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ALI Council Approves All or Part of Six Project Drafts at October Meeting

At its meetings on October 13 and October 22-23, 2020, the Council reviewed and discussed Council Drafts of seven projects and approved drafts and portions of drafts as listed below. All approvals are subject to the discussion at the meeting and the usual editorial prerogative.

The next ALI Council Meeting will be held via Zoom on January 21-22, 2021.

Children and the Law

The Council approved Council Draft No. 6, containing § 1.60 from Chapter 1, Parental Authority and Responsibilities; § 2.60 from Chapter 2, State Intervention for Abuse and Neglect; §§ 9.10 and 9.20 from Chapter 9, Religion in Public Schools; §§ 12.10 and 12.11 from Chapter 12, Pre-Adjudication; and §§ 14.20 and 14.21 from Chapter 14, Delinquency Dispositions.

Compliance, Risk Management, and Enforcement

The Council approved §§ 6.01-6.20 of Chapter 6 of Council Draft No. 4, which included principles common to enforcement by criminal prosecutors and civil enforcement officials, as well as criminal enforcement policy for misconduct by organizations. The approval excludes new material on joint defense agreements to be drafted by the Reporters in accordance with the discussion at the meeting and included in the next Council Draft.

The Council also discussed Chapter 4, Compliance Risk Management, but no vote was taken. The Reporters will revise the Chapter in accordance with the discussion for the Council's consideration in January 2021.

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Now Available:
Principles of the Law, Data Privacy

SEE PAGE 12 FOR MORE INFORMATION. ORDER ONLINE AT WWW.ALI.ORG/PUBLICATIONS.

THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

The American Law Institute and the U.S. Supreme Court, Revisited

In my Winter 2016 Director's Letter, I looked at the U.S. Supreme Court's use of ALI materials during the 2013 to 2015 Terms, as part of an effort to examine how the ALI's influence extends beyond the state courts and affects the development of federal law. Now that four years have passed since my last analysis of the Supreme Court's use of ALI materials and several new Justices have joined the Court, revisiting this topic seems worthwhile.

During the 2016 to 2019 Terms, the Supreme Court cited ALI publications in 51 separate opinions across 42 argued cases—roughly 15 percent of the total number of cases argued. (This proportion is comparable to the 16 percent of argued cases citing ALI publications during the 2013 to 2015 Terms.) Thirty-one of these 51 opinions were majorities, 17 were dissents, and three were concurrences. Eleven opinions relied on more than one ALI publication. Justice Sotomayor was the most frequent author of opinions citing ALI publications, with 10 opinions, followed by Justice Thomas and Justice Breyer with eight each, Justice Alito with seven, and Justice Ginsburg and Justice Gorsuch with five each. Every Justice cited the ALI's work at least once.

Since 2016, Torts is the field of ALI work that the Court has cited most frequently, with 17 opinions: three citing the original Restatement, 10 the Restatement Second, two the Restatement Third, Torts: Products Liability, and two the Restatement Third, Torts: Liability for Physical and Emotional Harm. Next, there are nine opinions citing the Model Penal Code and nine opinions citing the Restatement of the Foreign Relations Law of the United

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ALI COUNCIL MEETING CONTINUED FROM PAGE 1

Conflict of Laws

The Council discussed §§ 6.01, 6.05, and 6.10 of Council Draft No. 4, which contained Topic 1, General Rules, of Chapter 6 on Torts, but no approval vote was taken. Working with a small group of Council members, the Reporters will explore (i) reformulating the system set out in the black letter using a general rule of place of conduct with exceptions for common domicile and split domicile, and (ii) moving the description of the distinction between conduct-regulating issues (territorial connecting factors) and loss-regulating issues (personal connecting factors) to the commentary.

Government Ethics

The Council approved Council Draft No. 6 containing §§ 501(d), 514, and 515 from Chapter 5, Revolving-Door Restrictions, and all of Chapter 6, Disclosure, subject to review of a revised draft of Chapter 6 by a small group of Council members.

Property

The Council approved Council Draft No. 3, which contained Chapters 1-5 of Division One, The Estate System, of Volume 4 (Divided and Shared Ownership), and Chapters 4-7 of Division One, Zoning, of Volume 7 (Land Use).

Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities

The Council approved §§ 6.8-6.10 of Chapter 6, Formal Resolution of Sexual-Misconduct Complaints, of Council Draft No. 4. The Council also discussed but did not vote on whether to approve § 6.7, which the Reporters will revise in accordance with the discussion. There was insufficient time to discuss the remainder of the draft.

Torts: Concluding Provisions

The Council approved §§ 1-3 of Chapter 11, Liability of Medical Professionals and Institutions, in Council Draft No. 1, excluding Illustrations 5-8 in § 2. The Reporters may revise the excluded Illustrations in a future draft. There was insufficient time to discuss the remainder of the Council Draft.

Members interested in any of these projects can access drafts in the Projects section of the ALI website. Those who join a Members Consultative Group will be alerted when future meetings are scheduled and when drafts are available online.



Clockwise from top left: Raymond J. Lohier, Jr., of the U.S. Court of Appeals, Second Circuit; Judith A. Miller; Catherine T. Struve of University of Pennsylvania Carey Law School; and Larry D. Thompson of Finch McCranie during the Compliance, Risk Management, and Enforcement session



Clockwise from top left: Laura Denvir Stith of the Missouri Supreme Court; Troy A. McKenzie of New York University School of Law; John B. Bellinger III of Arnold & Porter; and Teresa Wilton Harmon of Sidley Austin during the Government Ethics session



Clockwise from top left: Patricia Ann Millett of the U.S. Court of Appeals, District of Columbia Circuit; Ketanji Brown Jackson of the U.S. District Court for the District of Columbia; Robert H. Sitkoff of Harvard Law School; and Abbe R. Gluck of Yale Law School during the Torts: Concluding Provisions session

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States, with three citing the Restatement Fourth of the Foreign Relations Law of the United States (including two citations to a Tentative Draft), five the Restatement Third, and one the Restatement Second.

Not surprisingly, several of the citations are to Restatements involving federal law. For example, in *United States Patent & Trademark Office v. Booking.com*, which sadly turned out to be her final majority opinion for the Court, Justice Ginsburg cited § 15 of the Restatement Third of Unfair Competition in holding that Booking.com is not a generic term ineligible for trademark registration under the Lanham Act. And in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Company*, the Court considered whether a nonfrivolous, but ultimately unsuccessful, claim that property was taken in violation of international law is sufficient to confer jurisdiction under the expropriation exception to the Foreign Sovereign Immunities Act of 1976. The Court relied on the Restatement Third of the Foreign Relations Law of the United States and a Tentative Draft of the Restatement Fourth in holding that the claim must be valid, not merely nonfrivolous. In addition, the Supreme Court also considered other types of ALI projects dealing with federal law, such as the ALI's 1969 Study of the Division of Jurisdiction Between State and Federal Courts and the 2004 Federal Judicial Code Revision Project.

The Supreme Court has also looked to our Restatements of state common law, as well as the Model Penal Code, for guidance on a range of constitutional, procedural, and statutory issues arising under federal law. On the constitutional front, for example, the Court relied on the Restatement Third of Trusts in *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust* in holding that the Due Process Clause of the Fourteenth Amendment limits a state's ability to tax in-state beneficiaries of a trust who have no right to demand trust income and are uncertain to receive it. With respect to procedural matters, in *McDonough v. Smith* the Court held that the statute of limitations for a fabricated-evidence claim under § 1983 begins to run only when the defendant is acquitted, not when the fabricated evidence is used. In that case, the Court cited our Restatement Second of Torts in drawing an analogy between the fabricated-evidence claim and the common-law tort of malicious prosecution. And in the statutory field, both our Restatements and Model Penal Code have been helpful for ascertaining the elements of predicate offenses like burglary referenced in statutes such as the Armed Career Criminal Act, which is a frequent issue before the Supreme Court given that the definitions of these offenses often vary among the states.

My Winter 2016 Director's Letter also addressed criticism of the ALI's work made by Justice Scalia in a 2015 partial concurrence and partial dissent in *Kansas v. Nebraska*. Justice Scalia claimed that the newer Restatements do not accurately describe the law as it is but instead reflect the Reporters' own normative vision of what the law should be. He warned that "it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law." This issue came up again this past June when Justice Thomas wrote a dissenting opinion in *Liu v. SEC* that quoted Justice Scalia's criticism in discussing the Restatement Third of Restitution and Unjust Enrichment.

I agree that it is vital that our Restatements accurately describe the law. Even before Justice Scalia's criticisms, we added a provision to our Style Manual requiring that a Restatement adopting a minority position "should say so explicitly and explain why." The ALI, the Style Manual adds, "needs to be clear about what it is doing." Such clarity makes it as easy as possible for busy judges and other readers who wish to make "further inquiry" into the case law underlying our Restatements to do so.

I like to think that it is at least in part because we have heightened our transparency and made it crystal clear where the Restatement adopts a minority or new position not well embedded in the prevailing law that both Justice Scalia and Justice Thomas continued to rely on our work. As I pointed out in my Winter 2016 Director's Letter, Justice Scalia was the member of the Court who most cited the ALI's work during the 2013-2015 Terms, and he cited the newer Restatements as well as the older ones around the time of his opinion in *Kansas v. Nebraska*. As indicated above, Justice Thomas is also one of the Justices who most uses our work. And while he has cited many of our older Restatements, he has also made use of our newer Restatements, too. In fact, he became only the second Justice to cite to the Fourth series when he quoted a Tentative Draft of the Restatement Fourth of the Foreign Relations Law of the United States in his dissent in *Upper Skagit Indian Tribe v. Lundgren* in 2018.

