

## March 2022 Council Meeting Update

At its meeting on March 2, 2022, the Council considered drafts and revisions for three projects as listed below. All approvals are subject to the discussion at the meeting and the usual editorial prerogative.

### Policing

The Council approved the following material: §§ 9.01 and 9.06 of Chapter 9, Forensic-Evidence Gathering, Chapter 12, Informants and Undercover Agents, §§ 14.01, 14.02, and 14.05-14.15 of Chapter 14, Role of Other Actors in Promoting Sound Policing, of Council Draft No. 6; and §§ 14.03 and 14.04 of Chapter 14, as revised by the Reporters after the discussion at the January Council meeting. The rest of Council Draft No. 6 was approved at the January Council meeting.

### Sexual Assault and Related Offenses

The Council approved the following material in Council Draft No. 12 and the revisions to that draft: Sections 213.0, 213.9, and 213.11-213.11J, and the grading changes in subsection (3) of Section 213.3 and subsections (1) and (4) of Section 213.8. The other material in Council Draft No. 12 requiring approval was approved at the January Council meeting.

### Torts: Concluding Provisions

The Council discussed but did not vote on a revised draft of the Section on Medical Monitoring. The Reporters will revise the material for consideration at a future Council meeting.

## IN THIS ISSUE: ANNUAL MEETING PREVIEW

SEE PAGE 10 FOR MORE INFORMATION.

THE AMERICAN  
LAW INSTITUTE

100

JOIN US IN CELEBRATING ALI'S 100TH ANNIVERSARY.  
SEE PAGE 4 FOR MORE INFORMATION.

THE DIRECTOR'S LETTER BY  
RICHARD L. REVESZ

## The ALI Convenes a Group to Address Electoral Count Act Reform

The attack on the Capitol on January 6 shocked most Americans and focused attention as well on the law that governs Congress' ordinarily ceremonial count of the state's electoral votes for President and Vice President, which took place that day and which the attack interrupted. To the members of The American Law Institute who are united by our mission "to secure the better administration of justice," and, as important, to secure the rule of law on which the administration of justice depends, that day's events also marked a challenge: how to ensure that the very essence of our democracy is not placed at risk again in the future.

That challenge is not easily met. The divisions that led to January 6 are not first and foremost legal ones, and the orderly transition of power depends on the civic commitment of our leaders, institutions, and people as much as on legal rules. What's more, legal rules played out largely as intended following the 2020 presidential election, up through and including the January 6 vote count. Various state and local actors conducted counts and certified election results in accordance with state law. State and federal courts—and, ultimately, Congress—rejected spurious challenges to election results. But the fact that institutions performed relatively well in the last presidential election is no guarantee that they will perform acceptably in the next one (or in other elections).

One area of concern is the Electoral Count Act (ECA), which governs how Congress counts the electoral votes. The statute is not a model of clarity, and it is therefore essential that it be reformed to make sure that in the future it is not invoked in a manner that frustrates the will of the American people.

*continued on page 2*

## THE DIRECTOR'S LETTER CONTINUED FROM PAGE 1

To undertake this important project, our President, David F. Levi, and I invited 10 individuals with extensive experience in law and government to study the ECA and to make proposals for reform. The group was chaired by Bob Bauer (currently of NYU Law School, and formerly White House Counsel to President Obama) and Jack Goldsmith (currently of Harvard Law School, and formerly Assistant Attorney General for the Office of Legal Counsel during President George W. Bush's first administration). It contained eight other legal luminaries with extensive experience in federal and state government, the academy, and private practice and public-interest litigation: Elise C. Boddie, Mariano-Florentino Cuéllar, Courtney Simmons Elwood, Larry Kramer, Don McGahn, Michael B. Mukasey, Saikrishna Prakash, and David Strauss. Though comprising individuals from both parties (including a former Attorney General of the United States), with varied experience and often conflicting political, ideological, and legal views, the group unanimously agreed that Congress should reform the ECA prior to the 2024 election. More than that, it reached agreement around general principles that should inform reform, and on specific principles as to what reform should do. These principles—released publicly on April 4, 2022—are printed below.

This was an unusual project for the ALI in several ways. While our projects often concern federal law in some way, ALI does not ordinarily issue legislative proposals to the U.S. Congress. More importantly, this project was not submitted for approval by our Council and membership and is therefore not the official work of the Institute. The urgent need for reform and the fact that reform efforts in Congress are taking place right now meant that our typical process, which prioritizes consultation, deliberation, and consensus, but which can take years—was not a good fit.

The ALI nonetheless found a way to contribute, and I hope this contribution will substantially influence ongoing efforts at reform. This was achieved by leveraging the Institute's unique place in American legal culture to convene a group whose names are respected in government, academia, and practice, on both sides of the aisle. The group was then able to develop thoughtful, serious proposals that the ALI has helped ensure find an audience. I am thrilled this group was able to reach consensus around a set of commonsense reforms.

Early reactions to the principles to guide reform of the Electoral Court Act have been encouraging. I very much hope that Congress approves bipartisan ECA reform and that our efforts prove to be helpful in that endeavor!

## GENERAL PRINCIPLES TO GOVERN ECA REFORM

Under Article II, section 1 of the Constitution, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," and "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes." And the Twelfth Amendment provides that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

Against this background, Congress enacted the ECA 135 years ago. The ECA is widely seen to be impenetrably complex and poorly conceived, especially in its definition of the congressional role in the final tally of electoral votes for President and Vice President.

ECA reform should be guided by these general considerations:

- Congress lacks the constitutional authority to address every issue that may arise in the presidential selection process.
- ECA reform should not itself become the basis of fresh uncertainties about the presidential selection process by raising new questions about whether Congress has acted within constitutional limits and inviting legal challenges on that basis. The aim of ECA reform should be, at a minimum, to address the core dangers and uncertainties presented by the current law without introducing new problems of the same kind.
- ECA reform should clarify that Congress has an important but limited role in tallying electoral votes, consistent with the best understanding of the Twelfth Amendment and other relevant authorities.
- ECA reform should help check efforts by any State actor to disregard or override the outcome of an election conducted pursuant to State law in effect prior to Election Day, including State law governing the process for recounts, contests, and other legal challenges. (Currently every State has chosen to select presidential electors through the popular vote.) This is the most difficult element of reform because the question of Congress' role in addressing abuses of this kind can raise novel and difficult constitutional questions and generate sharp political disagreement. ECA reform cannot by itself address every conceivable problem that may arise within a State, many of which will require legal and political responses at the State level.

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- ECA reform should not affect the authority of the federal courts to address Due Process, Equal Protection, and other constitutionally based claims of unlawful State action in the administration, count, and certification of a State's popular vote.

## SPECIFIC PRINCIPLES TO GOVERN ECA REFORM

### A. Congressional Powers in Counting and Determining the Validity of Electoral Votes

- Congress' power to consider objections to electoral votes transmitted from the States, and to reject any such votes, should be limited at most to objections grounded in explicit constitutional requirements: the eligibility of candidates or electors, the time for the selection of electors, and the time by which the electors must cast their votes (as specified by Congress pursuant to its Article II power over timing).
- The ECA provides that Congress cannot consider an objection to a certificate of electors submitted by a State unless joined by one member from each chamber. ECA reform should raise this threshold considerably. In determining the requisite threshold, Congress should balance (1) the need to avoid delays and disruption in the vote count occasioned by objections from only a handful of members, against (2) the importance of permitting significant objections, commanding meaningful support from both chambers, to be lodged and resolved.
- Congress should clarify that a threshold of at least a majority in each chamber is needed to sustain any objection properly made within the specified categories of allowable challenges to electoral votes.
- In enforcing its constitutional power over the timing for the selection of electors, Congress should amend the ECA to clarify that a "failed election" under 3 U.S.C. § 2 may include extraordinary (catastrophic) events, such as a natural disaster, but excludes the pendency of legal challenges brought against the outcome of the popular vote in State or federal court, or before a State legislature (or body established by a State legislature).
- Congress should clarify that under the Twelfth Amendment, the authority of the President of the Senate as presiding officer is limited to opening the envelopes containing the lists with the electors' votes as lawfully transmitted by the States, and otherwise presiding over the proceedings to ensure that they comply with the procedural requirements specified in that Amendment, the ECA and other applicable standing rules.

### B. Reform Related to the Electoral College Meeting Date

- Congress should move the Electoral College meeting date to a later date to ensure that States have more time to conduct recounts as needed, and so that legal challenges can be resolved.

### C. Reforms Related to State Action to Override or Disregard the Outcome of the Vote Under Existing Law

- Congress should exercise its Article II timing power to clarify that State legislatures and other State institutions do not have power after the Election Day specified by Congress to disregard the vote held pursuant to the State law in place on that day, or to select electors in a manner inconsistent with the State law in place on that day.

- To address the problem of multiple lists from any one State seeking recognition for purposes of Congress' Twelfth Amendment vote count responsibility, Congress should do the following:

- Require the State official or body responsible under State law for certifying final election results to transmit to the Archivist by a certain date the certificate of identification of electors and their votes, which reflects the final results of the State's election as conducted under the laws duly enacted by the State prior to Election Day.
- Make clear that Congress will choose the certificate that is sent by the State official or body responsible under State law for certifying final election results.
- Authorize any candidate for President or Vice President on the ballot in a State to bring a civil action in a three-judge federal court seeking a declaratory judgment that identifies, for purposes of the federal law duty described above, the State official or body responsible for certifying final election results pursuant to this duty. The three-judge court should be appointed as provided in 28 U.S.C. § 2284.
- Congress should additionally authorize the federal court to order appropriate injunctive or mandamus relief against the identified State official or body to carry out the federal-law duty to transmit the certificate of identification of electors and their votes. Congress should specify that the provision for injunctive or mandamus relief is severable in case a court deems the granting of such relief to be unconstitutional.
- Congress should specify that the three-judge court shall resolve all issues before it without delay, with direct appeal to the United States Supreme Court, which will have mandatory appellate jurisdiction.

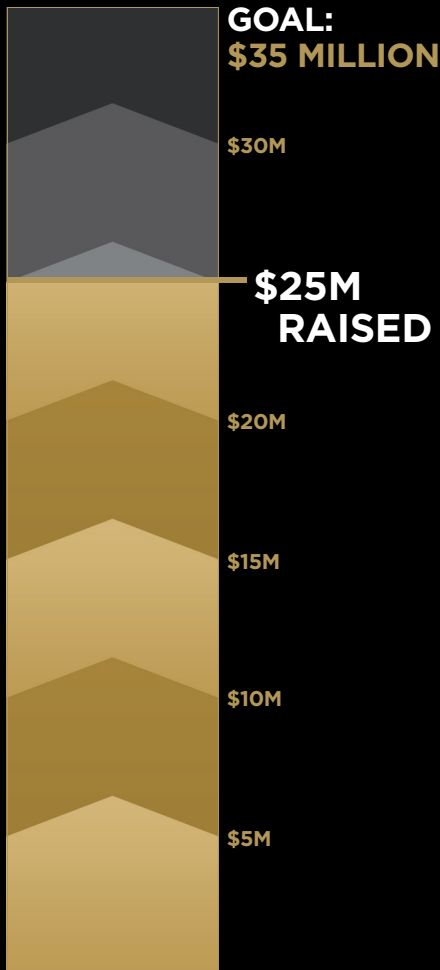
A PDF of the Principles to the ECA is available on the homepage of the ALI website and at [www.ali.org/eca-reform](http://www.ali.org/eca-reform).



# ALI's Second Century Campaign

Celebrating Our Legacy,  
Securing Our Future

With a goal of \$35 million, a successful campaign will establish a solid financial foundation for ALI's future without compromising its independence.



## Donor Spotlights

### Andrew D. Hendry

Elected to The American Law Institute in 1990, Andrew Hendry is now a Life Member. As a member for more than three decades, he has been actively involved in many of ALI's projects, which is no small feat, considering that he served as Colgate-Palmolive Company's Chief Legal Officer for more than 24 years before retiring in 2015.



