
The American Law Institute

*Capturing the Voice
of The American Law Institute:*

**A Handbook for ALI Reporters
and Those Who Review Their Work**

2005
(revised in part 2015)

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By
The American Law Institute

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Foreword

Beginning with our first Restatements, The American Law Institute developed a language and a style. American law had had statements of doctrine by common-law judges. It had had statutes and state and federal constitutional declarations. Since Story, Kent, and Walker, it had had Bractonian and Blackstonian treatises, declaring the common law on the empirical foundations of judicial decisions.

Afraid of chaos in a legal world of 48 states, toying with the possibility of official codification but unable to take such a nontraditional step, William Draper Lewis and his first generation of Institute Reporters invented the Restatement. Many thousands of citations later, that rhetorical form describes a diversity of works that are supplemented now by Reporter's Notes as well as Comments. Nonetheless, in their ninth decade, the Institute's Restatements still speak in a voice that the founders would immediately recognize.

They would recognize also the ALI's proposed statutes, but they probably would not have expected statutory work—such as the Uniform Commercial Code and the Model Penal Code—to become as important to the Institute as it is today. They would surely not recognize the ALI's Principles projects, a genre that began with Corporate Governance and Family Dissolution and now makes up a significant proportion of the agenda. Principles do not purport to restate but rather pull together the fundamentals underlying statutory, judicial, and administrative law in a particular legal field and point the way to a coherent (a principled, if you will) future.

It is no surprise that in this postmodern era, our Reporters do not begin their work speaking the ALI's language. Nor is it a surprise that the Reporters have different voices and styles and that different legal subjects demand different forms of expression. Nonetheless, the ALI attempts to give the world a single coherent body of law, as well as the many separate segments of law that together make up our 50-foot shelf.

When the Institute was 75 years old, its President, Charles Alan Wright, had an insight, directly descended from the core perception of the ALI's founders, that greater stylistic coherence was needed both to distinguish and to assimilate the different languages appropriate to Restatements, proposed statutes, and Principles. Professor Wright, a great teacher, also thought that new Reporters would benefit from a publication that would efficiently teach them how to express themselves in forms appropriate to this particular branch of legal scholarship. Charlie Wright persuaded Conrad Harper, then an ALI Vice President, to chair a committee of wordsmiths. He picked Conrad because Conrad had been skeptical of the possibility that this effort would succeed, and perhaps also because of Conrad's love for and knowledge of the work of Trollope. The other committee members—whose names appear on page v of this volume—were lifelong critics of legal language.

President Wright knew that the work would be done by Michael Greenwald, longtime sovereign of the ALI's publications. Appropriately, Mike's Harvard degrees are in both English and Law. For a quarter century he has been a central participant in editing and fashioning for publication all of the ALI's contributions to law reform. Few have done as much as Mike to improve the ALI's sentences and paragraphs.

Mike Greenwald worked on this handbook for five years, responding to constructive criticism from his committee members, from current and former Reporters, and from others who followed its development. I am confident that new Reporters will be helped by this manual and that its existence will lead to improvements in our ability to communicate our ideas and to positive evolution in the rhetorical forms that our Reporters use. The Institute is grateful to Mike Greenwald and to those who helped him in this work.

LANCE LIEBMAN

Director

The American Law Institute

December 23, 2004

Foreword to the 2015 Revisions

The 2005 edition of the *Style Manual* has withstood the test of time remarkably well. A decade later, it continues to provide important guidance to the Reporters of Institute projects. As a result of the excellent work reflected in the 2005 *Style Manual*, the revisions here are relatively minor. Most importantly, we clarified the distinction between Restatements and Principles projects, which emerged from separate retreats of the ALI Executive and Projects Committees shortly after I took office earlier this year. We also substituted the new Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects, adopted in 2010, which can be found in the Appendix, and made a number of other minor updates. I am very grateful for enlightening conversations on this project with Stephanie Middleton and Guy Miller Struve, and for the excellent editorial work of Todd Feldman and Nancy Shearer.

RICHARD L. REVESZ

Director

The American Law Institute

November 2014

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CHAPTER I. THE REPORTER'S TASK

A. THE VOICE OF THE INSTITUTE

The goals and purposes of The American Law Institute were set forth in the Institute's 1923 Certificate of Incorporation and have remained consistent throughout its history:

The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.

The task of an American Law Institute Reporter is to prepare a report for adoption by the Institute, aiming at carrying out these objectives in a particular area of the law that the Institute has chosen to address. The Reporter initially reports *to* the Institute by means of a series of drafts, which are then reviewed according to the deliberative processes established by the Institute and revised as a result of those processes. If eventually approved, both by the Institute's Council and by its membership as a whole, those successive drafts, now consolidated and integrated, are published, no longer as reports to the Institute, but as reports *of* the Institute. These reports are directed to the legal community as a whole and explicate what the law is, or should be, in the area addressed.

The Institute's Bylaws provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council." The successive project drafts presented for the Institute's deliberations are therefore not themselves the product of the Institute but rather are preliminary or tentative formulations of what might eventually constitute its official position, rehearsals aimed at fixing the text of which the Institute might finally become the author. From the initial

draft onward, however, the Reporter is expected to speak not in his or her own voice but as the Institute's spokesperson, capturing, assuming, and articulating the voice of the Institute.

Because the Institute is ultimately the author of all of its authorized work, it is important that its voice be perceived as uniform in style as well as substance. The official voice toward which the Institute aspires through its membership is that of an informed consensus of all components of the profession—practitioners, judges, and scholars—on what the law is, or should be, for a given subject. It aims to speak with an authority that transcends that of any individual, no matter how expert, and any segment of the profession, standing alone. Similarly, the Institute's style, the manner in which its voice is presented, must transcend the styles and idiosyncrasies of its individual Reporters to make that asserted authority credible. Consistency of style helps to convey consistency of perspective.

It is also important that Institute projects be not only internally consistent but consistent with each other. Just as the Institute seeks to achieve substantive uniformity among its projects, it seeks stylistic uniformity as well. The drafters of the original 1923 report that led to the founding of the Institute emphasized this need in the proposed Restatement of the Law as follows:

Though there necessarily will be minor variations in the manner of presentation of different parts of the restatement due to the special exigencies of particular topics, general uniformity of type throughout the restatement is important.

The profession would find great difficulty in the use of the publications of the organization if each topic was treated in a different manner. Again radical differences in form would rightly be taken to indicate a lack of agreement among those preparing the restatement as to its objects.

As the restatement will be the work of a number of persons all fundamental questions of form must be determined before the work on any topic is begun. These questions of form are of the first importance. The form adopted should reflect the objects of the restatement, and if it does so will materially aid the attainment of those objects.

The Institute's founders envisioned a single Restatement comprised of many parts. Stressing uniformity, they nevertheless apparently perceived no need to facilitate it by creating a style manual. More than three quarters of a century later, however, the prospects for achieving and maintaining a comprehensive "Restatement of the Law" appear increasingly remote.

Today's Restatements tend to be separate articulations of increasingly discrete areas of the law, and the Institute engages in numerous projects other than Restatements. This handbook is therefore conceived as a means of both articulating and preserving an appropriately uniform style for the various products of the Institute and thus as a common resource for all of those responsible for conveying the Institute's voice. As recognized by the drafters of the 1923 report, there will invariably remain "minor variations in the manner of presentation ... due to the special exigencies of particular topics," but the guidelines that follow are intended to assure that those variations will be deliberate and intelligible rather than careless or incoherent.

B. DRAFTING FOR PARTICULAR TYPES OF PROJECTS

The nature, content, and scope of each Institute project are initially developed by its Reporter in consultation with the Institute's Director, generally on the basis of a prospectus or memorandum prepared by the Reporter at the invitation of the Director and subsequently reviewed by the Projects Committee and either by the Council as a whole or its Executive Committee. The Director's recommendations that particular projects be undertaken and designations of specific Reporters are subject to the approval of the Council or Executive Committee. Once a project begins, its character and scope may be further refined in the course of the drafting process.

Institute projects generally are assigned to one of three broad categories: Restatements, model or proposed legislation, or Principles. The general approach and the basic format for each are similar. Each addresses a particular area of the law and seeks to clarify and synthesize it in such a way as to contribute to the "better administration of justice." Each consists of a series of concise "black-letter" legal formulations, elucidated by extended commentary and illustration, and supported by scholarly annotation of the sources considered. Indeed, the 1923 report described Restatement black letter as "the statement of principles" and observed that this statement "should be made with the care and precision of a well-drawn statute." More recently, Herbert Wechsler, at the time of his retirement as Director in 1984, suggested that an Institute legislative project, even if never enacted into law, can serve as a "modern restatement, describing present law in the context of an exploration of its difficulties and proposals for its possible improvement."

Nevertheless, there are important differences among these categories, which result from the stance toward the law assumed, the differing seg-

ments of the legal community to which each is primarily addressed, and the underlying purpose of each. These differences can be summarized as follows:

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 stands or might appropriately be stated by a court.

Model or uniform codes or statutes and other statutory proposals are addressed to legislatures, with a view toward legislative enactment. They are written in prescriptive statutory language.

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law.

Some Restatements may contain elements addressed to institutions other than courts. Such elements should be labeled appropriately, for example, as “suggestions for legislation.”

The particular drafting implications for each of these categories are addressed separately in this Chapter. Guidelines generally applicable to all Institute projects are contained in Chapter II.

1. Restatements

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 stands or might appropriately be stated by a court.

a. Nature of a Restatement. Webster’s Third New International Dictionary defines the verb “restate” as “to state again *or* in a new form” [emphasis added]. This definition neatly captures the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process.

The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases. For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner. In the view of the Institute’s founders, however, the underlying

principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States. The 1923 report suggested that, in contrast, the Restatements were to be at once “analytical, critical and constructive.” In seeing each subject clearly and as a whole, they would discern the underlying principles that gave it coherence and thus restore the unity of the common law as properly apprehended.

Unlike the episodic occasions for judicial formulations presented by particular cases, however, Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed. Restatements—“analytical, critical and constructive”—accordingly resemble codifications more than mere compilations of the pronouncements of judges. The Institute’s founders envisioned a Restatement’s black-letter statement of legal rules as being “made with the care and precision of a well-drawn statute.” They cautioned, however, that “a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended.” Although Restatements are expected to aspire toward the precision of statutory language, they are also intended to reflect the flexibility and capacity for development and growth of the common law. They are therefore phrased not in the mandatory terms of a statute but in the descriptive terms of a judge announcing the law to be applied in a given case.

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 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.

A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science. The Institute, however, needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.

An excellent common-law judge is engaged in exactly the same sort of inquiry. In the words of Professor Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia:

We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.

But in the quest to determine the best rule, 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.

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute's founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect *changes in the law, which it is proper for an organization of lawyers to promote* and which make the law better adapted to the needs of life. [emphasis added]

b. Operative language. The black letter in Restatements is written in the present tense and is a clear, precise, and succinct statement of the law. For example:

§ 48. Death or Incapacity of Offeror or Offeree

An offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract.

Restatement Second, Contracts

In contrast to “is terminated,” “shall be terminated” would convey a mandate more appropriately contained in a statute, while “should be terminated” would suggest that the law ought to provide that such power be terminated but not necessarily that it does contain such a provision. A mandatory requirement in a Restatement is expressed by “must” rather than “shall”: “Each party to a bargain must assent,” not “shall assent.”

c. Use of sources

(i) Cases. The prime source material for Restatements has been the case law of American courts, although sometimes cases from other nations, while not necessarily authoritative, may be consulted and cited for their historical or comparative relevance. For purposes of organizing the variety of decisions under state law into a coherent view of the law as a whole, the black-letter provisions of a Restatement generally treat the states as if they were a single jurisdiction. Reporters should take care to note, however, which state's law, if any, a federal case applies, and also to note whether decisions rest on a statute. Important statutory variations among the states may require recognition in a Restatement and preclude the statement of a single rule for the country.