It is gratifying to see the Supreme Court use our publications in so many ways. The trust the Justices repose in our work is to be earned and safeguarded. We should continue to be very proud of our work!

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*.

Fall Project Meetings Come to a Close

As 2020 comes to a close, so does ALI's busiest time of year. Thank you to all the members and project participants who came together in this new endeavor of virtual project meetings and continue to give their time to the work of the Institute. We look forward to seeing you in person soon.

Children and the Law (Nov. 6)
The material presented in Preliminary Draft No. 7 includes two Sections related to parental authority and responsibilities (§§ 1.50-1.51); seven Sections related to dispositions in child-protection cases (§§ 2.30-2.36); additional Comments to Sections in Part II, Children in Schools (§ 5.10, Comment *i*; § 7.10, Comment *k*; and § 7.20, Comment *h*); and five Sections from Part III, Children in the Justice System (§§ 12.30-12.32, 14.10-14.11). This project was also on the October Council Meeting agenda. See page 1 for more information.

Compliance, Risk Management, and Enforcement (Nov. 19)
After presenting Sections to the Council in October (see page 1), project participants convened to discuss Preliminary Draft No. 7, which includes new Sections to Chapter 6 on Criminal and Civil Enforcement Against Individuals and Companies for Corporate Misconduct, Topic 4. Corporate Civil and Administrative Enforcement Policy.

Conflict of Laws (Oct. 29)
Participants discussed Preliminary Draft No. 6, which includes a new Section in Chapter 5 on Choice of Law—§ 5.04, Public Policy—and revisions of Chapter 8 on Contracts (§§ 8.01-8.11). This project was also on the October Council Meeting agenda. See page 2 for more information.

Corporate Governance (Nov. 12)
Preliminary Draft No. 1 includes Part I, Definitions (§§ 1.23-1.24) and Part II, The Objective of the Corporation (§ 2.01). A revised draft of § 2.01 was emailed to project participants after Preliminary Draft No. 1 was distributed, and is also available on the Corporate Governance project page. The next Corporate Governance (virtual) project meeting is scheduled for March 25, 2021.



Holly J. Fujie of the Superior Court of California, County of Los Angeles (Children and the Law)



Ivan K. Fong of 3M Co. (Corporate Governance)

Recent Books from ALI Members

Year-round, we highlight recent works authored by our members on our website and in *The ALI Reporter*. Here are some covers of works from our membership this year. If you have a new publication you would like to share with our membership, please email *communications@ali.org*.





Sarah C. Dodds-Brown of American Express (Data Economy)



Virginia M. Kendall of the U.S. District Court, Northern District of Illinois (Sexual Assault and Related Offenses)



Samuel A. Thumma of the Arizona Court of Appeals, Division One (Torts: Remedies)

Data Economy (Oct. 8)

Preliminary Draft No. 4 contains Principles 11-15 and 24-40, covering the following subjects: data contracts (Part II, Chapters B and C), data rights (Part III, Chapter C), third-party aspects of data activities (Part IV, Chapters A-C), and multi-state issues (Part V). Please note that the numbering of the Principles has changed since the distribution of Preliminary Draft No. 3 (2019). A correlation table is included on page 6 of Preliminary Draft No. 4 as a guide to the new numbering.

Government Ethics (Oct. 16)

Preliminary Draft No. 6 includes a new Chapter—Chapter 7 on Administration and Enforcement of Ethics Provisions. This project was also on the October Council Meeting agenda. See page 2 for more information.

Property (Oct. 9)

All of the material presented in Preliminary Draft No. 7 is new and includes Sections on privileges to trespass, a Section on ejectment, and extensive Sections on land transfer, land records, and marketable title acts. This project was also on the October Council Meeting agenda. See page 2 for more information.

Sexual Assault and Related Offenses (Nov. 5)

Preliminary Draft No. 11 covers § 213.8 on Sexual Offenses Involving Minors and § 213.11-213.11J on Collateral Consequences of Conviction.

Torts: Remedies (Nov. 13)

This was the first project meeting for this Restatement project. Preliminary Draft No. 1 includes an introductory Section on the Right to a Remedy and 14 Sections on the General Rules for Measuring Compensatory Damages (§§ 2-9, 11-16).

Members interested in any of these projects can access drafts in the Projects section of the ALI website. Those who join a Members Consultative Group will be alerted when future meetings are scheduled and when drafts are available online.



Project Spotlight: Restatement of the Law Third, Torts: Remedies

This fall, the first draft was produced and the first project meeting was held for the Torts: Remedies project. This project was launched along with two other Torts projects, Defamation and Privacy and Concluding Provisions, which once complete will be part of the nine-book collection* that will be the entirety of the Restatement of the Law Third, Torts.

Once approved by the ALI Council and membership, this project will supersede the remedies Sections of Restatement Second, Torts. The Restatement Second recognized compensatory damages, injunctions, and other remedies as appropriate in particular cases. The Restatement Third reorganizes, consolidates, and expands the Restatement Second's discussion of remedies.

Preliminary Draft No. 1, § 1 is titled "Introduction: The Right to a Remedy." This Section is much like an index section, providing a preview of what is to come in this project. Project participants will recognize the following as excerpted from the Comments of § 1. These provide a broad overview of this project, and serve as a roadmap for any members who wish to join the project now.

If you are curious about all of the proposed Sections, the Preliminary Draft contains a projected table of contents for the entire project. Project Reporters Douglas Laycock and Richard Hasen note that, "The higher the proposed Section number, the more preliminary that table is. We think that the basic structure is sound and that any structural changes will be modest."

Most of Chapter 1: Compensatory Damages; Topic 1. General Rules for Measuring Compensatory Damages was presented at the first project meeting.

JOIN THE MCG

Now is the perfect time for interested members to join the Members Consultative Group (MCG). MCG participants will be alerted when future meetings are scheduled and when drafts are available.

This Restatement puts liability issues to one side, assuming that plaintiff can prove defendant's liability (or, in the case of preliminary injunctive relief, likelihood of liability). Similarly, this Restatement does not take a position on the question of whether a jurisdiction should recognize specific torts discussed in this Restatement, but considers only the appropriate remedy and the scope or measure of that remedy if the jurisdiction recognizes a specific tort. Illustrations describe conduct that causes or threatens harm and creates the need for a remedy, and the Illustrations assume that the conduct described is tortious. Often the tort will be obvious. But when the assumed tort is not obvious, this Restatement takes no position on whether the conduct is or should be a tort. Other parts of the Restatement Third, Torts, consider the standards for liability.

It is common to speak of liability rules as "substantive" when contrasting liability rules with remedial rules. This casual usage rarely causes any serious confusion, but it is not accurate, because the law of remedies is also substantive. Except for a few details in the law of preliminary relief, remedies law is no part of the procedural rules by which disputes are litigated. What and how much a plaintiff recovers is part of the plaintiff's substantive entitlement and not simply a rule for processing disputes. The law of remedies determines the practical extent of plaintiff's rights and of defendant's liabilities, and a plaintiff's rights under liability rules are meaningless without effective remedies. As many cross-references in this Restatement may suggest, the line between remedies law and the rest of the substantive law is often unclear or disputed. When it is necessary to distinguish remedies law from the rest of the substantive law, this Restatement will refer to liability rules, the law governing liability, or similar formulations.

The most common tort remedy is compensatory damages. Given their frequent use in tort litigation, compensatory damages take up a major portion of this Restatement. Compensatory damages are the dominant remedy in tort because torts often occur suddenly (as with most personal injuries), or they proceed in secret before the potential plaintiff discovers what has happened (as with most frauds and latent injuries from harmful substances). Either way, a potential plaintiff often lacks sufficient warning to obtain an injunction before the tort occurs. But when a tort is continuing or repeated, or in other circumstances in which a threatened tort can be anticipated, an injunction against the defendant is an important remedy. And some torts can be reversed, as when converted or misappropriated property is returned to its owner in replevin or pursuant to an injunction.

Many torts are profitless to the defendant, and without some benefit to the defendant, restitutionary remedies are inapplicable. Punitive damages are exceptional, aimed principally at punishment and deterrence. The remaining tort remedies are specialized, or beneficial to a plaintiff only in limited situations. These various limitations leave compensatory damages as by far the most common and most important tort remedy.

Although compensatory damages are the most common remedy in tort, this Restatement also considers other appropriate remedies for tort liability.

Injunctive relief seeks to prevent future harm, including the continuing effects of a tort committed in the past. Courts enforce injunctions through the contempt power, which is used to coerce defendant's behavior or compensate

plaintiff for violations of the injunction. Declaratory judgments declare the rights and responsibilities of the parties. Declaratory judgments are implicitly coercive, because the court can follow through with an injunction if necessary.

Nominal damages are awarded to vindicate a right without regard to actual damages; they function like a declaratory judgment with respect to past events. Punitive damages award more than the sum needed to restore tort victims to their rightful position (see § 2); they are designed to punish wrongdoing and to provide greater deterrence than compensatory damages alone.