He is currently serving on the Restatement of the Law, Corporate Governance project, and was also an Adviser on the recently completed project, Principles of the Law, Compliance and Enforcement for Organizations. When asked why the Institute is a priority, he explained, "ALI has been around for almost 100 years now, and in that time the world has changed significantly, but ALI's process and results have stayed almost the same—meaning that the organization consistently puts out work that is of high quality, that is respected by the bar and the courts and legislatures, and that improves the administration of justice. That is an incredible achievement."

Andy explains his commitment to the Institute's mission by saying, "ALI is unique in the fact that it is not partisan. I personally feel that it has been unfortunate that more and more of our organizations that focus on our national legal issues do it from a partisan point of view. They're trying to reach a certain conclusion, and the ALI doesn't do that. The ALI goes in and takes a look at the situation and tries to capture what the learning is on it. If they ever try to suggest anything, through Principles of the Law publications, it is by way of suggestion as an improvement, and not to achieve either a conservative conclusion or progressive conclusion. I think that is critical to the health of law in this country, the health of the legal profession, and just the health of the country in general."

On why he chose to give to ALI's Second Century fund, he explained, "As the world continues to change, we need The American Law Institute to remain constant and keep doing the great work it's been doing. That work takes a lot of money, and with publishing revenue no longer a given, ALI relies increasingly on the generosity of its members for funding."

The American Law Institute is especially grateful to Andy for his time and commitment to ALI and our projects over the years, and are honored that he has made the Institute a priority in his philanthropic giving through a generous donation to our Second Century Fund.

Read Andy's full profile at [www.ali.org/anniversary/profiles](http://www.ali.org/anniversary/profiles).

The American Law Institute is grateful to our donors' generosity that is helping ensure that ALI may continue our work for another century.

If you are interested in becoming a donor or would like more information on making a gift to The ALI's Second Century Campaign, please contact ALI Director Richard L. Revesz at [Director@ali.org](mailto:Director@ali.org). Additionally, donations can be made online at [www.ali.org](http://www.ali.org).



## Judith A. Miller and Peter Buscemi

ALI members Judith Miller and Peter Buscemi are one of the Institute's many married member-couples. Elected to the ALI in 1992 and 2002, respectively, they have made a significant contribution to the Institute's work by volunteering countless hours of their time and intellect, as well as significant financial resources.



Judith Miller at the October 2018 Council Meeting

Peter, a partner at Morgan, Lewis & Bockius LLP until his retirement at the end of 2015, built a distinguished career in Washington, D.C., as a litigator with extensive experience in appellate work, arguing cases before the Supreme Court and in federal and state appellate courts. Judith clerked for Judge Harold Leventhal of the U.S. Court of Appeals for the D.C. Circuit and U.S. Supreme Court Associate Justice Potter Stewart, before serving in the U.S. Department of Defense (DOD). She then worked at Williams and Connolly until she was confirmed as General Counsel of the DOD. She briefly returned to Williams and Connolly until she joined Bechtel Group for four years as Senior Vice President and General Counsel. Today, Judith dedicates much of her time to serving on nonprofit and corporate boards—including serving on ALI's Council since 2010.

It's the Institute's practice of bringing together the wisdom of its independent membership, and not allowing outside influence that would seek to sway the outcome of a project, that drives Judith and Peter to contribute to the Institute. "One of the great strengths of the ALI, and why the Institute's work is so influential, is its independence," Judith said. She continued, "It takes funding to be able to maintain that independence. We have to compensate Reporters, who spend amazing amounts of time drafting the materials—whether it's Principles, Restatements, or other kinds of projects that we've engaged in. We have to be able to provide financial support to members who work outside of the private sector and may not have the means to come to our project meetings, in order to ensure a diversity of views in all of our work. And in today's world, where publishing revenue is no longer as reliable as it once was, we want to operate in a way that makes it absolutely clear that we are not beholden to anyone in the course of developing these projects. Independence is the key goal, and charitable contributions from members are central to sustaining that independence and the genuinely important work that the Institute does."

As the ALI approaches its 100th anniversary, Judith and Peter have demonstrated their continued commitment to the ALI's future by making a generous contribution to our Second Century Campaign, and the ALI could not be more grateful.

Read Judith and Peter's full profile at [www.ali.org/anniversary/profiles](http://www.ali.org/anniversary/profiles).

## What Our Donors Say

*"ALI brings together an extraordinary and diverse group of accomplished legal thinkers dedicated to improving American law. By supporting ALI, we contribute as members of the legal profession to American civic society."*



**Ann and Dan Girard**



*"The work of the ALI is central to improving the law in the never-ending quest for all of us to live in a just and ordered society. In framing general statements of our mature judgment of the best legal rules and the best legal principles, we help all branches of government, organizations, and individuals to conduct themselves and interact with others in a rationally predictable and fair manner."*

**Conrad and Marsha Harper**

*"We both believe that the American Democracy depends upon an effective judicial system and to fairness in its application. The work of the ALI in living up to its mission is more important now than ever. Without independent financial support, it cannot continue to do its deeply important work."*



**Roberta Cooper Ramo and Barry W. Ramo**



*"One learns as one participates in the development of Restatements of Law, Principles projects, and other ALI work products. One learns from other ALI Members. One builds lifelong friendships of mutual respect, including with those whose views about the law may sharply differ from your own."*

**Victor E. Schwartz**



# Campaign Funding Priorities

As we enter our second century, we will build on our strengths—the caliber of the people who do our work, the collaborative culture and civil discussions that fuel its creation and finalization, and our proven process—to ensure we are responsive to an ever-changing world. This important, challenging undertaking will require hard work and substantial resources.

Your gift to the Second Century Campaign will allow us to:

- Examine areas of the law not yet studied by ALI that are at the forefront of legal discourse, to provide guidance on these critically important and often divisive issues.
- Continue to work on Restatements, Principles, and Model Codes that have been identified as areas in need of clarification or reform, and that will provide great legal and societal benefit, but provide no financial gain to ALI.
- Respond more quickly, through reports or whitepapers, to provide judges and practitioners a way of understanding and organizing rapidly developing fields of law.
- Coordinate legal rules and facilitate cooperation across borders by working with organizations in other countries to create transnational legal principles.
- Eliminate barriers to participation in our work, ensuring that our membership remains diverse and broad, and that there are no financial obstacles to participating in our process.
- Help under-resourced state courts handle the broad range of cases they encounter by providing free access to our Restatements, Principles, and Model Codes.
- Continue to reexamine areas of the law to respond to change, updating our influential work to ensure that ALI projects remain relied upon by courts, practitioners, and society.



A successful Second Century Campaign will allow our vital work to continue. Pictured: 2019 Policing Principles project meeting.

## 100 for 100

On the occasion of our 100th Anniversary, we issued a challenge to our donors who have the means, who cherish the rule of law, and who value our vital work, to be one of 100 donors giving \$100,000 to The American Law Institute.

Since then, more than 10 members of the ALI have accepted the challenge and have generously joined in helping to raise the funds necessary so the Institute will be able to continue our work for a second century.

We hope that those of you who are able, will take the challenge today. If 100 donors help us successfully complete this challenge, we will be within striking distance of our Second Century Campaign's goal of \$35 million by the end of our 100th Anniversary year.

### DONORS AS OF APRIL 9, 2022

We would like to recognize those who have already accepted the challenge and invite others to join them. The Second Century Campaign has the ambitious goal of raising \$35 million by the end of 2023. With the participation of 100 donors at the \$100,000 level, we can reach this exciting goal together.

Apgar-Black Foundation

Timothy W. Burns

J. William Elwin, Jr.

Sharon and Ivan Fong

Teresa Wilton Harmon

Conrad and Marsha Harper

William C. Hubbard

Robert H. Mundheim

Stephanie Parker

Roberta Cooper Ramo and Barry W. Ramo

Yvonne Gonzalez Rogers and Matt Rogers

Lori and Steve Weise

### MEMBERS MAY JOIN THE 100 FOR 100 CHALLENGE BY:

- Making a one-time gift of \$100,000
- Making a pledge (to be paid in up to 10 annual installments)
- Including ALI in your estate plans

For more information about joining these donors in the 100 for 100 challenge, please contact ALI Director Richard L. Revesz at [Director@ali.org](mailto:Director@ali.org).

## Gifts to the Second Century Campaign

Our 100th Anniversary is a wonderful opportunity to ensure that our successors, 100 years from now, will be in at least as good a position as we now are to plan for the future of the Institute and its work.

We are grateful to the following major donors to the Second Century Campaign for bringing us one step closer to securing the Institute's future:

### SECOND CENTURY VISIONARY

(\$2.5 million or more)

Bennett Boskey  
Mary Kay Kane

### SECOND CENTURY PATRON

(\$1 million to \$2.49 million)

Carnegie Corporation of New York  
Andréa W. and Kenneth C. Frazier  
Family Foundation  
Vester T. Hughes Jr.  
Victor E. Schwartz  
Anonymous

### SECOND CENTURY BENEFACTOR

(\$500,000 to under \$1 million)

Ann and Daniel C. Girard  
Andrew Hendry  
Lee and Gary Rosenthal

### SECOND CENTURY SUPPORTER

(\$250,000 to under \$500,000)

David F. Levi  
Judith Miller and Peter Buscemi  
Anonymous (2)

### 100 FOR 100

See page 6 to learn more about our 100 for 100 challenge and view the list of members who have already accepted the challenge.

Visit [ali.org/giving](http://ali.org/giving) to learn about participating in the Life Member Class Gift, the ALI Annual Fund, becoming a Sustaining Member, or planning for an Estate Gift to the Institute.

## Volume of Essays on ALI's First Century To Be Published

In celebration of ALI's first 100 years, a volume of essays is being produced that explores ALI's founding, examines some of the Institute's most influential projects, and contemplates adoption and criticism of our work so far. Provisionally entitled *The ALI at 100: Essays on Its Centennial*, the project is led by editors Andrew S. Gold of Brooklyn Law School and Robert W. Gordon of Stanford Law School.

In addition to the publication of a printed volume, which will be available at the 2023 Annual Meeting, ALI is also planning to host a conference to discuss the essays.

The volume will consist of the following topics and contributors:

- The ALI Projects in the Context of Their Times—Kenneth S. Abraham and G. Edward White, University of Virginia School of Law
- The Restatements and International Law—George A. Bermann, Columbia Law School
- Principles of Corporate Governance—William W. Bratton, University of Pennsylvania Carey Law School
- Restatements of Contracts—Richard R. W. Brooks, New York University School of Law
- Restatements of Trusts—Naomi R. Cahn, University of Virginia School of Law; Deborah S. Gordon, Drexel University Thomas R. Kline School of Law; and Allison Anna Tait, University of Richmond School of Law
- Restating Common Law in the Shadow of the Codes—Deborah A. DeMott, Duke University School of Law
- Model Penal Code—Kimberly Kessler Ferzan, University of Pennsylvania Carey Law School
- The Restatements in the Age of Statutes—Abbe R. Gluck, Yale Law School
- The Restatements and the Common Law—Andrew S. Gold, Brooklyn Law School and Henry E. Smith, Harvard Law School
- Restatements of Torts—John C.P. Goldberg, Harvard Law School
- Legal Realist Comments on and Critiques of the Restatement Projects—Robert W. Gordon, Stanford Law School
- Principles of Family Dissolution—Linda C. McClain, Boston University School of Law and Douglas NeJaime, Yale Law School
- Restatements of Property—Thomas W. Merrill, Columbia Law School
- Principles of Aggregate Litigation—Linda S. Mullenix, University of Texas at Austin School of Law
- The ALI as Community: An Inside View—Roberta Cooper Ramo, Modrall Sperling
- The Legal Theory of Restatements—Frederick Schauer, University of Virginia School of Law
- Uniform Commercial Code—Robert E. Scott, Columbia Law School
- Precursors of the Restatements—David J. Seipp, Boston University School of Law
- Restatements of Restitution and Unjust Enrichment—Emily L. Sherwin, Cornell Law School
- Restatements of Conflict of Laws—Symeon C. Symeonides, Willamette University College of Law
- Restatement of the Law Governing Lawyers—W. Bradley Wendel, Cornell Law School





# Deputy Director Stephanie Middleton Announces Retirement

It is hard to craft an announcement from the ALI that is as bittersweet as the retirement of Stephanie Middleton. For we are excited for her to take the time to focus on family, yet what she brought to the Institute was truly invaluable. Upon her hiring, the position of “Deputy Director” was described as “overseeing the day-to-day operations of ALI’s Philadelphia headquarters and supporting and advising the Director on the Institute’s law-reform work.” When, in fact, Stephanie provided to the Institute so much more.

