America's prison, jail, probation, and parole populations have exploded. During the same period, the types and severity of both the economic sanctions imposed on criminal defendants and the collateral consequences of criminal convictions have increased dramatically. In all these respects, the United States has diverged from every other developed democracy. For example, we have seven times the per capita prison rate of Western Europe, and since 2000 we have been the undisputed world leader in incarceration rates. Over the past few years there has been agreement across the political spectrum that a nation with five percent of the world's population cannot continue to have 25 percent of its prisoners, and that the fiscal and human costs of mass incarceration have become too great to bear. Despite that widespread agreement, however, meaningful reform remains elusive.

There could hardly be a more propitious moment for the presentation of the final draft of the Model Penal Code: Sentencing, which will occur at the 2017 Annual Meeting. So much has happened since the original Code was completed under the supervision of the great Herbert Wechsler, including a sentencing reform movement the results of which are themselves now in need of reform. After an initial period in which the first Code inspired widespread legislative reform in the states, over the past four decades its influence has been mainly in the academy. The challenge for the new Code will be whether it can mirror its predecessor's early years by helping to bring about needed policy changes in sentencing. When it

succeeds, and it most certainly will, the new Code will have accomplished great things.

For example, the new Code condemns all statutory mandatory punishments. The original Code did as well, but events since then have placed the importance of this issue in stark relief; the most pernicious effect of the reform movement that sought to restrict judicial discretion in sentencing has been the proliferation of mandatory sentencing provisions. A "central institutional philosophy" of the revised Code is "that substantial judicial discretion to individualize penalties ... must be preserved in a sound sentencing system." Judicial discretion is thus "an essential feature" of the revised Code, "not an unwanted element."

In addition, the revised Code provides that sentencing guidelines "shall not reflect or incorporate the terms of statutory mandatory-penalty provisions, but shall be promulgated independently by the commission." If followed, that principle would bring fundamental and desperately needed change to the federal system. The United States Sentencing Commission chose at the outset of the federal guidelines era to jettison the extensive empirical evidence it had gathered and instead to link the sentencing ranges for all drug offenses to the onerous mandatory minimum sentences Congress enacted in 1986 for kingpins and managers of drug operations. As the Commission itself recognized in its fifteen-year report to Congress in 2004, its failure in 1987 to explain that fateful decision was "unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population." The "delinkage" of the drug offense Guidelines ranges is long overdue. The revised Code sensibly calls for sentencing ranges based on, among other things, empirical evidence bearing on the effectiveness of sentences, projections of fiscal impact, correctional resources, and the demographic impacts of the sentences.

The revised Code breathes new and much-needed life into sentencing policy in countless other ways as well.

THERE COULD HARDLY BE A MORE PROPITIOUS MOMENT FOR THE PRESENTATION OF THE FINAL DRAFT OF THE MODEL PENAL CODE: SENTENCING, WHICH WILL OCCUR AT THE 2017 ANNUAL MEETING.

It bars the imposition of an economic sanction "unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction." Too frequently such punishments prevent defendants from getting back on their feet, or even worse induce them to commit a second crime so they can afford to comply with the sentence on the first one.

The drafters have wisely spotlighted the fact that one of the main reasons we have a mass incarceration problem is we have a mass supervision problem. We impose supervision at a rate more than five times higher than comparable European countries, and the intermediate sanctions that attend probation and parole supervision have high failure rates. In 2014, about one-third of all prison admissions nationwide were not the result of new convictions, but rather were due to parole revocations and probation renovations. The revised Code thus calls for a substantial reduction in probation and parole supervision, balanced by a dedication of resources to the high-risk, high-need offenders that really require the supervision.

The revised Code recognizes the preservation of families as a goal of sentencing policy. That may seem self-evident, but sentencing "reforms" over the past 40 years have too frequently taken us to another place. Here again, the consequences of following the revised Code in the federal regime would be dramatic and welcome. From their inception, the federal guidelines have sought to place the effects of sentencing on families out of bounds in all but the most extraordinary cases. And even though those effects must be considered under 18 U.S.C. § 3553(a) in *every* case, federal judges are influenced by the Sentencing Commission's advice. For too long, harsh sentences have been imposed with insufficient consideration of the effects of those sentences on the defendants' families, and by extension on the communities in which those families live, which the courts themselves are bound to serve.