Restitutionary remedies are generally measured by an intentional tortfeasor's unjust enrichment from the wrong. These remedies are attractive to a plaintiff when the defendant's provable profits exceed the plaintiff's provable damages, or when the plaintiff has a restitutionary claim to recover specific property. A plaintiff generally seeks restitution of a defendant's profits only in these circumstances, with the result that when restitutionary remedies are available, they often award more than the recovery available or collectible as compensatory damages. The principal goal of these restitutionary remedies is to ensure that conscious wrongdoers do not profit from their wrongs. Restitutionary claims to specific property are generally administered through equitable remedies such as constructive trust or equitable lien, which give the successful plaintiff a priority in bankruptcy.

Courts may award some remedies, such as punitive damages, in addition to compensatory damages; neither the purpose nor the measure of punitive damages duplicates the purpose or measure of compensatory damages. Other remedies may be duplicative of or inconsistent with compensatory damages. An award of nominal damages is duplicative of an award of compensatory damages for the same tort, and its declaratory purpose is fully served by the award of compensatory damages. Similarly, it would be improperly duplicative for a court both to enjoin future tortious conduct and also to compensate plaintiff with compensatory damages for expected losses from the threatened tortious conduct that is now enjoined.

Compensatory damages are substitutionary; they offer a sum of money as a substitute for plaintiff's true rightful position, a position in which the plaintiff had not been injured in the first place. Specific remedies also aim to restore plaintiffs to their rightful position, or to preserve threatened plaintiffs in that position by preventing the tort. These remedies seek to restore or preserve the rightful position in kind, rather than with an equivalent sum of money. These specific remedies include injunctions against threatened or continuing torts, injunctions to undo or repair the consequences of a tort, restoration of specific property, declaratory judgments, and constructive trusts and other specific restitutionary remedies.

Some courts and commentators refer to the award of a wrongdoer's profits in restitution as "damages," or as an alternate measure of damages. But that usage is both inaccurate and confusing and will never appear in this Restatement. The award of a wrongdoer's profits, or any other restitutionary remedy, is fundamentally different from compensatory damages. In some forms, such as disgorgement, restitution is an alternate monetary remedy, but it is not an alternate measure of the plaintiff's damages. Some restitutionary relief is specific (and traditionally available from courts of equity), and results in the plaintiff obtaining an interest in property to which defendant holds title, such as through a constructive trust.

Unlike compensatory damages, the award of punitive damages is not a measure of the plaintiff's rightful position. But the term "damages" is not confusing in this context, in part because it is so familiar and well understood, and in part because speakers and writers who mean punitive damages never use the word "damages" without the modifier "punitive."

Because remedies issues arise only if the injured person chooses to sue, after the parties are in court and generally after liability has been established, this Restatement will generally refer to "plaintiff" and "defendant" rather than to "an actor" and similar formulations common in many other Restatements.

***ONCE COMPLETE THE FOLLOWING WILL SUPERSEDE RESTATEMENT OF THE LAW SECOND, TORTS.**

PUBLISHED

Restatement of the Law Third, Torts: Apportionment of Liability

Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm

Restatement of the Law Third, Torts: Liability for Economic Harm

Restatement of the Law Third, Torts: Products Liability

CURRENT PROJECTS

Restatement of the Law Third, Torts: Intentional Torts to Persons

Restatement of the Law Third, Torts: Defamation and Privacy

Restatement of the Law Third, Torts: Remedies

Restatement of the Law Fourth, Property (addressing property torts such as nuisance and trespass)

Restatement of the Law Third, Torts: Concluding Provisions

Getting to Know ALI in 2020: New Members Attend Their First Project Meetings Held Virtually

The quality of the Institute's work is rooted in the gathering of its members for unfettered discussions on the most pressing legal issues of the day. ALI prides itself on the quality, depth, and civility of its project-meeting discussions, and cherishes the opportunity to bring together today's best legal minds to carry on scholarly and scientific legal work and help clarify and simplify the law.

This fall brought a new venture for the Institute, marking the completion of the first virtual-only season of project meetings. While the work of the Institute moved forward with great success, the camaraderie built in person is greatly missed.

In this piece, we celebrate some of our newest members (July 2020 Class). Although they joined the Institute at such a unique time, they demonstrate the dedication to its mission, even in these unprecedented circumstances. Here they share their experiences adapting to a remote environment and thoughts on what it was like to attend their first ALI project meetings virtually.



Lydia Kay Griggsby was appointed Judge of the United States Court of Federal Claims in 2014. Prior to her appointment, she served as the Chief Counsel for Privacy and Information Policy for the Senate Judiciary Committee. In 2004, Judge Griggsby was appointed counsel to the Senate Select Committee on Ethics. She served six years as an Assistant U.S. Attorney for the District of Columbia from 1998 to 2004. Between 1995 and 1998, Judge Griggsby was a trial attorney with the Civil Division of the United States Department of Justice, where she litigated complex civil matters before the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit. Prior to her appointment to the Department of Justice, Judge Griggsby was an associate at DLA Piper.

You attended your first ALI project meeting as a Members Consultative Group participant for Principles of the Law, Government Ethics, which took place remotely as a result of the pandemic. Although a remote project meeting cannot fully replace the experience of an in-person meeting, what did you take away from your first experience as a participant on an ALI project?

I very much enjoyed my first ALI project meeting. I was struck by the diversity of the views expressed and the experiences of the members of the consultative groups. I was very pleased to see that all views expressed during the meeting were valued and considered by the participants. Having worked on legislative ethics issues earlier in my legal career, I also appreciated the opportunity to share my own experiences.

As an ALI member joining the Institute during this unique time, what ALI experience are you most looking forward to when things return to normal?

I am looking forward to attending my first Annual Meeting as an ALI member. I have attended many Annual Meetings before, but my first meeting as a member will be very special.

What has been the most challenging experience adapting your work to a remote or hybrid environment? What have you learned that will change the way you work going forward?

Because the Court of Federal Claims has nationwide jurisdiction, I am accustomed to conducting some court proceedings remotely. But, conducting all oral arguments and trials remotely is quite challenging. I have learned that I can be very productive working from home, and I plan to incorporate telework into my work routine going forward.

As we close out 2020, what are you doing to stay connected to friends and family?

Lots of Zoom calls with family and friends. I text my godchildren daily to keep in touch.



Nadia N. Sawicki is a Georgia Reithal Professor of Law at Loyola University Chicago School of Law and Co-Director of Loyola's Beazley Institute for Health Law and Policy. Her areas of expertise are torts, health law, and bioethics. Professor Sawicki's research addresses issues at the intersection of these three fields, and she has published widely on subjects including law's role in shaping the informed-consent process; the challenges of protecting patients' rights to effective medical care while also accommodating health-care providers' conscientious beliefs; tort law's limitations in protecting the rights of patients making end-of-life decisions; and the state's role in enforcing ethical norms in medicine.

You attended two remote fall project meetings as a Members Consultative Group participant, Restatement Third of Torts: Intentional Torts to Persons and Restatement Third of Torts: Remedies. What did you take away from your experience as a remote participant on an ALI project?

I am lucky to have had the opportunity to experience these two remote meetings after having participated in one meeting in

person. I traveled to Philadelphia for my first ALI meeting in early March, just days before the COVID-19 lockdown began, to serve as an Adviser on Torts: Concluding Provisions. That first experience was so inspiring, and I was thrilled to be able to continue working on the Restatement after being elected as an ALI member. The remote meetings I attended this fall really did capture so much of the in-person experience. I have been impressed by my colleagues' ability to navigate this unique environment without losing any of the rigor, debate, and collegiality at the heart of the ALI experience.

What ALI experience are you most looking forward to when things return to normal ?

I am eager to attend my first ALI Annual Meeting, and I'm hopeful that we will all be able to travel to Washington, DC next May.

What has been the most challenging experience adapting your work to a remote or hybrid environment?

As a professor, the most challenging part of the transition to remote teaching has been learning how to connect with my students in a virtual environment. I have 73 first-year students in my Torts class, and their only experience of law school has been in front of a screen. Finding new ways to engage with them—both within the classroom and via informal opportunities like office hours and coffee talks—has been a learning process. Honestly, I think this experience has made me a better teacher, because it's made me rethink my traditional pedagogical practices and take a more innovative and creative approach.

As we close out 2020, what are you doing to stay connected to friends and family?

My parents, siblings, nieces, and nephews all live far from me, so video chats have been essential in keeping us connected. Here in Chicago, I'm still able to connect with a few of my closest friends in person. I have a large backyard with a fire pit, and once a week my husband and I invite someone to sit around the fire with us (at a distance), and imagine we're living in easier times.



Peter K. Yu is Regents Professor of Law and Communication and Director of the Center for Law and Intellectual Property at Texas A&M University. Born and raised in Hong Kong, Professor Yu is a leading expert in international intellectual property and communications law. He also writes and lectures extensively on international trade, international and comparative law, and the transition of the legal systems in China and Hong Kong. He is Vice-President and Co-Director of Studies of the American Branch of the International Law Association and has served as the general editor of *The WIPO Journal* published by the World Intellectual Property Organization.

You attended two fall project meetings as a Members Consultative Group participant, Principles for a Data Economy and Restatement of the Law, Copyright. What did you take away from your first experience as a participant on an ALI project?