Not only is Stephanie a natural mentor, counselor, and leader, but also at times she has been called upon to be a mediator, negotiator, and brilliant strategist, and let’s not forget a great friend.

Members who have surely met Stephanie and heard her valuable feedback on our drafts at a project meeting or an Annual Meeting may not realize that her support of ALI projects began even before the first draft, and continued even after publication. As deputy director, Stephanie works with Director Ricky Revesz and the project’s Reporters to recommend to Council the project Advisers and discusses project plans. She reviews each project draft and works with our director and project Reporters to try to resolve controversial Sections. She reviews every written comment on every project, and helps Reporters navigate suggestions from members, which can sometimes be in conflict with other comments received. She has admitted that this is her favorite part of the job. She attends every project meeting, Council meeting, and Annual Meeting. Although she does all of this as ALI’s Deputy Director, she is also a member of the Institute.

Stephanie will be moving to California to be closer to her children and grandchildren. Although we will miss working with her on the day-to-day business of the Institute, we are thrilled that we will still see her, and benefit from her vast knowledge of ALI projects and the law when she continues to participate as an ALI member at project meetings and the Annual Meeting.

Stephanie had a remarkable career before joining ALI in 2010. A graduate of Yale University and the University of Pennsylvania Law School, she previously served as staff director and general counsel for the U.S. Senate Committee on the Judiciary, Senator Arlen Specter, Ranking Member. Before that, she was chief counsel for litigation at CIGNA Corporation, a global health-services firm headquartered in Philadelphia. She also worked for more than two years as deputy general counsel for Pennsylvania Governor Tom Ridge. Stephanie began her legal career as an associate at Morgan, Lewis & Bockius in Philadelphia. Before attending law school, she taught for several years at a large Philadelphia-area high school.

From the ALI Council, project Reporters, members, and staff, we wish you the absolute best in your retirement. May your days be filled with family, love, and laughter. May you never forget us, as we will certainly never forget you.





# Spring Project Meetings

## Corporate Governance – Feb. 24

Preliminary Draft No. 3 includes new material in Chapter 1: Definitions (§ 1.13, Director; and § 1.27, Officer) and Chapter 5: Duty of Loyalty (§ 5.04, Use by a Director or Officer of Corporate Property, Material Nonpublic Corporate Information, or Corporate Position; and § 5.05, Taking of Corporate Opportunities by Directors or Officers; § 5.06, Competition with the Corporation; and § 5.11, Tender Offers by Controller). This project is on the 2022 Annual Meeting agenda. See page 11 for details.

Members may join the Members Consultative Group of any project that will have future drafts and project meetings by visiting individual project pages 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.

## Torts: Defamation and Privacy – Feb. 25

Preliminary Draft No. 2 incorporates updates to § 1 (Elements of Defamation Stated) and § 3 (Defamatory Communications) of Chapter 1 on Invasions of Interest in Reputation in response to the discussion at the previous Adviser’s meeting. The draft also includes new material on § 2 (The Determination of Meaning) and separate Sections on materially false statements of fact (§ 4) and defamation by implication (§ 5).

## Government Ethics – Mar. 25

Preliminary Draft No. 7 includes the remaining substantive portion of this project, Chapter 3 on Conflicts of Interest and Outside Activities of Public Servants. The final Chapter left to be presented in an upcoming draft is Chapter 1 on Scope, General Principles, and Definitions. Chapter 2 on Gifts from and Financial Relationships with Prohibited Sources, Chapter 4 on The Election-Related Activities of Public Servants, Chapter 5 on Restrictions on Leaving or Entering Public Service, Chapter 6 on Disclosure, and Chapter 7 on Administration and Enforcement of Ethics Provisions have been approved by the membership.



*Corporate Governance project meeting*

*Clockwise L-R: Jill Fisch of University of Pennsylvania Carey Law School, Edward B. Rock of New York University School of Law, John Finley of The Blackstone Group, and Amelia Miazad of UC Berkeley School of Law*



*Government Ethics project meeting*

*Clockwise L-R: Robert P. Charrow of Greenberg Traurig LLP, Richard Briffault of Columbia Law School, Judith A. Miller, and Joe R. Reeder of Greenberg Traurig, LLP*



*Torts: Defamation and Privacy project meeting*

*Clockwise L-R: Douglas P. Woodlock of the U.S. District Court, District of Massachusetts; Robert C. Post of Yale Law School; Leslie Carolyn Kendrick of University of Virginia School of Law; and Lyrissa Barnett Lidsky of University of Missouri School of Law*

# 2022 ANNUAL MEETING

AS OF 4/11/2022

## PRE-MEETING EVENTS: SUNDAY, MAY 15

**2:30-3:45 p.m.**

### Special Program on the U.S. Supreme Court

A conversation between two prominent U.S. Supreme Court appellate lawyers and former U.S. Solicitors General Paul D. Clement of Kirkland & Ellis LLP and Seth P. Waxman of WilmerHale.

Moderated by Leondra R. Kruger, California Supreme Court



*Clement*



*Kruger*



*Waxman*

**4:00-6:00 p.m.**

### ALI CLE Ethics Program on Emerging Technologies

Emerging technologies are increasingly the subject of transactions and the method by which transactions are entered into, documented, monitored, and enforced. As emerging technologies transform both the subject of transactions and their negotiation and administration, lawyers must be prepared to fulfill their professional roles in a world that may be far different than the one to which they are accustomed. Featuring a diverse panel of experienced practitioners and scholars, this session will explore areas where technological developments are transforming legal practice and, often, law itself.

Panelists: Sarah C. Dodds-Brown of American Express, Sarah Hammer of The Wharton School of the University of Pennsylvania, Teresa Wilton Harmon of Sidley Austin LLP, and Steven O. Weise of Proskauer will explore the ways emerging technologies affect how existing law governs transactions.

Moderated by: Neil B. Cohen, Brooklyn Law School

## MONDAY, MAY 16

### Children and the Law

Tentative Draft No. 4 includes material from Chapter 1, Parental Authority and Responsibilities, and Chapter 2, State Intervention for Abuse and Neglect, of Part I (Children in Families); Chapter 5, State Duty to Educate Children, of Part II (Children in Schools); and Chapter 12, Pre-Adjudication, Chapter 13, Delinquency Proceedings, Chapter 14, Delinquency Dispositions, and Chapter 15, Juveniles in Criminal Justice System, of Part III (Children in the Justice System), as well as three new Comments to be added to previously approved Sections in Part II.

### Copyright

Tentative Draft No.3 contains material from Chapter 1, Subject Matter and Standards: Generally; Chapter 2, Subject Matter of Copyright: Scope of Protection; Chapter 3, Initial Ownership, Transfers, Voluntary Licenses, and Termination of Grants; Chapter 4, Copyright Formalities; Chapter 5, Duration of Copyright; Chapter 6, Copyright Rights and Limitations; and Chapter 9, Copyright Remedies.

### Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities

Tentative Draft No. 1 contains the entire project.

### Conflict of Laws

Tentative Draft No. 3 contains Topic 1, Introduction, of Chapter 5 on Choice of Law.

## MONDAY AT A GLANCE

8:30 a.m. Opening Session

9:00 a.m. **Children and the Law**

10:30 a.m. **Copyright**

12:00 p.m. Lunch Break

1:30 p.m. **Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities**

4:30 p.m. **Conflict of Laws**

6:00 p.m. Adjournment

7:00-9:30 p.m.

Members Reception and Buffet, District Pier at The Wharf

The Members Reception on Monday night is at the District Pier at The Wharf. Details on shuttle schedules to this off-site location will be made available on the Annual Meeting website.

# 2022 AN

## TUESDAY, MAY 17

### Consumer Contracts

Tentative Draft No. 2 contains the entire project. See page 16 for a more in-depth look at the Restatement.

### MPC: Sexual Assault and Related Offenses

In Tentative Draft No. 6, the membership will be presented with material approved by ALI Council during its January and March 2022 meetings (Council Draft No. 12). A recap of the January Council meeting is included in the previous issue of *The ALI Reporter*. A recap of the March Council meeting is available on page 1 of this issue.

### Corporate Governance

Tentative Draft No. 1 contains Sections from Chapter 1, Definitions; Chapter 2, The Objective of a Corporation; Chapter 4, Duty of Care and the Business Judgment Rule; and Chapter 5, Duty of Loyalty.

### Henry J. Friendly Medal



This year's Friendly Medal will be presented to Merrick B. Garland, 86th Attorney General of the United States. Raymond J. Lohier Jr. of the U.S. Court of Appeals for the Second Circuit will present the award to Attorney General Garland at the Annual Dinner on Tuesday, May 17.

Attorney General Garland was sworn in as the 86th Attorney General of the United States on March 11, 2021. Immediately preceding his confirmation as Attorney General, he was a judge of the U.S. Court of Appeals for the District of Columbia Circuit. He was appointed to that position in 1997, served as Chief Judge of the Circuit from 2013-20, and served as Chair of the Executive Committee of the Judicial Conference of the United States from 2017-20. In 2016, President Obama nominated him for the position of Associate Justice of the United States Supreme Court.

He graduated *summa cum laude* from Harvard College and *magna cum laude* from Harvard Law School. Following law school, Attorney General Garland clerked for Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit, and for William J. Brennan Jr. of the Supreme Court of the United States.

### TUESDAY AT A GLANCE

- 8:15 a.m. Presentation of Distinguished Service Award to Steven O. Weise
- 8:30 a.m. **Consumer Contracts**
- 12:15 p.m. Lunch Break
- 1:45 p.m. **MPC: Sexual Assault and Related Offenses**
- 4:30 p.m. **Corporate Governance** (part one)
- 5:15 p.m. Adjournment
- 7:00 p.m. Annual Reception and Dinner

### DISTINGUISHED SERVICE AWARD: STEVEN O. WEISE



The Distinguished Service Award will be presented to Steven O. Weise of Proskauer Rose LLP on Tuesday morning. This award is given from time to time to a member who over many years has played a major role in the Institute as an institution, by accepting significant burdens as an officer, Council member, committee chair, or project participant and by helping keep the Institute on a steady course as the greatest private law-reform organization in the world.

Mr. Weise was elected to the ALI in 1992 and was elected to the Council in 2012. He serves as Co-Chair on Principles for a Data Economy, completed in 2021, and as an Adviser on Restatement of the Law, Consumer Contracts, and Restatement of the Law Fourth, Property.

He lectures widely on commercial-law topics and legal-opinion letters and is the author of more than 100 articles on these topics. He has a wide range of UCC expertise and has served as an ALI designee on the Permanent Editorial Board for the Uniform Commercial Code since the mid-1990s.



## WEDNESDAY, MAY 18

### Policing

Tentative Draft No. 4 contains material from Chapter 1, General Principles of Sound Policing, Chapter 4, Police Encounters, Chapter 9, Forensic-Evidence Gathering, Chapter 12, Informants and Undercover Agents, and Chapter 14, Role of Other Actors in Promoting Sound Policing.

