

## Restatement of the Law, Liability Insurance: Practitioners' Perspectives

*Restatement of the Law, Liability Insurance (RLLI), was approved by membership at the 2018 Annual Meeting and the Official Text is now available. The project greatly benefited from its diverse and engaged Advisers and Members Consultative Group. In this Q&A, we posed questions to two of those most involved in the project.*



**Michael F. Aylward** is a partner at Morrison Mahoney, where he chairs the firm's complex

insurance claims resolution group. He represents insurers and reinsurers in disputes concerning the application of liability insurance policies to commercial claims.



**Lorelie S. Masters**, an insurance coverage litigator, is a partner at Hunton Andrews Kurth

where she handles all aspects of complex, commercial litigation, and arbitration. She has advised policyholder clients on a wide range of liability coverages.

**You served as an Adviser on Restatement of the Law, Liability Insurance project. Why was it important to you to be an active participant on the project? Did you enjoy the experience?**

**Masters:** I have turned on many occasions during my career to Restatements (e.g., on contracts, torts, conflict of laws) to understand a point of law; and, since law school, have admired the work and leaders of the ALI. I was therefore honored and a bit awed first to be nominated to join the ALI and later to be asked to serve as an Adviser to the RLLI when it began in 2010. As a longtime practitioner representing policyholders and an author of two treatises on insurance coverage, I believed I had the experience and knowledge to make a significant contribution. I saw participation in this project as a way to give back to the profession and the practice that has been such a significant part of my life. Working on the Restatement also gave me the opportunity to work collaboratively not only with lawyers practicing in the area, but also with judges, professors, and others with a deep interest in the law and specifically the law on liability insurance.

What I did not appreciate at the outset of the project was the genius of the ALI process. I very much have enjoyed the intellectual rigor and dialectic included in ALI projects; the opportunity for deep thinking on these issues can sometimes be missing in the day-to-day work of litigation. As with any project

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THE DIRECTOR'S LETTER BY  
RICHARD L. REVESZ

## Toward Clearer Guidance on Drafting Principles of the Law

The ALI Style Manual, a somewhat obscure publication that nonetheless plays an important role in our work, provides relatively clear drafting guidance for Restatements and model codes. Drafting guidelines for Principles projects, however, are not as well specified. This gap has led to some confusion and disagreement among project participants and inconsistencies in our drafts. My hope is that this letter's focus on the issue will lead us to more consistency in our Principles projects.

Our three major project categories vary along two axes. The first axis—and the cardinal distinction among ALI project types—is the audience toward which the project is primarily aimed: courts for Restatements; legislatures for model codes; and a variety of institutions, both public and private, for Principles projects. The second axis is the voice in which the black letter is written: Is it the ALI's own voice speaking to the target audience, or are we adopting the voice of the audience itself?

On the question of voice, the Style Manual states that Restatements “assume[] the perspective of a common-law court,” and, accordingly, the black letter is phrased “in the descriptive terms of a judge announcing the law to be applied in a given case.” Thus, although Restatements are addressed *to* courts, Restatement black letter speaks in the voice *of* a court. This approach makes it easier for courts to adopt the ALI's articulation of a rule, simply by importing the black letter directly into a judicial decision. In the Comments and Illustrations, however, a Restatement reverts to the perspective of the Institute in our role as explainer and analyzer of the law, and in

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# Upcoming Meetings & Events

For more information, visit [www.ali.org](http://www.ali.org).

## OCTOBER 2019

### October 17-18

Council Meeting - October 2019  
New York, NY

### October 24

Model Penal Code: Sexual Assault and Related Offenses  
Philadelphia, PA

### October 31

Principles for a Data Economy  
Philadelphia, PA

## NOVEMBER 2019

### November 15

Restatement of the Law Third, Conflict of Laws  
Philadelphia, PA

## JANUARY 2020

### January 16-17

Council Meeting - January 2020  
Philadelphia, PA

## MAY 2020

### May 18-20

97th Annual Meeting  
San Francisco, CA

**VIEW ALL UPCOMING MEETINGS AND EVENTS ON PAGE 23.**

## THE DIRECTOR'S LETTER CONTINUED FROM PAGE 1

this voice we speak to courts, practitioners, and academics (and whoever else might seek our guidance).

Model codes follow a similar blueprint. The black letter consists of “prescriptive statutory language” crafted “with a view toward legislative enactment.” Thus, the black letter speaks in the voice of the legislative body itself. A legislature persuaded by the wisdom of our work can more easily adopt our black letter or make whatever changes it deems appropriate. But, as in the case of Restatements, our model codes revert to the Institute’s own voice in the Comments and Illustrations.

For Principles projects, nothing in the Style Manual directly indicates from whose perspective the black letter ought to be written. But since 2015, when the ALI clarified the distinction between Restatements and Principles projects, it has been clear that Principles are not meant to speak through the declarative voice of a common-law judge or the prescriptive voice of a legislature. And even where Principles are directed towards a legislative audience, they do not offer fully developed statutory language, as do model codes; instead, Principles provide guidance for the drafting of such legislation.

Despite the lack of attention to this issue in the Style Manual, since we clarified the three categories in 2015, black letter Principles provisions generally have been drafted in the voice of the Institute itself, which is fitting given that the ALI is providing its guidance to a project’s target audience, public or private. An example from § 3.07(a) of the Principles of the Law, Compliance, Risk Management, and Enforcement, provides that “[t]he board of directors and executive management should promote an organizational culture of compliance and sound risk management.” The ALI is therefore speaking, in its voice, to the board of directors. The perspective is different from those used in Restatements, which use the voice of the courts, and model codes, which use the voice of legislatures.

Nor is there Style Manual guidance about usage of the key terms employed to make operative the substance of our Principles work. In contrast, for Restatements and model codes, the Style Manual provides guidance on the use of words such as “shall,” “must,” “may,” and “should.”

In making recommendations to institutions in Principles projects, we generally use the word “should.” For an example in which the ALI speaks to governmental actors, § 7.03 of the Principles of the Law, Policing, says: “In instances in which force is used, officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.” To consider an example that speaks to private actors, § 3.06(a)(1) of the Principles of Compliance, Risk Management, and Enforcement, says: “The members of the board of directors . . . should [ ] be independent.” The reason that Principles projects tend to rely on “should” is precisely because they are written in the voice of the Institute and not in the voice of a body with sovereign compulsory powers, such as a court or a legislature.

In the example above concerning the board of directors, if we were preparing a Restatement, we would instead say, in the declarative voice of a court, that “the members of the board of directors are independent.” And, if we were writing a model code, the Style Manual prescribes that the preferred formulation would be “must,” reflecting the governmental power of the

legislature. The black letter in Restatements and model codes sets forth what will be legally binding obligations once adopted by courts and legislatures, respectively, and the violation of these obligations is generally coupled with a remedy. In contrast, the black letter in a Principles project sets forth best practices for a particular institution or actor, which might not suffer adverse legal consequences if it does not do what we say it should do.

But despite the prevalence of “should,” “shall” also makes a frequent appearance in our Principles projects. For example, § 3(a) of our recently approved Principles of the Law, Data Privacy, provides: “Whenever a data controller or data processor engages in a personal-data activity, the data controller or data processor shall provide a transparency statement, which is a publicly accessible statement about these activities.” What does “shall” mean in this context? It cannot be that this particular transparency statement is legally required, as “must” would convey, because there was no attempt to directly ground this provision in sources of positive law. Does it mean “should”? If so, using different words across our projects to convey the same thought is likely to lead to confusion over time. Or does it mean “should” with extra bite, as in “really should”? But “really should” sounds more like the voice of an exasperated parent than that of an institution that prides itself for using precise legal language. This ambiguity explains why the use of “shall” is becoming increasingly disfavored, as reflected in the Office of the Federal Register’s *Principles of Clear Writing* and in Bryan Garner’s article, *Shall We Abandon Shall*. “Shall” has served us for a long time but maybe the time has come for us to retire it as well.

Is it ever appropriate to use “must” in a Principles project? For example, consider § 11.03 of Principles of Policing, which states (emphases added): “Officers *should* inform suspects of their right to refrain from answering and their right to counsel, and ensure that any waivers of those rights are meaningfully made. Any invocation of rights *must* be respected, and if there is any uncertainty as to whether rights are being invoked, officers *should* take the time to clarify that. Waivers of rights *should* be documented using appropriate agency forms, and *must* be recorded in accordance with § 11.02.” In these instances, “should” is used to describe the best practices that the Principles project recommends, as is appropriate. The first “must,” dealing with the invocation of rights, refers to a clear requirement of the Constitution, as § 11.03 explains in a Comment. Thus, it is not a best practice transmitted by “should,” but a constitutional requirement transmitted by “must.” (One might ask why this command belongs in a Principles project, but it makes sense to include it for completeness in a discussion in which the ALI is recommending best practices with respect to related actions, all of which are aimed at enforcing constitutional safeguards.) The second “must” actually was the subject of a comment made from the floor at this past Annual Meeting, when an observant ALI member noted that

§ 11.02—which is cross-referenced—actually uses “should” to describe the recording requirement. The Reporter agreed with the commenter that “should” would be a better choice for this clause, and we can expect such a change to be made to the black letter in accordance with the Boskey motion.

Is there any role for “may” in Principles projects? Consider § 4.04(a)(1) of Principles of Policing: “During a stop, an officer may [ ] request identification and make other inquiries as necessary to investigate the crimes or violations for which the officer has reasonable suspicion, or as necessary to ensure officer safety.” Here, the provision is designed to emphasize that an officer is permitted to take such actions, presumably because it otherwise would not be clear. An unqualified “should” would be inappropriate because we are not recommending an across-the-board practice. If, in contrast, our goal is to say when such practices should be used, a “should under the following circumstances” formulation would be appropriate. “May” also sometimes is used to offer a menu of best practices, where the selection of one or more options will depend on the particular circumstances faced by the user of the Principles. An example appears in § 5.9 of a Preliminary Draft of Principles of the Law, Student Sexual Misconduct: “Informal resolution of complaints or reports may include a wide range of accommodations and remedial measures.” The Comment lists some of the accommodations and remedial measures to which the black letter refers, including administrative leave, apology, and no-contact directives. Because the choice among these options is best left to the educational institution in the context of the given case, “should” would be inapt.