The collateral consequences of convictions occupy the area of sentencing policy in which the revised Code may well have its greatest influence. We are only now beginning to acknowledge and address as a society the myriad ways in which offenders remain disabled by their convictions long after their sentences have been served. The revised Code provides guidance for sentencing commissions ranging from notification requirements, to cabining the duration of voting and jury service disqualifications, to certificates of relief from civil disabilities. Given the elaborate matrix of statutory and regulatory provisions, both federal and state, that have created this problem, it will prove to be the most challenging facet of the current reform movement. But the revised Code provides thoughtful guidance for policy makers seeking to align the collateral consequences of convictions with the needs of the community and basic fairness.

In sum, the Model Penal Code: Sentencing – the ALI's longest-standing project – is poised to add the respected voice of the Institute to an ongoing discussion at precisely the moment when the tectonic plates of sentencing policy in this country are shifting. This is the ALI at its best. The Advisers of the project, together with the Members Consultative Group, applaud the prodigious efforts of Reporter Kevin R. Reitz and Associate Reporter Cecelia M. Klingele, and we all look forward to the culmination of the project at next year's Annual Meeting.

Member Spotlight: Jeannie Suk Gersen

Jeannie Suk Gersen is the John H. Watson, Jr. Professor of Law at Harvard Law School, where she has taught criminal law and procedure, family law, and the law of art, fashion, and the performing arts.

She is a Contributing Writer for NewYorker.com. Her book, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy*, was awarded the Law and Society Association's Herbert Jacob Prize for the best law and society book of the year. She is the recipient of a Guggenheim Fellowship and the Sacks-Freund Award for Teaching Excellence at Harvard Law School.

Since joining ALI in 2015, you have been very active in several projects (six in total), including serving as an Adviser on the Sexual Assault project, and not all of these projects fall into your field of expertise. How did you decide which projects you would like to contribute your time to?

Though I've joined several projects with aspirations to follow their progress, I've been active on two projects: the Model Penal Code: Sexual Assault and Related Offenses, and the Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis. Those two projects connect directly with my heaviest areas of research in the past several years. They also feel to me extremely urgent and likely to be influential. They are so relevant to this moment in which our society is taking stock of the consequences of legal feminism on how people relate to each other sexually, and their effects on social equality. This is so fascinating and important. In the genuine crossroads of legal ideas, social change, and practical rule design, these projects feel like quintessential ALI projects.

After studying at the School of American Ballet and the Juilliard School, what triggered your interest in pursuing a legal career?

I did a doctorate in French literature before enrolling at Harvard Law School. I was a student of literary theory and had a serious performing arts background. But I struggled and yearned for more practical pursuits. I needed to get my hands dirty, and wanted to think hard about the impact that words, ideas, and institutions have on people. Law was the right place for me.

You teach various arts and entertainment law classes at Harvard. What does your expertise in ballet, piano and the arts bring to your curriculum?

I have taught a course at Harvard on Performing Arts and Law, with my friend Damian Woetzel, Director of the Vail Dance Festival and former Principal Dancer of the New York City Ballet. We were both students at the School of American Ballet, though of course he continued dancing and I did not. For years I watched his incredible performances at Lincoln Center – I thought he was a god. When I was teaching law students with Damian, I had to pinch myself. The course actually had a lot of law, and also involved Damian teaching the students the steps of certain dances. I remember Judge Michael Boudin of the First Circuit, who's a ballet fan, came to class one day, and I loved seeing him join in to dance the beginning of Balanchine's Serenade. That has been one of my favorite teaching experiences.

This academic year, I will teach a course called Fashion Law Lab, with Nana Sarian, General Counsel of Stella McCartney. It will be a hands-on, experiential learning course based on real-life scenarios faced by in-house fashion company counsels on a daily basis.

But when I'm teaching a more traditional criminal law or family law course, my arts background appears indirectly, in the form of great attention to the exciting live performance aspect of any classroom situation: you can't fully predict what's going to happen with the unique alchemy of the participants, even when you've taught the subject many times.

You are the first Asian American woman to be awarded tenure at Harvard. How has your experience with diversity in and/or outside the classroom affected your approach to the law?

