ALI Council Approves Seven Project Drafts at October Meeting

During its meeting in New York City on October 17 and 18, the ALI Council reviewed and approved drafts or portions of drafts for seven Institute projects. All approvals are subject to the discussion at the meeting and to the usual prerogative to make nonsubstantive editorial improvements.

**Children and the Law:** Reporter Elizabeth S. Scott and Associate Reporters Emily Buss, Solangel Maldonado, and David D. Meyer presented Council Draft No. 4. The Council approved § 2.22 from Chapter 2, State Intervention for Abuse and Neglect; § 4.10 from Chapter 4, Emancipation of Minors; §§ 8.10 and 8.11 from Chapter 8, Student Speech Rights; and §§ 10.10 and 10.20 from Chapter 10, School Searches, subject to the Reporters working with an ad hoc group of Council members to revise §§ 8.10 and 8.11 and to confirm that the revised material is consistent with the discussion at the Council meeting.

The Reporters also will revise §§ 9.10 and 9.20 from Chapter 9, Religion in Public Schools, and submit the revised versions at a future meeting.

**Compliance, Risk Management, and Enforcement:** Council Draft No. 3 was submitted by Reporter Geoffrey P. Miller and Associate Reporters Jennifer H. Arlen and Claire A. Hill. The Council approved §§ 5.09 and 5.18-5.36 of...
Upcoming Meetings
For more information, visit www.ali.org.

JANUARY 2020
January 16-17
Council Meeting - January 2020
Philadelphia, PA

MARCH 2020
March 12-13
Restatement of the Law Third, Torts: Concluding Provisions
Philadelphia, PA
March 20
Restatement of the Law, Corporate Governance
New York, NY
March 26
Principles of the Law, Compliance, Risk Management, and Enforcement
New York, NY
March 27
Restatement of the Law, Copyright
Philadelphia, PA

MAY 2020
May 18–20
97th Annual Meeting
San Francisco, CA

VIEW ALL UPCOMING MEETINGS AND EVENTS ON PAGE 19.

National Childhood Vaccine Injury Act of 1986, which contains a section modeled on Comment k to § 402A of the Restatement Second, Torts. This Comment states that a seller should not be held strictly liable for harm caused by “unavoidably unsafe products,” such as certain vaccines, and the Act’s legislative history makes clear that the statute was crafted to “set[] forth the principle contained in Comment k.”

At the state level, I previously have written about the influence of the Restatement Third, Trusts, on state codification of the “prudent investor rule.” The ALI’s publication of this Restatement in 1992 ushered in a wave of state legislative change, and by 2006 every state had enacted law that aligned with the position of the Restatement. In some of these states, this significant shift in the legal regime was accomplished through passage of the Uniform Prudent Investor Act, which itself had been influenced by the Restatement. Similarly, the Uniform Powers of Appointment Act, which has been enacted by nine states, “draws heavily” on the Restatement Third, Property (Wills and Other Donative Transfers).

In other cases, Restatements have influenced the legislative text. For example, the House Report accompanying the Foreign Sovereign Immunities Act of 1976 indicates which provisions are consistent with the Restatement Second, Foreign Relations Law of the United States. Restatements have played similar roles at the state level. For example, this year Nevada enacted legislation strengthening its requirements for certain professionals to report suspected child abuse or neglect. One subsection of the law pertains to the duties of attorneys; in crafting this provision, the Nevada legislature considered the Nevada Rules of Professional Conduct, which generally prohibit an attorney from revealing confidential client information, except “to the extent the attorney reasonably believes necessary to prevent a criminal act that is likely to result in reasonably certain death or substantial bodily harm.” The legislative history shows that in interpreting “substantial bodily harm,” lawmakers found useful the discussion in Comment c to § 66 of the Restatement Third, The Law Governing Lawyers, which explains that “serious bodily harm” includes the consequences of child sex abuse. Drawing on this Comment for support, Nevada law now provides that attorneys are required to report suspected abuse or neglect “[t]o the extent the attorney reasonably believes necessary to prevent the further sex trafficking or sexual abuse of the child.”

Administrative agencies likewise rely on Restatements for a wide variety of purposes. One of these is to draw on ALI definitions of key terms. A prominent example is the definition of “trade secret” from the first Restatement of Torts, which appears in Comment b to § 757. This definition has been adopted in rules promulgated by several federal agencies, including the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Mine Safety and Health Administration. Regulations in four states—Arkansas, Ohio, Texas, and Washington—similarly incorporate or reference Comment b’s definition of “trade secret,” for purposes generally relating to chemical safety disclosure requirements. In another instance of definitional borrowing, the U.S. Department of Housing and Urban Development has derived a definition of the term “waste” from the Restatement Third, Property (Mortgages), for use on standardized closing forms and documents for certain Federal Housing Administration programs. And, the Securities and Exchange Commission relies on the Restatement Third, The Law Governing Lawyers, in defining terms relevant to standards of professional conduct for attorneys.
who practice before the Commission. At the state level, the Indiana Natural Resources Commission in 1993 borrowed the definition of “lake,” set forth in § 842 of the Restatement Second, Torts, in determining in an administrative adjudication whether a particular body of water was a “lake” for purposes of the state’s Lakes Preservation Act. Two years later, the Commission “adopted the essence of the Restatement ‘lake’ definition by rule.” And in 2008, the Indiana legislature actually codified the definition by statute.