### Property

Tentative Draft No. 3 includes material on Nuisance, Bailments, The Estate System and Related Matters, and Zoning, Planning, and Subdivision.

### UCC and Emerging Technologies

Tentative Draft No. 1 contains draft amendments to Articles 1, 2, 2A, 3, 4, 4A, 5, 7, 8, and 9; draft Article 12; and transition provisions.

### Torts: Concluding Provisions

Tentative Draft No. 1 includes material on Apportionment of Liability for Economic Harm; Wrongful Acts Doctrine; Liability of Medical Professionals and Institutions; Interference with Family Relationships; Immunities; Parental Standard of Care; and Consortium.

### Torts: Remedies

Tentative Draft No. 1 contains § 1, The Right to a Remedy, and Sections from Topic 1, General Rules for Measuring Compensatory Damages, of Chapter 1 on Compensatory Damages.



#### Wednesday Members Luncheon:

#### Remarks by Kim J. Askew of DLA Piper

On Wednesday, May 18, the Institute will honor its new Life Members (Class of 1997) and 50-Year Members (Class of 1972) at a luncheon. All members and guests are welcome to attend this ticketed event. Tickets are \$65 per person.

Kim J. Askew (Class of 1997) will be the luncheon speaker. She is a partner at DLA Piper, where she represents clients in complex commercial and employment litigation. She was elected to the ALI in May 1997 and was elected to the Council in May 2007.

Askew has extensive experience in representing clients in complex commercial litigation in a variety of industries. She also represents clients in significant employment matters involving claims of race, disability, gender and age discrimination, and sexual harassment and in litigation involving trade secrets, non-compete, and non-solicitation and employment agreements. She has successfully tried cases to non-jury and jury verdicts in state and federal courts around the country, and handled appeals before the Texas Courts of Appeals and the Fourth, Fifth, and Eighth Circuit Courts of Appeals.

### WEDNESDAY AT A GLANCE

- 8:30 a.m. ALI Early Career Scholars Program: Presentation by David Pozen
- 8:45 a.m. **Corporate Governance** (part two)
- 9:30 a.m. **Policing**
- 11:45 a.m. **Property**
- 1:00 p.m. Members Luncheon  
Remarks by: Kim J. Askew, DLA Piper
- 2:30 p.m. **UCC and Emerging Technologies**
- 3:00 pm. **Torts: Concluding Provisions**
- 4:30 p.m. **Torts: Remedies**
- 6:00 p.m. Adjournment

Please consider joining us on Sunday afternoon as well. We have an exciting lineup of pre-Meeting events, including a CLE program offering ethics credits. Visit page 10 for more information.



## FOR THE LATEST INFORMATION AND TO REGISTER NOW VISIT [WWW.ALI.ORG/AM2022](http://WWW.ALI.ORG/AM2022).

If you have any questions or need additional information, please contact us at:

#### Registration and General Meeting Information

membership@ali.org  
(215) 243-1624 or (215) 243-1639

#### Drafts and Comments

publications@ali.org

#### Mailing Address

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Philadelphia, PA 19104  
Main phone: (215) 243-1600  
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# WHAT'S HAPPENING IN THE BALLROOM?

Throughout the year, members and project participants gather together to work on the Institute's current projects. Each project and Council meeting is in itself significant, but the culmination of that hard work is displayed at the Annual Meeting. Coming to the Annual Meeting is an amazing opportunity to see what ALI is really about, to be reminded of the importance of, and to reinforce your commitment to, the rule of law. There is something incredible that happens when the wisdom of our membership comes together.

However, whether it's your first or 15th time at the Annual Meeting, participating in the project session discussions can be daunting. We've put together this information with the hope of inspiring you to join in on the discussion.

## PREPARING FOR THE MEETING

Annual Meeting drafts are available to ALI members and project participants in advance of the Meeting. Electronic versions of drafts will be posted on our website, and you will be notified by email when each draft is available.

You don't have to wait until the Meeting to submit comments on drafts. Visit the Projects page of the ALI website to submit comments on a draft prior to the Meeting.

If you'd like to submit a motion on a project, please do so well in advance of the Annual Meeting in order to give Reporters and other members an opportunity to consider it carefully. Instructions on submitting motions can be found on the Drafts page of the Annual Meeting website.

Comments and motions to Annual Meeting drafts are posted for member review on each project's page.

**TRAVEL TIP:** This year's Annual Meeting includes sessions for 12 projects. Project sessions may run shorter or longer than expected. Keep this in mind when planning your arrival or departure.



## REGISTRATION

Upon arrival you should check in at the Registration Desk to receive your Annual Meeting materials, including your name badge which serves as your voting badge should the need for a hand count arise.



## ENTERING THE BALLROOM

Print copies of drafts for project sessions happening that day are available near the Ballroom entrance. There are a limited number of print copies available. If you requested a copy be mailed to you, please bring it with you to the Meeting, or consider downloading the electronic version.

The drafts table will also include copies of motions. Even if you bring your draft with you, be sure to check the table for additional documents. But, please do not place any materials on this table. Last-minute motion filings must be delivered to the Registration Desk, where staff can help you ensure that you have met the submission requirements.

## IN THE BALLROOM

Project Reporters sit on the dais with an ALI Council member (Chair), who presides over the session and guides members through each Section of the draft. The chair will announce each Section up for discussion which will also be projected onto screens.

Any registered attendee may queue at the available microphones to comment on the current Section. Each microphone is numbered. The chair will call on each microphone in turn. First, tell us who you are. All speakers at the microphone must state their name, city, and state each time they speak.

You have three minutes to make your comment or ask a question. Speakers should look for the light on the dais to help keep track of their time limits. When the green light turns yellow, speakers should wrap up their comments; the red light marks the expiration of time.

Reporters may accept suggestions for changes to the draft made from the floor and commit to making those changes to the text before the official text is published.



In an effort to get through as many substantive comments as possible, speakers should not make stylistic suggestions from the floor. Instead, we encourage you to submit nonsubstantive suggestions either before or after the session.

Members may make a motion rather than a comment—this is a request for a change, and requires a majority vote from the members in attendance.

Reporters have the opportunity to respond to any motion made and then members in attendance will be asked to queue at the microphones in support of or to oppose the motion. If a motion passes, the requested changes will be made before the official text is published.



## THE ANNUAL MEETING

Step up to the microphone; you never know who you'll meet.

*John H. Beisner, ALI Council Member and Skadden Partner*

When I'm asked by new members about what it's like to attend an Annual Meeting, I tell them two things:

1. Do not hesitate to stand at one of the microphones in the room and comment on our project drafts. We cannot do this work without our members' participation—it's the members' collaboration and thoughtful engagement at the Annual Meeting that make our work so reliable.
2. You never know who you will meet. ALI's members and project participants have amazingly diverse backgrounds and are among the most impressive, storied people that I have ever met, many of whom I now consider good friends.

Perhaps these points are best illustrated by sharing the story of the very first ALI Annual Meeting I attended as a member. On that occasion, I nervously stood at a microphone to offer a comment on a Restatement Section that was being discussed. It was quickly rebutted rather forcefully by several well-known professors who clearly had a very different view of the issue.

As I retreated to my seat in the back of the room, I realized that someone had taken the seat next to mine. As I looked more closely, I realized that it was

Judge John Minor Wisdom, an idol of mine whom I'd never met. As I was seating myself, he leaned over to me and said, "Don't mind those guys. You made a valid point that the group needed to hear. Keep at it. Tell him what you think." On reflection, that really speaks to what the organization is all about. The Annual Meeting features very friendly but spirited debates on whatever issues may be confronting the organization.

So, I hope to hear both new and familiar voices at the microphones this year. Our debates are sure to be vigorous, yet collegial, as always. Whether you comment on one or many of the projects on the agenda, your insights are vital to the Institute's work.

I look forward to seeing you in May.



## MEMBERSHIP VOTING

Often at the conclusion of a project session, a motion will be made to approve either part or all of the Draft Sections discussed during the session, "subject to the discussion at the Meeting and the usual editorial prerogative." This is known as the Boskey motion, named for longtime ALI Treasurer Bennett Boskey.

If time allows for the entire draft to be fully discussed, a Boskey motion will be made to approve the full draft in light of the Annual Meeting discussion, any motions that have passed, and allows for any necessary minor editorial changes.

If the time allotted on the agenda expires before the entire draft is discussed, a Boskey motion may be made for any Sections that were fully vetted by the members.

Voting usually is by voice vote. Voting by show of hands is at the presiding officer's discretion. When voting by show of hands, members must hold up their badges, with the *back* of the badge displayed.



**REGISTER NOW FOR THE  
2022 ANNUAL MEETING AT  
[WWW.ALI.ORG/AM2022](http://WWW.ALI.ORG/AM2022).**

# Restatement of the Law, Consumer Contracts (Tentative Draft No. 2, April 2022) – Significant Black Letter Changes Since 2019 Annual Meeting (Tentative Draft No. 1, April 18, 2019) (“TD No. 1”)

By Steven O. Weise, Proskauer Rose LLP

The members of The American Law Institute will consider Tentative Draft No. 2 of the Restatement of the Law, Consumer Contracts at the 2022 Annual Meeting. The Restatement, Tentative Draft No. 1, was considered at the 2019 Annual Meeting. As the Reporters state in their Reporters’ Memorandum for TD No. 2, since the 2019 Annual Meeting, the Reporters have considered the motions and comments made in connection with the 2019 Annual Meeting and subsequent court decisions, comments, articles, blogs, and other sources of input. Tentative Draft No. 2 adopts and implements a wide array of those contributions.

The table below identifies key changes made to the black letter since the 2019 Annual Meeting. There are also a few observations referring to the Comments. The full text of TD No. 2 is posted on the ALI Consumer Contracts project page and is available, along with a copy marked against Tentative Draft No. 1 (considered at the 2019 Annual Meeting).

Emphasis has been added to direct attention to relevant words. The markings do not show changes from earlier drafts.

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<b>Introduction</b>		
<p><i>Adds discussion of “core” terms as compared to “standard” terms</i></p>	<p>“Typically, consumer contracts consist of <i>core deal terms</i>, which consumers readily identify as characterizing the transaction (such as price and payment methods, a shorthand description of the product, and a few others), and <i>non-core standard contract terms</i>, which cover a variety of provisions that the business seeks to apply to the transaction. Primary among these non-core terms are provisions that disclaim representations and warranties, limit consumer remedies, qualify the rights of consumers to bring legal action, and authorize the business to collect, use, and share consumers’ personal data. Such standardized terms are frequently referred to as the ‘fine print’ or ‘boilerplate.’”</p>	<p>See also § 2, Comment 1 (“This Section describes the procedures for <i>adoption of standard contract terms</i> into consumer contracts. Adoption of standard contract terms is a <i>separate legal consequence</i> than the formation of a binding contract. A contract is formed when the parties manifest assent to a contractual relationship. ... This Section identifies minimum requirements for contracting procedures that result in the adoption of standard contract terms. It operates in a reality in which consumers, when manifesting assent to the transaction, are typically only aware of some ‘core’ aspects of the transaction ...”)</p>