When decisions among state courts conflict, a Reporter should report the conflict but is not bound to adhere to the majority view. Reporters are expected to recommend to the Institute what they believe to be the better rule or the better formulation of a rule. The main purpose of Comment is to provide a detailed explanation of the text and its legal rationale. In

Restatements, unlike statutory proposals or statements of principles, the Institute normally does not purport to argue its own policy preferences for a rule. The Comment may, however, refer to considerations that are articulated in judicial opinions or other sources of public policy. These sources should ordinarily be identified and cited not in the Comment but in the Reporter's Notes, although occasional exceptions may be made for leading cases that are essential to an understanding of the proposition advanced. The Reporter's Notes should also make clear the nature and extent of the authority supporting the chosen proposition and the extent of any contrary authority.

Because Restatements aim to "restate" legal propositions as precisely and coherently as possible, their Reporters are not bound to adhere to particular verbal formulations found even in the opinions that support the proposition asserted. Clarifying, and if necessary improving, established but insufficiently examined formulas has been an objective of the Institute from the beginning. Departures from standard, well-established terminology therefore need not be avoided but should be carefully considered, particularly in fields involving widespread long-term transactions. Changes of this sort and their legal or stylistic objectives should be expressly noted.

(ii) *Statutes.* The Institute's 1923 founding document spoke of expressing "the existing law as found in the decisions *and scattered statutes.*" [emphasis added] American jurisprudence has always regarded venerable British statutes, such as the Statute of Frauds, and their contemporary counterparts as part of the received common law, and Restatement Reporters have increasingly taken into account the growing prevalence of statutes in the traditional fields of the common law. Relevant statutes are no longer "scattered" or rare. In some instances these statutes can be regarded as essentially codifications of the common law. Such legislation and its judicial interpretations, constituting the "common law of the statute," can therefore be treated as part of the common law's own evolution. As noted in the Foreword to Restatement Third, Unfair Competition:

Federal and state statutes play a significant, sometimes dominant role in many of the substantive areas encompassed within this Restatement. For the most part the federal legislation does not preempt state law, and both federal and state unfair competition statutes generally rely without significant elaboration on concepts derived from the common law. ... Except as otherwise noted, the principles discussed in this Restatement are applicable to actions at common law and to the interpretation of analogous federal and state statutory codifications.

A different situation is presented when a statute alters and supersedes a traditional common-law rule, and the Institute determines that the approach taken in the statute is better law. For example, § 1.4 of Restatement Second, Property (Donative Transfers), replaced the traditional “what might happen” approach for determining the validity of nonvested interests in property under the rule against perpetuities with a “wait-and-see” approach. There was scant support in the case law for such a change. Instead, § 1.4 took account of a nationwide legislative trend and treated this development much like a newer line of cases announcing a better rule. Courts in states not governed by “wait-and-see” legislation were therefore encouraged to regard it as akin to judicial precedent.

Not all statutes manifest a uniformity or continuity with the common law sufficient to permit their ready integration into a Restatement format. Some may be inconsistent with what the Institute regards as optimum development of the common law. In these circumstances, a black-letter Restatement principle may sometimes be qualified by a phrase such as “unless a statute provides otherwise” or “to the extent permitted by law.” In one sense, such language is plainly superfluous, since it should be obvious that every Restatement rule must yield to a contradictory statute or other governing law, such as a controlling judicial precedent or an administrative regulation applicable within the jurisdiction. Nevertheless, this sort of formulation signals to the Restatement reader that this is an area in which divergent law may exist and may indeed supersede the Restatement rule in some jurisdictions. The actual situation can be explained in Comment and referenced in detail in a Reporter's or Statutory Note. Compare the following black-letter provision, in which the basic common-law principles contained in subsections (1) and (2) are qualified by subsection (3), which incorporates by reference legislative alternatives that vary from state to state:

§ 58. Vicarious Liability

(1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.

(2) Each of the principals of a law firm organized as a general partnership is liable jointly and severally with the firm.

(3) A principal of a law firm organized other than as a general partnership without limited liability *as authorized by law* is vicari-

ously liable for the acts of another principal or employee of the firm to the extent provided by law. [Emphasis added]

Restatement Third,
The Law Governing Lawyers

This handbook does not provide definitive standards for formulating Restatement black letter governed by statutes that are not uniform. Often the best solution is to address the problem in commentary or the Reporter's Notes. Another solution is as follows:

§ 3.2 Holographic Wills

Statutes in many states provide that a will, though unwitnessed, is validly executed if it is written in the testator's handwriting and signed by the testator, and, under some statutes, dated in the testator's handwriting. [Emphasis added]

Restatement Third, Property (Wills
and Other Donative Transfers)

Although such a formulation provides a basis for further development in the Comment and Notes, it lacks the definitive quality usually expected in black letter. A more satisfactory black-letter statement might have read as follows:

Holographic wills are ordinarily not valid unless an applicable statute provides otherwise and the statutory requirements are met.

Still another approach is that taken in Restatement Third, Torts: Apportionment of Liability. Here five distinct types of statutory regimes governing comparative liability are identified and the implications of each developed in alternative Restatement "tracks." In this Restatement no preference is stated among the various tracks but each is taken as a separate premise for the Restatement process. Yet another possible approach is to state that to the extent *permitted* by statute, the law *should be* as follows. Traditional Restatement formulations would thereby converge with those of the Institute's more recent projects that aim to formulate legal principles without the expectation that they necessarily be dependent upon the requirements of the common law. See B.3 below.

When a rule discussed in a Comment rests on a statute, the Comment should state this. Unless a provision is important to a proper understanding, however, the statute ordinarily should be described and discussed or

compared in the Reporter's Notes. When comprehensive legislative compilations are called for, they are more effectively presented in separate Statutory Notes.

(iii) *Foreign law.* In an age of increasing "globalization," foreign law, whether case, statute, or administrative regulation, may be appropriate for application by analogy. Ordinarily, the more analogous a foreign legal system is to U.S. law, the more pertinent will be its legal rules to the issue being addressed. Reporters are encouraged to be alert to the possibility that a comparative-law perspective may enrich a particular explication and analysis of U.S. law.

(iv) *Previous Restatements.* A Reporter revisiting the field of a previous Restatement should take that Restatement's formulations into account but is not bound to follow them. Nevertheless, departures from established Institute formulations should be undertaken only upon careful consideration and appropriate justification. Reporter's Notes should cite any corresponding provision in a prior Restatement and draw attention to any significant departures.

(v) *Secondary sources.* In addition to documenting the primary legal sources for the black letter and Comment, Reporter's Notes should guide the reader to additional research into the matters addressed. Citations to relevant treatises, articles, legal encyclopedias, and studies enhance the usefulness of the Reporter's Notes and reinforce the adequacy of the black letter and Comment.

2. Legislative Recommendations

Model or uniform codes or statutes and other statutory proposals are addressed mainly to legislatures, with a view toward legislative enactment.

a. *Nature of Model Codes.* Unlike its Restatements, the Institute's legislative recommendations are written with a view toward their formal legislative enactment. Nevertheless, in many respects the formulations in these projects do not differ from the Restatements.

Although soon after its creation the Institute began to draft model and uniform laws, it has avoided involving itself in "novel social legislation." Codifications such as the Uniform Commercial Code, the Model Penal Code, and the Federal Securities Code have built upon, rationalized, and synthesized previous legislation in these areas rather than proposing legis-

lation in fields where it had not previously existed. A more recent initiative, the Federal Judicial Code Revision Project, has proposed modest incremental improvements in the Judicial Code rather than a comprehensive revision. Although the Institute's founders considered advocacy of "any change in the law pertaining to taxation" as inappropriate, the Institute's subsequent extensive involvement in federal tax projects has also come to exemplify this incremental approach to legislation. A proposed Income Tax Statute influenced the 1954 Internal Revenue Code by way of clarification, and selective tax proposals developed subsequently have also mainly sought to clarify established and widely accepted tax policy.

The Institute traditionally does not lobby for enactment of its legislative projects, although participants in the process, including Reporters, may do so in their individual capacities. (The Institute's partner in the drafting and revision of the Uniform Commercial Code, the Uniform Law Commission, assumes sole institutional responsibility for achieving enactment of the Code.) The persuasiveness of the Institute's recommendations to lawmakers depends upon the objectivity and thoroughness of its procedures and the demonstrable quality of its work product. Commentary and Reporter's Notes in legislative projects should therefore be as fully developed and informative as those found in the Restatements and should include thorough consideration of the policy choices reflected in the proposed statute. Because, however, some courts refuse to consider supplemental material of this nature in interpreting statutory language, Reporters for the Institute's legislative projects should take care that everything intended to be covered by a proposed statute is clearly expressed in the black letter. See II.B.3.a.

b. Operative language. The black-letter provisions of statutory proposals purport to make mandatory a legal condition, requirement, right, or duty.

Examples [adapted from Model Penal Code]:

A person who issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee, commits a misdemeanor. [condition]

The Court shall not impose sentence without first ordering a presentence investigation of the defendant. [requirement or duty]

The Court may order a presentence investigation as in any other case. [right (or discretionary power)]

In statutory drafting, words of authority need to be selected with care. “Shall” should be used exclusively to impose a present requirement or duty upon the subject of the clause and not to indicate the future tense. Even in the former circumstance, consideration should be given to replacing “shall” with “must.” “Must” is preferable if it qualifies a verb that is intransitive or is in the passive voice or if the subject is inanimate. “May” can be used to convey a right or discretionary power upon the subject of the verb it qualifies. “May not,” however, is ambiguous and should be replaced by “must not.” See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 939-942 (2d ed. 1995); Uniform Law Commission, *Drafting Rules* (2012), Rules 103, 203, and 204.

3. Principles

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute's Principles projects. The Institute's Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called “Principles of Corporate Governance and Structure: Restatement and Recommendations,” but in the course of development the title was changed to “Principles of Corporate Governance: Analysis and Recommendations” and “Restatement” was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable “Principles” project.

The “Principles” approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute's first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command wide-

spread assent, while leaving many details to the local establishment of “rules of statewide application,” as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family
Dissolution: Analysis and
Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

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The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

“Principles” may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute’s Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

b. Operative language. Principles are generally written as recommendations to particular institutions (e.g., legislatures, corporations). At the same time, the black letter in Principles should be similar in scope, clarity, and succinctness to the black letter in Restatements. The Comment and Reporter’s Notes can compare the stated Principle to current law and consider how a Principle might most effectively be implemented.

4. Studies

The Institute sometimes produces studies that analyze in depth particular areas of the law. Some of these, such as the Institute’s tax studies and Federal Judicial Code Revision Project, also include specific proposals for statutory change. See B.2.a above. Other examples are the Reporters’ Study on Enterprise Responsibility for Personal Injury and the Statements of Canadian, Mexican, and United States Bankruptcy Law produced for the Transnational Insolvency Project. In the latter instances, these studies laid the practical and theoretical groundwork for subsequent black-letter propositions. The guidelines set forth in Chapters II, III, and IV are applicable to such studies.

C. THE DRAFTING CYCLE

An Institute project is developed in a series of drafts prepared by the project’s Reporter for review by various Institute constituencies.

1. Preliminary Draft

The Reporter initially prepares a *Preliminary Draft* of one or more substantial segments or divisions of the project for close and intensive review at a meeting of the project's Advisers. The Advisers are designated by the Institute's Director, in consultation with the Reporter and subject to approval of the Council or Executive Committee. They are selected for their particular knowledge and experience of the subject or the special perspective they are able to provide. They constitute an intellectually and geographically diverse group of practitioners, judges, and scholars and normally include one or more members of the Institute's Council.

The initial draft need not correspond to the intended first Chapter of the project, which may consist of introductory or definitional material better prepared at a later stage of the project's development. The first draft should, however, be sufficiently central to the work to enable the Reporter and Advisers to come to grips at the outset with fundamental issues of scope and substance whose early resolution is desirable in order to determine the subsequent direction and shape of the projected work.