I believe that three drafting principles will facilitate our future work on Principles projects. First, Principles should be written in the voice of the ALI, recognizing that this voice offers flexibility to meet the needs of different contexts. Second, we need to keep in mind the target audience for our recommendations. And third, we need to make sure that we are using the correct operative words and doing so consistently. In general, it will be “should,” though some exceptions are appropriate, as indicated above. But we need to make sure that the reader will understand why we are using different words. My hope is that we will now pay more attention to these issues and that, as a result, we will add further consistency to the language we use in Principles projects.

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

## LIABILITY INSURANCE: PRACTITIONERS' PERSPECTIVES CONTINUED FROM PAGE 1

of such scope, it is obvious that the objective of such a wide-ranging and rigorous process is to produce the best possible consensus work on the topic.

**Aylward:** Being an Adviser on this project was one of the most professionally engaging, satisfying, and frustrating things that I have done in 38 years as a lawyer. I had spent a lot of time between 2011 and 2014 writing articles and giving speeches complaining about how bad the Principles were. Finally, Lorie Masters called my bluff and told me that if I really wanted to say something meaningful, I needed to become a member of the ALI and get involved directly. As a coverage geek, the experience of being an Adviser and debating arcane points of insurance law with some of the best coverage lawyers in America was great fun. More to the point, I came away from the experience with tremendous respect for the effort that the Reporters put into this project and just how difficult their jobs were. I also now have a much more informed perspective with respect to what Restatements are and could be. So I'm glad I did it, I think that I may have influenced the project some and, while it was a lot of work, I'm glad that I volunteered.

**In contrast to other projects, in the Liability Insurance project, broadly speaking there are two sides – insurers and policyholders. Did the project participants get along? Was there general agreement on many of the Sections, but disagreement on some?**

**Aylward:** In fact, there was a great deal of camaraderie among the lawyers who served as Advisers on this project. While I can't say that we completely shed our client prejudices at the door, we really did do our best to listen to and appreciate each other's arguments and perspectives. In the process, I met a number of leading policyholder lawyers with whom I made lasting friendships.

At some level, I think that the real fault line in the Advisers group and the MCG was between the trial lawyers and the law professors, who were more inclined to apply an academic approach to insurance issues that the practitioners felt was unrealistic and at variance with how these issues actually get worked out in practice.

For all the controversy surrounding this project, most of what the Reporters proposed was actually fairly mainstream, particularly after Chapters 1 and 2 were rewritten after this became a Restatement project in 2014. During that process, some areas that had been extremely contentious, notably the treatment of misrepresentation issues, largely evaporated. As a result, most of the debate from 2016 to the conclusion of the project in May 2018 centered on a handful of topics: § 3 (plain meaning); § 12 (liability of insurers for acts or omissions of defense counsel); § 19 (consequences of failing to defend); § 24 (duty to make reasonable settlement decisions); § 41 (allocation in long-tail cases) and § 48 (remedies and damages).

**Masters:** Leaders in our practice came together in the later 1980s to develop a national coverage bar, both to enhance lawyers' satisfaction in this practice area and to promote our clients' interests as well. It can be difficult to settle a high-stakes, hard-fought litigation if there is no trust among the lawyers. That effort has succeeded in the decades since in enhancing not just professionalism, but also friendships among lawyers from across the country. In my view, the RLLI benefited from those long-standing efforts to promote collegiality among lawyers representing both policyholders and insurers. As Mike Aylward said in his comments, "fault lines" in these projects often emerged not just between lawyers who practice on opposite sides of these issues, but also between academics who may focus on the theoretical, judges who may focus on the balancing inherent in judging, and practicing lawyers who see (or think we see) practical limitations on more theoretical perspectives of the law.

While the process was professional and collegial, we had significant disagreement on many, if not most, of the Sections at times over the life of the project. That disagreement has extended beyond the ALI. I continue to see articles in the "insurance press" hostile to the Restatement and taking aim, unfairly, in my view, at not only the ALI but the Reporters also. Most of that commentary comes from individuals who were not involved in the project and most do not disclose the speaker's affiliation (insurer/policyholder) or seek out other viewpoints. In speaking about the Restatement, I have felt compelled to defend the ALI, the process, and the Reporters; in such situations, I stress my views about the professionalism and scholarship of all involved in the process, including our dedicated Reporters. I believe it important, in discussions, in seminars and writings about the Restatement, to communicate my view that the Restatement makes an important contribution to this key area of the law.

It has unsettled me to see the organized effort to undermine the Restatement. For example, in speaking at the National Conference of Insurance Legislators (NCOIL) in March this year, references were made to "overreach" by the ALI and asserting the need for legislation, or perhaps a "model law," that would "accurately state" the law applicable to liability insurance. Ignoring that much of the law on insurance is, and of necessity will be, made by courts, resolving disputes over specific claims and facts, these efforts could threaten the viability of insurance as a product should they achieve the stated objective.

**What happens when there is disagreement among the participants?**

**Aylward:** Disagreement on a project like this was inevitable and probably useful, if only because the law of insurance differs markedly among the 50 states and, in many states, is far from settled on key issues. As Kyle Logue said in a recent conversation, "if the law was cut and dried, why would we need Restatements?" Unanimity among the project participants was

never the issue, however. The job of the Advisers and MCG is to flesh out the arguments and make sure that the Reporters are fully aware of the law and its practical implications. It is then the Reporters' choice as to how to proceed whether a majority of the Advisers agree with them or not.

**Masters:** Disagreement in the RLLI process led to spirited debate at project meetings and ALI Annual Meetings, and was reflected in the voluminous comments submitted in advance of the Annual Meetings about the RLLI. Particularly at the Annual Meeting in 2017, when Preliminary Draft No. 1 was considered, the motions submitted filled a six-inch binder. A few of those originated on the policyholder side but most came from the insurer side. As Mike Aylward says, most of those motions were defeated. I draw a different conclusion from that result. I saw the debate on the floor at the Annual Meetings as reflecting a useful perspective from lawyers who practice in other practice areas (whether those practice areas may include some need to consider insurance or not) and at times raising the perspective and needs of insurance purchasers.

**In what ways do you feel that the input you provided to the Reporters, ALI Council, and ALI members at the Annual Meeting helped to shape the project?**

**Masters:** I felt privileged during the entire course of the project to be part of a group of leaders who treated both the subject matter and each other with respect and professionalism. I was able to make what I believe were important contributions to the overall project (orally, in writing, at meetings of the Advisers, and at ALI Annual Meetings), which, even when they were not accepted, were heard and considered. I believe we were fortunate to have Tom Baker and Kyle Logue as Reporters on the project. Throughout the eight years of the project, they addressed all respectfully and considered the varying views and comments thoroughly and objectively.

**Aylward:** While I would like to think that I helped to fix some of the problematic Sections in earlier drafts and may have headed off amendments that would have misstated the law in other areas, this was very much a collaborative effort that reflects the immense experience and passionate views of many members of the ALI and lawyers in the insurance community at large. I do think, however, that by engaging in a hard fought debate at our Advisers meetings and through letters and emails in between and finally at our floor discussions in Washington, D.C., I and others like me helped to ensure that the process was thoughtful and honest and, in most cases, correct.

**As a project participant, you attended most (if not all) of the project meetings. Why was it important to you to contribute to the project by attending the Annual Meeting Liability Insurance sessions as well?**

**Masters:** In attending ALI Annual Meetings, I have always been impressed with the seriousness and insights of members who delve into and comment on disparate issues outside their practice area. The value of the debate at ALI Annual Meetings



*Vanita M. Banks of Allstate Insurance Co. and Michael F. Aylward of Morrison Mahoney*

**“Disagreement on a project like this was inevitable and probably useful, if only because the law of insurance differs markedly among the 50 states and, in many states, is far from settled on key issues. As Kyle Logue said in a recent conversation, “if the law was cut and dried, why would we need Restatements?”**

Michael F. Aylward

in my view is to get the sense of the larger legal community on issues that can have broad impact on the law and on Society more generally. In the context of the RLLI, I found that comments by those not involved in the project often focused on the importance of the legal principles governing liability insurance as they affect other practice areas; the economy (as insurance helps facilitate innovation in commerce); and not just commercial policyholders and insurance companies, but individuals—who of course buy most of the insurance policies sold. All of us of any means are policyholders after all.

Personally, I felt it important to both observe the debate and participate in it. As the Proposed Final Drafts came up for debate and vote at Annual Meetings, I helped draft and comment on the targeted motions that policyholder representatives felt were important. I wanted to present my perspective as a longtime practitioner and advocate for policyholders, particularly given the many comments from both inside and outside the ALI. In 2017 and 2018, as the Annual Meeting drew near, the volume of commentary—both as part of the ALI process and in the press—increased dramatically. Some commentary has said (and frankly since approval has continued to say) that the ALI somehow “lost its way” in the project. Given my participation in the project and my understanding

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Lorelie S. Masters of Hunton Andrews Kurth

**“What I did not appreciate at the outset of the project was the genius of the ALI process. I very much have enjoyed the intellectual rigor and dialectic included in ALI projects; the opportunity for deep thinking on these issues can sometimes be missing in the day-to-day work of litigation.”**

Lorelie S. Masters

of the exacting work that went into it, I felt it important to participate in the debates at the Annual Meetings and to be able to confirm from my personal experience that these kinds of critiques of the ALI and the Restatement are unfounded.

**Aylward:** Attending the Annual Meetings gave me more insight into the thinking of the Reporters and other project participants and a better sense of some of the general themes that Tom and Kyle were trying to apply throughout the project. Although relatively few floor motions succeed at Annual Meetings, this is not always the case. Also, surprising things can sometimes happen that you can only respond to if you're physically there. At the May 2017 Meeting, for instance, the project that was scheduled for debate before the RLLI finished much earlier than expected and ALI Council member Gary Sasso, who served as chair of the RLLI Annual Meeting session, rolled right into the discussion of the Insurance Restatement at 11:20 a.m. when most of the ALI members favorable to the insurance industry hadn't yet flown in from out of town since the debate had been scheduled to start at 1 p.m. It may be the first and last 40 minute filibuster that the ALI has ever seen.