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<p><i>Adds discussion of adoption rules of §§ 2 and 3 as a component of “protective” (policing) measures (in addition to protective provisions in §§ 4-9)</i></p>	<p>“In dealing with this fundamental challenge of potential abuse in asymmetric contracting environments, consumer-contract law deploys several <i>protective</i> techniques. The <i>first set of techniques fits within the doctrine of mutual assent</i>—the rules that determine how a contract is formed, which terms are adopted into the agreement, which terms are being modified, and what processes a business must follow to alert consumers to the terms being introduced and to the consequences of their adoption.”</p>	
<p><i>Adds reference to different approaches in non-U.S. jurisdictions</i></p>	<p>“One possible approach to the marking of boundaries is a set of presumptions that certain provisions are unfair and unenforceable. This approach, <i>widely followed in foreign jurisdictions</i>, has only limited presence in American law (see, e.g., Uniform Commercial Code § 2-719(3)). Instead, under the common law, traditional doctrines like unconscionability and misrepresentation have been applied to police suspect practices and terms relating to the subject matter of the transaction, the remedies that consumers or the business may seek when the transaction fails, choices of law and forum, the business’s discretion to specify and adjust contractual obligations, and to many other areas of contracting.”</p>	
<p><b>§ 1. Definitions, Scope, and Outline</b></p>		
<p>§ 1(a)(6): <i>adds that “statement” can include an “implied” statement</i></p>	<p>“Affirmation of fact or promise’ – Any express or <i>implied</i> statement or representation about the transaction, ...”</p>	<p>Comment 6 also notes that an “omission” can be a “statement”; <i>see also</i> discussion of § 6 below</p>
<p>§ 1(b): <i>Clarifies that Restatement restates common law of contracts as applied in context of consumer transactions</i></p>	<p>“This Restatement restates the <i>common law of contracts as courts have applied it in the context of contracts between a business and a consumer</i>. It <i>restates</i> the approach courts have taken to determine which terms are adopted as part of the contract and whether these terms are enforceable.”</p>	
<p>§ 1(c): <i>Clarifies that entire Restatement Second of Contracts applies to consumer contracts</i></p>	<p>“The <i>entire Restatement of Law Second, Contracts, applies</i> to consumer contracts and provides additional rules and principles, including rules of mutual assent, interpretation, avoidance, and remedies not included in this Restatement.”</p>	



## RESTATEMENT OF THE LAW, CONSUMER CONTRACTS CONTINUED FROM PAGE 17

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
§ 1(c): <i>Adds express reference to Restatement Second of Contracts § 201 (interpretation takes into account the nature of the reasonable consumer)</i>	“Provisions from the Restatement of Law Second, Contracts that are particularly suited to the interpretation and supplementation of consumer contracts include § 201 on the nature of the reasonable consumer...”	<i>See also</i> Introduction to this <i>Restatement</i> (noting that consumers are “ <i>unlikely to read</i> ” the standard terms), <i>Restatement</i> § 2, Comment 1 (“[This Section] ... operates in a reality in which consumers, when manifesting assent to the transaction, are typically only aware of some ‘core’ aspects of the transaction but are <i>unlikely to read</i> and exercise meaningful informed consent to the non-core standard contract terms.”), and <i>Restatement of Law Second, Contracts</i> § 211, Comment <i>b</i> , noting that a business “ <i>does not ordinarily expect ... customers ... to read the standard terms</i> ”
§ 1(c): <i>Adds express reference to Restatement Second of Contracts § 206 (interpretation against the drafter)</i>	“Provisions from the Restatement of Law Second, Contracts that are particularly suited to the interpretation and supplementation of consumer contracts include ... § 206 on interpretation against the drafter ...”	
§ 1(c): <i>Adds express reference to Restatement Second of Contracts § 211(3) (protecting reasonable expectations of the consumer)</i>	“Provisions from the Restatement of Law Second, Contracts that are particularly suited to the interpretation and supplementation of consumer contracts include ... § 211(3) on protecting the reasonable expectations of the consumer.”	
§ 1(d): <i>clarifies deferral to UCC (as voted at 2019 Annual Meeting)</i>	“In particular, this Restatement neither interprets nor determines the scope or application of provisions of the Uniform Commercial Code.”	
§ 1(e): <i>Adds “Roadmap” to Restatement</i>	“This Restatement provides specific guidance on the following issues: ... [listing each Section of the Restatement and its title]”	
§ 1(f): <i>Adds statement that adoption of standard terms under §§ 2 and 3 is not a “safe harbor” from application of other Restatement provisions protecting consumers (§§ 4-9) or under other law</i>	“Standard contract terms that <i>satisfy the requirement for adoption</i> under Sections 2 and 3, or are subject to appropriate limits of discretion under Section 4, <i>may be unenforceable</i> under the rules provided in Sections 5-9 or under any other rules of contract law, or other statutory or regulatory provisions.”	

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<b>§ 2. Adoption of Standard Contract Terms</b>		
<p>§ 2(a)(1): <i>black letter requiring that consumer receive “reasonable notice” of the standard term has not changed since Tentative Draft No. 1 and is stated here for convenience – the discussion of this requirement in Comment 2 has been significantly expanded, applying and explaining a “totality of the circumstances” test and a broad array of factors used to implement that test; the discussion reflects the analysis in recent decisions, including the decisions of the Massachusetts Supreme Judicial Court in Kauders v. Uber Technologies, Inc., 486 Mass. 557, 159 N.E.3d 1033 (2021), and the Supreme Judicial Court of Maine in Sarchi v. Uber Technologies, Inc., (2022 ME 8, 268 A.3d 258) (2022) (citing Kauders extensively)</i></p>	<p>“(a) A standard contract term is adopted as part of a consumer contract if the business demonstrates that the consumer manifested assent to the transaction after receiving: (1) a <i>reasonable notice</i> of the term and of the intent to include the term in the consumer contract, ...”</p>	<p>From Comment 2:</p> <p>“The reasonableness of any process of adoption of a standard term is based on the <i>totality of the circumstances</i> and requires a case-by-case, fact-intensive analysis. The analysis of whether the consumer, who manifested assent to the transaction, has adopted the standard contract terms includes a review of numerous factors, such as the form and nature of the transaction; the clarity, sequence, flow, and simplicity of the communication of the terms; the design, layout, and content of the interface; the nature of the transaction; the totality of the consumer’s interactions with the business; the difficulty of identifying the notices and finding the location of the terms; the prominence of notices regarding important terms and their nature; and the visibility and clarity of the language alerting consumers that specific steps will result in the adoption of the terms as part of the contract with the business, as well as the manner in which the consumer is asked to manifest assent to the transaction and acknowledge the adoption of the standard contract terms.”</p>
<p>§ 2(a): <i>Adds statement that the “business” has burden to “demonstrate” that each element of adoption of standard terms has occurred</i></p>	<p>“(a) A standard contract term is adopted as part of a consumer contract <i>if the business demonstrates</i> that the consumer manifested assent to the transaction after receiving: ...”</p>	
<p>§ 2(b): <i>Adds statement that “business” has burden to “demonstrate” that each element of adoption of standard terms by pay now, terms later (“PNTL”) has occurred</i></p>	<p>“When a standard contract term is available for review only after the consumer manifests assent to the transaction, the standard contract term is adopted as part of the consumer contract <i>if the business demonstrates</i> that: ...”</p>	

## RESTATEMENT OF THE LAW, CONSUMER CONTRACTS CONTINUED FROM PAGE 19

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<b>§ 3. Adoption of a Modification [by the Business] of Standard Contract Terms</b>		
§ 3(a): <i>Adds express statement that Section applies only to modifications by the business</i>	“A modification proposed by <i>the business</i> of a standard contract term in a consumer contract governing an ongoing relationship is adopted ...”	
§ 3(a): <i>Adds statement that “business” has burden to “demonstrate” that each element of adoption of modification of standard terms has occurred</i>	“A modification ... is adopted if <i>the business demonstrates</i> that: ...”	
§ 3(a)(1) and (3): <i>Adds Comment that “reasonable notice” requirements of § 3 incorporate the “totality of the circumstances” test for “reasonable notice” under § 2; black letter requiring that consumer receive “reasonable notice” of the proposed modified term has not changed since Tentative Draft No. 1 and is stated here for convenience; “reasonable notice” requirement in § 3(a)(3) is new</i>	“A modification ... is adopted if the business demonstrates that: (1) the consumer received a <i>reasonable notice</i> of the proposed modified term ...; ... (3) the consumer received <i>reasonable notice</i> that continuing the contractual relationship without rejecting the proposed modified term will result in the modification becoming legally binding.”	Comment 3: “The factors listed in § 2, Comment 2, including appearance, placement, layout, and timing of the notice; the clarity, sequence, and simplicity of the communication of the terms; the difficulty of identifying and finding the location of the terms; the prominence of notice regarding important terms and their nature; the visibility and clarity of the language alerting consumers that specific steps will result in a modification of the terms; and the nature of the proposed modified standard contract terms determine whether, considering the <i>totality of the circumstances</i> , the notice and opportunity to review and reject are <i>reasonable</i> .”
§ 3(a)(1) and (3): <i>Adds in Comment that in the case of a modification “reasonable notice” requires a description of the “specific changes”</i>	[Please see relevant black letter in preceding row]	Illustration 5: “If the business does not provide the consumer with a distinct or separate notice of the modification, <i>describing specific changes to the agreement</i> and the effective date of those changes, the new terms are not adopted as a binding modification.”
§ 3(a)(3): <i>Adds statement that consumer must receive reasonable notice that continuing relationship will make proposed term legally binding</i>	“A modification ... is adopted if the business demonstrates that: ... (3) the consumer received reasonable notice that continuing the contractual relationship without rejecting the proposed modified term <i>will result in the modification becoming legally binding</i> .”	

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<p>§ 3(a)(4)(B): <i>Adds statement that modification effective only if consumer “continues to take the benefit of” the executory contract (derived from Restatement Second of Contracts § 69(1)(a)) (where there is no prior agreement for a modification process), after consumer receives required notices and time period has elapsed</i></p>	<p>“A modification proposed by the business of a standard contract term in a consumer contract governing an ongoing relationship is adopted if the business demonstrates that: ... (4) the consumer either: ... (B) did not reject the proposed modified term and <i>continues to take the benefit of</i> the contractual relationship after the expiration of the rejection period provided in the proposal.”</p>	
<p>§ 3(c): <i>Adds statement that modification adopted only if it is “fair and equitable” (derived from Restatement Second of Contracts § 89(a))</i></p>	<p>“(c) A modification by the business of a standard contract term in a consumer contract is adopted only if the modification is proposed in good faith, if it is <i>fair and equitable</i> ...”</p>	<p>Comment 1 newly elaborates on the “good faith” test: “[the modification] must be proposed in good faith, which means that the business must have an <i>objectively demonstrable legitimate reason for the modification</i>.” Comment 7 addresses the “fair and equitable” component: “The <i>fair and equitable</i> provision in subsection (c) is intended to ensure that the modification does not unduly disadvantage the consumer, even if the requirements of subsections (a) and (b) have been met.”</p>
<p>§ 3(d): <i>Adds statement that standard terms may not be modified if either party has “substantially” performed the contact</i></p>	<p>“(d) Standard contract terms may not be modified in a consumer contract that has been <i>substantially</i> performed by at least one party.”</p>	
<p><b>§ 5. Unconscionability</b></p>		
<p>§ 5(b): <i>Adds statement that procedural and substantive unconscionability are “factors,” which has the effect of setting a holistic test for unconscionability</i></p>	<p>“(b) In determining whether a contract or a term is unconscionable at the time the contract is made, a court examines the following <i>factors</i>: ...”</p>	<p>Also, clarifies that court <i>must</i> (not “should”) “examine” the factors (§ 5(b), lead in)</p>
<p>§ 5(b)(2): <i>black letter that “absence of meaningful choice on the part of the consumer” creates per se procedural unconscionability (low level) has not changed</i></p>	<p>“(b) In determining whether a contract or a term is unconscionable at the time the contract is made, a court examines the following factors: ... (2) procedural unconscionability, namely a contract or term that results in unfair surprise or results from the <i>absence of meaningful choice on the part of the consumer</i>.”</p>	<p>Given some comments about burden of proof, note that this provision creates a <i>per se</i> rule and makes any burden of proof here unnecessary</p>