Aside from borrowing definitions, agencies routinely rely on a Restatement for a basic expression of a rule of law relevant to the agency’s rulemaking. For example, in a rule promulgated by HUD’s Office of Federal Housing Enterprise Oversight, relating to minimum capital requirements for Fannie Mae and Freddie Mac, the agency cited § 204 of the Restatement Second, Contracts, for the point that, “agreements may be legally binding even when there is a lack of specificity on all terms.” The agency relied on this principle to justify its decision, in connection with the purchase or securitization of mortgages, not to restrict the term “commitment” with references to specifics such as price, volume, and fees. In a different regulatory context, the Bureau of Indian Affairs cited the Restatement Second, Conflict of Laws, to support the proposition that a child of unwed parents generally has the same domicile as the custodial parent for purposes of the Indian Child Welfare Act.

In a non-rulemaking context, the International Trade Administration in 2000 issued Safe Harbor Privacy Principles, which were meant to be evaluated by the European Commission for “adequacy” under European law. Once deemed adequate, the Principles then could “serve as authoritative guidance to U.S. companies and other organizations receiving personal data from the European Union.” In response to a request by the European Commission for clarification on some questions of American privacy law, the International Trade Administration set forth a detailed exposition of the law, relying heavily on the Restatement Second, Torts, which, with respect to issues of invasion of privacy in particular, the agency described as providing “an authoritative overview of the law in this area.”

State regulations also sometimes invoke our Restatements. In Missouri, for example, the Attorney General administers and enforces the state’s Merchandising Practices Act, and has issued rules to define the meanings of certain key enforcement terms and to provide notice of their application. In several of these rules, the Attorney General cites Sections of the Restatement Second, Contracts, for support. In one example, the regulation establishes that it is an unfair trade practice to violate the duty of good faith, citing § 205 of the Restatement, which sets forth a black-letter statement of the duty of good faith and fair dealing. And in another instance, the Attorney General cites Restatement § 208 to support the regulation’s definition of the term “unconscionable.”

Advisory opinions issued by bar authorities likewise regularly draw on ALI work, in particular from the Restatement Third, The Law Governing Lawyers, which has proven a trustworthy guide for state and local ethics authorities since its publication in 2000. Examples include New York City’s early reliance on Comment c to § 203 in Proposed Final Draft No. 1 (subsequently renumbered § 123 in the official text), explaining why attorneys “of counsel” to one another should be deemed a single unit for purposes of determining conflicts of interest, in an opinion concluding that “affiliated” attorneys and firms must follow this same rule; Nebraska’s reliance on § 68, defining communications protected by the attorney–client privilege, in an opinion relating to a lawyer’s representation of undocumented immigrants before the Nebraska Workers’ Compensation Court; Utah’s reliance on §§ 99 and 100 in analyzing whether an attorney may contact employees of an organization, when that organization is represented by counsel in litigation against the attorney’s client; and Oregon’s reliance on § 122, covering client consent to a conflict of interest, in discussing whether a lawyer may advise a married couple on estate-planning issues where one spouse would have an elective share claim against the other spouse’s separate property.

There is also a significant body of administrative adjudicatory material in which Restatements of the Law are referenced. As early as the 1930s and 1940s, decisionmakers at federal departments and agencies, including the Department of the Interior, the National Labor Relations Board, and the Securities and Exchange Commission, were citing volumes from the first Restatement series. Today, citations to Restatements regularly appear in many different types of decisions, including by the Administrator of the Federal Aviation Administration, DOJ administrative law judges deciding cases under the Immigration and Nationality Act, and ALJs at the Commodity Futures Trading Commission. Similarly, at the state and municipal levels, Restatements frequently are cited by decisionmakers on public employment relations boards, public utilities commissions, and tax tribunals, to name just a few examples.

These varied examples of the influence of our Restatements serve as a striking and welcome reminder of how deeply the ALI’s work is woven into the fabric of American law, and how our Restatements can serve as resources in just about any legal context, whether legislative or administrative, at both federal- and state-government levels. The broad influence of our work underscores the value of the time and effort that our Members, Advisers, and Reporters, as well as our Institute staff, devote to each of our Restatement projects.

Editor’s Note: A version of this Director’s Letter, featuring citations to the materials referenced in the main text, is posted on the News page of the ALI website: www.ali.org/news.