It's also important to be there and make the arguments that matter. Even where floor motions do not carry, the arguments that are presented have a lingering effect and can sometimes sway the Reporters in their post-Meeting drafting. For instance, Bob Cusamano of Crowell & Moring (former general counsel to ACE) made what I thought was a

very compelling argument at the 2016 Annual Meeting as to why § 24's standards for holding insurers liable for failing to make reasonable settlement decisions failed to reflect the reality of litigation and insurance practice. His motion went down in flames by a voice vote but nearly all of what he argued for was in the next draft of Chapter 2 when it came out that fall. Similarly, Harold Kim of the Chamber of Commerce made some very practical comments in May 2018 concerning the impracticality of insurers being liable for not monitoring substance abuse problems with defense counsel that got voted down but was subsequently adopted by the Reporters in their Comments to § 12.

**Masters:** I also feel it important to say that the insurance industry was represented throughout in the process (except for a brief time in 2013-2014) by a liaison from the American Insurance Association (AIA). There really is no comparable “industry group” that represents policyholders in the same way. While Amy Bach of United Policyholders (UP) made valuable contributions as an Adviser throughout, UP, a small nonprofit (admittedly with an outsize impact), cannot compete with the resources of the AIA. I wanted to ensure that my perspective, informed by years of representing policyholders, from individual pro bono clients to Fortune 100 companies, and participation in debates at the meetings of Advisers, was heard.

**Restatements are primarily addressed to courts. Do you think that the Liability Insurance Restatement will continue to be cited by courts? Are there some Sections you think may be cited more than others?**

**Masters:** I believe that the RLLI will be cited in the same context in which other Restatements typically have been cited during my years of practice: When courts look for guidance on an unsettled question of law. Restatements are not law and, in my experience, do not sway courts when the jurisdiction has settled law on an issue. However, like influential treatises and other secondary sources, a Restatement can provide important guidance when the law is unsettled or has not been addressed.

**Aylward:** Now that this Restatement is available in its final form, I think that it is far more likely to be cited by litigants. Whether courts will rely on it is another story. Moreover, many of the most controversial Sections of this Restatement (*e.g.*, §§ 3 and 24) are areas where most states already have abundant precedent and probably could care less what the ALI thinks. Where I do think that this Restatement will ultimately prove most influential are some of the more arcane areas, such as counting “occurrences” (§ 38) and the “drop down” obligations of excess insurers (§ 39), where many states don't have precedents.

**Masters:** Given that insurance policies are contracts, I believe that §§ 2-4 on principles of policy interpretation will be influential not just on issues arising under liability insurance policies, but other kinds of insurance as well. Sections 24-28, addressing an insurers' duty to make reasonable settlement decisions, seek to strike a middle ground in an issue of great importance to policyholders—the promise by a liability insurer to pay for the policyholder's liability. Because the law on this very important duty is less uniform than that on the duty to defend, and because of the interplay between law on this issue and on insurance company bad faith, these Sections seem likely to provide useful guidance to courts (and advocates). The Sections on insurance company bad faith likely will be cited by both policyholders (perhaps particularly in states that have not adopted a bad-faith tort) and insurers (perhaps in states that have). The rules in § 13 relating to liability insurers' other significant duty, the duty to defend, follow the generally applicable "potential for coverage" rule, with perhaps one exception that created much debate. That is the "one-way rule," under which evidence outside the complaint against the policyholder and the insurance policy can be used when it confirms that the duty to defend applies—but not the other way, to deny coverage.

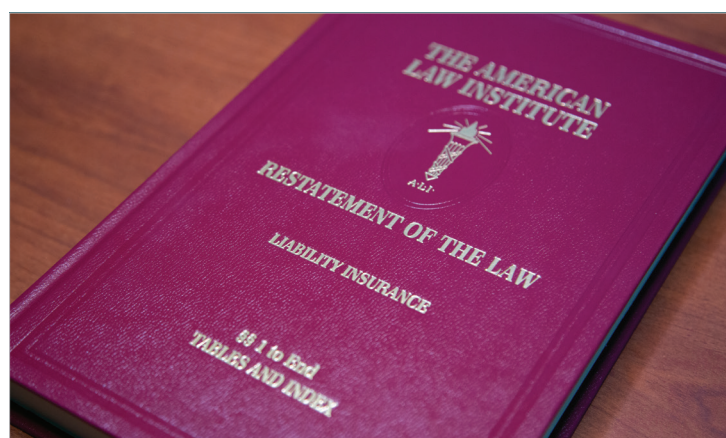
Two other principles addressed in the Restatement may be influential as well.

- Section 21 and § 47, Comment *d*, state that an insurer cannot seek to recoup the payment of policy proceeds paid in defense or liability absent and explicit agreement between the insurer and the policyholder allowing for such recoupment. This is a sensible rule that gets to the heart of why people buy liability insurance.
- Section 41 on the issue of "allocation" in claims involving "long-tail harm" changed 180 degrees in response to insurer comments and after the Council voted to change the project from a Principles project to a Restatement. That Section throughout was the subject of extensive debate and commentary, including motions at more than one Annual Meeting. We policyholder lawyers advocated strenuously for a different rule ("all sums"), in part because, unlike all the other Sections in the Restatement, this Section relies on principles of "equity" and "fairness," and not the contract language. This is in contradiction to the rule in § 2(1) which defines insurance policy interpretation as "the process of determining the meaning of the terms of an insurance policy." I feel confident, however, courts will (continue to) distinguish between these two approaches ("fairness" vs. "contract language") when deciding this issue and will choose between them.

**Both of you have signed up to participate on the Members Consultative Groups on several additional projects. Why is it important for you to dedicate your time to ALI's work?**

**Aylward:** For all that I think of myself as being an expert in insurance law, it is a narrow and somewhat confining area of the law and it's engaging to see what else is bubbling up. Also, many of the projects, where I am on Members Consultative Groups, involve areas (*e.g.*, data privacy, intentional torts) that can have an enormous albeit indirect impact on the emerging claims that give rise to insurance disputes.

**Masters:** The ALI has active projects on many issues of great personal and professional interest to me. I very much enjoyed the ALI process leading to the RLLI, learning much from the wide range of perspectives offered and appreciating the intellectual challenge of the process. I went to law school because I wanted intellectual challenge. Few organizations in which I have been active provide the same opportunity to consider the issues with this level of intellectual rigor and challenge. Particularly after my experience with the RLLI, I see ALI projects as presenting the opportunity to give back to the profession I love.



## Restatement of the Law, Liability Insurance Official Text Available

The book contains four Chapters:

1. Basic Liability Insurance Contract Rules (Topics: Interpretation, Waiver and Estoppel, and Misrepresentation)
2. Management of Potentially Insured Liability Claims (Topics: Defense, Settlement, and Cooperation)
3. General Principles Regarding the Risks Insured (Topics: Coverage; Conditions; and Application of Limits, Retentions, and Deductibles)
4. Enforceability and Remedies

The American Law Institute would like to thank the Reporters, Tom Baker and Kyle D. Logue, project participants, and ALI members who contributed their time, wisdom, and guidance to the Restatement.

**ORDER ONLINE AT [ALI.ORG/PUBLICATIONS](http://ALI.ORG/PUBLICATIONS).**

# Project Spotlight: Restatement of the Law Third, Torts: Concluding Provisions

by Michael D. Green & Nora Freeman Engstrom

We think that one can only understand how the project titled “Restatement Third of Torts: Concluding Provisions” came about and what it will address with some background about the Third Restatement of Torts. So, this profile might more appropriately be titled, “A Brief History of the Third Restatement of Torts.”

This story begins with the Responsibility for Personal Injury (Enterprise Liability) project, itself inspired by the widespread adoption of strict products liability, which occurred, in no small part, because of the 1965 publication of § 402A of the Second Restatement of Torts. Authored by leading torts and administrative law scholars of the day and ultimately published in 1991, the Enterprise Liability project was a magnificent piece of academic work, providing a range of recommendations for an optimal system to address accidental injuries. Once completed, though, the Institute realized that this project, which was somewhat unmoored from case law, could not be published in any form that the ALI had previously utilized, all of which the ALI endorsed as appropriate for common law judges. The Institute thus named it a “Reporters’ Study,” which meant that it was the voice of the Reporters, not the Institute, and also meant that, other than publishing it, the ALI did not endorse its recommendations.

In the aftermath of that somewhat ill-fated project, then-ALI Director Geoffrey Hazard determined it was time to start work on the Third Restatement of Torts, which he hoped might benefit from the Enterprise Liability’s Reporters’ Study. To kick off that effort, in 1992, the ALI convened two meetings of tort law experts, where Hazard canvassed attendees’ views about the wisdom of restating product liability law and, once convinced that the project was worthwhile, sought advice about how to proceed.



Michael D. Green



Nora Freeman Engstrom

After these meetings and much deliberation, the Institute launched the Products Liability project, with two leading products liability scholars, Jim Henderson of Cornell University and Aaron Twerski of Brooklyn Law School, as the Reporters.

Notably, in so doing, the die was cast for the future of the Third Restatement. Peeling off products liability and addressing it solo meant that the Institute would be breaking with tradition in the manner it had previously prepared Restatements. In the past, one or perhaps a couple of Reporters took on the entire subject (whether torts, property, or the law governing lawyers) and proceeded seriatim through the subject, culminating with the publication of a multivolume final product. Instead, Products Liability (PL) would be a discrete project and volume, which meant, for better or worse, that further efforts on the Third Restatement would follow this mold.

Though that much was clear, for a long while the shape and scope of the remainder of the Third Restatement of Torts was distinctly uncertain. Some supported a “General Principles” project that would address the core issues of duty, negligence, intent, and causation. Others pointed out that a Third Restatement couldn’t just address those basic elements but would also have to address the major reforms of the latter part of the 20th century, including comparative fault, which, starting in the mid- to late 1970s, supplanted the complete bar of contributory negligence; states’ many modifications to the traditional rule of joint and several liability; and states’ new rules for contribution and credit, in the event of a partial settlement.

That latter idea gained traction, and the Institute ultimately commissioned Bill Powers of the University of Texas to lead that project, eventually dubbed “Apportionment of Liability” (AoL). One of us (Mike, then of the University of Iowa) also joined to collaborate with Bill on this project. Meanwhile, as to General Principles, the Institute scored a great coup and convinced Professor Gary Schwartz of UCLA, who we consider one of the torts titans of the latter part of the 20th century, to take the pen.

Gary began his work in 1997, covering topics such as negligence, intent, and causation, and was eventually joined by Mike (by then at Wake Forest) to assist in the project’s completion. Tragically, however, Gary died six months into that partnership. To continue the project after Gary’s untimely death, Mike enlisted (by that time, his frequent coauthor and dear friend) Bill Powers.