I was keenly aware of how seriously ALI members take Institute projects, and I have seen the quality of Restatements and Principles, but nothing compares to seeing firsthand how the Reporters, Advisers, and other members work behind the scenes. Even on the rare occasions when strong disagreements arise, members work collegially and collaboratively to make sure that the work product best reflects the law and its current developments.

What ALI experience are you most looking forward to when things return to normal?

Meeting other ALI members face-to-face. The Institute includes a lot of luminaries in the legal field—whether at the bench, at the bar, or in academia. I am especially eager to participate in Institute projects that will teach me new insights and perspectives and that will allow me to develop a more holistic view of the legal system.

What has been the most challenging experience adapting your work to a remote or hybrid environment?

I have never been a big fan of online meetings. Compared with physical gatherings, I find these meetings not as conducive to collecting information and knowledge that I have not planned to solicit in advance. Before the pandemic, we tended to overlook the large amount of information that gets communicated, often spontaneously, through social gatherings and physical interactions. Even a handshake or a hug could tell us a lot.

As a longtime Lakers fan, you have witnessed a good amount of championship seasons. Does this year's championship feel different?

I am amazed you found that out. I have been supporting the Lakers since the late 1980s and have been a basketball referee at the University of Wisconsin. This year's championship felt different because of the lack of live fans and home-court advantage. As viewers, we also went into the postseason with very different expectations—not that different from resuming practice or teaching after a lockdown. But all in all, I am very happy that the Lakers finally have as many championships as that other team.

As we close out 2020, what are you doing to stay connected to friends and family?

What I do will depend on the number of confirmed COVID cases in my area, but this winter I most likely will stay home to connect with friends and family through virtual means. Technology has made it easy to communicate without face-to-face contact, and the last few months have transformed even technophobes into regular users. I do plan to use this winter to start making plans to visit friends and family after the pandemic—in the not too distant future, I hope.

ALI to Celebrate its New Life Members: the Class of 1996

In May, The American Law Institute will welcome a new class of Life Members—the Class of 1996. Each year, ALI members who have contributed 25 years of service to the Institute are granted Life Member status. Life Members are no longer required to pay dues or adhere to the Institute's participation requirement, but they continue to enjoy all the rights and privileges of elected membership.

The Class of 1996 will be honored at a special celebration to honor our new Life Members and 50-Year Members. While this event was originally intended to be a luncheon held during the 2021 Annual Meeting, we are currently exploring virtual alternatives should we be unable to hold the celebration in person. New Life Members are given the opportunity to commemorate this quarter-century milestone by contributing to the 1996 Life Member Class Gift, which will be presented to the Institute by the 1996 Life Member Class Gift Committee during the event. The 1996 Life Member Class Gift campaign will be chaired by William C. Hubbard of University of South Carolina School of Law.

Now in its 10th year, the Class Gift program has raised more than $1.3 million to support key aspects of ALI's mission, including the MCG Travel Assistance program and the Judges and Public-Sector Lawyers Expense Reimbursement program—two vital components of the Institute's efforts to minimize financial barriers to member participation.

The Class Gift initiative also provides funding for the Early Career Scholars Medal and annual conference program, which raises awareness of the Institute's work while engaging up-and-coming legal academics. Additionally, as ALI continues to expand the breadth of its law-reform endeavors, the Class Gift program helps cover some of the costs associated with maintaining the high level of quality that distinguishes the Institute's work.

The 1996 Life Member Class Gift campaign is now underway. For more information about the campaign, please contact Senior Development Manager Kyle Jakob at 215-243-1660 or kjakob@ali.org. Or, to learn about ALI's other ongoing fundraising initiatives, please visit *www.ali.org/support*.

1996 LIFE MEMBER CLASS

Bernard Audit, Paris, France; Universite Pantheon-Assas Paris II
Joseph F. Baca, Albuquerque, NM; New Mexico Supreme Court (Retired)
William T. Barker, Chicago, IL; Dentons US LLP
Deborah Hodges Bell, University, MS; The University of Mississippi School of Law
Anthony J. Bocchino, Philadelphia, PA; Temple University Beasley School of Law (Retired)
Ellen B. Brantley, Little Rock, AR; Circuit Court of Pulaski-Perry Counties, Sixth Judicial District (Retired)

Class of 1996 Facts & Figures





31 DIFFERENT STATES, DISTRICTS, OR TERRITORIES

8 DIFFERENT COUNTRIES

45 DIFFERENT LAW SCHOOLS ATTENDED

12 SERVED ON THEIR LAW SCHOOL'S LAW REVIEW, INCLUDING 4 AS EDITOR-IN-CHIEF

14 HELD JUDICIAL CLERKSHIPS, INCLUDING 2 FOR THE U.S. SUPREME COURT

2 HAVE SERVED IN THE U.S. MILITARY, REPRESENTING ARMY AND NAVY

3 ARE ALI COUNCIL MEMBERS

1 WAS A FULBRIGHT SENIOR SCHOLAR

2 HAVE SERVED AS ALI PROJECT REPORTERS

17 HAVE SERVED AS ADVISERS TO ALI PROJECTS

7 SERVE ON ALI REGIONAL ADVISORY GROUPS

Rebecca Brown, Los Angeles, CA; University of Southern California, Gould School of Law
K. King Burnett, Stow, MA; Webb Burnett Cornbrooks (Retired)
Janet Langford Carrig, Houston, TX; ConocoPhillips (Retired)
Cedric C. Chao, San Francisco, CA; Chao ADR, PC
Yee Wah Chin, New York, NY; Ingram Yuzek Gainen Carroll & Bertolotti, LLP
Stephen Yee Chow, Boston, MA; Hsuanyeh Law Group PC
William H. Clark, Jr., Philadelphia, PA; Faegre Drinker Biddle & Reath LLP
Gerald B. Cope, Jr., Miami, FL; Akerman LLP
Christopher Scott D'Angelo, Philadelphia, PA; Montgomery, McCracken, Walker & Rhoads, LLP
Keith L. Davidson, Chicago, IL; Law Offices of Keith L. Davidson
David N. Ellenhorn, New York, NY; Office of the Attorney General of New York
Charles M. Elson, Wilmington, DE; University of Delaware, Lerner College of Business & Economics
Charles E. English, Bowling Green, KY; English, Lucas, Priest & Owsley
Craig T. Enoch, Austin, TX; Enoch Kever PLLC
JoAnne A. Epps, Philadelphia, PA; Temple University
Jeffrey M. Feldman, Seattle, WA; Summit Law Group
Robert A. Feldman, Ann Arbor, MI
Kenneth C. Frazier, Kenilworth, NJ; Merck & Co., Inc.
Andrew L. Frey, New York, NY; Mayer Brown LLP
John M. Gerrard, Lincoln, NE; U.S. District Court of Nebraska
Patricia J. Gorence, Milwaukee, WI; U.S. District Court, Eastern District of Wisconsin (Retired)
Michael M. Greenfield, St. Louis, MO; Washington University School of Law
Leslie Joan Harris, Eugene, OR; University of Oregon School of Law (Retired)
Philip Lee Harris, Studio City, CA; ElevateNext Law Firm
Walter Hellerstein, Athens, GA; University of Georgia School of Law
Lawrence K. Hellman, Oklahoma City, OK; Oklahoma City University School of Law
Eric B. Henson, Philadelphia, PA; U.S. Attorney's Office
Miguel Angel Hernández Romo, Mexico City, Mexico; Foley Arena
John E. Higgins, Jr., Chevy Chase, MD
Gail K. Hillebrand, Washington, DC; Consumer Financial Protection Bureau (Retired)
William C. Hubbard, Columbia, SC; University of South Carolina School of Law
John A. Humbach, White Plains, NY; Pace University, Elisabeth Haub School of Law
Barry Hunsaker, Jr., Houston, TX
Sidney K. Kanazawa, Los Angeles, CA; Alternative Resolution Centers, LLC
Joette Katz, Hartford, CT; Shipman & Goodwin LLP
Kenneth Keith, Wellington, New Zealand
Sydney W. Kentridge, London, England; Brick Court Chambers
Geoffrey R. T. Kenyon, Boston, MA; Dechert LLP
Daniel S. Kleinberger, Mendota Heights, MN; Mitchell Hamline School of Law
Andrew D. Koblenz, Tysons, VA; National Automobile Dealers Association
Andrew Kull, Austin, TX; University of Texas School of Law
Gregory Joseph Lavorgna, Havertown, PA; Faegre Drinker Biddle & Reath LLP (Retired)
Hal R. Lieberman, New York, NY; Emery Celli Brinckerhoff Abady Ward & Maazel LLP
William Parker Lightfoot, Washington, DC; May Lightfoot, PLLC
David A. Logan, Bristol, RI; Roger Williams University School of Law
Thad G. Long, Birmingham, AL; Thad Long Legal Services
L. Paige Marvel, Washington, DC; U.S. Tax Court
David Charles Mason, St. Louis, MO; Missouri Circuit Court, 22nd Judicial Circuit
Grayson M.P. McCouch, Gainesville, FL; University of Florida, Levin College of Law
Lizabeth A. Moody, St. Petersburg, FL; Stetson University College of Law
Margaret L. Moses, Chicago, IL; Loyola University, Chicago School of Law
Kimberly J. Norwood, St. Louis, MO; Washington University School of Law
Ronald A. Norwood, St. Louis, MO; Lewis Rice LLC
J. Thomas Oldman, III, Houston, TX; University of Houston Law Center
Joseph J. Ortego, New York, NY; Nixon Peabody LLP
Robert W. Pass, Tallahassee, FL; Carlton Fields P.A.
Lawrence Ponoroff, East Lansing, MI; Michigan State University College of Law
Gerald S. Reamey, San Antonio, TX; St. Mary's University School of Law
Joseph H. Rodriguez, Camden, NJ; U.S. District Court
Jeffrey A. Rosen, Washington, DC; U.S. Department of Justice
Yvonne W. Rosmarin, Arlington, MA; Law Office of Yvonne W. Rosmarin
Seth Rosner, Saratoga Springs, NY
L. F. Sams, Jr., Tupelo, MS; Mitchell, McNutt & Sams, P.A.
Suzanne R. Sawada, Evanston, IL
Myra C. Selby, Indianapolis, IN; Ice Miller LLP
Henry J. Sommer, Philadelphia, PA; National Consumer Bankruptcy Rights Center
Edward B. Stead, Dallas, TX
Kent D. Syverud, Syracuse, NY; Syracuse University
Winnie F. Taylor, Brooklyn, NY; Brooklyn Law School
Peter Tierney, Austin, TX
Holly K. Towle, Seattle, WA; Holly Towle LLC (Retired)
Sarah S. Vance, New Orleans, LA; U.S. District Court, Eastern District of Louisiana
Vincenzo Vigoriti, Florence, Italy; Studio Legale Vigoriti
Gerhard Walter, Bern, Switzerland
Richard S. Ward, New York, NY; ITT Corporation
Bonnie M. Wheaton, Wheaton, IL; Circuit Court of the 18th Judicial Circuit of Illinois
Lord Woolf of Barnes, London, England; House of Lords (Retired)
William A. Worthington, Houston, TX; Taylor Book Allen & Morris, LLP
Susan Webber Wright, Little Rock, AR; U.S. District Court, Eastern District of Arkansas
Jacob S. Ziegel, Toronto, Canada; University of Toronto Faculty of Law (Retired)