When I first joined the Harvard Law School faculty ten years ago, the staff would assume I was a student and try to keep me out of the faculty workshop room, saying "Honey, that's just for the professors." It was an honest mistake, and I know I looked pretty young too. My mentor Lani Guinier was, amazingly, the only other woman of color on the faculty, and there were no other East Asians. Now there are three East Asians, and two of us are women. I'm still the only tenured Asian woman. Faculty diversity is apparently a pretty long-term project, though the student body is more diverse than ever. Given that in my own college and law school education, I almost never had an Asian professor, I do sometimes marvel, gosh, what must it be like for my students to have an Asian woman as a law teacher? But it doesn't cross my mind on a daily basis. Mostly I focus on teaching the students in front of me, diverse as they are, to be

The New Yorker, *well-known for its single panel cartoons, once featured ALI's Restatement of Torts. Published in December of 1974, the cartoon depicts the interior of a lawyer's office with three books on the shelf titled: Restatement of Torts, Corpus Juris, and Loopholes.*

able to communicate in a way that makes sense to people with whom they may differ or disagree. That's the most important skill they'll need as lawyers and people.

What do you see as the most challenging aspects of an increasingly diverse academic community, and what steps can be taken to meet such challenges?

The biggest challenge is the risk of refusal to engage with people who seem so different that it's not worth being misunderstood and demonized for having wrong views or sensibilities. I see great potential in the law school classroom for inculcating the habits of listening, argument, reason, empathy, open-mindedness, flexibility, and dialogue. These are the qualities I keep on the top of my agenda as I teach law students.

In your experience, what are the key factors that contribute to the success of students from diverse backgrounds?

Students from diverse backgrounds often have prior experiences of struggling to master a new language or culture, not fitting in, looking different, and not getting the codes at first. And yet they got as far as law school and will go much further. These difficulties can be the basis of resilience and strength. And I do believe more new and innovative ideas can come out of being made to talk and listen to people across diverse backgrounds.

Having earned your J.D. from Harvard Law School, does your experience at HLS as a student contribute to your teaching style? If so, how?

At HLS I had some truly great teachers who influenced my teaching style, so I am one of the "old-school" teachers and I have not at all given up on the Socratic method and cold-calling. However I have leavened the strictness with various other methods designed to induce more introspection, listening, and group work.

What do you love the most about Boston in the fall?

Honestly, I love that students are back in town and I feel their sense of endless possibility.

The Institute in the Courts

The U.S. Supreme Court has looked to the **Restatements of Judgments** for guidance in two recent opinions.

In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, authored by Justice Breyer, the Court considered two provisions of a 2013 Texas statute, which mandated that individual abortion providers have hospital admitting privileges (the admitting-privileges provision) and that abortion facilities meet standards applicable to surgical centers (the surgical-center provision), and concluded that they imposed an undue burden on abortion access. Before turning to the constitutional questions, the Court considered whether the petitioners—a group of abortion providers—were precluded from bringing their claims on the ground that several of the petitioners previously brought an unsuccessful facial challenge to the admitting-privileges provision. The Court relied on the Restatement Second of Judgments in reversing the Fifth Circuit's judgment to the extent that it held that the claims were barred by claim preclusion.

The Court initially pointed out that the petitioners were not bringing a facial challenge to the admitting-privileges provision, but rather, were challenging the provision as it applied to two specific abortion clinics in Texas, and agreed with the Court of Appeals' conclusion that the as-applied claim was not barred by claim preclusion. However, the Court disagreed with the lower court's determination that claim preclusion barred the petitioners from obtaining facial relief as a remedy for the as-applied claim, citing Restatement Second of Judgments § 24 in support of the proposition that the development of new material facts could mean that a new case and an otherwise similar previous case did not present the same claim. The court concluded that the petitioners' post-enforcement as-applied challenge, which was filed after a large number of abortion clinics had closed, did not present "the very same claim" as their pre-enforcement facial challenge, which was filed when it was unclear how many abortion clinics would be affected.

The Court similarly rejected the lower court's ruling as to the surgical-center provision, holding that the petitioners were not required to have brought their constitutional challenge to that provision in the prior action. The Court reasoned that the two challenges did not arise from the same transaction for purposes of claim preclusion, because the surgical-center provision and the admitting-privileges provision were separate, distinct statutory provisions, which set forth different, independent requirements with different enforcement dates.

In a dissenting opinion, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, argued in favor of affirming the Court of Appeals' conclusions regarding claim preclusion, reasoning, in part, that the majority's holding was contrary to both the first Restatement of Judgments and the Restatement Second of Judgments.