Advisers' meetings are scheduled with a view to providing sufficient time for full consideration both of the broad issues that pervade the draft as a whole and of the specific issues particular to each Section. The Institute's founders originally contemplated that the Advisers would function much like a Drafting Committee of the Uniform Law Commission and assume joint responsibility with the Reporter for the work produced. By established practice, however, the Advisers provide Reporters with advice and criticism, but they have no authority to determine the course of future drafting. Straw votes may be taken among the Advisers as a means of informing the Reporter with respect to particular issues. The Reporter is not bound to follow the result of such a vote but is expected to inform the Council of any significant difference of opinion from or among the Advisers.

The discussions between the Reporter and the Advisers are extremely important because most of the Advisers have specialized expertise in the subject matter. Although the Reporter need not defer to the views of the Advisers, Adviser uneasiness with a particular draft should cause the Reporter carefully to reconsider. If the Reporter has resolved a controversial question in a particular way, the concurrence of the Advisers holds particular weight when the draft is considered by the Council and the ALI membership. The Reporter should regard the meeting with the Advisers as an

opportunity to explore issues, to solicit advice and counsel, and to test the appropriateness of the draft.

Preliminary Drafts are normally also reviewed by the Members Consultative Group for the project, usually in a meeting held at about the same time as the meeting of the Advisers. Sometimes the meeting of the Consultative Group is consolidated with that of the Advisers. Members Consultative Groups are self-selected and consist of Institute members who have a special interest in the subject. They expose the Reporter to a wider range of relevant viewpoints at an early stage of the drafting process and enable the Reporter to anticipate, address, and sometimes resolve issues that otherwise might not have come to light until they are raised by members at the Annual Meeting. Like the Advisers, the Members Consultative Groups have no formal drafting authority but provide valuable sources of informative criticism and advice for Reporters.

For some projects, the Director may invite interested legal organizations, such as Sections of the American Bar Association, or governmental entities, such as the State or Treasury Departments, to appoint project Liaisons to participate in the review of the Preliminary Drafts. Depending upon the structure of the project, Liaisons will be asked to attend either the meetings of the Advisers or those of the Members Consultative Group, or in some instances they may meet as a separate group with the Reporter. They are thus given the opportunity to inform the Reporter of the special concerns of the organizations they represent as well as to keep those organizations informed about the progress of the project.

2. Council Draft

When the Director determines that the subject matter of a Preliminary Draft is ready for consideration by the Council, the Reporter prepares a *Council Draft*, which incorporates revisions made in light of the previous review by the Advisers and Members Consultative Group. (Alternatively, particularly in the formative stages of a project, the Director may decide that the revised draft should first be resubmitted to the Advisers and Members Consultative Group for additional review.) Council Drafts are normally considered at the Council's regular meetings in October or January. The Council almost inevitably has less time available to review this draft than the Advisers do with a Preliminary Draft, but its review is nevertheless comprehensive and detailed. Unlike the Advisers, the Council has the authority to direct the Reporter to make changes in the draft and, accordingly, binding votes may be taken. Upon completion of its review, the

Council may decide that all or part of the draft should be revised and resubmitted. Most often it will conclude that all or part, subject to the revisions agreed to, should be submitted to the membership as a whole, either for full consideration and action or for discussion only, at the Institute's Annual Meeting in May. Sometimes the Council will require that particular revisions be reviewed by an ad hoc committee consisting of those members who are particularly interested in the subject matter, or even by the entire Council, before submission to the membership.

The Council consists of lawyers, judges, and academics and reflects a broad range of specialties and experiences. Although some Council members may have specialized expertise in the subject matter of a draft, many will not. The presentation of the draft to the Council is an opportunity to test the general logic and coherence of the draft and the persuasiveness of the arguments in support of the draft.

Council Drafts are also made available to the project's Advisers, Consultative Group, and Liaisons, thus enabling members of these groups to monitor subsequent revisions and offer further advice, which the Reporter is expected to consider with care.

3. Tentative Draft

A *Tentative Draft*, incorporating any revisions directed or agreed to by the Council, is submitted to the Annual Meeting for action by the membership. It is made available in advance of the Meeting to the membership as a whole, which is invited to submit written comments and suggestions. It is also made available to the entire legal community and thus exposed to a still wider ambit of review and comment. (Any Adviser to a project who is not a member of the Institute is sent a copy of every draft in that project prepared for the Annual Meeting and invited to participate in the Annual Meeting discussion.) Members are urged to submit in writing before the Meeting any motions to amend a draft, and such presubmitted motions are generally given priority on the agenda. However, oral motions offered in the course of the discussion are not precluded. As with the Council, review by the membership is comprehensive, and any portion of the draft not fully considered is held over for resubmission at a subsequent Meeting. At the close of the discussion, the Tentative Draft, subject to any changes resulting from the Meeting, may be approved in whole or part or remanded in whole or part to the Reporter for further revision and eventual resubmission to the membership. If the membership adopts a substantive position contrary

to that of the Council, the revision must then be submitted to the Council for its consideration.

4. Discussion Draft or Report

The Council may conclude that a draft is not yet ready for action by the membership but would nevertheless benefit from discussion at the Annual Meeting. It may therefore direct that the draft, as revised following the Council Meeting, be submitted to the membership for discussion only. Such a draft is denominated a *Discussion Draft*. At the Annual Meeting, straw votes may be taken to inform the Reporter of the sense of the house, but no action is taken with regard to the draft as a whole. The draft is eventually revised and resubmitted as a Tentative Draft. Alternatively, in lieu of a draft, the Director may ask the Reporter to submit for discussion at the Annual Meeting a written report describing the current status and agenda of the project.

5. Proposed Final Draft

The drafting cycle described above continues until each segment of the project has been accorded final approval by both the Council and the membership. If the process does not result in extensive and complicated drafting changes or structural reorganization, it may be completed with the approval of the last Tentative Draft. When extensive changes are required, the Reporter may be asked to prepare a *Proposed Final Draft* of the entire work, or appropriate portions thereof, for review by the Council and membership. Review of such a draft is not de novo, and it will ordinarily be limited to consideration of whether the changes previously decided upon have been accurately and adequately carried out.

6. Official Text

Upon final approval of the project, the Reporter, subject to oversight by the Director, proceeds to prepare the Institute's *official text* for publication. At this stage the Reporter is authorized to correct and update citations and other references, to make editorial and stylistic improvements, and to implement any remaining substantive changes directed or agreed to by the Council or membership. Any additional proposed changes considered by the Director to be of a significant and substantive nature must be referred to the Council or its Executive Committee. A proposed change that might

arguably be regarded as such should therefore be brought to the Director's attention by the Reporter.

After submitting the official text for publication, the Reporter is expected to review and correct the page proof and the index. Upon completion of that service, the Reporter's task is done. With the exception of the Reporter's Notes and any Statutory Notes, the author of the published text is The American Law Institute.

Note on numbering of drafts: Each type of draft within a project has its own numbering sequence. Thus, the first Preliminary Draft is Preliminary Draft No. 1, the first Council Draft is Council Draft No. 1, and the first Tentative Draft is Tentative Draft No. 1. If only one draft in a series is anticipated, it need not be numbered, e.g., Proposed Final Draft. If, however, subsequent drafts are needed, they should be numbered accordingly, e.g., Proposed Final Draft No. 2.

7. Acknowledgment of Written Comments and Suggestions

In the course of a project's development, Reporters are likely to receive numerous written comments and suggestions from Advisers, members, and other persons whose aim is to improve the work as they see it. Reporters are required neither to accept such suggestions nor to respond to them in extensive detail, but they are expected to acknowledge them courteously and to take them into account. At each stage of the drafting process, Reporters should also be alert to the possibility that an exchange of viewpoints with their critics may help to clear up misconceptions on both sides and avoid unnecessary controversy at subsequent stages of the process.

D. CONFLICTS OF INTEREST

Institute Reporters must be sensitive to the possibility of conflicts of interest arising from their professional engagements and other activities outside the Institute. They are therefore expected to be familiar with and to adhere to the Institute's official Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects, the current version of which is found in the Appendix.

CHAPTER II. LANGUAGE AND STRUCTURE

Institute Reporters can most effectively achieve the Institute’s goals of clarifying and simplifying the law by drafting in a manner that itself aspires to clarity and simplicity. The report of the Institute’s founding committee emphasized “the importance of expressing the restatement in clear and simple English, avoiding so far as possible, the use of technical and unusual terms” and added that it “should be understandable by an intelligent, educated person who is not a trained lawyer.” The voice of the Institute does not communicate by means of legal jargon but seeks to express itself as clearly, coherently, and directly as possible, not only to its primary audience of those who are trained in the law but also to those intelligent, educated persons who are not.

The principles for effective ALI drafting are therefore essentially those for effective writing in general and for effective legal writing of all kinds. This handbook, however, does not purport to be a comprehensive manual of style, but rather to provide guidelines for those aspects of language and structure that are most pertinent to ALI drafting. Reporters in search of more extensive guidance on stylistic issues are encouraged to consult William Strunk, Jr., and E.B. White, *The Elements of Style* (4th ed. 2000); Bryan A. Garner, *The Elements of Legal Style* (2d ed. 2002) and *The Redbook: A Manual on Legal Style* (3d ed. 2013).

A. DICTION

1. Draft as clearly and as simply as meaning will permit

a. Clarify. In conveying the voice of the Institute, an Institute Reporter is expected not only to give expression to its substantive

views but to take pains to express these views as clearly as possible, thus furthering the Institute's fundamental objective of clarifying the law. Clarity of style is inextricable from clarity of substance. It is achieved by careful attention to both diction (choice of words) and structure (organization of component parts). The latter is developed in B below.

b. Simplify. A clear style is generally a simple style, free of obfuscation and unnecessary verbal complication. The voice of the Institute should speak plainly and directly, preferring the simple word to the complex, the short sentence to the long. It should avoid elaborate metaphors and rhetorical flourishes, which may be effective attributes of an individual style but not of the Institute as a whole.

Reporters do need to guard against stylistic oversimplification, just as they need to guard against oversimplifying a legal argument or analysis. Simple sentences are not always sufficient to explore complex matters of law, and Reporters need not deny themselves the full resources of the English language in their efforts to clarify and simplify the law. Nevertheless, Reporters should strive to write as simply and directly as the meaning they wish to convey will permit, bearing in mind that the simpler the language they employ, the clearer it is apt to be for their readers.

c. Eliminate superfluous words. Superfluous words are unnecessary words. They tend to make one's analysis or argument more complicated and harder to follow than it needs to be and less effective than it ought to be. One can frequently replace familiar but verbose phrases by single words with no loss of meaning. Consider these examples from *A Plain English Handbook*, produced by the United States Securities and Exchange Commission:

<i>Superfluous</i>	<i>Simpler</i>
in the event that	if
subsequent to	after
prior to	before
despite the fact that	although

One can also reduce phrases consisting of nouns and attendant verbs or prepositions to what Bryan A. Garner calls "kernel verbs." For example, replace "submit an application" with "apply" or "be in agreement" with "agree." Similarly prefer positive phrasing to negative. Instead of, "the court did not accept the agreement," write "the court rejected the agreement."

d. Prefer plain English. Reporters should use the simplest words that permit the clear expression of an idea. Just as one needs to be continually alert to the possibility of eliminating superfluous words, one should consider whether multisyllabic words of Latin or French origin can be replaced by simpler words of Anglo-Saxon origin without distorting or oversimplifying the meaning.

e. Be consistent in terminology. Clear legal explication and analysis require that the words and terms selected to represent essential concepts and ideas be used consistently wherever they appear. Verbal exactitude is preferable to elegant variation. Conceptual clarity calls for repetition of the same terms when the same thing is meant. Use of a different term, even one that is nearly synonymous, may suggest to the reader that a different meaning is intended. This is not to imply that departures from familiar, established terminology may not sometimes be appropriate. See I.B.1.c(i). Once a particular word or phrase has been established in the text as a “term of art,” however, the Reporter should try to make both its definition and scope clear to the reader at the outset and to use it in the same sense throughout.

f. Prefer short sentences. Short sentences tend to be easier to follow than long ones. A Reporter should always be alert to the possibility of shortening a sentence, whether by eliminating superfluous words or by dividing it into shorter sentences.

g. Generally prefer the active voice to the passive. The passive, like the active voice, is capable of conveying action. In a sentence phrased in the active voice, however, the subject of the sentence is the actor. When the passive voice is used, the subject is acted upon. Compare the following:

Active

Any party may seek a continuance.