## RESTATEMENT OF THE LAW, CONSUMER CONTRACTS CONTINUED FROM PAGE 21

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<p>§ 5(b) [end]: <i>Adds statement that finding of “unconscionability” does not require showing of both procedural and substantive unconscionability when appropriate</i></p>	<p>“In appropriate circumstances, a sufficiently high degree of one of the factors is sufficient to establish unconscionability.”</p>	<p>Clarifies that procedural <i>or</i> substantive unconscionability can be sufficient to establish unconscionability (§ 5(b))</p>
<p>§ 5(d): <i>Adds specific examples of per se procedural unconscionability, along with factors to use in making that determination</i></p>	<p>“(d) Without limiting the scope of subsection (b)(2), a contract term is procedurally unconscionable if a reasonable consumer in the circumstances is not aware of the term or does not understand or appreciate the implications of the term, and as a result does not meaningfully account for the term in making the contracting decision. <i>Factors</i> relevant to making such a determination include:</p> <ul style="list-style-type: none"> <li>(1) the legal and financial sophistication of a consumer who enters into such transactions;</li> <li>(2) the complexity of the term or of the agreement as a whole;</li> <li>(3) pressure tactics and manipulation employed by the business in soliciting the consumer’s assent; and</li> <li>(4) the process by which the term was introduced.”</li> </ul>	
<b>§ 6. Deception</b>		
<p>§ 6(b)(2): <i>Adds specific examples of per se deception, where a material term is obscured</i></p>	<p>“Without limiting the scope of subsection (a), an act or practice by the business <i>is</i> deceptive if it has the effect of: ... (2) obscuring the presentation of a material term of the contract or of its effect, including a charge to be paid by the consumer or the overall cost or detriment to the consumer ...”</p>	
<p>§ 6(b)(3): <i>Provision of specific examples of per se deception added, where there is obscuring of the absence of a material term beneficial to the consumer which was reasonably expected by the consumer</i></p>	<p>“Without limiting the scope of subsection (a), an act or practice by the business <i>is</i> deceptive if it has the effect of: ... (3) obscuring the fact that the subject matter of the contract does not have a material beneficial attribute that consumers to such transactions reasonably expect it to have.”</p>	

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<p><i>Comment 2 affirms that an “omission” can constitute a “deceptive act or practice”</i></p>		<p>Comment 2: “In both subsections (b)(2) and (b)(3), a deceptive obscuring may be done affirmatively, as when information necessary to correct misperceptions is overshadowed by other terms the business prioritizes. The obscuring may also result from an <i>omission</i> by the business, as when the business has reason to believe that the consumer reasonably but mistakenly expects a particular term or a particular benefit and fails to correct that expectation. A business that discloses part of the truth about the transaction but fails to add qualifications or other information necessary to avoid a reasonable but mistaken expectation engages in both an act and an <i>omission</i> that obscure a term or a fact. (Cf. Restatement of the Law Third, Torts: Liability for Economic Harm § 5, Comment <i>e</i>.)”</p>
<p><i>Comment states that § 6 addresses only common law</i></p>		<p>Comment 8(b): “This Section is consistent with federal and state anti-deception law, but it <i>restates only the common law consequences</i> of deception and does not incorporate the tests and remedies of that anti-deception law.”</p>
<p><b>§ 7. Affirmations of Fact and Promises that Are Part of the Consumer Contract</b></p>		
<p>§ 7(a): <i>Clarifies that Section addresses “affirmation of fact or promise” that a “particular attribute becomes part of the consumer contract”</i></p>	<p>“(a) An affirmation of fact or promise made by the business that creates a reasonable expectation by a consumer who is its intended audience that the subject matter of the contract will have a <i>particular attribute</i> becomes part of the consumer contract between the business and the consumer.”</p>	

## RESTATEMENT OF THE LAW, CONSUMER CONTRACTS CONTINUED FROM PAGE 23

SECTION OF RESTATEMENT AND TOPIC	RELEVANT <i>BLACK LETTER</i> TEXT FROM TENTATIVE DRAFT NO. 2 (DRAFT TO BE CONSIDERED AT 2022 ANNUAL MEETING)	OBSERVATIONS, COMMENTS, AND NOTES
<b>§ 9. Effects of Derogation from Mandatory Provisions</b>		
§ 9(a): <i>Adds statement that § 9 does not displace remedies available outside this Restatement</i>	“(a) If a court finds that a contract or any term excludes, limits, or violates any mandatory provision of law, or is otherwise unenforceable, the court should, <i>in addition to any other remedy available in law</i> , do one of the following: ...”	
§ 9(a)(3): <i>Adds statement that consumer can enforce part of contract not made unenforceable</i>	“If a court finds that a contract or any term excludes, limits, or violates any mandatory provision of law, or is otherwise unenforceable, the court should, in addition to any other remedy available in law, do one of the following: ... (3) <i>enforce the remainder of the contract</i> but limit the application of the derogating term.”	
§ 9(b)(3): <i>Adds statement that in case of “extreme derogation” from mandatory rule, court may replace term with a term “proportional” to severity and willfulness of departure</i>	“(b) If the court enforces the remainder of the contract without the derogating term, the court may replace the derogating term with: ... (3) if the contravening term was placed by the business not in good faith, or if it purports to effect <i>extreme derogation</i> from a mandatory provision of law, a term that is calculated in a manner <i>proportional</i> to the severity and willfulness of the violation to give the business an incentive to avoid placing such terms in consumer contracts.”	
§ 9(b)(3): <i>Replaces “bad faith” with “not in good faith”</i>	“(b) If the court enforces the remainder of the contract without the derogating term, the court may replace the derogating term with: ... (3) if the contravening term was placed by the <i>business not in good faith</i> , or if it purports to effect extreme derogation from a mandatory provision of law, a term that is calculated in a manner <i>proportional</i> to the severity and willfulness of the violation to give the business an incentive to avoid placing such terms in consumer contracts.”	

**RESTATEMENT OF THE LAW, CONSUMER CONTRACTS IS ON THE 2022 ANNUAL MEETING AGENDA. VISIT [WWW.ALI.ORG/AM2022](http://WWW.ALI.ORG/AM2022) FOR MORE INFORMATION AND TO REGISTER NOW.**

# Leaving Clients at the Door

By ALI Deputy Director Stephanie A. Middleton

Council Rule 4.03 states: “To maintain the Institute’s reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. In communications made within the framework of Institute proceedings, members should speak, write, and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest.”

This does not mean that we leave our views, shaped by our personal and professional experience, and our expertise, often gleaned from representation of clients, at the door. The diversity of experience and opinion in our membership, as well as the character and motivation of individual members, are an important part of what makes our work influential. With such diversity, disagreement is inevitable, but the vision of the founders of the ALI was that members would view their participation as a public service, and not as in the service of the self or of clients. And this should inform members on how we are to engage in the work of the ALI.

The formation committee that conceived of the ALI had very clear ideas, which remarkably include precise descriptions of membership and what the ALI members would create in the ensuing 95 years, as well as a practical guide to the process of creation. At the first meeting of the ALI in 1923, Elihu Root recognized that the Institute’s work “must be so done as to carry authority, as to carry conviction of impartial judgment upon the most thorough scientific investigation and tested accuracy of statement. ... Participation in the enterprise must be deemed highly honorable. Selection for participation must be deemed to confer distinction[,] it must be recognized as a great and imperative public service.”

At the second Annual Meeting of the Institute in February 1924, ALI President George Wickersham explained to the members what he hoped the Institute would produce:

Out of the welter of decisions of many courts all over the land, it is the purpose of the Institute, through the labors of the foremost scholars in the law, to produce a statement of the existing state of the common law, so clear and accurate, that it will pass the criticism of the professional critics employed by the Institute[,] of the Council of the Institute, and of the Membership. It is our hope and belief that such a statement, when finally put forth with the authority of this body, may be accepted by the bench as at least *prima facie* authoritative, and that it will relieve the bench and bar from repeating the arduous tasks that will have been performed by the authors of the statement, in examining the great mass of decisions of the past and gleaning from them an accurate statement of the law.

One of the first acts of the Council was to appoint the Reporters on projects on Torts, Agency, Contracts, and Conflict of Laws. By the time of the second Annual Meeting in 1924, several “conferences,” or project meetings, had been held. George Wickersham told the members:

I have had the privilege of attending one [or] two of these conferences, from which I came away with renewed confidence in the ultimate success of the undertaking. I wish that every member of the Institute could have been present and heard the discussions had at these meetings, and have witnessed the spirit of open-mindedness with which all criticisms were received by the authors of the drafts under consideration, and the frank scholarly character of the discussions. What impressed me most favorably was the utter absence of any dogmatic attitude on the part of scholars of [worldwide] repute in these discussions. No attitude of resentment, or even of impatience at even the most destructive criticism was exhibited at any time, but only the keenest desire for accuracy and for clarity; a welcoming of all helpful criticism, and a patient weighing and analysis of every suggestion that any part of the draft under consideration was susceptible of improvement or required modification. It is in this spirit alone that the work properly can be performed. It is the presence of this attitude and this spirit in the minds of the great scholars who are addressing themselves to the task, that affords an earnest success in their efforts. No one who has not taken part in these discussions or devoted himself in some measure to an effort to ascertain and state in clear form the existing law on any given subject, can appreciate the difficulty of extracting from the great mass of precedents a statement of the actual law, which will be accepted generally as a final authoritative declaration. The work, from its very nature, cannot be hurried. It is better that we produce only one book which will successfully run the gamut of professional criticism and find acceptance as the correct formulation of existing law, than that we should produce twenty treatises, concerning the accuracy and authority of which the best informed and most competent lawyers should differ. ... Unlike the great commentaries of the Roman law ... the work of this Institute will not have behind it the force of Imperial mandate, nor of legislative sanction. It must appeal to the professional sense of the American bar as accurate and adequate, and to the judgment of the bar we must commit the result of our labors.



# The Institute in the Courts: Court of Appeals of Oregon Cites Restatement of the Law, Children and the Law

In *In re C. L. E.*, 502 P.3d 1154 (Or. Ct. App. 2021), the Court of Appeals of Oregon cited Restatement of the Law, Children and the Law § 15.30 (Tentative Draft No. 2, 2019) (subsequently renumbered as § 13.40), which the membership approved at the 2019 Annual Meeting.

The case arose in 2014, when a 13-year-old youth was arrested for sexual misconduct. The youth had shown signs of developmental delay “nearly from the beginning of his life,” was diagnosed with intellectual disabilities and other disorders, and, at the time of his arrest, was living in a highly skilled foster home due to his developmental-disability needs. The trial attorney from the county public defender services who was appointed to represent the youth did not question his competency or seek a competency evaluation, because she “thought that youth ‘knew what [she] was talking about and he knew what he did.’” The youth entered an admission to attempted sexual abuse in the first degree, and the juvenile court ordered up to five years of probation, continued supervision by the county’s department of youth services, and registration with the Oregon State Police.

In 2018, the county public defender services withdrew from the youth’s representation due to a conflict that arose when one of his lawyers sought an evaluation of his current competency and a retroactive assessment of his competency at the time of the adjudication. The evaluating psychologist concluded that the youth “lacked the abilities to understand the nature of legal proceedings, to assist and cooperate with counsel, and to participate in his own defense, and, ‘to a reasonable degree of certainty that if [the psychologist] had evaluated [youth] in 2014, [she] would have found him unfit to proceed.’” The youth petitioned to set aside his adjudication, with his new counsel arguing that there was “a substantial denial of youth’s constitutional rights in the proceedings because youth was not competent at the time of adjudication and because he had received ineffective assistance of counsel.” The juvenile court denied the motion to set aside the adjudication, reasoning, among other things, “that the attorney’s impressions at the time of the adjudication—through her observations of youth—were a more reliable indication of youth’s competency than the 2018 psychological evaluation.”