In time, just as that project's leadership changed, its scope did as well. The project, which started with a narrow focus on limited topics, ultimately morphed into something much larger, in recognition of the fact that "General Principles" needed to be supplemented with a deep dive into the many bricks that make up a contemporary tort law edifice, including, for example, negligence per se, lost chance, market share liability, and stand-alone claims for emotional distress. Remarkably Bill continued on this project—which came to be called "Liability for Physical and Emotional Harm (LPEH)"—even after he became President of the University of Texas in 2006. When liability of those who hire independent contractors was appended to this project, Ellen Pryor, now of the UNT Dallas College of Law, generously agreed to join Bill and Mike as an Associate Reporter. LPEH was ultimately published in two volumes in 2010 and 2012.

Gentle and impatient readers: Yes, this background really is critical to understanding Concluding Provisions.

In 2007, as LPEH was winding down, Director Lance Liebman convened an important meeting about the future of the Third Restatement of Torts in Austin, Texas. From Mike's perspective, the meeting's critical takeaway was a decision that the Third Restatement would not leave any provisions of the Second Restatement expressing the position of the Institute. The Third Restatement would not be a "lite" restatement of the tort law of the 21st century. Instead, it would be, attendees agreed, comprehensive and complete on its own terms. Attendees immediately recognized some implications of this decision (for example, that Intentional Torts, a largely stable area, would have to be included). The full implications of this decision, however, would not be revealed for a decade.

Meanwhile, as the larger project's architecture was being worked out, other projects were proceeding. A project on economic harm had been moving forward in stutter-steps, as it was initiated in 2004, suspended, and restarted in 2010 with Ward Farnsworth, who would shortly thereafter become the Dean at the University of Texas, as the Reporter. Covering topics including the unintentional infliction of economic loss, fraud,

*continued on page 10*

## Intentional Torts

*September 20 in Philadelphia, PA*

Project participants discussed Preliminary Draft No. 6, which features Sections of Chapter 3—Privileges. Several Sections of this project will be presented at the January 2020 Council meeting.



TOP RIGHT  
*José F. Anderson of  
University of Baltimore  
School of Law*

RIGHT  
*Carol F. Lee of Taconic  
Capital Advisors*



## Children and the Law

*September 27 in Philadelphia, PA*

This project will be presented at the October 2019 Council meeting. C.D. No. 4 is available online.



*Richard B. Katskee of Americans United for Separation of Church and State*

## TORTS: CONCLUDING PROVISIONS CONTINUED FROM PAGE 9

breach of fiduciary duty, and public nuisance, the final portions of that project were approved at the 2018 Annual Meeting, and publication of this fourth piece of the Third Restatement is imminent.

So too, in 2012, the ALI began the Restatement of Intentional Torts to Persons, with Ken Simons of the University of California at Irvine and Ellen Pryor at the helm. When Ellen stepped down to help launch the law school at UNT Dallas, Jonathan Cardi of Wake Forest stepped in. That project, which will ultimately address matters including assault, battery, and false imprisonment, is well underway.

But, that still left some unfinished business—and after taking over as the new Director of the ALI—Richard Revesz sought to determine what would be required to actually *finish* a comprehensive Third Restatement, which, even at that point, had been in production for almost a quarter-century. Eager to close the book on the odyssey of this project, Director Revesz contacted Bill and Mike and requested that the two longtime collaborators prepare a blueprint for the Third Restatement's completion.

In preparing this to-do list, the collaborators agreed that some unfinished business was easy to spot: defamation (with all of its constitutional overlay) and privacy were ripe for revision. Similarly, the critical matter of remedies required comprehensive attention. All were addressed by the Second Restatement but had escaped attention in the patchwork of projects that comprised the Third Restatement up to that point.

But the two also found something unexpected: all of the completed and planned subject-specific projects had also left behind numerous matters covered in the Second Restatement. Though the Austin meeting had

concluded with the commitment that the Third Restatement would be comprehensive and not leave orphans—the reality was, even after decades of sustained effort, orphans remained.

At the same time, Bill and Mike found topics that logically should have been in the Second Restatement but weren't: How can a Restatement of Torts not address medical malpractice? Or vicarious liability? Neither of those subjects was contained in either of the first two Restatements, although *legal* malpractice was included in the Restatement Third of the Law Governing Lawyers, and vicarious liability was included in the Restatement Third of Agency.

Finally, Bill and Mike also realized something that all of the work on specific-subjects missed. Important new areas had emerged in the years since the Second Restatement—and these, too, had so far been unaddressed. Recent developments include a wide variety of issues, including: spoliation-of-evidence claims, wrongful birth, pregnancy, and life, and bad-faith insurance claims, among many others.

Canvassing these orphans and newly-emergent areas, Bill and Mike prepared a memorandum, which they submitted to ALI leadership in 2018

## The Law of American Indians September 19 in New York, NY

Preliminary Draft No. 8 presents what may possibly be the last new Sections of this project. Project participants discussed § 10 from Chapter 1—Federal-Tribal Relations, Chapter 4—Tribal Economic Development, and Chapter 6—Natural Resources. This project is scheduled to be on the agenda at the January 2020 Council meeting.



*Matthew L.M. Fletcher of MSU College of Law and Kaighn Smith Jr. of Drummond Woodsum*



*Riyaz A. Kanji of Kanji & Katzen*

recommending that yet another torts project be commissioned to cover these “leftover” subjects, an eclectic but broad swath of tort law. Director Revesz agreed and by the fall of 2018 the Council also provided its approval. Bill and Mike got their just deserts, however, when Director Revesz asked if they would serve as Reporters for this final Torts Restatement project. As Mike remembers it: “Bill and I talked over the phone about the invitation, fully cognizant that we were far too old to do it. Although, I couldn’t see him, I am confident that Bill had a twinkle in his eye when he said, ‘This is crazy Mike, but let’s do it.’” No doubt the attraction of getting back in the saddle together for a third time provided the motivation for the “crazy” acceptance. Bill and Mike did agree to find a third Reporter, a bit younger, to join onto what is now known as Restatement Third of Torts: Concluding Provisions, and Professor Nora Freeman Engstrom of Stanford Law School (Bill and Mike’s first choice), after approval by ALI leadership, was approached and signed on.

Given the breadth (some may say, “grab bag nature”) of the project, some subjects will be covered by Associate Reporters recruited to restate those subjects. Mark Hall of Wake Forest,

one of the leading health-care law experts in the country and a non-physician member of the Institute of Medicine, has been recruited and will oversee medical malpractice. The country’s leading expert on the law of the dead, Wake Forest’s Tanya Marsh—who also serves as an Associate Reporter on the Restatement of the Law Fourth, Property project—will address the Right of Sepulcher and other tort aspects regarding corpses. Don’t know what the right of sepulcher is? Join the Members Consultative Group for Concluding Provisions and save yourself a trip to the dictionary.

As the project progresses, we are working through the list Bill and Mike initially devised and finding still additional areas that demand adequate coverage. For example, loss of consortium in the Second Restatement was limited to married couples. Since that time, a substantial minority of courts have expanded consortium claims to cover the parent–child relationship—and the Third Restatement will need to address that development. Similarly, medical monitoring claims did not exist when the Second Restatement was published. These claims are now quite prominent, and the existence, contours, and limitations of medical-monitoring claims demand careful attention.

Regrettably, the story of the project includes a terrible tragedy about which many readers may already know: Bill Powers died on March 10, 2019 from complications suffered in a fall at the University of Texas. We will not dwell here on his remarkable career and extraordinary contributions to the work of the ALI, as that is well documented in other places. But among those who knew Bill, he will be greatly missed.

And, for our part, we are committed to completing a project that Bill would have been proud of and that will put another twinkle in his eye.

## Property *September 26 in Philadelphia, PA*

This project will be presented to the Council for the first time at the October 2019 Council meeting. C.D. No. 1 is available online.



*Eduardo Peñalver of Cornell Law School*



*Susan F. French of UCLA School of Law*

# Member Spotlight: Judith Leonard, Smithsonian Institution

Judith Leonard is the general counsel of the Smithsonian Institution. Before joining the Smithsonian, she served as the vice president for legal affairs and general counsel at the University of Arizona (1998–2009). Her previous experience includes serving as an attorney in the Office of the General Counsel of the U.S. Department of Education and general counsel of the Office of National Drug Control Policy in the Executive Office of the President in Washington, D.C. She has taught law to masters and doctoral students studying higher education leadership. She is currently an Adviser on Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities, and serves on the Members Consultative Group of Model Penal Code: Sexual Assault and Related Offenses.



**Prior to working at the Smithsonian Institution, you have an interesting career background in both government and education. How do you determine which career venture to pursue? What drives your decisions?**

I have been very fortunate with professional opportunities although, honestly, very few were planned. I always joke that I have been on an accidental journey, but when people, especially young people, look at my resume, they think it was all planned.

One aspect of my career choices that was intentional is that I wanted to work in education and education policy. I've always had a passion for education, particularly because public education has so significantly influenced my life and opportunities. I initially wanted to be a mathematics teacher and then I became really interested in psychology and special education; that's why I have a master's degree in special education. After I received my master's degree, I went to work in the special education field with a federally funded project that was developing models for young children with disabilities and training teachers. Right about that time was when the first law passed that required public schools to provide education to children with disabilities in the same way schools were required to provide for children without disabilities.

The project that I was working on involved a lot of advocacy work, identifying children for services and securing the services for them, and working with their families. At that time, I also was being mentored by a professor at the Institute of Government at the University of North Carolina at Chapel Hill and his wife, who happened to be a professor of special education. I was getting ready to go back to school and get my Ph.D. when the law professor from the Institute of Government suggested that I pursue a law degree instead as a way to further my interests in education, policy, and advocacy. I went to law school not really intending to be a lawyer, but to work in education.

My first professional opportunity during law school was working with the Public Interest Law Center of Philadelphia. It is there that I became more interested in the law and becoming a practicing attorney. It was pretty obvious to me at that time that this was an avenue where I could have an effect and be influential and still maintain my interest and passion for education—public education in particular.

