Completing the Restatement Third of Torts

At its January meeting, the Council approved the launch of the final three components of the Restatement Third of Torts. The projects tentatively are titled: Remedies; Defamation and Privacy; and Concluding Provisions. With these projects, the ALI aims to complete an effort that began nearly three decades ago, when we started work on the Restatement of the Law Third, Torts: Products Liability. And when these projects are completed, the ALI will have produced a body of work that entirely supersedes the Restatement Second of Torts.

The ALI’s work on torts arguably has been the most influential of our efforts to restate the common law. Courts have cited to our Torts Restatements more than 80,000 times. No other ALI publication comes close to this mark; Contracts Restatements, the runner-up, have somewhat less than 40,000 citations. And the Restatement Second of Torts, in particular, has long held the mantle as “the most widely accepted distillation of the common law of torts,” as Justice Souter described it in a 1995 opinion for the Supreme Court of the United States.

The condition of tort law in the early 20th century was part of the motivation for establishing the ALI. In its 1923 report, the Committee on the Establishment of a Permanent Organization for the Improvement of the Law lamented: “Torts is a subject which has developed unsystematically and is therefore full of the evil of uncertainty.” Shortly after our founding, the Restatement of Torts was launched as one of the original nine Restatements and Francis H. Bohlen of the University of Pennsylvania Law School was selected as its Reporter. The Restatement’s first

In Memoriam: Roswell B. Perkins

ALI President 1980-1993

Roswell B. (Rod) Perkins passed away on March 10, at the age of 92.

“Rod Perkins was a beloved and admired leader of The American Law Institute for many years,” said ALI President David F. Levi. “He served as President from 1980 to 1993 and as Chair of the Council from 1993 to 2008. He led our deliberations with dignity and graciousness. In later years, he was no less supportive of the work of the ALI. He attended most Council meetings and contributed helpfully to our discussions, bringing to bear the benefit of his wisdom and unparalleled experience in private practice. He was the model of professionalism, and we will miss him very much. On behalf of our members, I express our gratitude for his remarkable career and his dedication to a fair and effective legal system.”

ALI President Emeritus and Chair of the Council Roberta Cooper Ramo added, “I loved his ready laugh, enduring curiosity and incredibly open interest in diverse views.”

During his presidency he played a leading role in the development of the Principles of Corporate Governance: Analysis and Recommendations. An ALI member since 1964, he served on numerous projects and committees. In recognition of his years of service, ALI presented him with the Distinguished Service Award in 2008.

“The ALI meant so much to Rod, and he was hoping to attend the Annual Meeting this May,” said his wife Susan H. Perkins. Ms. Perkins regularly accompanied Mr. Perkins to ALI meetings when travel became difficult. “I am the daughter of a former ALI member, the late Henry Harfield of Shearman & Sterling, and as a lawyer’s daughter and wife I loved accompanying Rod to ALI meetings. I so admire the high standard, non-partisanship, collegiality, and shared work of brilliant members from the judiciary, academia, and practicing law that continues to strengthen the American legal system.”

Mr. Perkins leaves a lasting legacy at The American Law Institute. As President, he oversaw the completion of several projects, and his daughter Nancy Leeds Perkins of Arnold & Porter is currently an active member.

Mr. Perkins, a native of Boston, received his undergraduate and law degrees, cum laude, from Harvard University, where he was an editor of the Harvard

continued on page 18
two volumes were published in 1934, with its final two volumes appearing in 1938 and 1939, respectively.

Work on a revision began in 1955. William Prosser, then Dean of the U.C. Berkeley School of Law, whose treatise, Handbook of the Law of Torts, already had gained leading status since its publication in 1941, was selected as Reporter. The first two volumes of the Restatement Second were published in 1965, and Prosser, who by that time had moved on to the U.C. Hastings College of the Law, continued his work until 1970. Stepping into his shoes was Dean John W. Wade of Vanderbilt Law School, who saw through to publication the final two volumes in 1977 and 1979, respectively.

These two Torts Restatements clearly furthered the ALI’s mission to “clarify, modernize, and improve the law.” Consistent with our mission, they drew from the mass of judicial decisions to set forth statements of tort law’s essential rules but also pushed boundaries in some instances. In the latter category, § 402A of the Restatement Second of Torts altered our legal landscape by making available a strict-liability cause of action for defective products.

In 1991, ALI Director Geoffrey C. Hazard, Jr., proposed that work commence on a Restatement of Products Liability, as the first component of a comprehensive effort to restate modern tort law and ultimately to supersede the Restatement Second. The Institute has since published three components of this effort: Products Liability; Apportionment of Liability; and Liability for Physical and Emotional Harm. Liability for Economic Harm received its final approval at last year’s Annual Meeting and is being prepared for publication. Intentional Torts to Persons and Property Torts are well underway. With the three final components launched by the Council earlier this year, the Restatement Third of Torts will eventually have nine components.

In connection with the planning for these new projects, I owe great thanks to Professor Michael Green of Wake Forest University and the late Professor William Powers of the University of Texas, who already served as the Reporters for Apportionment of Liability and Liability for Physical and Emotional Harm. At my request, they prepared a persuasive blueprint for how to bring the Restatement Third to a successful conclusion. In particular, they explained how Concluding Provisions could help avoid possible confusion about the ALI’s position on issues that otherwise would be addressed by the Restatement Second but not the Restatement Third:

“We recommend that these miscellaneous issues be combined into a final ‘miscellaneous torts’ project. This project should include all of the left-over issues in R2. If the Institute decides to adopt or revise one of these torts, it would occupy a new section or set of sections in this new volume. If the Institute decides to disavow a tort (as we would expect for alienation of affections), this new volume would at least explain why for those jurisdictions that have not yet abolished it. Only in this way will all of the issues addressed in R2 be considered and decided through the usual process by the Institute, which we think appropriate.”

The success of all ALI projects is largely dependent on the identity of its Reporters. We seek not only leading scholars in the respective fields but also individuals with the temperament to be fair arbiters of competing positions and the humility to set aside their own deeply held views when doing so is necessary to comply with the rules governing our Restatements. I was therefore so delighted that all the extraordinary scholars I approached agreed to take on this weighty responsibility.

We are currently beginning to form the Adviser groups for the three new projects and 61 members have already signed up for their Members Consultative Groups. Work on the drafting will then proceed concurrently. I eagerly await the next steps and have no doubt that the completion of the Restatement Third of Torts will be regarded as a highlight in the ALI’s distinguished history.