Passive

A continuance may be sought.

Although the two sentences make similar points, the first specifies who is entitled to request a postponement in a proceeding and the latter does not. In legal drafting it is often essential to make it clear precisely who may, should, or must perform a particular action. The active voice compels the drafter to specify the intended actor, while the passive voice makes it possible to evade or avoid that task. Use of the active voice, therefore, tends to

permit greater precision, while use of the passive voice leads more readily to vagueness.

One can cure this defect in the second sentence above, of course, by adding a prepositional phrase identifying the source of the action described:

A continuance may be sought by any party.

The meanings of the two sentences are now essentially equivalent, but notice that the second sentence requires more words to make the same point. Its passive construction, with a subject acted upon rather than acting, lacks the immediacy and directness of the sentence phrased in the active voice. Generally more precise and more direct, the active voice is more likely to be at once simpler and clearer, and thus it is usually preferable.

One may nevertheless find the passive voice more appropriate if the intention is to focus on the object of an action or if naming the actor is irrelevant to the meaning intended. Consider the following examples:

Franklin Roosevelt was elected President four times.

The American people elected Franklin Roosevelt President four times.

One might choose the first alternative if the focus is meant to be on Roosevelt but the second if on the electorate. Note, however, that if the actor (the electorate) is understood, there is no need to add an identifying prepositional phrase such as “by the American people.” The first sentence, despite its passive construction, is therefore as precise and direct as the second. Or compare the following:

Numerous cases to the contrary have been found.

Researchers have found numerous cases to the contrary.

The first sentence appropriately emphasizes the abundance of contrary authority rather than the anonymous researchers who have merely confirmed its existence.

Contrast:

The court cited good authority in support of its holding.

Good authority in support of its holding was cited by the court.

The active-voice construction brings immediately to the fore both a significant actor (the court) and the action it has taken; it makes its point simply and directly. The passive-voice construction, in contrast, withholds both actor and action until the end of the longer sentence; the same information is conveyed more awkwardly and less vividly.

If one decides to employ the passive voice, the decision should be a deliberate one based on a determination that the usual advantages of the active voice, its greater precision and directness, are outweighed by other considerations. One especially needs to consider whether the sentence focuses on the appropriate subject and makes clear the source of the action it seeks to describe. Consider this example of Restatement black letter:

§ 11. Subject Matter Jurisdiction

A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action.

Restatement Second, Judgments

If translated into the active voice, this provision might read as follows:

The court may properly render a judgment against a party only if the court has authority to adjudicate the type of controversy involved in the action.

This version of the sentence takes as its subject, and places its primary focus on, “the court,” which indeed is repeated as the subject of the qualifying, “only if” clause. As promulgated, however, the subject of the sentence is “a judgment,” which is also the subject of the Restatement. The primary focus thus remains on the subject of the Restatement as a whole, and in particular on that of the chapter in which § 11 is found, i.e., what constitutes a valid judgment. The actor whose authority is required to render such a judgment, the court, is nevertheless made sufficiently apparent in the qualifying clause.

h. Prefer singular to plural. Compare the following:

A convicted felon is not permitted to vote.

Convicted felons are not permitted to vote.

Ordinarily, as in the examples above, a generalization about a class of persons has essentially the same meaning, whether phrased in the singular

or the plural. Sometimes, however, use of the plural may result in ambiguity and uncertainty of meaning:

Ordinarily an actor has a duty of reasonable care to aid another who has been placed in greater peril by the actor's intervention.

Ordinarily actors have duties of reasonable care to aid others who have been placed in greater peril by their intervention.

The plural version leaves it unclear whether the "duties" referred to exist only when two or more persons act in concert with one another or also when each acts independently of the other, only when at least two intervene or also when only one does so. Thus, if there are no countervailing considerations, the interests of clarity generally favor drafting in the singular rather than the plural.

Nevertheless, one should not hesitate to draft in the plural if the sense to be conveyed is unmistakably plural, as, for example, will be the case when a rule is stated that applies only if two or more actors are involved. In such a case, however, one should take care to clarify any ambiguities of the sort suggested in the previous paragraph. Drafting in the plural can also help a Reporter to follow the ALI's mandate that the voice of the Institute should be gender-neutral. See A.3 below. Plural third-person pronouns are, unlike singular ones, themselves gender-neutral. By using plural nouns as antecedents, one can more readily avoid both reliance on gender-specific pronouns and, in an effort to neutralize them, the awkward repetition of phrases like "he or she."

Even if plural terminology is itself both clear and appropriate in a particular context, abrupt shifts in perspective from singular to plural and casual commingling of the two can result in lack of clarity and should be avoided.

i. Generally draft in the present tense. Although a legal rule or principle may describe the consequences of past conduct or proscribe future conduct, in general it is most clearly and effectively stated in the present tense, which reflects present law and the perspective of the person seeking to interpret and apply it.

Consider, however, the following statement of law:

An actor whose conduct is judged to have been negligent is ordinarily legally accountable for reasonably foreseeable consequences. By "reasonably foreseeable consequences" the law means consequences reasonably foreseeable to an ordinarily prudent person in the position of the actor at the time the conduct occurred.

While retaining the present perspective for the act of judging (“is judged” and “is ordinarily legally accountable”), the statement introduces a second perspective, that of “an ordinarily prudent person in the position of the actor,” as the standard for judging. That perspective is one that looks to the future (“reasonably foreseeable consequences”) but is confined to its own present, which from the perspective of the judge is that of the past (“at the time the conduct occurred”). A careful distinction in this example between the present and past tense delineates the difference between the standard intended and one that would have permitted the actor’s conduct to be judged with the benefit of hindsight, in the light of actual consequences rather than those reasonably foreseeable at the time of the conduct.

Even if the accurate statement of a rule or principle does not itself depend upon such a precise distinction of tenses, careless and abrupt shifts of tense are confusing and detract from the clarity of a Reporter’s exposition or analysis. Particular care should be taken to align the present perfect with the present tense, the past perfect with the past tense. Thus, either:

The plaintiff alleges that it is and has been prepared to perform the terms of its contract;

or:

The plaintiff alleged that it was and had been prepared to perform the terms of its contract.

j. Do not use “where” as a situational substitute for “if,” “when,” or “in which.” Lawyers are overly fond of using the word “where” as an all-purpose situational substitute for more precise terms such as “if,” “when,” or “in which.” Certainly “where” can refer to a situation as well as a specific place, as in “He wondered where he would be without his wife’s support.” In ALI drafting, however, one can generally achieve greater precision by replacing this vague situational “where” with another term. Compare the following:

A misapprehension of fact or law on the part of the transferor constitutes an invalidating mistake *where* the transfer would not have taken place but for the mistake.

A misapprehension of fact or law on the part of the transferor constitutes an invalidating mistake *if* the transfer would not have taken place but for the mistake.

The substitution of “if” makes it clear that the subordinate clause describes a condition precedent, not a locale.

Where plaintiffs seek no more than declaratory relief, they are not seeking to enforce a claim.

When plaintiffs seek no more than declaratory relief, they are not seeking to enforce a claim. [reference properly not to the place but to the time]

That was the case *where* the court struck down the death penalty.

That was the case *in which* the court struck down the death penalty [relationship to case more precisely described by “in which”]

k. Distinguish clearly between restrictive and nonrestrictive clauses. A relative clause may be restrictive or nonrestrictive. A restrictive clause identifies or defines the noun to which it relates. It is essential to the meaning of the sentence in which it appears and is therefore not set off by commas. A nonrestrictive clause, on the other hand, is parenthetical rather than essential and is set off by commas.

Restrictive

The victim whose domicile was Ohio sued in federal court.

Nonrestrictive

The victim, whose domicile was Ohio, sued in federal court.

The restrictive use of the relative clause in the first sentence suggests that there was more than one victim but that only the one from Ohio sued in federal court. The nonrestrictive, parenthetical use of the same clause in the second sentence suggests that there was only one victim, whose Ohio domicile is an additional fact about that victim but not one that is essential for identifying him or her. In the interest of clarity, therefore, it is important to consider whether one intends that a particular dependent clause be used restrictively or nonrestrictively and whether that intended meaning has been conveyed clearly to the reader.

In addition to using commas for nonrestrictive clauses and omitting them for restrictive clauses, avoid using “which” to introduce a restrictive clause, which should instead be introduced with “that.” Although many excellent writers of classical English prose appear to use “that” and “which” interchangeably when they intend a restrictive context, the need for clarity

calls for ALI Reporters to adhere to the preferred contemporary practice of using “which” to introduce nonrestrictive clauses only. Compare the following:

Restrictive

It is the Restatement of Contracts that deals with promissory estoppel.

Nonrestrictive

The court cited the Restatement of Contracts, which deals with promissory estoppel.

2. Draft impersonally

a. Maintain a neutral perspective. An ALI document represents the product of a collaborative drafting process and is intended ultimately to reflect the voice of The American Law Institute. It should be drafted objectively, in the third person, and not as if it were a personal essay. Its aim is to describe and analyze the law and its processes in a detached and neutral fashion. References to either the Institute or the Reporters as actors (“The Institute takes the view”; “The Reporters have found no cases to the contrary”) should therefore also be avoided.

3. Use gender-neutral and avoid sexist language

a. Use gender-neutral language. Gender-neutral language is language that is free of stereotyping by gender. Sexist language is language that, often unconsciously, betrays stereotypical assumptions about the gender of those occupying particular social roles. Gender-specific language is not inconsistent with gender-neutral language if it refers to a specific example of which gender is an aspect (“The testator was survived by his wife.”), and gender-specificity is not sexist unless it reflects unsubstantiated assumptions about gender, assumptions that may not be immediately obvious. “Workmen’s compensation,” a once ubiquitous legal term, was transformed into “worker’s compensation” when the increasing number of women in the workplace and an increased sensitivity to feminist concerns combined to make the latent sexism underlying the original term too blatant to overlook.

The Institute is strongly committed to the elimination of gender bias, and therefore expects its Reporters to strive to eliminate all traces of sexism from the language they draft on its behalf. This includes not only overt

expressions of gender bias but also the more insidious sexism that is rooted in the unconscious conventions of the English language itself. Particularly insidious in this regard is the long-established convention, exposed to serious critical scrutiny only in the last quarter of the 20th century, that masculine terms may be either gender-specific or generic expressions referring to either men or women or to humanity as a whole. According to this convention, “man” can mean either “adult male human being” or simply “human being.” “Mankind” can be synonymous with “humankind” or “humanity;” and “he” can be the equivalent of “he or she.”