After law school, my first job was at the U.S. Department of Education in the Office of the General Counsel. Then, within a fairly short time, I was invited back to the University of North Carolina as counsel for the health science schools. When I left that position and eventually returned to the U.S. Department of Education to work on special education and civil rights, among other things, I knew that someday I would return to working in a university. Before leaving the government, I had the opportunity to spend a year as the general counsel of the Office of National Drug Control Policy in the Executive Office of the President. Once I decided to accept that assignment, one of my colleagues wondered what I knew about drug policy and the subject matter under the jurisdiction of that agency. I basically said, "Well I think on the other side of Pennsylvania Avenue, contracts and constitutional law are just the same," and I was right.

As I said, I always knew that I wanted to return to a higher education environment. That took me to the University of Arizona, and now to the Smithsonian. We don't have a football team or a medical school, but we do conduct a lot of research and we provide significant education in a slightly less traditional way. I feel I'm still in a learning organization.

I never had a set path to follow. That may not be ideal for everyone, but it did leave me open to possibilities. While I admire professionals with specific plans for their career, I have to admit I thought more about change as opportunities appeared. My current position arose as the result of a call from a search firm, rather than my seeking a new opportunity. At times, making a change took being willing to disrupt my living situation and familiar environments where I had succeeded, and to learn to navigate within new settings. That being said, each position I have held definitely built on the skills of the prior position—and of course on the accomplishments of those who preceded me.

**You are a member of the Women’s Forum of Washington, D.C., a chapter of the International Women’s Forum. Can you tell me about your experience as a woman lawyer, and why do you dedicate time to women’s issues?**

I think that there have been many people, both men and women, on the shoulders of whom I stand and who have helped me along the way—including the three male lawyers who nominated me to be elected to The American Law Institute, a university President who had confidence in those around him, and a female law school Dean who was a client and also invested in my success. Obviously, there have been obstacles along the way, which probably influenced me to help younger women. It’s also just something I like doing and find rewarding. I think that even if there had never been any doors closed to women or even if I’d never been treated somewhat differently as a woman, I’d be mentoring young women anyway.

I don’t have a specific example of an obstacle that I have overcome. I feel that I’ve been pretty lucky with the opportunities I’ve had and the support I’ve received along the way. However, there were no female professors at my law school when I began with the exception of the law librarian. My professors were men, and wonderful professors—I was very fortunate to have them—but it didn’t give me or the other female students the same role models or the same thoughts about our future as perhaps my male student counterparts had. I was fortunate to take a seminar in education law at another law school taught by the professor who eventually gave me my first opportunity at the U.S. Department of Education’s Office of the General Counsel.

My involvement with the Women’s Forum of Washington is important to me in part because of the role that it plays internationally, without borders for emerging leaders. It’s also a wonderful educational opportunity for me. Being part of the international network and the support that members of the forum provide to each other sustains me and also expands my opportunity to help others.

**You are an Adviser on the Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities. Why is it important to you to engage in this area of the law?**

I am particularly interested in the Principles project on Student Sexual Misconduct for a number of reasons, particularly that I have been directly involved with the law on the issue from the perspective of the federal government and of a general counsel for a large, public university for many years.

This is an issue that is particularly well-suited to the ALI process that relies on expertise from multiple perspectives and allows for deliberative debate. This issue like so many that ALI selects and tackles yearns for balance.

Now that I’ve been exposed to the ALI process, it has been one of the most enlightening, educational, and impressive experiences.

*continued on page 14*

**“I find the debate and the discussion of the interpretation of the law to be thought provoking and stimulating. I come back to my office and say to my staff, ‘This was my brain food for the year,’ and I encourage them to find similar opportunities.”**

Judith Leonard on attending ALI meetings

## Student Sexual Misconduct

*September 13 in Philadelphia, PA*

This project meeting included discussion on Chapter 9–Appeals; Chapter 10–Integrity of the Process: Confidentiality, Disclosure, Retaliation; and Chapter 11–Internal Student Discipline and the Criminal Justice System. Portions of this project will be presented at the October 2019 Council meeting.



*From Left to Right: Deborah Tuerkheimer of Northwestern University Pritzker School of Law, Melissa Murray of NYU School of Law, and Susan Frelich Appleton of Washington University School of Law*



*Jeannie Suk Gersen of Harvard Law School*

# Government Ethics

*September 12 in Philadelphia, PA*

Project participants gathered for their second project meeting in 2019 to discuss revised portions of this Principles project, as well as new content. Preliminary Draft No. 5 includes one Section of Chapter 3—Conflicts of Interest and Outside Activities of Public Servants; a new subsection and two new Sections of Chapter 5—Revolving-Door Restrictions; and a draft of Chapter 6—Disclosure.



*Ronald D. Lee of Arnold & Porter*



*Evelyn V. Keyes of the Texas Court of Appeals,  
1st District*

JUDITH LEONARD CONTINUED FROM PAGE 13

I think one of the things that I've been impressed with is that all views are considered—those of the members who participate, as well as the Reporters. Everybody is extremely respectful of one another. And I think it's really important that we get all views out there, so that we get the most deliberative and considered interpretation of the law.

It's true of most of the ALI projects, but particularly with ones like this and the sexual assault project, it's crucially important that all views be heard and that the path forward is realistic, practical, well-reasoned, and legally supportable.

Although I now work in a less traditional education setting, I have a strong and continuing interest in higher education. It has been intellectually stimulating to engage with practicing lawyers, academics, and judges around this difficult topic.

**ALI's Principles and Model Code projects take on areas of the law that are often developing and in need of guidance. In what ways do you think these projects when complete will provide this much needed guidance and will help improve the law in these areas?**

These projects address a void where there is a need for guidance. They are often complex issues with little established law and a pressing need for some thoughtful analysis, particularly in the absence of black letter law or significant case law. As in the case of sexual misconduct on campus, the deliberative model used by the ALI can contribute without the biases that might be present within a single constituency. It is also reasonable to believe that regulators and policymakers at various levels will find value in the guidance, which will eventually improve the law, the understanding of the law, and its application.

**Have you enjoyed participating on ALI projects? What would you tell a new member considering signing up for an MCG, or attending next year's Annual Meeting in San Francisco?**

Participating on ALI projects and attending the ALI Annual Meeting is thought provoking and intellectually stimulating. This is true both in the areas where I am knowledgeable as well as the projects in which I do not have expertise. I find the debate and the discussion of the interpretation of the law to be thought provoking and stimulating. I come back to my office and say to my staff, "This was my brain food for the year," and I encourage them to find similar opportunities.

I think the best way for new members to engage with ALI is to identify two projects of interest and to sign up as consultants. Although I am only involved with the Campus and Model Penal Code projects, I have followed others with interest including the recently approved Restatement of Charitable Nonprofit Organizations, and the Principles projects on Compliance, Risk Management, and Enforcement (where I have a particular interest) and Government Ethics.

## Do you have a favorite Smithsonian Museum or Exhibit?

If I did, I could not tell you!

I will tell you that we're undertaking an incredible project to expand our reach by creating a virtual Smithsonian, so that audiences, whether they can or cannot get here physically, may experience our scholarship and collections.

Those collections will be organized around themes like democracy, race, innovation, and identity. That's why it's no longer okay to say that any particular museum is a favorite. Because these things like democracy, race, and innovation are to be approached in innovative ways and collaborative ways they aren't just the domain of one museum or one research center.

One of the goals is to engage people in discussions around contemporary issues, bring people together, and position the Smithsonian as a hub of ideas and innovation. To do that, it's going to take really interdisciplinary and collaborative effort from all of us.

That's the way we approach things in my office now. It's no longer compartmentalized. When somebody brings us an agreement to read, we don't think of it as just that one project for that client. We think of it in the greater context.

What I like most about the Smithsonian and the practice of law at the Smithsonian is the diversity of issues and what can be accomplished in research or education by the Smithsonian through the combined efforts of its many museums and centers. The American experience isn't approached from a narrow perspective but as an interdisciplinary experience with many facets. Various parts of the enterprise taken together contribute to the reach and relevance of the programming.

## Legal Issues in Museum Administration

March 18-20, 2020

ALI CLE is proud to offer this conference in partnership with the Smithsonian Institution for nearly 50 years.

Learn more and register online at [www.ali-cle.org/CB004](http://www.ali-cle.org/CB004).

The Smithsonian Institution is the world's largest museum, education, and research complex. A short list of exhibitions currently on view can be found below. A full list of exhibitions, including upcoming ones, can be found at [si.edu/exhibitions](http://si.edu/exhibitions).

### **I Am... Contemporary Women Artists of Africa**

National Museum of African Art  
Through March 15, 2020

### **One Life: Marian Anderson**

National Portrait Gallery  
Through May 17, 2020

### **Illegal to Be You: Gay History Beyond Stonewall**

National Museum of American History  
June 21, 2019 – 2020

### **Forgotten Workers: Chinese Migrants and the Building of the Transcontinental Railroad**

American History Museum  
May 10, 2019 – Spring 2020

### **Our Universes: Traditional Knowledge Shapes Our World**

National Museum of the American Indian  
Through September 2020

### **Ella's Books: Volumes from the Library of Ella Fitzgerald**

National Museum of African American History and Culture  
Through December 31, 2019

### **Nature by Design: Selections from the Permanent Collection**

Cooper Hewitt, Smithsonian Design Museum, New York City  
Through December 31, 2020

### **Deep Time**

National Museum of Natural History  
Permanent



*In its new pose devouring a Triceratops, the Nation's T. rex is the centerpiece of the David H. Koch Hall of Fossils—Deep Time, a 31,000-square-foot dinosaur and fossil hall.*

*Smithsonian Institution*

# The new Restatement of the Law, Liability Insurance: a primer

By Kirk Pasich

Restatements of the Law have been a feature of the legal landscape nearly 100 years. Issued by the American Law Institute, they influence and shape the law. The institute's members include U.S. Supreme Court justices, judges of the highest courts of most states, law school deans, professors, and private practitioners. Putting it simply, when the institute speaks, courts and others tend to listen.

Now, for the first time, the institute has spoken on the subject of liability insurance. It has published the Restatement of the Law, Liability Insurance. This Restatement has proven to be controversial, both in its drafting process and since its final approval. Yet, it was not adopted lightly. It was the subject of seven institute annual meetings and a lengthy back-and-forth process involving more than 160 lawyers representing insurers, insureds, and others. This process produced 29 drafts presented formally in institute meetings. Therefore, this Restatement may have a significant impact on the law — exactly what it is intended to do.