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Now Available

Principles of the Law, Data Privacy

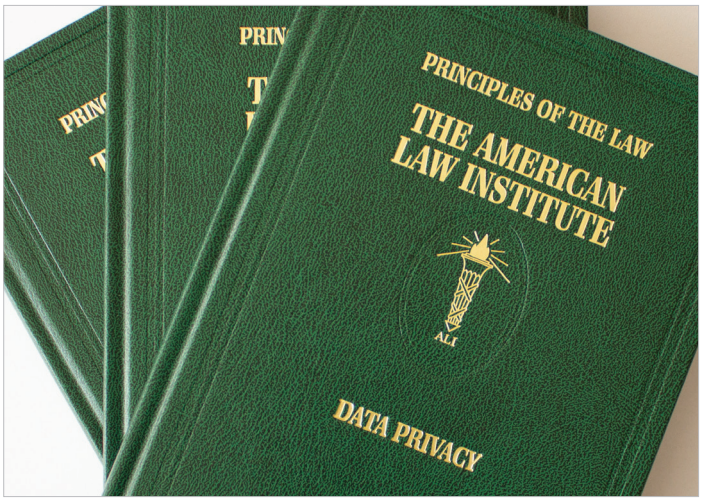
Principles of the Law, Data Privacy, is The American Law Institute's first venture into the field of information privacy law. This project identifies core principles useful for bringing greater coherence to this area. Like all Principles projects, it seeks to provide best practices for institutions other than the courts—in this case entities that collect personal information and the legislatures and administrative agencies, state and federal, that regulate them.

Reporters Paul M. Schwartz of the University of California, Berkeley School of Law, and Daniel J. Solove of George Washington University Law School completed this project at a time when guidance on data privacy is more necessary than ever. High-profile scandals—such as the hacking of sensitive data from the credit-reporting agency Equifax and Cambridge Analytica's abuse of misappropriated personal data during the 2016 presidential election—underscore the dangers for individuals, who are often unaware that their personal information is being collected in the first place, as well as pitfalls facing businesses and organizations reliant on such data. In response to such events, states have passed privacy legislation and Congress has been considering several bills that would provide greater protection for personal data privacy, including proposals to overhaul the Federal Trade Commission or to create a new Data Protection Agency.

The global COVID-19 pandemic has given these important questions even greater urgency. Governments and public-health officials around the world have turned to digital data to track and seek to contain the spread of the virus. Many countries are employing digital contact tracing, which uses personal data collected from mobile devices or credit cards to identify anyone who was in contact with an infected individual. Even traditional tools, like temperature checks at workplaces and health surveys for travelers, involve the collection, use, and disclosure of personal information. But while personal data offers promising avenues for limiting the spread of the virus and resuming economic activity, measures like digital contact tracing have elicited strong opposition from privacy advocates, who worry that these developments endanger civil liberties and give too much power to governments and technology companies.

These Principles will be of use in addressing the difficult questions raised by the pervasive use of personal data, including vital questions of public health, as well as financial and personal safety of individuals.

VISIT WWW.ALI.ORG TO ORDER NOW.



Trial Manual 6 with 2020 Supplement

The electronic versions of the 2020 Supplement to the sixth edition of the *Trial Manual for the Defense of Criminal Cases* (2016) and the *Trial Manual 6* with the 2020 Supplement incorporated are now available for download. Attorneys in public-defender offices and in nonprofit legal-services organizations that do criminal-defense work can apply for a free electronic copy by visiting *www.ali.org/trial-manual*. A print version of the 2020 Supplement is forthcoming.

Authored by Anthony G. Amsterdam and Randy Hertz of NYU School of Law, the *Trial Manual* is designed as a how-to-do-it exposition for the general practitioner of the law and practice of criminal defense. It gives the lawyer who is relatively inexperienced in criminal proceedings a compact guide through the stages of a criminal case, from arrest and investigation to appeal. It identifies critical points in the proceedings, warns of rights to be asserted and interests to be protected at each stage, describes the practices and procedures necessary or useful for the assertion of those rights and the protections of those interests, and, in both narrative and checklist form, suggests steps to be taken or considered by defense counsel at the various stages.

The book is organized for easy access by both experienced practitioners and those just starting out in practice. It enables both to locate quickly the legal and practical materials needed to jump-start their work at any given stage. It is an invaluable resource for those who are called upon to defend an individual in a criminal case.

ATTORNEYS IN PUBLIC-DEFENDER OFFICES AND IN NONPROFIT LEGAL-SERVICES ORGANIZATIONS THAT DO CRIMINAL-DEFENSE WORK CAN APPLY FOR A FREE ELECTRONIC COPY BY VISITING WWW.ALI.ORG/TRIAL-MANUAL.

ALI CLE Courses on ALI Restatement Projects

ALI project participants and Reporters recently contributed even more of their time to create CLE courses on topics addressed in two Restatement projects: Children and the Law, and the U.S. Law of International Commercial and Investor–State Arbitration. These courses are available through ALI-CLE.org.



In ***Children and the Law: Protecting the Vulnerable in a Time of Crisis***, Restatement of Children and the Law Reporters Elizabeth Scott and Clare Huntington, along with project participants Kristin Henning and Marsha Levick, focus on child welfare and juvenile justice issues and how these issues are made even more complicated in the time of COVID. They break down different portions of the Restatement in detail to address how the law defines parental authority and responsibility, what Constitutional challenges youth encounter during a pandemic, and much more. This course is being made available for free to legal-services and child-advocacy organizations across the country; contact *communications@ali.org* for more information.



In ***Ethics Issues Implicated in the Restatement of the U.S. Law of International Commercial and Investor–State Arbitration***, Reporters George A. Bermann, Catherine A. Rogers, Jack J. Coe, Jr., and Christopher R. Drahozal explore how ethical considerations manifested themselves in the course of the project and how they manifest themselves in the operation of international arbitration, particularly in U.S. courts. Topics addressed include arbitrator procedural power and attorney–client privilege, arbitrator immunity, counsel conduct and arbitrator authority to disqualify, and ethics and public policy. This ethics CLE course will be available as a live program in early 2021.

ALI MEMBERS ENJOY COMPLIMENTARY ACCESS TO A VAST DATABASE OF ALI CLE COURSES THROUGH THE LAWPASS PORTAL (ACCESS BY CLICKING "CLE FOR MEMBERS" ON THE ALI.ORG MEMBERS PAGE).

ALI TO CELEBRATE ITS NEW LIFE MEMBERS CONTINUED FROM PAGE 11

NEW 50-YEAR MEMBERS

Emmet J. Bondurant, II, Atlanta, GA; Bondurant, Mixson & Elmore LLP

James. A. Churchill, New Orleans, LA; Jones Walker LLP (Retired)

Donn I. Cohen, Washington, DC

John P. Davis, Jr., Pittsburgh, PA; Reed Smith LLP (Retired)

Martin L. C. Feldman, New Orleans, LA; U.S. District Court, Eastern District of Louisiana

James B. Halpern, Bethesda, MD; Arent Fox LLP (Retired)

Douglas B. Heidenreich, St. Paul, MN; Mitchell Hamline School of Law

Jerry Van Kyle, Brenham, TX; Hunton Andrews Kurth LLP (Retired)

Bruce S. Lane, Washington, DC; Nixon Peabody LLP

Robert Frederick Patton, Pittsburgh, PA; Bank Consulting Associates

Harry M. Reasoner, Houston, TX; Vinson & Elkins LLP

David T. Smith, Gainesville, FL; University of Florida, Levin College of Law

Jack B. Weinstein, Great Neck, NY; U.S. District Court, Eastern District of New York

Thomas O. White, Stockton, NJ

Effective May 2021

Every attempt has been made to publish an accurate list of each member's location and company. If a change is required, please contact the ALI Membership Department at 215-243-1623 or membership@ali.org.