The convention has resulted in stirring and memorable lines such as “all men are created equal” and “the proper study of mankind is man,” and contemporary paraphrases meant to cure their anachronistic sexism—“all humans are created equal” or “the proper study of humanity is a study of human beings”—are decidedly less deft than the originals. Formerly, the Institute’s publications fully embraced the convention. Nevertheless, what has been referred to as “generic man and its compounds” (Marilyn Schwartz et al., *Guidelines for Bias-Free Writing*, 1995) is no longer acceptable in ALI drafting. Holmes may have intended the generic and not the specific masculine in this well-known passage:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

The lawyerly image he evokes, however, whether of a good person or a bad one, is inevitably envisioned as stereotypically male. Such an attempt to use gender-specific terms generically runs too great a risk of seeming sexist to today’s readers. The use of feminine terms when referring to a predominantly but not exclusively female group, such as nurses or kindergarten teachers, conveys its own brand of gender stereotyping, while the use of masculine terms in such a context is apt to sound artificial. ALI Reporters, therefore, must aim for gender-neutrality in their drafting.

b. Avoid sexist language. The most effective way to avoid sexist language is to avoid using gender-specific language generically. One should not write of lawyers, for example, as if they consisted entirely of men or, for that matter, of women, and should not use gender-specific pronouns when referring to nonspecific but representative members of a group or class. The pronoun problem may present special difficulties because the “best”

means of avoidance may not be immediately apparent and will inevitably vary depending on the context. Possible solutions include the following:

(i) Make the antecedent noun plural

Plural pronouns are not gender-specific. Thus, instead of

A lawyer may sue to obtain his fee

one can write

Lawyers may sue to obtain their fees.

This option should be weighed against the preference for drafting in the singular stated in *A.1.h* above. It is possible that the second alternative above may be read as requiring lawyers to sue collectively to obtain their fees.

(ii) Repeat the antecedent noun

Compare the following:

An actor intentionally causes harm if he brings about that harm either purposefully or knowingly.

from § 1, Restatement Third, Torts: General Principles

(Council Draft No. 1)

An actor's causation of harm is intentional if the actor brings about that harm either purposefully or knowingly.

from § 1, Restatement Third, Torts: General Principles

(Discussion Draft)

The repetition of “actor” in the revised version eliminates the need for the gender-specific pronoun. Continual repetition of the noun, however, would produce dull and awkward prose.

(iii) Replace a subordinate clause with a participial phrase

Compare these alternatives:

An actor purposefully causes harm if he acts with the desire to bring about that harm.

from § 1, Restatement Third, Torts: General Principles

(Council Draft No. 1)

An actor purposefully causes harm by acting with the desire to bring about that harm.

from § 1, Restatement Third, Torts: General Principles
(Discussion Draft)

The participial phrase in the revised version does not require a subject. The need for a gender-specific pronoun or the alternative of a repeated noun is thereby avoided.

(iv) Use a neuter pronoun

Particularly when the actor referred to is likely to be a business or other type of organization, “it” may be an appropriate substitute for a gender-specific pronoun:

§ 33. Secondary Obligor’s Collateral Available to Obligee

When the principal obligor supplies collateral securing its duty of performance or reimbursement to the secondary obligor, and the secondary obligor defaults on the secondary obligation, the obligee may elect to enforce for its benefit the rights of the secondary obligor with respect to the collateral to the extent of the secondary obligor’s failure to perform the secondary obligation.

Restatement Third, Suretyship and
Guaranty

(v) Cut the pronoun

In some circumstances the gender-specific pronoun will be superfluous and can be excised without the need to replace it with anything:

The principal can be sued directly on the basis of his vicarious liability.

The principal can be sued directly on the basis of vicarious liability.

(vi) Replace the pronoun with an article

Pronouns can frequently be replaced by an article with no loss of precision:

The defendant must file his answer within 10 days.

The defendant must file an answer within 10 days.

Although these solutions will cure many instances of sexist writing, one may sometimes need to revise more extensively in order to preserve the precise meaning intended and to express it clearly and gracefully. One acceptable approach is to replace a single, gender-specific pronoun with “he

or she” or “his or her” (alternatively “she or he” or “her or his”), but, as with repetition of the antecedent noun, continued repetition of these phrases in close proximity is likely to prove awkward. The approach found in much academic legal writing of merely replacing all generic masculine pronouns with generic feminine ones is not gender-neutral and therefore is not acceptable in ALI drafting, nor is the practice of alternating masculine and feminine pronouns, whether instance by instance or chapter by chapter.

c. Employ gender-specific language in gender-specific situations. The Institute’s requirement that its voice be gender-neutral does not preclude the employment of gender-specific language in gender-specific situations, such as facts pertaining to an actual case or to an actual person. Moreover, this policy is not intended to limit the discussion of gender-based distinctions and problems that have developed in a particular area or field of law. Even if not legally relevant, gender-specific Illustrations may render more vividly the issues of law they aim to clarify and are acceptable if, taken as a whole, they do not promote gender stereotyping. See, for example, the gender-specific Illustrations found in the Institute’s Principles of the Law of Family Dissolution: Analysis and Recommendations.

The Institute’s policy of gender-neutrality also does not preclude the full and accurate quotation of relevant language that might itself be regarded as sexist if promulgated by the Institute, such as the passage quoted from Holmes in A.3.a above.

B. ORGANIZATION

1. Overall Structure

a. General plan. Reporters are ordinarily expected to begin their work on an ALI project by developing in outline form a general plan of organization that defines the scope of the project and sets forth the order and relationship of its component parts. Rather than attempting to create at the outset a completely original outline of the subject, a Reporter might better begin by examining and then adapting as appropriate the structural conventions established by previous treatises and works on the subject. Particularly if the topic has been previously treated by the Institute, that treatment should provide the touchstone and starting point for any later reorganization. Variations from established structural conventions should be carefully considered and appropriately justified. Even if there is no direct Institute model for the new work to be undertaken, Reporters should con-

sider comparable Institute works as possible structural models for the new project.

The normal structural plan for a work of the Institute is to move from the general to the particular, from broad principles to narrower applications and from central concepts to more peripheral variations. Nevertheless, it may be appropriate in some projects to begin not with general principles but with a series of definitions of essential terms that will be used throughout the work, or with a series of index Sections that spell out the scope and content of the work to follow.

A project's work plan need not correspond precisely to its structural plan. The introductory portions, for example, may be better postponed until after the central issues and formulations have been debated and resolved. The most difficult issues are often best addressed at the outset, when energy levels are high and frustration levels low and when the comments received during the review process can help to shape the project's subsequent development. In any event, while it is essential to begin with a clear structural plan, the plan should remain sufficiently flexible to accommodate changes decided upon in the course of the drafting process.

b. Component parts. The fundamental structural unit of most Institute works is the Section, normally consisting of three parts: a black-letter provision, Comment explicating, analyzing, and illustrating the black letter and its application, and Reporter's Notes explaining the sources relied upon in formulating the provision and its attendant Comment and setting forth its relationship to current law. Reporter's Notes are sometimes complemented by separate Statutory Notes when a comprehensive compilation of relevant statutes is desirable.

A series of related Sections is normally grouped into larger units denominated as Chapters or Parts. (The Restatement of Property indeed includes, in descending order, Divisions, Chapters, and Parts.) These in turn may be subdivided into Topics, Titles, or Subparts. Although in organizing a new project Reporters should consult previous work by the Institute on the same subject or in related areas, they are not precluded from organizing their own work in what they consider to be the most effective manner.

Distinct groupings of Sections, whatever they may be called, should be prefaced by Introductory Notes briefly summarizing the contents of the Sections to follow and the relationships among them. The work as a whole should be prefaced by a general Introduction. (In the Restatement Second of Judgments the Introduction consisted of the entire first Chapter.) Draft-

ing of the introductory material may, however, be deferred until later in the project.

c. Titles and headings. Care should be taken to assure that the title or heading selected for each component part of the work accurately and fully describes and conveys the contents of the material to which it relates. Key terms and concepts should be included in a heading to assure that they will be found in the table of contents and the index, thereby enabling a reader readily to locate where in the work they have been treated. If a familiar term has been supplanted by a novel one, consideration should be given to including the more traditional term parenthetically in the title or heading, thus enabling the reader to locate the desired topic despite the unfamiliar terminology.

d. Cross-references. Readers of Restatements and other Institute publications are usually looking for the treatment of a particular problem or the resolution of a particular issue; they rarely read the work extensively or consecutively. Because no single Section or group of Sections can explore every facet of the issue under investigation or fully develop every relevant qualification or exception, a Reporter must be attentive to the need for thorough cross-referencing to places where related material is covered. Such cross-referencing should not merely cite the number of another relevant Section but indicate also why such a Section may be relevant. For example, one should not simply say, “see also § 9,” but something like “The rule stated in this section is a specific application of the rule stated in § 9.” The Reporter may wish to follow the example of Restatement Third, Property (Servitudes), which lists at the beginning of each Section, by both Section number and subject matter, cross-references to related Sections considered especially worth noting.

Cross-references within black letter should normally be limited to black letter only. It should not be necessary to burden the black letter with references to Comment or Reporter’s Notes. All Comments should bear headings or other identification that will enable the reader to discern their possible relevance to the black-letter citation. Comment should not ordinarily specifically cross-refer to the accompanying Reporter’s Notes, the relevance of which should also be sufficiently clear from their headings. In addition to addressing black letter or Comment, Reporter’s Notes may cross-refer to other Reporter’s Notes.

2. The Section

a. Components. The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. See B.1.b above. The following discussion of each of these components is generally applicable to all Institute projects. For a discussion of special drafting considerations for particular types of projects, see Chapter I.B.

b. Allocation of responsibility. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

c. Allocation of material. One of the most difficult challenges for a Reporter is the appropriate allocation of material among related Sections and among the components of a single Section. Usually a Section is organized around a single rule, principle, or statement of law or an integrally related series of rules, principles, or statements. The Comment explains, exemplifies, and expounds upon the meaning and significance of the black letter. The Reporter's and Statutory Notes furnish the nexus of law, policy, and theory that supports the black letter and Comment. There is no set formula for dividing and allocating the material among these components. Rather, the Reporter must be prepared to be flexible and to reallocate and reorganize in light of both the drafting and reviewing process.

Frequently a Reporter will be asked to move part of one Section into another or to use it as the basis for an entirely separate Section; to move a concept that appears only in Comment into the black letter or to remove something from the black letter and to address it only in Comment; or to transfer a portion of a Reporter's Note into Comment or the reverse. The Reporter should always be open to consideration of the appropriateness of those requests but need not accede to a request unless persuaded of its correctness or required to do so by the Council or membership of the Institute.

3. Black Letter

a. Need for statutory precision. As indicated in B.2.c above, a black-letter provision normally consists of a single rule, principle, or statement of law or of an integrally related series of rules, principles, or statements. It is called black letter because it is highlighted in boldface type. A completed

series of black-letter provisions for a particular subject should constitute a compendium of the essential law of that subject, to be fleshed out in fuller detail and thereby clarified by the appended Comment and Reporter's Notes. Whether or not the black-letter provisions are intended to constitute a model statute, they should be drafted in the form of a codification of the subject in question; in the words of the Institute's founders the black letter "should be made with the care and precision of a well-drawn statute." Black-letter formulations should be as concise and simple as possible, with clear and consistent terminology, carefully organized syntactical relationships, and parallelism of structure. In some instances a jury instruction may provide a useful model. If a black-letter provision extends to more than 10-15 lines of text, the Reporter should consider whether it might better be divided into separate Sections or whether some of its language might appropriately be transferred into the Comment.

b. Interconnection of Sections. Consider the formulation of § 1 of the Restatement Second of Contracts:

§ 1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

If it were possible to reduce the entire Restatement of Contracts to a single statement, this sentence might well be it. The rest of the Restatement can indeed be regarded as an explication and elaboration of this extremely broad and general provision, with the meaning of such terms as "promise," "breach," "remedy," and "performance" developed in specific detail in the material that follows. The Restatement thus moves, both Chapter by Chapter and Section by Section, from the general to the particular by means of increasing degrees of specification.

Compare the opening Section of the Restatement Second of Judgments:

§ 1. Requisites of a Valid Judgment

A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action, as stated in § 11, and

(1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or

(2) Adequate notice has been afforded the party, as stated in § 2, and the court has territorial jurisdiction of the action, as stated in §§ 4 to 9.

This Section specifically anticipates the further development of its central concepts by directly incorporating cross-references to subsequent Sections where this development is to be found. It thus serves not only as a broad general statement of the subject matter of the Restatement as a whole but as a kind of index to what is to come. When a series of Sections develops the same general topic, it may be useful to begin the series with such an index Section, which in black letter as well as Comment spells out the organizational structure and interrelationships that will follow. An Introductory Note may fulfill a similar function, but an index Section is more likely to be consulted and relied upon.