According to the institute, the Restatement “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.” Courts in California already have begun citing the new Restatement. *See, e.g., Webcor Constr., LP v. Zurich Am. Ins. Co.*, 2019 WL 1129554, at \*4 (N.D. Cal. Mar. 12, 2019); *Endurance Am. Specialty Ins. Co. v. Bennington Group, LLC*, 2017 WL 4225945, at \*4 (L.A. Super. Ct. Aug. 22, 2017, quoting March 28, 2017 proposed final draft regarding “misrepresentation”).

**While there's a lot in the new Restatement that could be talked about, here are three key highlights.**

## Insurance Policy Interpretation (Section 3)

The Restatement's approach is similar to California's. However, its guidance may clarify and influence California's approach in important ways. For example, the Restatement provides substantive and practical guidance regarding evidence of custom, practice and usage to assist in policy interpretation, even when policy language appears to be clear. According to the Restatement, when custom, practice, and usage “can be discerned from public sources and with only limited discovery (such as through an affidavit of an expert in the trade or business, who is subject to deposition, but without the need for extensive document requests), this is the better approach. ... Consideration of custom, practice, and usage at the plain-meaning stage does not open the door to extrinsic evidence such as drafting history, course of dealing, or precontractual negotiations. ... There should be no need to take discovery to discern prima facie, the existence of a custom, practice, or usage. Each party should be knowledgeable of custom, practice, and usage in its own trade or business; insurers should have access to information outside of discovery regarding custom, practice, and usages in the trades or businesses that they insure; and insureds should have access outside of discovery to insurance brokers and others with knowledge of the insurance industry.”

## An Insurer's Receipt of Confidential Information (Section 11)

There has been considerable debate about what information can be shared with an insurer that has reserved its rights to deny coverage without potentially jeopardizing the attorney-client privilege. California Civil Code section addresses this issue, at least in part. Section 2860(a) provides that when an insurer has a duty to defend and reserves rights that create a conflict of interest between it and its insured, then the insured has the right to be represented by independent counsel paid for by the insurer. Section 2860(d) states that in that circumstance, the insured and its independent counsel have a duty “to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes. ... Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.”

However, Section 2860 applies only when an insurer has, and is honoring, a duty to defend. If an insured discloses privileged information to a non-defending insurer (e.g., a denying insurer, an excess insurer, or an insurer whose policy obligates it to pay defense costs, but not to actually defend the insured), there is a risk of privilege waiver. *See, e.g., Continental Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 525 (E.D. Cal. 2010) (“[T]he attorney-client privilege has never been extended to cover communications among an insured, defense counsel, and an insurer that is not defending its insured without reservation, let alone an insurer that is not defending its insured at all.”).

The Restatement takes a more protective approach to privilege. It states: “An insurer that is not providing a defense should also be regarded as an agent of the insured for purposes of receiving confidential information related to the legal action, because the insurer may subsequently be called upon to pay a settlement or a judgment on behalf of the insured or, in some cases, even to take over the defense on behalf of the insured. A non-defending insurer should also come within the scope of the common-interest rule, pursuant to which disclosure of privileged information by parties within a common interest is protected as against third persons.”

This approach should facilitate settlements because it will allow for a more fulsome exchange of information. However, like California Civil Code Section 2860, the Restatement notes that “the insurer’s right to defend does not include the right to receive confidential information from the defense lawyer that could harm the insured with regard to a matter that is in dispute, or potentially in dispute, between the insurer and insured.”

### Recoupment of Defense Costs (Section 21)

California, like most states, takes a very pro-insured approach to an insurer’s duty to defend its insured, holding that such a duty exists whenever there is a potential for coverage. However, unbeknownst to many, California law allows an insurer to seek reimbursement of a settlement or defense costs that may be allocated solely to uninsured claims, even if it funded a settlement over the insured’s objection. *See Buss v. Superior Court*, 16 Cal. 4th 35, 57-58 (1997) (insurer may seek reimbursement of “claims that are not even potentially covered,” but not of claims that are “potentially covered,” although it bears “extremely difficult” burden of allocating costs “solely to claims that are not even potentially covered”).

The Restatement rejects this reimbursement rule, instructing: “Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not seek recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs.” It explains: “This Section follows the emerging state-court majority rule that the insurer does not have a right of recoupment of defense costs unless this right is stated in the insurance policy or otherwise agreed to by the parties. . . . State courts that have decided this issue for the first time in more recent years . . . have rejected the insurer’s claim to recoupment in the absence of a provision in the policy or other agreement permitting reimbursement.”

The Restatement’s explanation may lead to a reconsideration of the rule in California: “[A]n insurer’s choice not to insert a recoupment provision in the policy acquires contractual significance. At a minimum, it suggests that the hardship created by the lack of a right of recoupment is not as substantial as might appear.” As it further explains, “recognizing that the insurer is making the choice not to insert a recoupment provision in the policy brings the default rule followed in this Section within the principle disfavoring the use of unjust enrichment when the parties are in a position to address the issues by contract. . . . The issue of the right to recoup the costs of defending a noncovered legal action is a known uncertainty that the insurer can address in the liability insurance contract.”

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*This article includes citations to Proposed Final Draft language of the Restatement that has been updated. The Official Text of the Restatement of the Law, Liability Insurance, is available to purchase now.*

## 2019 New York Arbitration Week to Feature Restatement Discussion

The New York International Arbitration Center and the New York Branch of the Chartered Institute of Arbitrators have jointly launched the first New York Arbitration Week.

The three-day inaugural event begins on Wednesday, November 20, with a program on the Restatement of the Law, The U.S. Law of International Commercial and Investor–State Arbitration. Reporter **George A. Bermann** of Columbia Law School, along with Associate Reporters **Jack J. Coe Jr.** of Pepperdine University School of Law, **Christopher R. Drahozal** of University of Kansas School of Law, and **Catherine A. Rogers** of Penn State Law will lead panel discussions on key issues that were the focus of debate or controversy during the Restatement’s decade-long development.

Joining them are several ALI members who served on the project, including: **Andrea K. Bjorklund** of McGill University Faculty of Law; **Donald F. Donovan** of Debevoise & Plimpton; **Louis B. Kimmelman** of Sidley Austin; arbitrator **Jennifer Kirby**; **Carolyn B. Lamm** of White & Case; **M. Margaret McKeown** of the U.S. Court of Appeals for the Ninth Circuit; and **Linda J. Silberman** of New York University School of Law.

The speakers will address matters of practical concern to arbitration practitioners and will explain how certain issues were resolved to serve the interests of clarity, predictability, and, in some instances, the promotion of best practices in international arbitration in the United States, including:

- “Delegation” of gateway issues
- Forum non conveniens
- Interim measures as arbitral awards
- Grounds for vacatur of awards made in the U.S.
- Arbitration on a class basis
- Manifest disregard of law
- Discovery under 28 U.S.C. § 1782
- Arbitral immunity

For additional information, please contact [nyevents@sidley.com](mailto:nyevents@sidley.com).

# The Institute in the Courts: State Supreme Court Adopts Section of Law Governing Lawyers

Recently, in *Parkinson v. Bevis*, 2019 WL 4266089 (Idaho Sept. 10, 2019), the Supreme Court of Idaho adopted **Restatement of the Law Third, The Law Governing Lawyers § 37, Comment d**.

That case arose when a client filed an action for breach of fiduciary duty against the attorney who represented her in her divorce proceedings, alleging, among other things, that the attorney “without [the plaintiff’s] knowledge or consent, shared attorney-client confidential information with [plaintiff’s husband’s] attorney” and “was complicit with [plaintiff’s husband’s attorney] in securing a divorce for [her husband] on terms more favorable to [her husband].” The plaintiff initially sought damages in “an amount to be proven at trial” but, after the defendant filed a motion to dismiss, the plaintiff admitted that she did not suffer economic loss and that she sought equitable remedies that were “implicit in her breach of fiduciary duty claims.” Granting the defendant’s motion to dismiss, the state district court found that the plaintiff’s claim “was, in essence, a legal malpractice claim,” and “because [the plaintiff] ha[d] failed to allege sufficient facts to show the information was confidential and/or the communications were privileged, [the plaintiff’s] complaint fail[ed] to state a cause of action upon which relief [could] be granted.” The district court denied the plaintiff’s motion for reconsideration of the dismissal and motion to amend her complaint, reasoning “that it would be futile to allow [the plaintiff] to amend her complaint to clarify the equitable nature of her

allegations, because such a claim [was] indistinguishable from a negligence claim, for which [the plaintiff] would have to show damage.”

Vacating the judgment of dismissal and reversing the district court’s grant of the defendant’s motion to dismiss, the Supreme Court of Idaho held, *inter alia*, that the district court was correct in “conclud[ing] that Idaho permit[ted] plaintiffs to bring a claim for breach of fiduciary duty where the fiduciary duty ar[ose] from the lawyer-client relationship,” but that “the court erred in concluding that the facts here failed to establish an independent claim for breach of fiduciary duty by [the defendant].” The court explained that “[b]reach of fiduciary duty, even when based on attorney misconduct, differ[ed] from a legal malpractice claim.”

The court noted that Restatement of the Law Third, The Law Governing Lawyers § 37, Comment *d*, provided factors to be used in determining whether an attorney’s violation of a duty to his or her client constituted a clear and serious violation that warranted partial or complete forfeiture of the attorney’s compensation. Adopting § 37, Comment *d*, the court explained that “[t]he sanction of fee forfeiture [was] available when an attorney violate[d] his duty to his client in a serious way,” and that the factors set forth in § 37—“(1) the extent of the misconduct, (2) whether the breach involved knowing violation or conscious disloyalty to a client, (3) whether forfeiture [was] proportionate to the seriousness of the offense, and (4) the adequacy of other remedies”—“[were] to be used to determine whether the trial court [could] order forfeiture of all or a portion of an attorney’s fee as an appropriate equitable remedy in these circumstances.” The court clarified that “[t]he result here is narrow, offering relief to a client *only* in those cases in which the client seeks fee disgorgement as a solitary remedy. To the extent that legal malpractice plaintiffs seek both damages and fee disgorgement, the principles articulated in this decision would apply to the equitable portion of the claim. But, if the breach of fiduciary duty claim includes a claim for damages, that claim is appropriately subsumed by the legal malpractice claim.” In making its decision, the court pointed out that other states, including Nevada and West Virginia, had relied upon and adopted the Restatement’s factors.

## When Was the Last Time You Heard From ALI?

It is important to all of us at ALI that we stay in touch with our members and project participants. Our primary method of doing so is email.