As to the admitting-privileges provision, the dissenting justices contended that the petitioners' prior facial attack and their current facial attack were the same claim under both the first Restatement of Judgments § 61, which provided that a plaintiff who was unsuccessful in a first action was precluded from maintaining a second action based on the same transaction where the evidence needed to sustain the second action would have sustained the first action, and Restatement Second of Judgments §§ 24 and 19, which provided that a valid and final personal judgment rendered in favor of a defendant barred another action by the plaintiff on a claim that arose from the same transaction or common nucleus of operative facts; the operative fact in both cases was the enactment of the admitting-privileges provision, and the fact that the petitioners now had better evidence with respect to the number of clinics that would have to close as a result of the provision than they did at the time of the first case was irrelevant.

The dissenting justices pointed to Restatement Second of Judgments §§ 1 and 25 as setting forth the hornbook rule that a plaintiff who lost in a first case could not later bring the same case because the plaintiff now had gathered new and better evidence, and argued that Restatement Second of Judgments § 24 did not support the majority's holding that a change of circumstances permitted the petitioners to relitigate their previously unsuccessful facial challenge to the admitting-privileges provision, particularly given that, here, the petitioner's second facial challenge was not based on new acts postdating the first suit, but rather, on the same underlying act, specifically, the enactment of the statute that allegedly posed an undue burden.

As to the surgical-center provision, the dissenting justices again cited Restatement Second of Judgments § 24 in maintaining that the petitioners' challenges to the admitting-privileges requirement and the surgical-center requirement were part of the same transaction or series of connected transactions. The dissenting judges argued that the admitting-privileges provision and the surgical-center provision were both part of the same transaction—the enactment of the statute—and that the petitioners' challenges to the provisions formed a convenient trial unit, noting that the petitioners themselves contended that the provisions combined to have the effect of unconstitutionally restricting access to abortions, and made no effort to separate the effects of the two provisions.

Justice Sotomayor, delivering the opinion for a unanimous Court in *Simmons v. Himmelreich*, 136 S. Ct. 1843, cited the Restatements of Judgments in support of the conclusion that the so-called judgment-bar provision set forth in the Federal Tort Claims Act (FTCA), in which a judgment in an FTCA suit foreclosed any future suit against individual employees, 28 U.S.C. § 2676, did not apply to a claim that was dismissed under the "exceptions" provision, which dictated that the FTCA did not apply to certain categories of claims, 28 U.S.C. § 2680(a).

The case involved two suits filed by a federal prisoner who alleged that he was severely beaten by a fellow inmate in federal prison and that the beating was the result of prison officials' negligence, the first suit against the United States, and the second suit against individual Bureau of Prison employees. After the first suit was dismissed under the FTCA's exceptions

provision on the ground that it was a claim based upon the exercise or performance of a discretionary function, namely, deciding where to house inmates, the second suit was also dismissed as foreclosed by the FTCA's judgment-bar provision. After the Sixth Circuit reversed, the U.S. Supreme Court affirmed unanimously. The Court reasoned, in part, that its conclusion was buttressed by analogy to the common-law doctrine of claim preclusion as set forth in the Restatements of Judgments.

The Court explained that, while a plaintiff would ordinarily have been barred from suing the United States after having sued an employee but not vice versa under the first Restatement of Judgments §§ 99 and § 96(1)(a), Comments *b* and *d*, claim-preclusion principles would not foreclose a second suit where the first suit was dismissed under the exceptions provision, which reflected the United States' decision not to accept liability for certain types of claims, and thus acted as a "personal immunity." Under the first Restatement of Judgments § 96, Comment *g*, and Restatement Second of Judgments § 51(1)(b), Comment *c*, dismissals for defenses that could be asserted by one party but not others did not have claim-preclusive effect.

THE PRESIDENT'S LETTER CONTINUED FROM PAGE 1

Now after his death at 99, Bennett's personal representative, longtime friend and colleague Sharon Watson, has informed the ALI that it is the beneficiary of a substantial seven-figure gift from his estate that will help insure that our work can continue into our next 100 years. In his typical thoughtful way, he has told us in his will that it is "my hope" that we use a portion of this amazing gift to support new projects. Needless to say, we are all deeply grateful and working hard to formulate just how to ensure that this latest gift from Bennett is properly memorialized in his name and used as he would wish.