Because readers of an Institute work are more likely to examine Sections of particular interest to them than to familiarize themselves with the work's overall structure, it is incumbent upon the Reporter to provide frequent cross-references to other Sections that may clarify, amplify, or qualify what is contained in the Section initially consulted.

c. Qualifications and limitations. The broader and more general a black-letter provision, the more likely it is to be subject to some sort of qualification or limitation. Yet if such qualification or limitation is spelled out in full, the Section may become both verbose and unduly repetitious of matters more appropriately developed in other Sections. The Reporter must therefore be attentive to the possibility that a particular provision may be overly broad and also alert to ways in which the provision might be qualified without introducing excessive verbiage. Sometimes the insertion of a term such as "ordinarily," with additional clarification and cross-reference as needed in the Comment, will be sufficient; in other cases it may be necessary to limit the scope of the provision explicitly by the use of cross-references such as "subject to the rule of § 18 (contingent remainders)" or "except as provided in § 3 (ex parte hearings)." Vague qualifying terms such as "on occasion" or "in rare instances" often cannot readily be verified and should therefore be avoided in black letter.

If each in a series of related provisions is subject to the same limitation, it should not ordinarily be necessary to qualify each with the same verbal formula. Thus, if each in a series of rules of liability is subject to affirmative defenses, this point should be made at the outset and perhaps reinforced in the Comment to each Section; it should not have to be repeated in each separate black-letter provision. Similarly, every Restatement provision is

potentially subject to a countervailing statute; one need not add the phrase “unless a statute provides otherwise” unless there are indeed statutes in some jurisdictions that do provide otherwise. See Chapter I.B.1.c(ii).

If exceptions and qualifications need to be stated in the black letter, they normally should be placed after the statement of the basic rule. If, however, they can be expressed briefly, such as with a phrase introduced by “subject to,” they should precede the basic rule.

d. Conditions. Conditions, normally introduced by the word “if,” should be inserted where they can be read most easily. “When” should be used instead of “if” when the sentence needs an “if” to introduce another related clause or if the condition is expected to occur. Normally avoid “where” to introduce a condition. See A.1.j above. If a condition is short, it is usually best placed in front of the statement it modifies. If, however, the condition is long and the main clause to which it relates is short, the main clause is likely to be more effectively positioned first. See Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* (Administrative Office of the United States Courts, 1996; fifth printing 2007).

e. Organization of black letter. A Section should represent an integrated treatment of the subject matter reflected in its title. Its scope should also be consistent with the title, and the terminology used in both the title and the contents of the Section should be consistent. Each black-letter provision should be drafted as clearly and simply as its scope—and its meaning—will permit. See A.1.a above. Although a black-letter provision may be simple and straightforward enough to require no subdivision, more complicated provisions should be subdivided into appropriately identified smaller units to assist the reader to comprehend the meaning by better apprehending the structure. To this end also, related units of black letter should be organized in terms of parallel structure. Careful attentiveness to structure will enable the Reporter better to test the coherence of the black letter.

The Drafting Rules of the Uniform Law Commission provide a helpful guide to the subdivision of black letter. The following is adapted from Rules 402 and 403 as they appear in the 2012 Edition:

- (a) Divide into subsections and paragraphs, as necessary, a Section that covers a number of contingencies, alternatives, requirements, or conditions. A paragraph may be divided into subparagraphs. A subparagraph may be divided into clauses, and a clause may be divided into subclauses, but avoid their use. Divide a Section into several Sections as an alternative to using subparagraphs or lower subdivisions.

- (b) Designate each subdivision of a Section—*i.e.*, subsection, paragraph, subparagraph, clause, or subclause—by a letter or number, in the following order:
 - (1) Designate subsections by lower-case letters in parentheses.
Example: Section 101(a)
 - (2) Designate paragraphs by Arabic numerals in parentheses.
Examples: Section 101(a)(1); Section 101(1)
 - (3) Designate subparagraphs by upper-case letters in parentheses.
Example: Section 101(a)(1)(A)
 - (4) Designate clauses by lower-case Roman numerals in parentheses. *Example:* Section 101(a)(1)(A)(i)
 - (5) Designate subclauses by upper-case Roman numerals in parentheses. *Example:* Section 101(a)(1)(A)(i)(I)
- (c) Avoid numbering internal clauses in a nontabulated sentence. If internal numbering is essential for clarity, use lower-case Roman numerals.

Because ALI Sections themselves bear a number, it is logical to identify subsections by letters and paragraphs by numbers rather than the reverse, thus enabling the numbers and letters to alternate, as in the examples above. Many ALI publications, however, have traditionally subdivided Sections initially by number (subsection (1); paragraph (a); etc.). If continuing or updating such a work, Reporters may consider retaining this alternative system in order to maintain consistency within that work.

f. Captions. ALI black letter does not normally include captions for separate subsections within a Section, but such captions have been used occasionally to clarify the structure and content of black letter that is especially lengthy and complex. See, for example, § 7.13 of Principles of Corporate Governance (Judicial Procedures on Motions to Dismiss a Derivative Action Under § 7.08 or § 7.11), which consists of five subsections, each with its own caption, as follows:

- (a) *Filing of Report or Other Written Submission*
- (b) *Protective Order*
- (c) *Discovery*
- (d) *Burdens of Proof*
- (e) *Privilege*

In the last two years of the long and ultimately successful effort to revise Article 9 (Secured Transactions) of the Uniform Commercial Code, a joint

ALI-NCCUSL (also known as the Uniform Law Commission) project, a Simplification Task Force was created, which influenced the drafters to make a number of changes in format, including the “use of subsection headings” to facilitate understanding, particularly in dealing with long sections. See Neil B. Cohen, “The Revised UCC Article 9 Secured Transaction Simplification Experience,” 105 Dick. L. Rev. 213, 215 (2001).

Institute Reporters are encouraged to consider whether captions for subsections in their own projects might be of comparable utility.

g. Items in a series. In a conjunctive series (one in which all items in the series are required or must apply) the last item in the series should be prefaced by “and.” In a disjunctive series (in which only one of the items need apply) the last item should be prefaced by “or.” If some items are conjunctive and some disjunctive, the appropriate conjunction should be used at the end of each item. To avoid ambiguity about a conjunctive or disjunctive series and to emphasize the applicable relationship, the appropriate conjunction may be used before all but the first item in the series. Sometimes an introductory phrase—such as “any of the following,” “one of the following,” “all of the following,” or “one or more of the following”—may more clearly indicate the intended relationship among the items in a series. See Uniform Law Commission *Drafting Rules*, Rule 405(d) (2012). An introductory phrase of this sort should be followed by a colon and the items in the series that it introduces should be linked by semicolons without conjunctions.

The Reporter should consider whether the items in a series are meant to exclude any similar or related matters not specifically enumerated. If not, the last item may be a general “catch-all” phrase to avoid an overly restrictive reading of the series. Another approach is to introduce a series of related items with a statement of this sort:

Applicable sanctions may include, but are not limited to, the following:

h. Gray letter. In contrast to black-letter rules and principles, which are set in boldface, provisions that are intended to be recommendations of good practice rather than statements of binding law should be set in ordinary type (gray letter). They should nevertheless be drafted with the precision of black letter and may themselves be supplemented by relevant Comment and Notes, as were those contained in Part III-A of the ALI’s Principles of Corporate Governance.

The distinction between the gray-letter provisions of Part III-A and the black-letter provisions set forth in the rest of the Corporate Governance Principles was described in the Introductory Note to Part III-A as follows:

The recommendations in this Part are made to corporations and their counsel, not to courts or legislatures. Accordingly, these recommendations are not intended as legal rules, noncompliance with which would impose liability. Rather the purpose of these recommendations is to further the voluntary adoption of structures that would help enhance managerial accountability.

Similar considerations may suggest the need for gray rather than black letter in other formulations of the Institute.

4. Comment

a. Function. The Comment appended to an ALI black-letter provision is mainly explanatory. Like the black letter, it is intended to be published ultimately as the official product of the Institute and to represent its institutional voice rather than the voice of the Reporter. Along with the black letter it is regarded by the Institute as an integral part of the Section to which it belongs. Readers consult the Comment in order more fully to understand the background and rationale of the black letter and the details of its application. Comment is also the appropriate place for identifying the competing considerations encapsulated in the black-letter provision. In clarifying the black letter's meaning and scope, the Comment may frequently make explicit what is only implicit or suggested by the black letter, but it should normally remain consistent with the black letter. On rare occasions, however, it may be useful to employ Comment to forecast, suggest, or consider possible areas of legal development, presently inconsistent with the black-letter rule, for which there is no current precedent. See, for example, Restatement Third, Torts: Products Liability § 2, Comment *e*. Because of the unwillingness of some courts to recognize Comment as germane to the interpretation of a statute, Reporters for ALI legislative projects should not rely upon it to fill in gaps or alter or modify the meaning or scope of proposed statutory language; special care must therefore be taken to assure that the meaning intended is contained in the statute's black-letter text. See I.B.2.a.

Because of the close connection between black letter and Comment, Reporters are expected to prepare and submit both for review together. Black letter without Comment is incomplete.

b. Structure. Comment should be structured in a way that will most readily assist the reader to understand the black letter. To the greatest extent possible, it should track the structure of the black letter, and both the headings and subject matter of a Comment's subdivisions should be tied to the black letter's central terms and concepts. Nothing should be introduced for the first time in the Comment that is not at least foreshadowed by or closely related to the black letter.

Comment is normally subdivided into distinct components (Comments), each introduced by a separate lower-case italicized letter and heading describing the subject matter. These subdivisions are cited and referred to as Comment *a*, Comment *b*, etc. If additional subdivision is called for, such components are introduced by parenthetical italicized numbers—(1), (2), etc.—and given their own headings. Even if there is no need to subdivide the Comment, its single component should, for citation and indexing purposes, nevertheless be identified as Comment *a* and given an appropriate heading.

Introductory Comments to a black-letter provision normally cover, in a consistent order determined to be appropriate, such matters as scope, cross-references, rationale, and history or background. Subsequent Comments explicate and clarify in an orderly fashion the various components of the provision. Any exceptions and qualifications should be included in the discussion of the component to which it relates and not held back until the end of the Comment. It may also be relevant in the appropriate places to indicate which issues are regarded as matters of law and which as matters of fact.

If the black letter is divided into subsections, each of which can readily be discussed as a unit, it may be helpful to develop, in addition to more general commentary pertaining to the Section as a whole, a Comment or series of Comments pertaining exclusively to each subsection. Thus, after introductory Comments *a*, *b*, and *c*, Comments *d* and *e* might be introduced with the heading “Comment on Subsection (a)” and Comment *f* with the heading “Comment on Subsection (b).”

c. Focus on legal analysis. The collective expert knowledge of the Institute is in legal analysis and not in behavioral or social science. The Institute is not an effective forum for empirical factfinding or for developing the factual predicates underlying legal rules. The statements it makes in Comment should be analytical and explanatory but not rest on unsubstantiated opinion. Although the Institute’s commentary does not normally contain extensive citation of the sources upon which it relies, the factual assumptions upon which its analysis depends should be based on reliable sources properly identified in the Reporter’s Notes.

5. Illustrations

a. Function. Illustrations are distinct but integral parts of the Comment. They are inserted into the Comment for the purpose of pro-

viding concrete, “real world” examples of how the black-letter rule or principle under discussion applies to specific factual situations.

To be effective, Illustrations need to be concise and limited to the facts essential to demonstrating the functioning of the precise rule or principle under discussion. The facts set forth should point unambiguously to a single definitive resolution, which is stated at the conclusion of the Illustration. Illustrations thus differ significantly from the typical law-school hypothetical in which a multitude of facts suggest multiple and often competing legal theories and many possible solutions. Brief Illustrations are therefore generally preferable to lengthy ones.