The Court of Appeals of Oregon reversed and remanded with instructions to grant the youth’s motion to set aside the adjudication, concluding that the trial attorney’s failure to have the youth’s competency evaluated “was not the product of reasonable professional skill and judgment.” The court explained that, given factors such as the youth’s age, the nature of the offense, and the lifetime consequences of his plea to a felony sex offense, “it was not reasonable for counsel to base her assessment of youth’s competency to enter a plea on her

conversations with youth, standing alone.” Citing Restatement of the Law, Children and the Law § 15.30 (subsequently renumbered as § 13.40) and Comment *d* thereto (Tentative Draft No. 2, 2019), the court noted that there is a “need for case-specific assessment of a juvenile’s competency to be adjudicated delinquent.” The court reasoned that “whether a juvenile is competent to knowingly and voluntarily enter a plea in the context of a delinquency proceeding, particularly where, as here, the plea will have long-term consequences, depends largely on the particular juvenile’s developmental maturity, something difficult to assess without some expertise.” The court quoted § 15.30, Reporters’ Note to Comment *d*, to emphasize that “[a] key component of competence to make a consequential plea decision is future orientation, the ability and inclination to understand the future consequences of choices, and to weigh the available options adequately.” Furthermore, the Restatement recognized that “an individual might be competent to proceed in a proceeding involving a minor offense with straightforward evidence, little procedural complexity, and modest sanctions who would be incompetent under other circumstances,” citing § 15.30 and Comment *c* thereto.

The court pointed out that, while a juvenile’s competency is dependent on the specifics of the case, the lawyer’s obligation to assess the juvenile’s competency “remains a constant.” The court determined that “counsel’s decision to proceed without an even rudimentary investigation of youth’s intelligence and decision-making capacity reflects an absence of professional skill and judgment,” particularly given that the probable-cause affidavit in support of the warrant for youth’s arrest, which the lawyer should have reviewed, stated that the youth was seeing a psychologist who had diagnosed him as developmentally disabled, that he functions at the level of an eight-year-old, and that he has an unspecified impulse-control disorder. The court concluded that the youth was prejudiced by the lawyer’s failure to have his competency evaluated, because if she had, she would not have permitted him to enter his plea or, failing that, the juvenile court would not have accepted his plea. The court reasoned that, according to the 2018 evaluation, the youth demonstrated his limited understanding of the adjudication through statements indicating his belief that “he has to answer any ‘question the judge asks’” and that “a plea of guilty is ‘that you did it’”; in addition, the record did not support that the youth had a cognitive decline between the time of his plea in 2014 and the time of his evaluation in 2018.

**The Institute is currently working on the Restatement of the Law, Children and the Law. To join the Members Consultative Group for this project, visit the projects page on the ALI website at [www.ali.org/projects](http://www.ali.org/projects).**

# ALI Designates Two Reporter's Chairs

The American Law Institute has designated Nora Freeman Engstrom of Stanford Law School, Reporter for the Restatement of the Law Third, Torts: Concluding Provisions, as the R. Ammi Cutter Reporter's Chair, and Henry E. Smith of Harvard Law School, Reporter for the Restatement of the Law Fourth, Property, as the A. James Casner Reporter's Chair. Chairs are designated upon recommendation of the Director to the President of ALI.

"We are grateful to Professors Engstrom and Smith for their dedication to the Institute's work as Reporters," said ALI President David F. Levi upon announcing the designation during the ALI Council Meeting on March 2. "These designations are a mark of distinction and indicate our appreciation for their outstanding service."



**Nora Freeman Engstrom**  
R. Ammi Cutter Reporter's Chair

Established in 1991 in honor of R. Ammi Cutter, associate justice of the Supreme Judicial Court of Massachusetts from 1956 to 1972 and president of ALI from 1976 to 1980, the Cutter Chair is occupied by an active Reporter of

proven effectiveness for the remaining duration of the project on which the Reporter is engaged.

Engstrom serves as a Reporter for Restatement of the Law Third, Torts: Concluding Provisions. She is a nationally recognized expert in both tort law and legal ethics. Much of her work explores the day-to-day operation of the tort system and particularly the tort system's interaction with alternative compensation mechanisms, such as no-fault automobile insurance, the Vaccine Injury Compensation Program, and workers' compensation. Engstrom has also written extensively on trial practice, complex litigation (including MDLs), attorney advertising, alternative litigation finance, contingency fees, tort reform, and law firms she calls "settlement mills"—high-volume personal injury law practices that heavily advertise and mass-produce the resolution of claims.

Before joining Stanford's faculty in 2009, Engstrom was a Research Dean's Scholar at Georgetown University Law Center and an associate at Wilmer Cutler Pickering Hale and Dorr LLP. She was also a law clerk to Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit and Henry H. Kennedy Jr. of the U.S. District Court for the District of Columbia. Before that, she worked at the U.S. Department of Justice, focusing on terrorism and national security issues. She graduated from Dartmouth College in 1997, summa cum laude, and from Stanford Law School in 2002, with Distinction and as a member of Order of the Coif.

Cutter was an ALI member for more than 55 years. In addition to serving as president of the Institute, he served as an Adviser to the Model Land Development Code, the Model Code of Pre-Arrest Procedure, the Restatement Second of Property (Landlord and Tenant), the Restatement Second of Property (Donative Transfers), the Restatement Second of the Foreign Relations Law of the United States, and the Restatement Second of Conflict of Laws.



**Henry E. Smith**  
A. James Casner Reporter's Chair

The Casner Chair was established to honor the memory of Harvard Law School Professor A. James Casner, who, as a Reporter and Adviser for various ALI projects for over half a century, made profound contributions to the

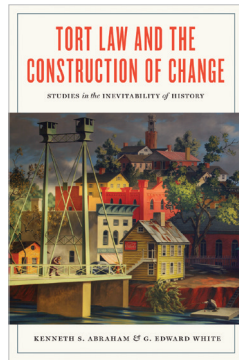
development of the law of property, the taxation of trusts and estates, and estate planning. Casner served the Institute as a Reporter over a long period of years, commencing in 1936, when he was designated a Special Reporter and a member of the Advisory Committee for portions of the original Restatement of the Law, Property.

Since 2014, Smith has served as Reporter for Restatement of the Law Fourth, Property. He is the Fessenden Professor of Law at Harvard Law School, where he directs the Project on the Foundations of Private Law. Previously, he taught at the Northwestern University School of Law and was the Fred A. Johnston Professor of Property and Environmental Law at Yale Law School. He holds an A.B. from Harvard, a Ph.D. in Linguistics from Stanford, and a J.D. from Yale. After law school he clerked for Ralph K. Winter of the U.S. Court of Appeals for the Second Circuit. Smith has written primarily on the law and economics of property and intellectual property, with a focus on how property-related institutions lower information costs and constrain strategic behavior. He teaches primarily in the areas of property, intellectual property, natural resources, remedies, and law and economics.

His books include *The Oxford Introductions to U.S. Law: Property* (2010, coauthored with Thomas W. Merrill), *Property: Principles and Policies* (3d ed., 2017, coauthored with Thomas W. Merrill), and *Principles of Patent Law* (7th ed., 2018, coauthored with John M. Golden, F. Scott Kieff, and Pauline Newman). He is the coeditor of *The Research Handbook on the Economics of Property Law* (2011, with Kenneth Ayotte), *Philosophical Foundations of Property Law* (2013, with James Penner), and *Perspectives on Property Law* (4th ed., 2014, with Robert C. Ellickson and Carol M. Rose).

## Notes About Members and Colleagues

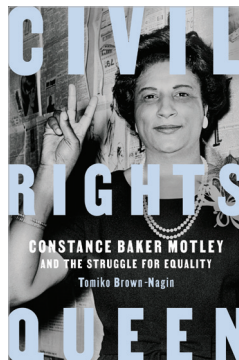
**Kenneth S. Abraham** and **G. Edward White**, both of UVA School of Law, have authored *Tort Law and the Construction of Change: Studies in the Inevitability of History* (University of Virginia Press 2022). The book details the influence of judges and social change on the evolution of tort law over the last 175 years.



Lawdragon's 2022 Hall of Fame Class includes **Rosemary Alito** of K&L Gates, **Kim J. Askew** of DLA Piper, **Stephen G. Breyer** of the Supreme Court of the United States, **Evan R. Chesler** of Cravath, Swaine & Moore, **Merrick Brian Garland** of the U.S. Department of Justice, Office of the Attorney General, **Allan Kanner** of Kanner & Whiteley, **Theodore N. Mirvis** of Wachtell, Lipton, Rosen & Katz, and **Harry M. Reasoner** of Vinson & Elkins.

**Stephen G. Breyer** of the Supreme Court of the United States has announced his retirement from judicial service at the end of the Court's current term.

**Tomiko Brown-Nagin** of the Radcliffe Institute has authored *Civil Rights Queen: Constance Baker Motley and the Struggle for Equality* (Pantheon 2022), a biography on Constance Baker Motley, a lawyer who became the first black woman to serve as a federal judge. Brown-Nagin discussed her book as a part of *The Washington Post's* series on the role of black women in U.S. history.



**Sarah Keeton Campbell** was confirmed to the Tennessee Supreme Court on Feb. 10, 2022, filling the vacancy created by the passing of Cornelia A. Clark.

**Kami Chavis** will join the faculty of William & Mary Law School as the R. Hugh and Nolie Haynes Professor of Law for the 2022-2023 academic year, pending the Board of Visitors' final approval. **Paul Marcus**, the current holder of the Haynes Professorship, is retiring in May.

**Evan R. Chesler** of Cravath, Swaine & Moore will receive the Albert Gallatin Medal for Outstanding Contributions to Society at New York University's 2022 pre-Commencement celebration for his support of the NYU community and for his outstanding contributions to the legal profession.

"Privacy Harms" by **Danielle Citron** of UVA School of Law and **Daniel J. Solove** of George Washington University Law School and "The Surprising Virtues of Data Loyalty," coauthored by **Neil M. Richards** of Washington University in St. Louis School of Law are among those chosen for the 12th Annual Privacy Papers for Policy Makers Awards.

The 65 Project, a bipartisan organization to investigate lawyers who engage in fraudulent lawsuits to overturn election results, has launched. **Christine M. Durham** of the Utah Supreme Court (Retired), **Renee Knake Jefferson** of University of Houston Law Center, and **Roberta Cooper Ramo** of Modrall Sperlberg serve on the organization's Advisory Board.

**Walter A. Effross** of American University, Washington College of Law has published the third edition of *Corporate Governance: Principles, Practices, and Provisions* (Aspen Publishing 2022).

**Edward B. Foley** of Ohio State University Moritz College of Law, **Michael T. Morley** of Florida State University College of Law, and **Jeffrey Rosen** of the National Constitution Center participated in the National Constitution Center's "America's Town Hall" series on current legislative proposals to the U.S. election process.

Yale Law School has appointed **Heather Gerken** as dean for a second term, effective July 1.

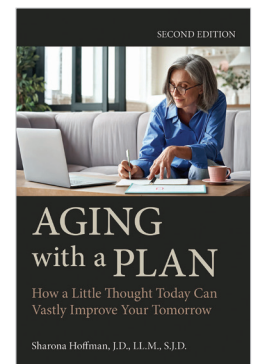
**Aya Gruber** of University of Colorado Law School was featured in an episode of the CBS news show "48 Hours," providing commentary on a missing persons case.

In the Common Law podcast episode "Policing the Police," **Rachel A. Harmon** of UVA School of Law discusses police reform in the United States.

**Richard L. Hasen** of UC Irvine School of Law has authored *Cheap Speech: How Disinformation Poisons Our Politics - and How to Cure It* (Yale University Press 2022), discussing legal and social measures to combat disinformation and support American democracy.

**Sharona Hoffman** of Case Western Reserve University School of Law was awarded the 2021 Case Western Reserve University Faculty Distinguished Research Award. She has authored the second edition of *Aging with a Plan: How A Little Thought Today Can Vastly Improve Your Tomorrow* (First Hill Books 2022), a resource for people who are middle-aged and beyond that provides recommendations for building sustainable social, legal, medical, and financial support systems for aging and caregiving.