You should be receiving emails about our project meetings, draft notifications, administrative notifications, and other news items of interest.

To ensure that you receive our electronic communications, please add our domain ([ali.org](http://ali.org)) to your spam filter’s whitelist, also called the approved or safe sender list. Doing so will ensure proper delivery of emails to your inbox. Because all spam filters are different, you may need to contact your technology team or service provider helpdesk for assistance in accessing your spam settings.

### Did your email address change recently?

If so, please be sure to update your member profile at [www.ali.org](http://www.ali.org).

## Notes About Members and Colleagues

This July, **Shirley S. Abrahamson** retired from the Wisconsin Supreme Court, on which she served for 43 years. She is the longest-serving Supreme Court justice in Wisconsin history and its first woman justice.

**Jane Bland** of Vinson & Elkins was sworn in to the Texas Supreme Court on September 11.

At the National Bar Association's 94th Annual Convention in July, **Paulette Brown** of Locke Lord was inducted into the Fred David Gray Hall of Fame. The Hall of Fame honors lawyers who have been licensed to practice law for 40 years or more and who have made significant contributions to the cause of justice.

**Danielle Citron**, formerly of University of Maryland Francis King Carey School of Law, has joined the full-time faculty of Boston University School of Law.

**Jack J. Coe Jr.** of Pepperdine School of Law was a featured speaker at PLI's International Arbitration 2019 program in June. Professor Coe presented a segment entitled, "Reflections on the Newly Completed Restatement of International Arbitration." A video of his speech is available on the ALI website.

**Kelly M. Dermody** of Lief Cabraser Heimann & Bernstein and **Judith D. McConnell** of the California Court of Appeal, Fourth Appellate District, Division One were among the women honored with the 2019 ABA Margaret Brent Women Lawyers of Achievement Award at the ABA's Annual Meeting. The award honors outstanding women lawyers who have achieved professional excellence in their area of specialty and have paved the way for others.



*From Left to Right: 2019 Margaret Brent Award recipients Judith D. McConnell of the California Fourth District Court of Appeal-Division One (left) and Kelly M. Dermody of Lief Cabraser Heimann & Bernstein (right), with Julie A. Su of the California Labor & Workforce Development Agency, Raquel Aldana of UC Davis School of Law, and Michelle Banks of BarkerGilmore.*

**Michael R. Dreeben** of the U.S. Department of Justice announced his retirement in June, after a 30-year career of federal government service. He will join Georgetown University Law Center as a distinguished lecturer in government for the 2019-20 academic year. Tributes to Mr. Dreeben from **William C. Bryson** of the U.S. Court of Appeals for the Federal Circuit, **Neal Katyal** of Hogan Lovells US, **Leondra R. Kruger** of the California Supreme Court, **Nicole A. Saharsky** of Mayer Brown, **Donald B. Verrilli Jr.** of Munger, Tolles, & Olson, and **Seth P. Waxman** of WilmerHale are featured on SCOTUSblog. Mr. Dreeben wrote a response to these tributes that was also published on SCOTUSblog.

Retired Chief Justice of the Utah Supreme Court **Christine M. Durham** received the ABA's 2019 Robert J. Kutak Award. The award "is presented annually to honor an individual who has made significant contributions to the collaboration of the legal academy, the bench, and the bar."

**Justin Driver** joined the full time faculty at Yale Law School. Previously, he was the Harry N. Wyatt Professor of Law at the University of Chicago.

**Lee S. Edmon** of the California Court of Appeal, Second Appellate District and **Carolyn B. Kuhl** of the Superior Court of California, County of Los Angeles published articles in The Association of Business Trial Lawyers' Los Angeles Chapter (abtL-LA) Summer 2019 Report. Justice Edmon's piece, coauthored with Judge Samantha P. Jessner of the Civil Division of the Los Angeles Superior Court, was entitled "Gender Equality Is Part of the Civility Issue," and Judge Kuhl's piece was entitled "Winning Through Cooperation."

**James Forman Jr.** of Yale Law School was honored by New Haven Legal Assistance Association at its Equal Access to Justice Reception.

**Holly J. Fujie** of the Los Angeles County Superior Court was honored by the Japanese American Bar Association at its Third Annual Judges' Night Reception.

Duke Law School launched the Duke Center for Science and Justice in September. The center, led by **Brandon L. Garrett**, will work to apply legal and scientific research to reforming the criminal justice system.



*Holly J. Fujie*

**E. Susan Garsh**, Retired Justice of the Massachusetts Superior Court, is the recipient of the 2019 Haskell Cohn Award for Distinguished Judicial Service, presented by the Boston Bar Association. The Haskell Cohn Award is presented to a member of the Massachusetts judiciary, or a resident of Massachusetts who is a member of the federal judiciary, who has distinguished himself/herself in a manner that calls for special recognition.

**Thomas C. Goldstein**, cofounder and publisher of SCOTUSblog, and **Daniel P. Tokaji** of Ohio State University Moritz College of Law participated in The American Constitution Society's 2018-2019 Supreme Court Review at the National Press Club.

In July, **Eric L. Hirschhorn** testified before the U.S. Senate Committee on Banking, Housing, and Urban Affairs on implementation of the Export Control Reform Act of 2018.

# New Members Elected

On July 18, the Council elected the following 60 persons.

**Aviva Abramovsky**, Buffalo, NY  
**Afra Afsharipour**, Davis, CA  
**Deborah Brereton Barbier**, Columbia, SC  
**Wendy Beetlestone**, Philadelphia, PA  
**Jeannine A. Bell**, Bloomington, IN  
**Anna Blackburne-Rigsby**, Washington, DC  
**Tracie L. Brown**, San Francisco, CA  
**John Buckley**, Washington, DC  
**John Joseph Cannon, III**, New York, NY  
**Thomas A. Chaseman**, New York, NY  
**Kenneth Chin**, New York, NY  
**Huey P. Cotton, Jr.**, Van Nuys, CA  
**Gonzalo P. Curiel**, San Diego, CA  
**John F. Fischer**, Tulsa, OK  
**Michael A. Fitzpatrick**, Washington, DC  
**Joseph B. Frumkin**, New York, NY  
**Jacob E. Gersen**, Cambridge, MA  
**Richard Glazer**, Philadelphia, PA  
**Marcy H. Greer**, Austin, TX  
**Roger L. Gregory**, Richmond, VA  
**Benjamin E. Griffith**, Oxford, MS  
**Andrew Grumet**, New York, NY  
**Vivian Eulalia Hamilton**, Williamsburg, VA  
**Noel L. Hillman**, Camden, NJ  
**Sandra A. Jeskie**, Philadelphia, PA  
**Sonia Victoria Jimenez**, Washington, DC  
**Elizabeth E. Joh**, Davis, CA  
**Marcel Kahan**, New York, NY  
**Curtis E.A. Karnow**, San Francisco, CA  
**David Andrew Katz**, New York, NY

**Sarah M. Konsky**, Chicago, IL  
**Alexandra D. Lahav**, Hartford, CT  
**Jan P. Levine**, Philadelphia, PA  
**Browne C. Lewis**, Cleveland, OH  
**Lyrissa Barnett Lidsky**, Columbia, MO  
**Simon M. Lorne**, New York, NY  
**Paul B. Matey**, Newark, NJ  
**Suzanne Ross McDowell**, Washington, DC  
**Michael H. McGinley**, Philadelphia, PA  
**Maria D. Melendez**, New York, NY  
**Erin Nealy Cox**, Dallas, TX  
**David Reiss**, Brooklyn, NY  
**Gwendolyn Prothro Renigar**, Washington, DC  
**David B. Rich III**, New York, NY  
**Allison Jones Rushing**, Asheville, NC  
**Nicole A. Saharsky**, Washington, DC  
**John Sare**, New York, NY  
**Matthew W. Sawchak**, Raleigh, NC  
**Ronald Joseph Scalise, Jr.**, New Orleans, LA  
**Hans Schulte-Nölke**, Osnabruck, Germany  
**Aviam Soifer**, Honolulu, HI  
**David A. Strauss**, Chicago, IL  
**Ethan V. Torrey**, Washington, DC  
**Marketa Trimble**, Las Vegas, NV  
**Ari Ezra Waldman**, New York, NY  
**Sarah Hawkins Warren**, Atlanta, GA  
**Linda A. Wasserman**, Bloomfield Hills, MI  
**Paul J. Watford**, Pasadena, CA  
**Neil G. Westesen**, Bozeman, MT  
**Flavio Luiz Yarshell**, Sao Paulo, Brazil

## In Memoriam

### James A. Henderson Jr.

James A. Henderson Jr., the Frank B. Ingersoll Professor of Law Emeritus at Cornell Law School, died on July 2, 2019, at the age of 81. An ALI member for more than 40 years, he served as co-Reporter of Restatement of the Law Third, Torts: Products Liability, which was completed in 1998. Professor Henderson testified extensively on torts, products liability, and insurance before the Senate and Congress, as well as before numerous state legislatures. He also served as a special master for the World Trade Center first responders' litigation in the U.S. District Court for the Southern District of New York.



#### ELECTED MEMBERS

**F. Leary Davis**, Greensboro, NC; **Malcolm C. Lindquist**, Seattle, WA; **Judith L. Maute**, Norman, OK; **Sarah Michael Singleton**, Santa Fe, NM

#### LIFE MEMBERS

**Kenneth J. Bialkin**, New York, NY; **Wayne Boyce**, Newport, AR; **Mortimer M. Caplin**, Washington, DC; **Milo G. Coerper**, Chevy Chase, MD; **Albert W. Driver, Jr.**, Mountainside, NJ; **James R. Greenfield**, New Haven, CT; **James A. Henderson, Jr.**, Ithaca, NY; **George C. Keady, Jr.**, Longmeadow, MA; **Arthur A. McGiverin**, Cedar Rapids, IA; **Manuel L. Real**, Los Angeles, CA; **Jeffrey G. Sherman**, Chicago, IL; **David Simon**, New York, NY; **S. Shepherd Tate**, Memphis, TN; **George M. Treister**, Los Angeles, CA; **James W. Wilson**, Austin, TX; **J. Sam Winters**, Austin, TX; **G. Robert Witmer, Jr.**, Rochester, NY; **K. Martin Worthy**, Brunswick, GA

## NOTES CONTINUED FROM PAGE 19

**William C. Hubbard** of Nelson Mullins participated in a debate at the Oxford Union on the motion “This House believes that modern (Western) democracy no longer supports the rule of law.” U.S. Supreme Court Associate Justice **Neil M. Gorsuch** was in attendance and questioned the debaters after the initial round of arguments.