The Institute in the Courts: Idaho Supreme Court Relies on Restatement Third of Property (Wills and Other Donative Transfers) and Restatement Third of Trusts

In *Ferguson v. Ferguson*, 473 P.3d 363 (Idaho 2020), the Supreme Court of Idaho relied on the Restatement of the Law Third, Property (Wills and Other Donative Transfers), and the Restatement of the Law Third, Trusts, in holding, as a matter of first impression, that no-contest provisions were generally enforceable in Idaho trust instruments, subject to various common-law limitations.

In that case, the petitioner was originally excluded as a beneficiary of his parents' trust ("Original Trust") but, after his father's death, his mother, through her will, exercised a power of appointment granted to her in the Original Trust to name the petitioner as a beneficiary of one of the three sub-trusts of the Original Trust ("Survivor's Trust"), which was made up of his mother's separate property and any interest of the community property held in the Original Trust upon his father's death. After his mother's death, the petitioner filed a petition in Idaho state court against his three siblings and his parents' long-time accountant, who were successor trustees of the trusts, seeking financial records from the sub-trusts and the Original Trust to determine whether he would receive his full share of the Survivor's Trust. The successor trustees responded by providing an inventory and interim accounting of the Survivor's Trust but refusing to provide any information or accounting from before the mother's death. While this matter was pending, the petitioner filed a claim in Arizona probate court against his mother's estate, alleging that he was "a creditor of her estate because [his mother], as trustee of the Survivor's Trust, breached various fiduciary duties owed to him." After the petitioner's three siblings, acting this time as co-personal representatives of the mother's estate, disallowed his claim, the petitioner filed a Petition for Allowance of Claim and for Stay in the probate court, seeking "to preserve his rights from being barred by the statute of limitations while his entitlement to the Trust's financial records was litigated" in this case.

The magistrate court in the Idaho proceedings denied in part and granted in part the successor trustees' motion for summary judgment to enforce the forfeiture provision in the Original Trust, finding that the petitioner's Arizona petition "did not trigger the forfeiture provision because it was attempting to ascertain the full extent of [the petitioner's] interest rather than contest the validity of the Original Trust," but that the petitioner "did not become a beneficiary of the Survivor's Trust until after [his mother's] death, and as such, he was not entitled to any Survivor's Trust records from before [his mother's] death." Reversing in part, the state district court held that, while the petitioner became a beneficiary of the Survivor's Trust when his mother exercised the power of appointment in her will, he forfeited his interest in the Survivor's Trust because he lacked probable cause to bring his Arizona petition. The state court reasoned that the mother did not owe the petitioner any fiduciary duties and that "it would not be reasonable for [him] to conclude he was entitled to an accounting from before [her] death or that she breached any fiduciary duties," because she was the sole trustee of the Survivor's Trust, which granted her broad discretion to distribute and use its principal during her lifetime for "any reason."

Reversing and remanding to the district court with instructions to remand to the magistrate court, the Supreme Court of Idaho "adopt[ed] the majority position identified in the Restatement [of the Law Third, Trusts § 96, Comment *e*]," and held, inter alia, "that no-contest provisions are generally enforceable in Idaho trust instruments" but "their enforceability is subject to various common law limitations." Relying on § 96, Comment *e*, the court reasoned that no-contest clauses were valid and generally enforceable in most jurisdictions. Additionally, citing Restatement of the Law Third, Property (Wills and Other Donative Transfers) § 8.5, Comment *i*, the court noted that "the same rules and principles logically apply to trusts" as they do to wills, and Idaho had "codified common law limitations on the enforceability of no-contest provisions in wills when it adopted the Uniform Probate Code." The court observed that, under § 8.5, and Comments *b* and *c* thereto, "no-contest provisions [were] enforceable 'unless *probable cause* existed for instituting the proceedings.'" Furthermore, "[n]o-contest provisions 'shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust,'" (quoting Restatement of the Law Third, Trusts § 96(2)), and that "[t]he mere filing of a paper that is 'intended solely to procure time to ascertain the facts upon which the decision to institute a proceeding must rest should not be construed to constitute the institution of an action to contest,'" (quoting Restatement of the Law Third, Property (Wills and Other Donative Transfers) § 8.5, Comment *d*).

The court determined that the district court erred in enforcing the forfeiture provision against the petitioner before first addressing whether the trustees breached their fiduciary duties in administering the Survivor's Trust. The court explained that the trustees sought to apply the forfeiture provision to remove the petitioner as a beneficiary because he requested records relating to the manner in which the Survivor's Trust had been administered, and "[s]uch a result [was] inconsistent with the proper administration of the Survivor's Trust under Idaho law, and interfere[d] with [the petitioner's] rights as a beneficiary in the Survivor's Trust." The court rejected the trustees' argument that the forfeiture provision could not interfere with the trust administration because the petitioner was not entitled to the

Help Protect and Promote the Rule of Law: Make a Year-End Gift Today

As a reader of *The ALI Reporter*, you understand how crucial The American Law Institute's Restatements of the Law, Principles of the Law, and Model Codes are to the legal profession and to society—especially in this time of crisis. In the last year alone, ALI's work was cited more than 2,600 times by federal and state courts, including citations in 12 U.S. Supreme Court cases in the Court's October 2019 Term. These works would not be possible without the generous financial support of members like you. As 2021 approaches, we ask that you help protect and promote the rule of law by including the Institute in your year-end giving plans.

Your gift to ALI will provide critical funding to support all aspects of our work and our mission. This includes investing in new technology to advance the capabilities and effectiveness of our remote work and providing free public access on our website to ALI projects that contain guidance on the legal and policy issues we are currently facing, such as approved Chapters of our Principles of the Law, Policing, and Principles of the Law, Election Administration. Your support will also ensure that we are able to continue producing and distributing scholarly and scientific legal work at the level of excellence the Institute is known for.

You can make an end-of-year charitable contribution to ALI by completing and returning the envelope enclosed in this newsletter, visiting *www.ali.org/support*, or calling 215-243-1660. Your gift will help us continue our work through which we serve the legal profession, the judiciary, and society as a whole, which is needed now more than ever.

Thank you in advance for your generosity and best wishes for a happy and healthy 2021.

records, given that the mother did not owe the petitioner any fiduciary duties. The court clarified that, while the mother had "virtually unlimited discretion" in using the trust assets, she did owe some limited duties to the petitioner under Restatement of the Law Third, Trusts §§ 50 and 76, and her discretion "ha[d] no bearing on the Successor Trustees' *current* fiduciary duties" to the trust's beneficiaries. In examining the trustees' argument that the forfeiture provision was enforceable because the petitioner lacked probable cause in filing his creditor's claim, the court explained that "Idaho has never considered whether lack of probable cause is a requirement to enforce a no-contest provision." The court declined to consider whether the petitioner had probable cause to bring his petition in probate court at this stage, noting that, on remand, "if [the petitioner was] provided records that allow[ed] him to determine whether he received his full share of the Survivor's Trust, and, within a reasonable time, [did] not withdraw his Arizona petition, the trial court [could] take up the issue of whether [he] ha[d] probable cause to pursue th[at] action."

The Institute is currently working on the Restatement of the Law Fourth, Property. To join the Members Consultative Group for this or other projects, visit the project's page on the ALI website at *www.ali.org/projects*.

CIVIL JUSTICE FEST

The Law & Economics Center at Antonin Scalia Law School, George Mason University hosted the free virtual event, "Civil Justice Fest: A Month of Dialogues On the Most Pressing Civil Justice Issues." In addition to discussions on contemporary civil justice topics, the event also featured a special panel on ALI, "*Behind the Curtain at the American Law Institute (ALI): Drafting and Approving Restatements of Law at the ALI and Their Proper Weight in Judicial Decisionmaking*," which included **Christopher E. Appel** of Shook, Hardy & Bacon, **Matthew L.M. Fletcher** of Michigan State University College of Law, and **Carolyn B. Kuhl** of the Los Angeles County Superior Court as panelists.

The LEC's Annual Judicial Symposium on Civil Justice Issues aims to help judges make sense of America's rapidly changing civil justice environment.

Other participating ALI members included:
John M. Barkett, Shook, Hardy & Bacon
John H. Beisner, Skadden, Arps, Slate, Meagher & Flom
David L. Faigman, UC Hastings Law
Philip S. Goldberg, Shook, Hardy & Bacon
Eric Goldman, Santa Clara University School of Law
Betsy J. Grey, Arizona State University Sandra Day O'Connor College of Law
Donald J. Kochan, George Mason University Antonin Scalia Law School
Timothy D. Lytton, Georgia State University College of Law
Robert S. Peck, Center for Constitutional Litigation
David J. Porter, U.S. Court of Appeals for the Third Circuit
Daniel B. Rodriguez, Northwestern University Pritzker School of Law
Victor E. Schwartz, Shook, Hardy & Bacon

Notes About Members and Colleagues

William D. Araiza has been named the Stanley A. August Professor of Law at Brooklyn Law School.