Every time we now hear a Boskey motion on the floor of our Annual Meeting, we can remember not only his intellectual contributions to building this important American democratic institution, but his philanthropy. As we figure out the best way to memorialize Bennett, we will of course let you know.

A moment of standing, thankful applause at your desk (as I did at mine) would not be out of order.

The U.S. Supreme Court has been much in the news this election year. Often what is written about it is in purely and sometimes incorrect political terms. If you were to believe many of the political commentators, the Justices are made to sound like the Montagues and the Capulets. But a quick look at the statistics over the last term shows a different picture. Last term, 44 percent of their decisions were unanimous. Looking at those justices most often labeled liberal and those labeled conservative show nothing like a hard political division. Justice Ginsburg voted with Chief Justice Roberts 78 percent of the time. Justice Alito and Justice Kagan agreed 81 percent of the time. What is true is that in certain cases the absence of Justice Scalia left four cases with important issues tied at four to four and thus no Supreme Court opinion could be issued. But that is related to the Senate's inaction and not the Court's. I mention this here because of my heartfelt view that each of us has a duty to protect the reputation of the justice system, in this case the U.S. Supreme Court, by refuting characterizations we know to be incorrect.

It is almost Labor Day and in many places school has already started. Along with laying in a new stock of school supplies, we are all back to work on ALI's 20 ongoing projects and in attending to the business of preparing for the next two Council meetings. We are also working on the transition to our next President David Levi. David and I are cochairing our 100th anniversary celebration committee and I look forward to this wonderful chance to work with David in thinking about our future and the celebrations in 2023. David is working hard as always to take over at the end of our May meeting. We expect to have at least four projects completed and ready to vote on during the 2017 and 2018 Annual Meetings. This will make way for some new projects and for work that will come out of suggestions from the 100th Anniversary Committee.

In ALI committee telephone conferences this week, the issue of people quoting from our work in draft form causing confusion and sometimes unfortunate press attention has come up. Our new website is the very best way to check to make sure that something that you read in the press, an email, or a blog is an accurate depiction of either the words of a specific project or its current state. All of our written work is in flux until the final vote on the entire project by the Council and the membership has taken place. We are trusted by courts and lawyers because of our thoughtful, iterative process, in which people of integrity with many points of view discuss things back and forth and make substantive and stylistic changes until the work is finally approved.

When next I write, we will have had an election—there will be a new President Elect of the United States. We are proud to have members representing both major parties in the election process and our work. Recently I listened to Justice Ginsburg remind a legal audience that while there was great disappointment on the losing side after Bush v. Gore and the final aftermath electing President Bush, there was a peaceful transition of power, Vice President Gore called George Bush to concede, and the great American Democracy marched on. These pictures of our past elections will be joined, I am confident, by the same peaceful transition that we have made since our founding. And at the heart of looking after interests of American democracy will be our members.

Roberta

Roberta Cooper Ramo
President

Notes About Members and Colleagues

Council member **Kim J. Askew** of K&L Gates is the recipient of the Hon. Sam A. Lindsay Professionalism and Ethics Award. The award, presented by the Dallas Bar Association on August 5, recognizes individuals who have achieved excellence in the legal profession by upholding an unwavering commitment to the highest standards of professionalism and ethical conduct.

W. Jonathan Cardi of Wake Forest University School of Law will serve as Wake Forest Law's newest Executive Associate Dean for Academic Affairs. Professor Cardi most recently served as the law school's Associate Dean for Research and Development.

JoAnne A. Epps

JoAnne A. Epps, Dean of Temple University Beasley School of Law, has been confirmed as Temple University's new executive vice president and provost. She has been a member of the Temple faculty for more than 30 years and dean of Temple University Beasley School of Law since 2008.

Robert E. Lutz of Southwestern Law School has been selected as the 2016 Lifetime Achievement Award recipient by the ABA Section of International Law. Professor Lutz, who is a liaison on ALI's U.S. Foreign Relations project, was presented with the award in recognition of his contributions to international law and years of dedicated service to the Section.

Robert James Miller of ASU Sandra Day O'Connor College of Law has been appointed to the Navajo Nation's new Council of Economic Advisors. The six-person Council will take on the task of diversifying the Navajo Nation economy "in light of dwindling royalties from natural resources."