*William C. Hubbard of Nelson Mullins (left) and Neil M. Gorsuch of the Supreme Court of the United States (center) with other participants from the debate on Western Democracy at the Oxford Union*

**Linda A. Klein** of Baker Donelson was appointed to the Board of Councilors of The Carter Center, a not-for-profit organization advancing peace and health worldwide.

**Elizabeth Lang Miers** of Locke Lord was sworn in as 2019-20 Chair of the ABA’s Judicial Division during the ABA’s annual meeting in August. Ms. Lang Miers rejoined Locke Lord in April after serving on the Court of Appeals for the 5th District of Texas at Dallas for 15 years.

**John G. Levi** of Sidley Austin was honored with the “Champion of Justice Award,” at the 2019 Legal Aid Chicago Luncheon, presented by Illinois Governor J.B. Pritzker. Mr. Levi was recognized for the significant impact he has made as Chairman of the Board of the Legal Services Corporation.

**Roberta D. Liebenberg** of Fine, Kaplan and Black and **Dena Sharp** of Girard Sharp were recognized by *The National Law Journal* in its 2019 list of elite trial lawyers in the “Elite Women of the Plaintiffs’ Bar” category. This category celebrates women lawyers who have consistently excelled in high-stakes matters on behalf of plaintiffs.

**Lance Liebman** of Columbia Law School was honored with a retirement luncheon in April. Friends, family, former students, the faculty, and senior administrators gathered to honor Professor Liebman and his many contributions to the law school over the course of his 28-year-long career.

**Jenny S. Martinez** of Stanford Law School took part in a video discussion about technology in society with Facebook founder and CEO Mark Zuckerberg and Noah Feldman of Harvard Law School. The video was the fourth in a series of public discussions hosted by Mr. Zuckerberg.

**Judy Perry Martinez** of Simon, Peragine, Smith & Redfearn became the ABA’s 143rd president. Ms. Martinez will serve a one-year term ending in August 2020. **Patricia Lee Refo** of Snell & Wilmer assumed the role of president-elect.

**M. Margaret McKeown** of the U.S. Court of Appeals for the Ninth Circuit received the 2019 John Marshall Award, presented by the ABA’s Judicial Division and the

Standing Committee on the American Judicial System. The award recognizes individuals who have had a positive national impact on the justice system.

**Paul Mogin** of Williams & Connolly authored an article entitled “Grounded on Newly Discovered Evidence,” featured in Fall 2019 issue of Georgetown Law’s *American Criminal Law Review* (Vol. 56, No. 4).

**Erin E. Murphy** of NYU School of Law was quoted in a KUOW.org article “A murder trial in Snohomish County will change genetic privacy forever,” which details the ongoing trial of William Talbott II, accused of murdering two people in 1987.

**Sean D. Murphy** of George Washington University Law School was chosen by the Federal Republic of Nigeria to serve as an *ad hoc* judge for a proceeding before the International Tribunal for the Law of the Sea.

**Alexandra Natapoff** of UC Irvine School of Law authored an article for *Law360* entitled “US Misdemeanor System Should Honor Principles of Justice.”

**Saikrishna B. Prakash** of UVA School of Law coauthored Article II, Section 3, for the *Interactive Constitution*. A free online platform, the *Interactive Constitution* brings together scholars from across the legal and philosophical spectrum to explore the meaning of each provision of our founding document.

**Jed S. Rakoff** of the U.S. District Court for the Southern District of New York was a guest on *Common Law*, a UVA Law podcast hosted by UVA School of Law Dean **Risa L. Goluboff** and Vice Dean **Leslie Carolyn Kendrick** in an episode entitled “Science and the Gavel.”

**Kevin R. Reitz** of University of Minnesota Law School and **Cecelia M. Klingele** of University of Wisconsin Law School published an article in Volume 48 of *Crime and Justice*, a journal from the University of Chicago, entitled “Model Penal Code: Sentencing—Workable Limits on Mass Punishment.”



*Lance Liebman*

## NOTES CONTINUED FROM PAGE 21

## RECENT BOOKS FROM ALI MEMBERS

**Curtis A. Bradley** of Duke Law School has completed work as editor of *The Oxford Handbook of Comparative Foreign Relations Law*. The *Handbook* seeks to lay the groundwork for the relatively new field of comparative foreign relations law.

**Elizabeth Chamblee Burch** of University of Georgia School of Law has published *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation*. The book “marshals a wide array of empirical data on multidistrict litigation to suggest that the systematic lack of checks and balances in our courts may benefit everyone but the plaintiffs.”

*The Conservative Case for Class Actions* by **Brian T. Fitzpatrick** of Vanderbilt Law School will be available this fall from The University of Chicago Press. The book makes the case for the importance of class action litigation from a conservative political perspective.

**Neil M. Gorsuch**, Associate Justice of the Supreme Court of the United States, published a new book, *A Republic, If You Can Keep It*. In it, Justice Gorsuch reflects on his journey to the Supreme Court, the role of the judge under the U.S. Constitution, and the vital responsibility of each American to keep our republic strong.

**George W. Liebmann** of Liebmann & Shively had three books re-issued in paper editions by Bloomsbury Publishing: *Diplomacy Between the Wars: Five Diplomats and the Shaping of the Modern World* (2008), *The Fall of the House of Speyer: The Story of a Banking Dynasty* (2015), and *America’s Political Inventors: The Lost Art of Legislation* (2018).

President and Chief Legal Officer of Microsoft **Bradford L. Smith** published a new book, *Tools and Weapons: The Promise and the Peril of the Digital Age*, co-authored with Director of Executive Communications for Microsoft Carol Ann Browne. *Tools and Weapons* examines the tech industry’s increasing level of advancement – its limitless potential and subsequent rising level of risk – as we continue to digitize our world.

**Sonia Sotomayor**, Associate Justice of the Supreme Court of the United States, published a children’s book in collaboration with award-winning artist Rafael Lopez. *Just Ask!* is a kind and thoughtful explanation for children about how to understand and respect the ways in which we are all unique.

The American College of Environmental Lawyers (ACOEL) elected ALI Director **Richard L. Revesz** as an honorary fellow. ACOEL is a nonprofit organization of highly respected environmental lawyers dedicated to maintaining and improving the ethical practice of environmental law; the administration of justice; and the development of environmental law at both the state and federal level through collegial interaction, education, and outreach.

**Abbe Smith** of Georgetown Law was featured in a video conversation with Georgetown Law Criminal Defense and Prisoner Advocacy Clinic colleague and Professor Vida Johnson, responding to the 7-2 Supreme Court ruling in *Flowers v. Mississippi*, which found that death-row inmate Curtis Flowers’ criminal trial was affected by racial discrimination.

*Just Mercy*, the film based on the award-winning book *Just Mercy: A Story of Justice and Redemption* by founder of the Equal Justice Initiative **Bryan Stevenson**, premiered at the Toronto International Film Festival in September. The film is based on the true story of Mr. Stevenson’s tireless efforts to defend Walter McMillian, an African-American man who was sentenced to die for a murder that he did not commit.

**E. Thomas Sullivan** of The University of Vermont received the Vermont Council of World Affairs 2019 Award for his scholarship on international principles of proportionality and his commitment to international student recruitment and education.



E. Thomas Sullivan (center)

**Heath P. Tarbert** began his term as the 14th Chairman of the U.S. Commodity Futures Trading Commission, succeeding J. Christopher Giancarlo.

**Dennis J. Wall** of the Law Office of Dennis J. Wall made updates to *Litigation and Prevention of Insurer Bad Faith*, published by Thomson Reuters West, in its third edition. The volume explains all the features of insurance bad-faith law for both students and practitioners.

**If you would like to share any recent events or publications in the next ALI newsletter, please email us at [communications@ali.org](mailto:communications@ali.org).**

# Complimentary CLE for All Members

Through the LawPass portal (**CLE for Members** on the ALI.org Members page), ALI members enjoy complimentary access to a vast database of ALI CLE's premier professional development content, including:

- Webcasts
- On-demand video programs
- On-demand audio/MP3 downloads
- Online course materials
- Articles and forms

In addition to having access to free online courses, ALI members may attend ALI CLE multi-day, in-person courses at a discounted rate of \$699 (courses regularly priced at \$1,299-\$1,899).

To take advantage of this member benefit, visit *ali-cle.org* and use coupon code **ALIMCLE**. Members may share this discount with friends and colleagues.



## NOW AVAILABLE ON-DEMAND:

*What No One Told You About Nonprofit Fundraising: Legal Pitfalls and Best Practices to Avoid Them* featuring **Andrew Grumet** and Christina N. Cahill of Polsinelli. Mr. Grumet served as an Adviser on Restatement of the Law, Charitable Nonprofit Organizations.

# Meetings and Events Calendar At-A-Glance

*For more information, visit [www.ali.org](http://www.ali.org).*

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

## 2019

### October 17-18

Council Meeting - October 2019  
New York, NY

### October 24

Model Penal Code: Sexual Assault and Related Offenses  
Philadelphia, PA

### October 31

Principles for a Data Economy  
Philadelphia, PA

### November 15

Restatement of the Law Third, Conflict of Laws  
Philadelphia, PA

## 2020

### January 16-17

Council Meeting - January 2020  
Philadelphia, PA

### March 12-13

Restatement of the Law Third, Torts: Concluding Provisions  
Philadelphia, PA

### March 20

Restatement of the Law, Corporate Governance  
New York, NY

### March 27

Restatement of the Law, Copyright  
Philadelphia, PA

### April 2

Principles of the Law, Policing  
Philadelphia, PA

### May 18-20

97th Annual Meeting  
San Francisco, CA

### October 22-23

Council Meeting - October 2020  
New York, NY

### November 13

Restatement of the Law Third, Torts: Remedies  
Philadelphia, PA



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A stylized graphic of the Golden Gate Bridge in San Francisco, rendered in a dark red color. The bridge's towers and suspension cables are visible against a dark blue, geometric background.

# SAVE THE DATE

## 97TH ANNUAL MEETING

MAY 18-20, 2020  
THE WESTIN ST. FRANCIS  
SAN FRANCISCO