Rather than suggesting how facts may point to different results by means of complex fact patterns, a Reporter should conceive of Illustrations typically as “bookends” that demonstrate fact patterns in which the rule or principle at issue either clearly applies or clearly does not. To show more fully the intersection of fact and law in the area between these clearly demarcated boundaries, the Reporter should consider developing a series of related Illustrations, in each of which a single fact is changed, which may or may not change the result but which as a whole reveals a spectrum of possible outcomes. Following the first Illustration in such a series, subsequent Illustrations may begin: “Same facts as Illustration 1, except that...”

Illustrations should generally follow immediately after the discussion of the rule or principle they are meant to illustrate. When several rules closely intersect, however, it may be helpful to group the Illustrations for all of them together after explicating each in the Comment. If this approach is followed, it is useful to insert cross-references to the forthcoming Illustrations following the discussion of each rule in the manner suggested below:

(Discussion of Rule A) See Illustration 1. (Discussion of Rule B) See Illustrations 2 and 3. (Discussion of Rule C) See Illustration 4. (Then insert Illustrations 1-4.)

b. Cases. Actual cases are frequently excellent sources for Illustrations. Such cases, however, inevitably include far more facts and issues than are suitable for an Illustration. A Reporter is therefore free to modify, simplify, and adapt both the facts and the resolution of particular cases in constructing an Illustration. The actual case utilized for an Illustration should be cited in the Reporter’s Notes and the relationship of the Illustration to the case identified, e.g., “Illustration 12 is based on (or adapted from, suggested by, derived from the facts of, etc.)....”

c. Format. Illustrations are numbered consecutively within each Section. The first Illustration within each Section is thus always Illustration 1, even if it is the only Illustration in that Section. Each Illustration or group of Illustrations is introduced by the boldface heading, **Illustration:** or **Illustrations:**, and indented. The narration of each Illustration's facts is ordinarily set forth primarily in the present tense.

d. Gender. Illustrations may be gender specific in referring to the persons who inhabit them, but they should avoid gender stereotyping. See A.3.c above.

e. Identification of actors. It is easier for a reader to follow the relationships, factual and legal, among the actors in an Illustration if they are identified either by proper name or by legal category. Identification by means of letters only is best avoided. For example:

Arthur and Betty (not A and B)

Husband and Wife (not H and W)

Settlor and Trustee (not S and T)

6. Reporter's Notes

a. Function. Unlike the Introduction, Introductory Notes, black letter, and Comment (including Illustrations), the Reporter's (or Reporters') Notes are regarded as the work of the Reporter (or Reporters). Nevertheless, they are submitted for review together with the other components of the Section to which they pertain. Reporter's Notes set forth and discuss the legal and other sources relied upon by the Reporter in formulating the black letter and Comment and enable the reader better to evaluate these formulations; they also provide avenues for additional research. In addition, the Notes furnish a vehicle for the Reporter to convey views not necessarily those of the Institute and to suggest related areas for investigation that may be too peripheral for treatment in the black letter or Comment. They are nevertheless written from the objective, third-person perspective characteristic of a work of the Institute. See A.2.a above.

b. Structure. In order to be most useful to the reader, the Reporter's Notes should parallel as closely as possible the structure of the black letter and Comment. It is helpful to divide the Notes into segments corresponding in both heading and subject matter to the Comments and to

present them in corresponding order. If the project constitutes a revision or new version of a previous Institute project, the Reporter's Notes for each Section should include, consistently either at the beginning or the end, a segment indicating where the subject matter was covered in the previous work and whether and in what respects it has been changed in this version.

c. Citations. Citation in the Reporter's Notes need not be exhaustive except to the extent that it purports to be. It should, however, be balanced and fair in its selection, analysis, and evaluation of sources and provide a sufficient basis for further research. Most importantly, the Reporter's Notes should provide an accurate picture of the current state of the law in the topic covered and of the current degree of support for the formulations advanced.

For a discussion of the use of different types of sources in Restatements, see Chapter I.B.1.c.

d. Statutory Notes. Statutory Notes should be prepared as adjuncts to the Reporter's Notes when a separate comprehensive compilation of relevant statutes would be especially useful to convey an adequate picture of the current state of the law. See Chapter I.B.1.c(ii). Statutory Notes have frequently been utilized, for example, in the various Restatements of Property. Like Reporter's Notes, they are considered the work of the Reporter and not that of the Institute.

CHAPTER III. ALI STYLISTIC CONVENTIONS

This Chapter sets forth certain ALI conventions in matters of citation, punctuation, and format that have been generally followed in Institute publications. Unless there are good reasons for deviation, they should be adhered to for reasons of consistency with previous Institute work. If a stylistic rule or convention is not covered in this handbook, Reporters should consult the latest edition of *The Bluebook*. *The Chicago Manual of Style* is a valuable source of guidance for matters not covered in *The Bluebook*.

A. CITATIONS

The format for citations should generally follow *The Bluebook*, but special note should be made of the following variations:

1. Cases

In general, citations should be to the official Reporter of the case. When referring to a specific point made in the opinion cited, the Institute Reporter need not provide a pinpoint (internal) cite except to a direct quotation within the opinion. If parallel citations are utilized, pinpoint citations should also be parallel. When a federal case applying state law or a state case applying the law of another state is cited for its interpretation of that law, the state whose law has been interpreted should be parenthetically identified.

2. References to Other ALI Works

Institute works are generally cited without reference to the Institute as author or publisher and without year of publication.

For example:

Restatement of Torts § 1 (not Restatement First)

Restatement Second, Contracts § 90

Restatement Third, The Foreign Relations Law of the United States
§ 402

Note that no comma precedes the section symbol.

Citations to Institute drafts, on the other hand, should indicate both the particular draft cited and its year of publication. For example:

Restatement Third, Restitution and Unjust Enrichment § 5 (Tentative
Draft No. 1, 2001)

In general, Reporters should take care not to cite to superseded drafts except for historical reasons or for reason of comparison with the currently applicable formulation.

3. Cross-References

Reporters should generally avoid using *infra* and *supra* in cross-references. For example, See § 17 or See § 4, not § 17 *infra* or § 4 *supra*. A reference within § 9 to Comment *a* or Illustration 3 of that Section should be merely to Comment *a* or Illustration 3, not to § 9, Comment *a*, or § 9, Illustration 3. If the Comment or Illustration cited is in another Section, however, the reference should name the Section. For example:

See § 3, Comment *a*

See § 17, Illustration 3

B. PUNCTUATION AND FORMAT

In general, consult a standard reference guide such as *The Chicago Manual of Style*. Note, however, the following ALI conventions:

1. Apostrophe

Add an apostrophe plus *s* (*'s*) when forming possessives for names ending in *s*. For example, Holmes's and Brandeis's opinions, not Holmes' and Brandeis' opinions.

2. Boldface

Use boldface type for black-letter legal rules and principles. Practice recommendations that are not presented as legal rules or principles should, in contrast, be set in regular typeface (gray letter). See Chapter II.B.3.*h*.

A quotation of or from a black-letter provision, whether or not it derives originally from an ALI publication, should not ordinarily be set in boldface.

3. Capitalization

Capitalize the following terms in connection with an ALI text or project:

Adviser
Chapter
Comment
Division
Illustration
Introduction
Introductory Note
Part
Reporter
Reporter's Note
Section
Statutory Note
Subpart
Title
Topic

For titles and major headings, capitalize the first and last words as well as any other nouns, verbs, adjectives, adverbs, and prepositions of more than four letters. For Comment headings, capitalize only the first word and any other words that would ordinarily be capitalized in the text.

4. Commas

In a series of three or more words or phrases in which the last item is preceded by a conjunction, separate each item with a serial comma, the last of which should precede the conjunction. For example:

blood, sweat, and tears (not blood, sweat and tears)

first, second, or third (not first, second or third)

5. Hyphens

Hyphens are used to link two or more words that are meant to be read and comprehended as a unit. Many writers, however, tend to use hyphens haphazardly, resulting in inconsistency at best and at worst in ambiguity and confusion. To minimize such problems, Institute Reporters should keep the following considerations in mind:

a. Compound nouns. As compounds become more familiar and accepted as entities in their own right, they tend to evolve from being written as separate words to hyphenated compounds to single words. Note, for example, the completed linguistic evolution from base ball to base-ball to baseball and the one apparently still in progress from web site to web-site to website. A hyphenated compound frequently represents an interim stage or halfway house between a concept once represented by two separate words and a new compound word for the concept. Dictionaries should be consulted to help the Reporter determine whether a compound term has evolved to the point that it should be hyphenated or written as a single word, but generally in the case of well-known and well-recognized compound nouns, ALI stylistic convention would favor the latter alternative. Therefore:

factfinder and factfinding (not fact-finder and fact-finding)
decisionmaker and decisionmaking (not decision-maker and decision-making)

b. Prefixes. In general, do not follow a prefix with a hyphen.

Thus,

antitrust, not anti-trust
nonlawyer, not non-lawyer
pretrial, not pre-trial

Hyphenate, however, if the alternative appears to be awkward or potentially confusing. Thus,

co-owner, not coowner

c. Compound adjectives. Although it is frequently assumed that compound adjectives need only to be hyphenated if the lack of hyphenation is likely to result in confusion, in actual practice such an approach tends to be highly subjective and to result in a high degree of textual inconsistency. In contrast, ALI practice is generally to hyphenate all compound adjectives in order to facilitate comprehension. For example, consider the following:

common law subject
civil procedure expert

Although few readers of an ALI text are likely to think that the first refers to a common legal subject and the second to a polite proceduralist, it makes for swifter comprehension to link the elements of compound adjectives with hyphens and thereby to separate them from the term they are modifying. Therefore, write “common-law subject” and “civil-procedure expert” unless it is the less likely meanings mentioned above that are the ones actually intended.

Sometimes, the precise meaning of a phrase is unclear without hyphenation and can vary depending on the nature of the hyphenation. Consider the term “federal law reform organization.” Is it an organization concerned with federal law reform (federal-law-reform organization), a federal organization concerned with law reform (federal law-reform organization), or a reform organization concerned with federal law (federal-law reform organization)? To leave the phrase completely unhyphenated is to beg the question and leave the reader confused and uncertain. On the other hand, there are instances when adjectives each modifying the same noun do not constitute a compound adjective and should therefore be left unhyphenated. For example, “transnational commercial dispute.” False and misleading hyphenation is worse than no hyphenation at all.

Although as a general rule, compound adjectives ought to be hyphenated for clarity, hyphenation is not needed when their compound nature is otherwise unmistakable, such as when the compound is distinguished by initial caps:

First Amendment rights

is a self-contained foreign phrase:

in forma pauperis petition

or an adverbial phrase:

happily married couple

6. Italics

Italicize Comment divisions and headings:

c. Toxic torts
Comment *c*

Italicize short forms of case names:

The court distinguished *Brand* from *Fowler* as follows.

Do not, however, italicize case names when given in full:

The principle was first announced in *Hadley v. Baxendale*.

7. Latin legal terms

Do not italicize common Latin words and phrases. For example,

contra
de jure
habeas corpus
id
res ipsa loquitur

Uncommon foreign terminology, however, may be italicized.

8. Numbers

Use numerals for numbers from 10 and beyond. Write out numbers from one through nine except in short or abbreviated parentheticals, tables, or charts. Within the latter, use numerals for the numbers one through nine as well, e.g., (1-9). For clarity, use commas to separate numbers consisting of five or more digits: 20,000; 4,681,312. Write numerical sequences in full: 317-345, not 317-45.

9. Percentages

Except within short or abbreviated parentheticals, tables, or charts, use the word “percent,” not the symbol:

three percent
14 percent

Use the percent symbol within short or abbreviated parentheticals, tables, or charts, e.g., (3%); (14%).