Tom Baker of the University of Pennsylvania Carey Law School participated in a virtual panel discussion, hosted by the Thompson Center, based at the University of Wisconsin-Madison, on the current challenges and future possibilities of insuring low-risk, high-cost events. The event was part of the Thompson Center's ongoing series: Preparing for Public Emergencies. Professor Baker is also the creator of the Covid Coverage Litigation Tracker, which provides empirical research on insurance disputes and resolutions during the pandemic. He spoke about the project on an episode of *Case in Point*, a podcast produced by Penn Law, which gives an in-depth look at how the law touches every part of one's life.

On Oct. 27, **Amy Coney Barrett** was sworn in as the 103rd Associate Justice of the Supreme Court of the United States. Previously serving on the U.S. Court of Appeals for the Seventh Circuit, Justice Barrett fills the U.S. Supreme Court vacancy created by the passing of Justice Ruth Bader Ginsburg.

Susan G. Braden, former Chief Judge of the U.S. Court of Federal Claims, has been appointed to the United States Patent and Trademark Office Patent Public Advisory Committee. In June, Judge Braden was selected to serve as a dispute settlement panelist pursuant to Chapter 31 of the United States-Mexico-Canada Agreement. Judge Braden was also elected to the Board of Directors for The United Inventors Association of the United States of America, a nonprofit educational organization dedicated to providing resources to the inventing community, while encouraging honest and ethical business practices among industry service providers, for a three-year term beginning January 2021.

Stephen G. Breyer of the Supreme Court of the United States, **M. Margaret McKeown** of the U.S. Court of Appeals for the Ninth Circuit, and former U.S. Solicitor General **Paul D. Clement** of Kirkland & Ellis were featured in the live event, "RBG: Her Legacy & the Court's Future," a PBS NewsHour Special, which explored the life of the late historic civil-rights figure and cultural icon.

The American Arbitration Association and its international division, the International Centre for Dispute Resolution, announced that **Cedric C. Chao** of Chao ADR joined its Roster of Arbitrators and Mediators. In addition, Mr. Chao has been appointed the co-head of the ICDR's International Advisory Committee.

Colleen V. Chien of Santa Clara Law has been chosen to join President-Elect Joe Biden's 20-person review committee for the Department of Commerce, which includes oversight of The United States Patent and Trademark Office.

In June, **Janet DiFiore** of the New York State Court of Appeals appointed the Commission to Reimagine the Future of New York's Courts. Chaired by **Henry M. Greenberg** of Greenberg Traurig and comprising a distinguished group of judges, lawyers, academics, and technology experts, the Commission is charged with examining technological, regulatory, and other long-term innovations for New York Courts. Additionally, in the short-term, it was to provide recommendations for resuming in-person court operations amid the COVID-19 pandemic. In August, the Commission released its recommendations for restarting in-person grand juries, jury trials, and other related proceedings. Other ALI members who serve on the Commission include: **Paul Shechtman** of Bracewell; **Michael A. Simons** of St. John's University School of Law; and **Ari Ezra Waldman** of Northeastern University School of Law.

Brian T. Fitzpatrick was named the Milton R. Underwood Chair in Free Enterprise at Vanderbilt Law School.

New Members Elected

On October 15, the Council elected the following 36 persons.

Raquel E. Aldana, Davis, CA
Evelyn Mary Aswad, Norman, OK
David J. Berger, Palo Alto, CA
Lonnie T. Brown, Jr., Athens, GA
Karen K. Caldwell, Lexington, KY
Zachary D. Clopton, Chicago, IL
Maria Elena Cruz, Phoenix, AZ
Lisa A. Fairfax, Washington, DC
Ronald S. Flagg, Washington, DC
Noel J. Francisco, Washington, DC
R. Wilson Freyermuth, Columbia, MO
Richard W. Garnett, South Bend, IN
José Ramón González, Chicago, IL
Jonathan P. Harmon, Richmond, VA
Daniel Earle Hinde, Houston, TX
Patricia Brown Holmes, Chicago, IL
Christina Michelle Houston, Wilmington, DE
Steven C. Jones, Atlanta, GA
Sivan R. Korn, Tucson, AZ
Adam Lauridsen, San Francisco, CA
Ariel B. Levinson-Waldman, Washington, DC
Justin F. Marceau, Denver, CO
Jonathan S. Massey, Washington, DC
Thomas B. McNamara, Denver, CO
Zachary Evan Pelham, Bismarck, ND
Johnnie B. Rawlinson, Las Vegas, NV
Julissa Reynoso, New York, NY
Lauren K. Robel, Bloomington, IN
Julie A. Robinson, Kansas City, KS
Kimberly J. Robinson, Charlottesville, VA
Jacob H. Rooksby, Spokane, WA
Carl L. Solomon, Columbia, SC
Nancy A. Welsh, Fort Worth, TX
Wendell Lewis Willkie, II, Darien, CT
Benjamin F. Wilson, Washington, DC
Shira R. Yoshor, Houston, TX

The National Constitution Center hosted a live podcast recording of *Free and Fair with Franita and Foley Live: The Contested Election of 1876*, featuring Michael T. Morley of Florida State University College of Law in discussion with hosts **Edward B. Foley** of Ohio State University, Moritz College of Law and Franita Tolson of USC Gould School of Law. **Jeffrey Rosen**, president and CEO of the National Constitution Center, served as the moderator. Professor Foley and Mr. Rosen also participated in another Constitution Center event, "America's Contentious Presidential Elections: A History," which featured discussion on key controversial and contested elections throughout American history and what can be learned from them.

Jeffrey B. Golden of 3 Hare Court was presented with the inaugural Lifetime Contributor-Private Practice Award at *Legal Week*'s virtual Legal Innovation Awards 2020. The Awards celebrate outstanding achievement and excellence in the legal profession.

Laura E. Gómez of UCLA School of Law discussed her book, *Inventing Latinos: A New Story of American Racism* (The New Press 2020), at a virtual event hosted by Boston University School of Law.

Paul W. Green, a retired justice of the Texas Supreme Court, joined Alexander Dubose & Jefferson as a partner in its newly created San Antonio office.

In an interview with MSNBC's Joshua Johnson, **Renee Knake Jefferson** of the University of Houston Law Center discussed her latest book, *Shortlisted: Women in the Shadows of the Supreme Court* (NYU Press 2020), and reflected on the legacy of Justice Ruth Bader Ginsburg.

Vincent R. Johnson of St. Mary's University School of Law published the third edition of *Advanced Tort Law: A Problem Approach* (Carolina Academic Press 2020), a textbook which focuses on misrepresentation, defamation, invasion of privacy, tortious interference, and injurious falsehood.

ALI President **David F. Levi** of Duke Law School penned "From Judge to Dean and Back Again: Reflections on Transitions," featured in the fall 2020 edition of *The Judges' Journal* (Vol. 59, No. 4), published by the American Bar Association. President Levi, also director of the Bolch Judicial Institute, and **Michael P. Scharf** of Case Western Reserve University School of Law sat down with Benjamin B. Ferencz, the last living Nuremberg War Crimes Trials prosecutor and an icon in the field of international justice, for the inaugural installment of the Raphael Lemkin Rule of Law Guardian series. The series, sponsored by the Bolch Judicial Institute, honors those who have contributed to the preservation and advancement of the rule of law by highlighting their work through interviews, oral histories, and other programs.

Lyrissa Barnett Lidsky of the University of Missouri School of Law participated in a panel discussion hosted by the CATO Institute on "John Roberts and Free Speech: A Report on the Roberts Court's First Amendment Jurisprudence," that was broadcast on C-SPAN 2. The discussion focused on a study by Ronald Collins and David Hudson examining the 56 free-speech cases handed down by the Roberts Court from 2005 through 2020.

The Fellows of the American Bar Foundation held an event featuring **Goodwin Liu** of the California Supreme Court for a discussion exploring the changing diversity of J.D. students. Justice Liu is coauthor of an ABF-sponsored study that provides a thorough examination of recent U.S. law-school-enrollment trends since the Great Recession.

Margaret Colgate Love, former U.S. Pardon Attorney, and David Schlussel, Deputy Director of the Collateral Consequences Resource Center (CCRC), have published *The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities After Arrest or Conviction* (2020). The report describes the present landscape of laws in the United States aimed at restoring rights and opportunities after an arrest or conviction. It is an update and refresh of the CCRC's previous national survey, last revised in 2018.

M. Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit delivered the Constitution Day Lecture, "My Mother Made Me Do It: How Motherly Advice Secured Ratification of the 19th Amendment and Changed the Course of History," a virtual event organized by the Stanford Constitutional Law Center.

María D. Meléndez, Chief Diversity Officer of Sidley Austin, produced a video series, in honor of Hispanic Heritage Month, highlighting prominent Hispanic lawyers and promoting diversity in the legal profession. The series offered a look into the personal and professional lives of Sidley's lawyers and clients of Hispanic and Latino descent.

Robert H. Mundheim, of counsel to Shearman & Sterling, has received the 2020 Michael Franck Professional Responsibility Award from the ABA Center for Professional Responsibility. The award is presented to individuals whose career commitments in areas such as legal ethics, disciplinary enforcement, and lawyer professionalism demonstrate the best accomplishments of lawyers.