State Bar of New Mexico President, J. Brent Moore, Justice Ginsburg, and President Ramo

At the State Bar of New Mexico's 2016 Annual Meeting, ALI President **Roberta Cooper Ramo**, joined U.S. Supreme Court Associate Justice **Ruth Bader Ginsburg** during the Keynote session. Justice Ginsburg began with a tribute to Justice Antonin Scalia, and then discussed topics from the Constitution to her role in expanding legal rights for women.

Michael H. Reed of Pepper Hamilton LLP has been elected to the Board of Trustees of Temple University. Mr. Reed received his bachelor's degree in political science from Temple University and serves as counsel on the Board of Directors of the Temple University Alumni Association.

Thomas E. Rutledge of Stoll Keenon Ogden PLLC has been appointed to the American Bar Association's Corporate Laws Committee. The committee addresses issues relating to the functioning of public and private corporations.

James G. Sammataro of Stroock & Stroock & Lavan LLP's Entertainment and Litigation Practice Groups and managing partner of the firm's Miami office was among 41 attorneys named to Billboard's annual list that recognizes the leading music lawyers in the country. Mr. Sammataro is the go-to advisor and litigator in Latin music and has negotiated deals for high-profile shows, organizing them with an eye toward the bottom line and the unanticipated glitches.

A *Washington Post* Op-Ed piece written by **Mark P. Schlefer** details the efforts of a small group of Washington lawyers, including Mr. Schlefer, to draft the Freedom of Information Act and enact it into law. It was his own experience as a maritime lawyer that exposed him to the hurdles in acquiring government documents.

Carl A. Solano, formerly of Schnader Harrison Segal & Lewis, LLP has been nominated to serve as a judge on the Superior Court of Pennsylvania. His nomination was confirmed by the state Senate in June.

Paul B. Stephan, Coordinating Reporter for ALI's Foreign Relations Project and Reporter for the Jurisdiction section of the Foreign Relations Project, **Jimmy Gurule** of Notre Dame Law School and **Michael B. Mukasey** of Debevoise & Plimpton LLP participated as witnesses at a the House Judiciary Committee hearing, held on July 14, regarding the Justice Against Sponsors of Terrorism Act (JASTA).

Ken Trujillo has joined Chamberlain Hrdlicka's Philadelphia office as a shareholder. Mr. Trujillo was co-chair of the host committee for this year's Democratic National Convention in Philadelphia.

In Memoriam

ELECTED MEMBERS

Kenneth W. Gideon, Washington, DC; **Elwin Griffith**, Tallahassee, FL; **Stephen T. Zamora**, Houston, TX

LIFE MEMBERS

John M. Dinse, Burlington, VT; **J. Rodney Johnson,** Richmond, VA; **Jerome Kurtz**, New York, NY; **Abner J. Mikva,** Chicago, IL; **Norma L. Shapiro**, Philadelphia, PA; **Geoffrey B. Shields**, South Royalton, VT; **W. Wayne Withers,** St. Louis, MO

New Members Elected

On June 27, the Council elected the following 43 persons:

Loren L. AliKhan, Washington, DC
Hilarie Bass, Miami, FL
Brigida Benitez, Washington, DC
Richard F. Boulware, II, Las Vegas, NV
Richard R. W. Brooks, New York, NY
Tomiko Brown-Nagin, Cambridge, MA
Jean-Jacques Cabou, Phoenix, AZ
Michelle Williams Court, Los Angeles, CA
Geoffrey W. Crawford, Rutland, VT
Mary A. Crossley, Pittsburgh, PA
James C. Duff, Washington, DC
Thomasenia P. Duncan, Washington, DC
David Freeman Engstrom, Stanford, CA
Nora Freeman Engstrom, Stanford, CA
James Forman, Jr., New Haven, CT
Terry L. Fromson, Philadelphia, PA
Thomas F. Gede, San Francisco, CA
Jamal Greene, New York, NY
Paul W. Grimm, Greenbelt, MD
Aya Gruber, Boulder, CO
Katharine S. Hayden, Newark, NJ
Adalberto J. Jordan, Miami, FL
Riyaz A. Kanji, Ann Arbor, MI
Leo Katz, Philadelphia, PA
Joseph D. Kearney, Milwaukee, WI
Leondra R. Kruger, San Francisco, CA
Stephen Lee, Irvine, CA
Tracey Maclin, Boston, MA
Linda C. McClain, Boston, MA
Jonathan R. Nash, Atlanta, GA
Sharon L. Nelles, New York, NY
Caleb E. Nelson, Charlottesville, VA
Michael M. O'Hear, Milwaukee, WI
Cristina M. Rodriguez, New Haven, CT
Blake Rohrbacher, Wilmington, DE
Thomas Andrew Saenz, Los Angeles, CA
Anjan Sahni, New York, NY
Ani B. Satz, Atlanta, GA
Carolyn P. Short, Philadelphia, PA
Michael W. Stocker, New York, NY
Nancy E. Weiss, Washington, DC
Robert E. Welsh, Philadelphia, PA
Jonathan L. Zittrain, Cambridge, MA

