Restatement of the Law, Liability Insurance: Practitioners’ Perspectives

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

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

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

What I did not appreciate at the outset of the project was the genius of the ALI process. I very much have enjoyed the intellectual rigor and dialectic included in ALI projects; the opportunity for deep thinking on these issues can sometimes be missing in the day-to-day work of litigation. As with any project...
this voice we speak to courts, practitioners, and academics (and whoever else might seek our guidance).

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

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

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

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

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

In the example above concerning the board of directors, if we were preparing a Restatement, we would instead say, in the declarative voice of a court, that “the members of the board of directors are independent.” And, if we were writing a model code, the Style Manual prescribes that the preferred formulation would be “must,” reflecting the governmental power of the
legislature. The black letter in Restatements and model codes sets forth what will be legally binding obligations once adopted by courts and legislatures, respectively, and the violation of these obligations is generally coupled with a remedy. In contrast, the black letter in a Principles project sets forth best practices for a particular institution or actor, which might not suffer adverse legal consequences if it does not do what we say it should do.

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

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

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

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

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