On February 28, **D. Brock Hornby** of the U.S. District Court for the District of Maine took inactive senior status after 36 years of judicial service. Senator Angus King of Maine thanked Hornby for his service in a tribute presented during the U.S. Senate session on March 1. A copy of King's remarks is available in the news section of [www.ali.org](http://www.ali.org).



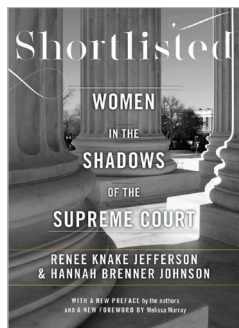


The American Bar Foundation, in partnership with the University of South Carolina School of Law, hosted its inaugural William Hubbard Conference on Law & Education, honoring **William C. Hubbard** of University of South Carolina School of Law for his lifelong contribution to the legal profession and his continued interest in law and education. **Elizabeth Andersen** of World Justice Project, **Kristine Bowman** of Michigan State University, **Richard M. Gergel** of the U.S. District Court for the District of South Carolina, **Ajay K. Mehrota** of the American Bar Foundation, **Martha L. Minow** of Harvard Law School, **Rachel Fay Moran** of UC Irvine School of Law, and **Kimberly J. Robinson** of UVA School of Law participated in panel discussions.

The AccessLex Institute, a nonprofit dedicated to providing access and affordability to legal education, has announced that **Renée McDonald Hutchins** of University of the District of Columbia David A. Clarke School of Law has been elected to its Board of Directors.

**Ketanji Brown Jackson** has been confirmed by the U.S. Senate to the Supreme Court of the United States, filling the vacancy left by the retirement of Associate Justice **Stephen G. Breyer**.

The paperback edition of *Shortlisted: Women in the Shadows of the Supreme Court* (NYU Press 2022) by **Renee Knake Jefferson** of University of Houston Law Center was released with a new foreword by **Melissa Murray** of NYU School of Law.



**Orin S. Kerr** is the new William G. Simon Professor of Law at UC Berkeley School of Law.

**Donald J. Kochan** of George Mason University Antonin Scalia Law School moderated “Unmanned Aerial Vehicles and Civil Justice — Can Common Law Adjust to a Drone World?,” an event hosted by the Law & Economics Center at George Mason University Scalia Law School on the increasing use of drone technology and its intersection with the law.

During public hearings in the case *Ukraine v. Russian Federation*, filed with the International Court of Justice at The Hague, **Harold Hongju Koh** of Yale Law School argued on behalf of Ukraine and provided closing arguments.

**Nathan L. Hecht** of the Texas Supreme Court and **Priscilla R. Owen** of the U.S. Court of Appeals for the Fifth Circuit wed on April 10, 2022. The Texas Lawbook published a story on the couple’s engagement on April 4. With their permission, the story has been reprinted below, and is also available at [texaslawbook.net](http://texaslawbook.net).

### SCOTX, FIFTH CIRCUIT CHIEFS TO MARRY

Call this a case of permissive joinder.

Priscilla Owen and Nathan Hecht are getting married.

Hecht, chief justice of the Texas Supreme Court, and Owen, chief judge of the U.S. Court of Appeals for the Fifth Circuit, became engaged last summer and their wedding is set for Palm Sunday in Austin.



*Nathan Hecht and Priscilla Owen. Special thanks to the Texas Supreme Court.*

Court officials say it is the first time in U.S. history when a chief judge of a federal appeals court and a state supreme court chief justice have married. For Chief Justice Hecht, 72, it’s his first marriage. His fiancée, 67, has been married before.

“We’ve been friends and close for a long time, since she joined the [Texas Supreme] Court in 1995 and we just decided to do it,” Chief Justice Hecht told The Texas Lawbook. “We were together last summer and we had our dogs with us and they seemed agreeable.”

One dog was between them on the back porch of a house they were building when, as she tells it, he dropped to one knee and proposed. “It was very touching,” the chief federal appeals court judge said.

Changing her name to her maiden name, Chief Judge Owen now goes by Priscilla Richman.

“Looking down the road for two and a half years both of us could answer to Chief Hecht,” she said. And beyond that, “Too much Judge Hecht.”

Chief Justice Hecht said a small group of family and friends have been invited to attend.

Covid considerations framed the when of the coming marriage, especially for her 91-year-old aunt, who told her, “I’m taking your mother’s place.” Her mother died in 2020.

And her response to Nathan Hecht on his knee, a dog beside him probably wondering what was going on?

“I said yes.”



## NOTES CONTINUED FROM PAGE 29

SAVING  
THE  
FREEDOM  
OF  
INFORMATION  
ACT

Margaret B. Kwoka

*The Yale Journal on Regulation* hosted a symposium on **Margaret B. Kwoka** of Ohio State University, Moritz College of Law's recent book *Saving the Freedom of Information Act* (Cambridge University Press 2021), an empirical study of The Freedom of Information Act and solutions on how to re-center the Act's purpose.

As a part of Michigan State University's fall 2021 commencement, **Douglas Laycock** of UVA School of Law addressed the colleges of Arts and Letters, Communication Arts and

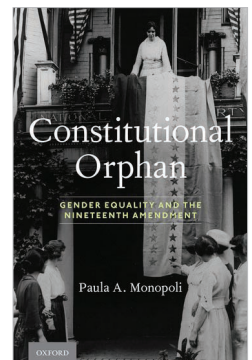
Sciences, and Social Science. Following his speech, MSU awarded him the honorary degree of Doctor of Laws.

In 2021, **David C. Mason** of the 22nd Circuit Court for St. Louis, Missouri, received the Purcell Professionalism Award for civility in professional and civic activities from the Missouri Bar Foundation and the ICON Award from Missouri Lawyers Weekly for leadership and an outstanding career as a lawyer. In 2022, the Bar Association of Metropolitan St. Louis awarded Mason the Legal Pioneer Award for his work as founder of the St. Louis Freedom Suits Memorial Curator and Contributor of volume 67 of the *Washington University Journal of Law & Policy*, "Celebrating the MCBA Centennial: Looking Back, Looking Forward," discussing the MCBA, a bar association for black lawyers.

The Aggie Dispute Resolution Program at Texas A&M University School of Law and the *Texas A&M Law Review* hosted "The Renaissance Woman of Dispute Resolution: Carrie Menkel-Meadow's Contributions to New Directions in Feminism, Ethics, and ADR," a symposium featuring the scholarship of **Carrie J. Menkel-Meadow** of UC Irvine School of Law. **Catherine A. Rogers** of Bocconi University School of Law and Queen Mary University School of Law was among the symposium's presenters.

**Stephanie A. Middleton** has announced her retirement as ALI Deputy Director. Read more about Middleton on page 8.

**Paula A. Monopoli** of University of Maryland Carey School of Law has authored *Constitutional Orphan: Gender Equality and the Nineteenth Amendment* (Oxford University Press), exploring the impact of race, gender, and class on the constitutional development of the woman suffrage amendment.



## TEXAS LAW REVIEW CENTENNIAL CELEBRATION

On March 26, the *Texas Law Review* (TLR) hosted its Centennial Year Banquet, bringing together TLR alumni from over 60 volumes.

The banquet included *Legal Giants – TLR Heroes*, a series honoring TLR alumni that have left significant impressions in the legal field. This year's honorees included **Diane P. Wood** of the U.S. Court of Appeals for the Seventh Circuit and deceased ALI members **W. Page Keeton** (Adviser to the Restatement of the Law Second, Torts), **Stephen D. Susman** (founder of the Texas Law Review Association), and **Charles Alan Wright** (ALI President 1993-2000).



The event included a video presentation celebrating and discussing Judge Wood's legal accomplishments, featuring ALI Director **Richard L. Revesz** of NYU School of Law, **David A. Strauss** of University of Chicago Law School, and **Amy J. St. Eve** of the U.S. Court of Appeals for the Seventh Circuit.



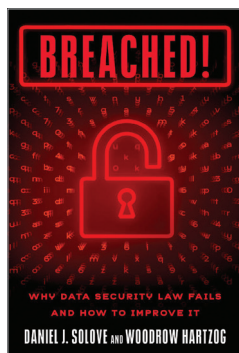
**Ward Farnsworth**, dean of University of Texas School of Law, provided welcome remarks, and **Mark G. Yudof**, former dean of Texas Law, was the keynote speaker. **Hugh Rice Kelly** of Texans for Lawsuit Reform gave a speech in recognition of TLR Volume 50, for which he served as editor in chief, and **Gregg Costa** of the U.S. Court of Appeals for the Fifth Circuit and immediate past president of the Texas Law Review Association provided closing remarks.

Videos and photos of the event are available at [texaslawreview.org/centennial](https://texaslawreview.org/centennial). Photography by Robert Cameron Connelly.

Arkansas Governor Asa Hutchinson has appointed **Cynthia E. Nance** of University of Arkansas School of Law, Leflar Law Center to the Arkansas Public Broadcasting Service Commission for an eight-year term.

The ABA Nominating Committee has elected **Mary L. Smith** to serve as the next president of the ABA. The House of Delegates is expected to elect Smith during the ABA Annual Meeting in August 2022 for a term beginning in 2023. If elected, Smith will become the first woman Native American to serve as ABA president.

**Daniel J. Solove** of George Washington University Law School has coauthored *Breached! Why Data Security Law Fails and How to Improve it* (Oxford University Press 2022), a book discussing the increase in data breaches, despite the presence of data security laws.



**Sonia Sotomayor** of the Supreme Court of the United States has authored *Just Help! How to Build a Better World* (Philomel Books 2022), a book about teaching young readers about helping their communities.



The University of Missouri School of Law has announced that **Sandra F. Sperino** will join the faculty as the Elwood L. Thomas Missouri Endowed Professor of Law and begin teaching for the fall 2022 semester.

The IATL Foundation has selected **Larry S. Stewart** of Stewart Tilghman Fox Bianchi & Cain, P.A. (Retired) to receive the Glenna Goodacre Creative Arts Award for his accomplishments in creative writing. He will receive the award in October 2022.

**Jeffrey S. Sutton** of the U.S. Court of Appeals for the Sixth Circuit was featured on a Federalist Society forum to discuss his recently published book, *Who Decides? States as Laboratories of Constitutional Experimentation* (Oxford Univ. Press 2021), with **William H. Pryor Jr.** of the U.S. Court of Appeals for the Eleventh Circuit.

Birnbaum Women’s Leadership Network and NYU’s Institute for Public Knowledge and the Center for the Study of Gender and Sexuality hosted a book talk on *Credible: Why We Doubt Accusers and Protect Abusers* by **Deborah Tuerkheimer** of Northwestern University Pritzker School of Law.

**Mary Jo Wiggins** of University of San Diego School of Law was recently featured on the University of San Diego’s “Faculty in Focus” series, reflecting on her time and work at the university.

**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).**

## In Memoriam

### ELECTED MEMBERS

**Walter Dellinger, III**, Washington, DC; **Peter J. Henning**, Detroit, MI

### LIFE MEMBERS

**Donald C. Lubick**, Chevy Chase, MD; **Richard J. Medalie**, Hull, MA

# Meetings and Events Calendar At-A-Glance

Below is a list of upcoming meetings and events. For more information, visit [www.ali.org](http://www.ali.org).

### 2022

**April 25**  
Uniform Commercial Code  
Virtual

**May 16-18**  
2022 Annual Meeting  
Washington, DC

**October 20-21**  
Council Meeting  
New York, NY

### 2023

**January 19-20**  
Council Meeting  
Philadelphia, PA

**May 22-24**  
2023 Annual Meeting  
Washington, DC

**October 19-20**  
Council Meeting  
New York, NY

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**ANNUAL  
MEETING**

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