10. Section symbols

Use section symbols (§ for a single Section; §§ for multiple Sections) except at the beginning of a sentence, when the word “Section” or “Sections” must be written out.

11. United States

Write out “United States” when it is used as a noun. Write “U.S.” if it is used as an adjective:

Contract law in the United States
U.S. jurisdiction

CHAPTER IV. PREPARING ALI DRAFTS FOR DISTRIBUTION AND PUBLICATION

A. SUBMISSION

All drafts and revisions to drafts intended for distribution to a project's Advisers or Members Consultative Group or to the Institute's Council or membership should be submitted initially to the ALI's Executive Office, which will handle the intended distribution. In order to assure that the Executive Office is aware of all such materials and has copies for its records and archives, these materials should not be independently distributed by the Reporters.

Drafts should be transmitted to the Executive Office in electronic format. The Institute prefers to receive drafts in Microsoft Word. Generally it is not necessary that the Reporters also provide printed hard copies.

Reporters are primarily responsible for the accuracy of the texts they submit. In preparing manuscripts for submission, they should make a reasonable effort to adhere to the guidelines for drafting set forth in Chapters I-III of this handbook and to proofread their work carefully before submitting it. Preliminary and Council Drafts are ordinarily not copyedited by the Institute's staff and, except for the addition of cover, front matter, and binding, are generally distributed in the form in which they have been submitted to the Executive Office. Drafts to be submitted to the Annual Meeting as well as texts submitted for final publication are edited by ALI staff pursuant to the guidelines contained in this handbook.

Materials intended for publication and distribution should be transmitted to the Institute by the speediest practicable means. Normally this will be e-mail for electronic files.

1. Preliminary and Council Drafts

a. Camera-ready form. Because there is rarely time for editing of Preliminary and Council Drafts at the Institute's headquarters, they should be submitted in camera-ready form, i.e., ready for reproduction. The manuscript will be checked to see that all the pages are included, legible, and in the proper order, but it will not be proofread.

b. Table of contents and introductory memorandum. In addition to the draft's main text, the Reporter is expected to provide a table of contents that includes the Comments and Reporter's Notes and a concise introductory memorandum addressed to the group or groups that will be reviewing the draft. These items will be included in the front matter and paginated with Roman numerals. The memorandum should assist the reader to understand what are the most significant issues presented by the draft and should provide both context and focus for discussing it. It may contain an outline or summary of the draft, concentrating on areas of particular importance, as well as an overview of the project as a whole. It may also include a series of questions on which the Reporter especially seeks guidance from those who are considering the draft. A comprehensive or cumulative table or summary of contents for the project as a whole is also a useful means of assisting the reader to contextualize the draft. See, for example, the drafts prepared for Restatement Third, Restitution and Unjust Enrichment.

c. Format. Black-letter rules, principles, or proposals should be in boldface, as should main headings for Comment, Illustrations, and Reporter's Notes. Specific headings for Comments and Reporter's Notes should be in italic. Text for the black letter, Comments, Illustrations, and Reporter's Notes should be submitted in Times New Roman 12, and footnotes, if any, in Times New Roman 9.

Line spacing should be 1.5 lines, except for Reporter's Notes, which should be single-spaced.

d. Pagination. Pages should be numbered consecutively from beginning to end rather than as separate segments. The draft will be reproduced on both sides of the paper, with odd-numbered pages on the right and even-numbered pages on the left. Major divisions, such as a new Chapter or Part, should begin on a new right-hand page. If a previous division ends on a right-hand page, the succeeding left-hand page should be left blank but accounted for, and the new division begun on an odd-numbered page.

e. Running heads. There should be running heads at the top of each page, indicating at least the relevant Section, Chapter, or Part. Usually the number of the Section discussed on a page will suffice as the running head. On odd-numbered (recto) pages the Section number should be on the right side and on even-numbered (verso) pages the left side. If further identification is called for, additional running heads may be inserted on the right side of verso pages and on the left side of recto pages. For example:

	verso	
§ 8.04		Agency
	recto	
Ch. 8. Duties of Agent and Principal to Each Other		§ 8.04

f. Line numbering. It is helpful to a person reviewing and discussing a draft to be able to refer to the lines on a page by number. Reporters should therefore utilize a line-numbering program when submitting a camera-ready draft. If possible, lines on recto pages should be numbered in the right margin and those on verso pages in the left margin.

g. Front matter and cover. As described in A.1.b above, Reporters are responsible for providing the table of contents and the introductory memorandum. The remainder of the front matter, including the title page and lists of project participants, and the cover are prepared by ALI staff. The listing of the “subjects covered” that appears on the cover and title page is based upon the table of contents submitted by the Reporter.

2. Annual Meeting Drafts

In submitting drafts for consideration by the membership at the Institute’s Annual Meeting, Reporters should generally adhere to the guidelines for submission set forth above. Annual Meeting drafts, however, are usually copyedited and reformatted, to the extent necessary, at the Institute’s

headquarters for outside printing. Although they therefore need not be submitted in camera-ready form, Reporters should submit them in a form that will minimize the need at this stage for extensive editing and reformatting.

Usually there will be insufficient time to furnish the Reporter with a page proof for reviewing editorial corrections and other changes made to an Annual Meeting draft before printing. The editor assigned to the draft will instead consult, by e-mail or telephone, with the Reporter about any significant editorial questions or proposed changes to the draft. Reporters should be accessible for this purpose during the period in which the draft is being edited. The Reporter will also be asked to review the Director's Foreword to the Annual Meeting draft and to suggest any appropriate changes.

When the editorial process is completed, the text of an Annual Meeting draft is reformatted and repaginated for printing; any last-minute changes therefore will appear only in this version. After the draft has been printed, its reformatted and edited Word version will be sent to the Reporter for future revisions. In order to retain the editorial changes inserted into the draft when it is next worked upon, it is important that the Reporter use this returned version rather than the version originally submitted.

3. Final Texts

The final, official text of an ALI project, approved for publication by the Council and the membership, represents the culmination and integration of all the drafts that have preceded it. All revisions previously agreed to and otherwise needed should be incorporated before it is submitted for printing, and special attention should be given to harmonizing and updating the prior drafts not only substantively, but also in matters such as style, format, and cross-reference. As with an Annual Meeting draft, final texts are copy-edited at ALI headquarters and reformatted for publication. A page proof is produced at this stage, and the Reporter is allowed ample time for careful and thorough proofreading, but not for major rewriting.

B. LEAD TIME REQUIRED

Except for final publications, ALI drafts are generally prepared for consideration at a particular meeting. Time must therefore be allowed to get a draft in the hands of those for whom it is intended sufficiently in advance of the meeting to enable them to read it and prepare themselves adequately for the discussion. The aim is to get the drafts out three to four weeks before the scheduled meeting. This means that a draft for Advisers, Members Consultative Group, or Council should be submitted at least four weeks before the meeting. Annual Meeting drafts, however, are produced in much larger quantities for much wider distribution, and this process takes approximately six weeks. In order to get an Annual Meeting draft to the members sufficiently in advance of the May meeting, the text should ordinarily be submitted no later than mid-March. Drafts may also be transmitted electronically or posted on the Institute's website, but printed drafts will nonetheless be produced and the deadlines indicated above apply unless a shorter time frame has been agreed to by the ALI Executive Office.

For final publications, Reporters are expected to take the time needed to prepare and submit a text that will be regarded as embodying the official voice of the Institute. This text should ordinarily be submitted in its entirety rather than piecemeal.

Appendix

The American Law Institute Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects (Approved by the Council on May 16, 1994, and amended by the Council on May 17, 2010.)

A. Policy Statement

The Institute's Director and Reporters must exercise sensitivity to conflicts of interest that may result from their professional engagements outside the Institute. They should follow the procedures set forth below, which are designed to reduce the incidence and appearance of conflicts and the effect of any potential conflict on Institute texts. The Institute's reputation for objectivity is one of its most valuable assets. The respect accorded the Institute's texts depends in major part on that reputation. The Institute's reputation will suffer if an accusation is made with any colorable basis that Institute texts were shaped to aid the interests of the Institute's Director or Reporters. If the accusation were justified, the Institute's reputation would suffer justifiably.

The problem of conflicts arises because members of the legal-academic community, from which Reporters are customarily drawn, often are offered engagement on behalf of private and public interests. Reporters are not sufficiently compensated for their part-time Institute work to justify an Institute rule requiring them to renounce all engagements in related matters for the duration of the Institute project, which ordinarily covers several years or more. The Institute therefore hereby adopts procedures that are designed to minimize the incidence of conflict, and its appearance, and to reduce any likelihood that the Institute will be influenced in its adoption of positions by potentially compromised views.

B. Procedures to Minimize Conflict of Interest

1. The Director and Reporters, including Associate and Assistant Reporters, should perform their responsibilities with the objectivity expected of legal scholars. Accordingly, they must exercise sensitivity to the risk and appearance of conflict of interest in their work for the Institute.

2. A risk or appearance of a conflict of interest arises when formulation of text, Comment, or Illustration could advance a position taken by the Director or Reporter in another engagement on an issue within the scope of a pending Institute project. The 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.

3. (a) Before accepting assignment as a Reporter, a prospective Reporter should deliver a memorandum to the Director identifying and explaining previous, existing, and contemplated engagements that may cause conflict, or its appearance, with the work proposed to be undertaken for the Institute. The prospective Reporter and the Director should discuss possible solutions.

(b) A Reporter who is offered another engagement during the pendency of a project should, before accepting it, assess the extent to which conflict, or its appearance, may result from the engagement. If the Reporter concludes that a conflict or its appearance may result, the Reporter should provide a memorandum to the Director explaining the conflict or appearance of conflict. When a Reporter has entered into an engagement unaware of likely conflict but later becomes aware of it, the Reporter should then provide such a memorandum. Delivery of such memoranda may be briefly delayed if premature disclosure would injure the prospective client's temporary need for confidentiality. Where in the Director's judgment the likelihood of conflict or its appearance is high and a satisfactory solution is not apparent, the Reporter should decline or withdraw from the engagement.

(c) The Reporter should advise the Director of any changes in the potential for conflict or its appearance arising from outside engagements.

(d) Reporters should recognize that conflict and its appearance can arise also from engagements of spouses or other close relations. They should consider carefully in each case whether any such engagement warrants following these procedures and, in cases of doubt, should consult the Director.

(e) Where these procedures provide for a report to, or consultation with, the Director, if the Reporter believes, or the Director advises, that the Director has, or is likely to have, a conflict of interest relating to such engagement, the Reporter may instead report to the President, or the President's designee.

4. The Director shall observe procedures similar to those stated in paragraph 3, reporting to the President, or the President's designee.

5. When Reporters are working in teams, the Reporter affected by a possible conflict should consider with the Director whether the Reporter can feasibly withdraw from the drafting and consideration of the particular issue, in favor of a co-Reporter. When reassignment is impractical, the Director shall take other suitable measures to protect the integrity of the project.

6. (a) A Reporter should make a statement about any engagements on issues within the scope of a project draft presented at an annual meeting or a Council meeting where the project draft is considered. The detailed nature of the statement may depend on the circumstances of the Reporter's engagement and whether specific issues in the draft may be perceived as being influenced by the Reporter's engagement.

(b) An Illustration that parallels the facts of a Reporter's or the Director's engagement should not be used in a draft or official text before the final determination of the matter.

7. The Institute will include in all drafts and the official text of each project a statement that: (a) the project's Reporter(s) may have been involved in other engagements on issues within the scope of the project; (b) all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects; and (c) copies of Reporters' written disclosures are available from the Institute upon request; however, only disclosures provided after July 1, 2010, will be made available and, for confidentiality reasons, parts of the disclosures may be redacted or withheld.

8. Members of an Advisory Committee, a Members Consultative Group, and the Council should observe the policies stated in paragraph 1 of these procedures. In addition, they 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. Rule 6.4 of the ABA Model Rules states:

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.

9. The Director shall report annually to the Governance Committee on the Institute's experience under these procedures.

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