Barry J. Nace of Paulson & Nace is the recipient of the 2020 Leonard M. Ring Champion of Justice Award. The award is given to an American Association for Justice (AAJ) member who has provided distinguished service in advancing AAJ's mission and growth, and made outstanding contributions to trial advocacy and the legal profession. The member must epitomize outstanding integrity and overall character and have demonstrated Leonard Ring's devotion to human and civil rights.

David Orentlicher of the University of Nevada, Las Vegas, William S. Boyd School of Law won his election for a two-year term in the Nevada State Assembly. Professor Orentlicher previously served in the Indiana House of Representatives (2002-2008).

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NOTES CONTINUED FROM PAGE 17

ALI Director **Richard L. Revesz** of NYU School of Law has coauthored a new book, *Reviving Rationality: Saving Cost-Benefit Analysis for the Sake of the Environment and Our Health* (Oxford Univ. Press 2020). A video of Director Revesz and coauthor Michael A. Livermore of UVA School of Law discussing the book is available on the ALI website.

President-elect Joe Biden announced members of his White House senior staff, which included **Julissa Reynoso Pantaleon** of Winston & Strawn as Chief of Staff to Dr. Jill Biden, and **Dana Ann Remus**, General Counsel of the Biden–Harris Campaign, as Counsel to the President.

UVA School of Law held a symposium exploring whether the United States should recognize a federal right to education and what that would look like. Participants discussed issues raised by UVA Law professor **Kimberly Jenkins Robinson**'s new book, *A Federal Right to Education: Fundamental Questions for Our Democracy* (NYU Press 2019). The event also featured opening remarks from UVA Law dean **Risa L. Goluboff**, and **Martha L. Minow** of Harvard Law School served as a moderator.

Arizona State University, Sandra Day O'Connor College of Law announced the creation of the Jonathan and Wendy Rose Professorship, in honor of ALI member **Jonathan Rose** and his wife, Wendy.

James R. Silkenat of the World Justice Project has published "Impeachment of a U.S. President" in the 2020 edition of the Middle Temple's magazine, *The Middle Templar*. The article discusses the impeachment of President Trump in light of earlier impeachment trials. Mr. Silkenat argues that the Constitutional provision of impeachment should be used sparingly, but that the provision is important to America's civic health: "The drafters of the U.S. Constitution believed an officeholder's tyrannical conduct could so endanger the nation that addressing it could not await the next election. This concept had merit then; it still does."

Henry E. Smith of Harvard Law School, the Reporter for Restatement of the Law Fourth, Property, has received the 2020 Brigham-Kanner Property Rights Prize from the William & Mary Law School Property Rights Project. The prize is presented annually to a scholar, practitioner, or jurist whose work affirms the fundamental importance of property rights.

Paul B. Stephan of UVA School of Law has been appointed special counsel to General Counsel Paul C. Ney, Jr., of the U.S. Department of Defense. Also, Professor Stephan and **Sarah H. Cleveland** of Columbia Law School served as editors to *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* (Oxford Univ. Press 2020), which provides a definitive, authoritative analysis of Restatement of the Law Fourth, The Foreign Relations Law of the United States (Treaties, Jurisdiction, and Sovereign Immunity) as a source of law. Professors Stephan and Cleveland also served as Coordinating Reporters for the Restatement.

E. Thomas Sullivan of the University of Vermont has been elected president of the American Bar Foundation for the 2020-2022 term.

Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit delivered the talk "Fifty-One Imperfect Solutions: States and the Making of American Constitutional Law" as the Lloyd Cutler Distinguished Visitor at the American Academy in Berlin. Also, Judge Sutton and Edward Whelan served as editors to *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law* (Crown Forum 2020). With a foreword by Associate Justice **Elena Kagan** of the Supreme Court of the United States, *The Essential Scalia* is a collection of opinions, speeches, and articles from the late U.S. Supreme Court Associate Justice Antonin Scalia on some of the most important and complex legal issues of our time.

Sandra Guerra Thompson of the University of Houston Law Center has received the Hispanic Heritage Education in the Community Award, presented by Sylvester Turner, Mayor of Houston, TX.

Ann A. Scott Timmer of the Arizona Supreme Court was named one of 2020's Most Influential Women in Arizona Business by *Az Business* and *AZRE* magazines.

Stacey Ann Tovino, previously of the University of Nevada, Las Vegas, William S. Boyd School of Law, has joined the faculty at the University of Oklahoma College of Law.

After the passing of U.S. Supreme Court Associate Justice Ruth Bader Ginsburg, the ABA released a video featuring the 10 women who have served as ABA president speaking about what Ruth Bader Ginsburg meant to them.

ALI members who were featured in the video include:
Martha W. Barnett, Holland & Knight (Retired)
Hilarie Bass, Bass Institute for Diversity and Inclusion
Linda A. Klein, Baker Donelson
Carolyn B. Lamm, White & Case
Judy Perry Martinez, Simon, Peragine, Smith & Redfearn (ABA Immediate Past President)
Roberta Cooper Ramo, Modrall Sperling
Patricia Lee Refo, Snell & Wilmer (Current ABA President)

Karen Roberts Washington, a mediator-arbitrator from Dallas, TX, was elected as a Life Member of the Uniform Law Commission, having served as a Texas Commissioner for 20 years.

Christiane C. Wendehorst of the University of Vienna and president of the European Law Institute has joined the new Global Partnership on AI, an alliance between various countries who have nominated experts and organizations with a mission to support and guide the responsible adoption of Artificial Intelligence. Dr. Wendehorst will be leading a project to develop an agreed data governance framework for the Data Governance Working Group. She also serves as a Co-Reporter for the Principles for a Data Economy project.

The Board of Regents of the Texas A&M University System has designated **Peter K. Yu** a Regents Professor. Professor Yu directs the Center for Law and Intellectual Property and holds a joint appointment at the School of Law and the Department of Communication at Texas A&M University. He is the first professor from the School of Law to receive this system-wide honor.

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

The Federalist Society held the 2020 National Lawyers Convention from November 9 to 13. The event featured addresses, debates, and panel discussions from a wide variety of legal experts and scholars focusing on the theme of "The Rule of Law and the Current Crisis."

ALI members who participated include:
Samuel A. Alito, Jr., Supreme Court of the United States
Ashutosh A. Bhagwat, University of California, Davis School of Law
Elizabeth L. Branch, United States Court of Appeals, Eleventh Circuit
Brian P. Brooks, Office of the Comptroller of the Currency, United States Department of the Treasury
Elizabeth Chamblee Burch, University of Georgia School of Law
Ronald A. Cass, Cass & Associates
W. Neil Eggleston, Kirkland & Ellis
Brian T. Fitzpatrick, Vanderbilt University Law School
Britt C. Grant, United States Court of Appeals, Eleventh Circuit
Deepak Gupta, Gupta Wessler PLLC
Thomas M. Hardiman, United States Court of Appeals, Third Circuit
James C. Ho, United States Court of Appeals, Fifth Circuit
W. William Hodes, The William Hodes Law Firm
Edith H. Jones, United States Court of Appeals, Fifth Circuit
Sally Katzen, NYU School of Law
Randall L. Kennedy, Harvard Law School
Julian G. Ku, Hofstra University, Maurice A. Deane School of Law
Michael B. Mukasey, Debevoise & Plimpton
William H. Pryor, Jr., United States Court of Appeals, Eleventh Circuit
Christopher A. Seeger, Seeger Weiss
David R. Stras, United States Court of Appeals, Eighth Circuit
Amul R. Thapar, United States Court of Appeals, Sixth Circuit
Eugene Volokh, University of California, Los Angeles School of Law

In Memoriam

ELECTED MEMBERS

John Theodore Boese, Washington, DC; **Allen K. Harris**, Oklahoma City, OK; **Enrique Moreno**, El Paso, TX; **Jonathan A. Small**, New York, NY

LIFE MEMBERS

Charles E. Ares, Tucson, AZ; **Edward J. Barshak**, Boston, MA; **Theodore I. Botter**, Pompano Beach FL; **Michael A. Cooper**, New York, NY; **Dave L. Cornfeld**, St. Louis, MO; **Jerry Bruce Crockett**, Miami, FL; **David J. McCarthy, Jr.**, Charlottesville, VA; **Thomas M. Reavley**, Houston, TX; **George Slover, Jr.**, Dallas, TX

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MDLs Go Mainstream: Mass Torts Today

On this episode, moderator **Elizabeth Chamblee Burch** of University of Georgia School of Law is joined by **John H. Beisner** of Skadden, **Abbe R. Gluck** of Yale Law School, and **Shanin Specter** of Kline and Specter.

When complex issues affect large numbers of people, MDLs are often seen as the most efficient way to consolidate and manage those cases. However, MDL cases are not only procedurally complex, but also much of what happens during a case is nuanced and known only to MDL practitioners.

The panel explores the procedural complexity of MDLs and discusses if and how the system should be reformed.

This program will also be available for CLE credit through ALI-CLE.org in January 2021.



John H. Beisner



Elizabeth Chamblee Burch



Abbe R. Gluck



Shanin Specter

reasonably speaking

LISTEN NOW ON ALI'S WEBSITE OR THROUGH ANY PODCAST APP.