IF YOU WOULD LIKE TO SHARE ANY RECENT EVENTS OR PUBLICATIONS IN THE NEXT ALI NEWSLETTER, PLEASE EMAIL US AT NOTES@ALI.ORG.

Meetings and Events Calendar At-A-Glance

(for more information, visit www.ali.org)

Below is a list of upcoming meetings and events. This schedule may change, so please do not make travel arrangements until you receive an email notice that registration is open.

2016

October 6 (Advisers)
October 7 (MCG)
Restatement of the Law, Liability Insurance
Philadelphia, PA

October 20–21
Council Meeting - October 2016
New York, NY

October 24–25 (JOINT)
Model Penal Code: Sexual Assault and Related Offenses
New York, NY

October 26 (JOINT)
Restatement of the Law, The U.S. Law of International Commercial Arbitration
Philadelphia, PA

October 27 (JOINT)
Restatement of the Law, Children and the Law
Philadelphia, PA

October 28 (Advisers)
November 1 (MCG)
Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis
New York, NY

November 10 (Advisers)
November 11 (MCG)
Restatement of the Law, Copyright
Philadelphia, PA

November 18 (JOINT)
Restatement of the Law, Charitable Nonprofit Organizations
Philadelphia, PA

December 8 (Advisers)
December 9 (MCG)
Principles of the Law, Police Investigations
Philadelphia, PA

December 9 (JOINT)
Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes
Philadelphia, PA

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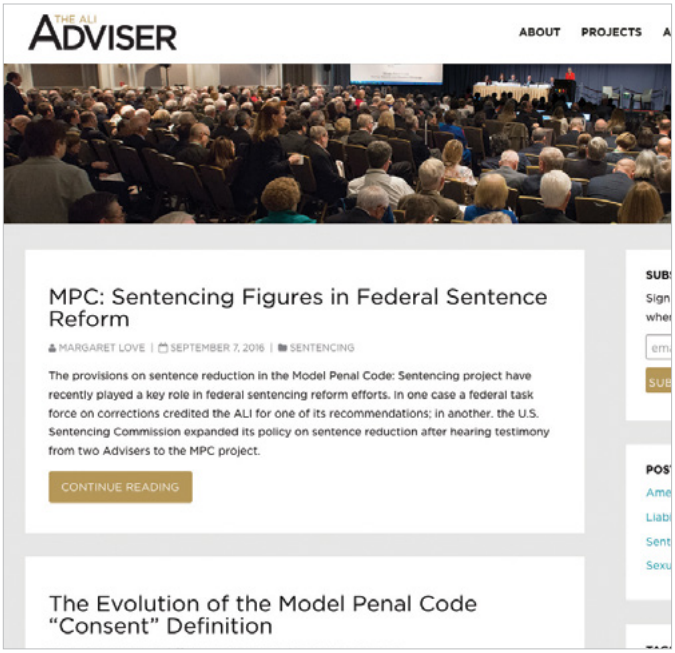
Visit ALI's Online Project Forum: *The ALI Adviser*

ALI has recently launched the website, *The ALI Adviser,* which houses posts dedicated to project topics. Our mission is to share with the legal community our continued commitment to clarifying the law by initiating discussions as they relate to our current projects, and to increase awareness of the status and progress of these projects.

The *Adviser* is currently hosting discussions on four ALI projects, and aiming to include all current projects in the near future.

- American Indians Restatement
- Liability Insurance Restatement
- MPC: Sentencing
- MPC: Sexual Assault

If you are interested in writing for the forum, please email the Communications Department at *communications@ali.org*.



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