Clarifying the Nature of the ALI’s Work

The American Law Institute appropriately describes itself as “the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.” From time to time, it is important for the ALI, as for all organizations, to spend time and energy clarifying its own mission. Over the past year, we have devoted significant effort to this important endeavor.

Because the document that describes the mission of the ALI in the most sustained way is our Style Manual (formally “Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work”), our clarifying effort took the form of revisions of that Manual. It’s a wonderful document, which you might want to download (www.ali.org/publications/style-manual). The revision process was undertaken by a Committee on Institute Style, which was very ably chaired by Professor Mary Kay Kane. The Committee’s recommendations were then adopted by the Council in January.

I will focus on three highlights. First, the revised Style Manual draws a clear distinction among our major types of works—Restatements, Model or Uniform Codes, and Principles projects—based both on the primary audience for our guidance and the form in which such guidance is provided. “Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations.” Codes, such as our enormously influential Uniform Commercial Code, which we do in partnership with the Uniform Law Commission, and Model Penal Code “are addressed to legislatures, with a view toward legislative enactment. They are written in prescriptive statutory language.” Principles “are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law.” Style Manual p. 4. Principles will often take the form of best practices for either private institutions (e.g., our just launched Principles of Compliance) or public institutions (e.g., our also just launched Principles of Police Investigations).

The next two highlights concern the nature of Restatements: the interpretation of what a Restatement black letter rule is, and the inquiry that should be undertaken in formulating such a rule. On the former question, a Restatement aspires to do exactly the same work as a common law judge. In the words of my legendary predecessor (Style Manual, p. 6), Professor Herbert Wechsler, which are quoted on the wall of the conference room in the ALI headquarters in Philadelphia: “We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.”

But, as the Style Manual indicates (p. 6), “what a Restatement can do that a busy common-law judge, however distinguished, cannot is engage the best minds in the profession over an extended period of time, with access to extensive research, testing rules against disparate fact patterns in many jurisdictions.”

Finally, the inquiry involved in fashioning Restatement black letter rules contains four principal elements. I’ll quote from the Style Manual (p. 5) because the language was carefully vetted by the Council:

The first is to ascertain the nature of the majority rule. If most courts faced with an issue have resolved it in a particular way, that is obviously important to the inquiry. The second step is to ascertain trends in the law. If 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well. Perhaps the majority rule is now widely regarded as outdated or undesirable. If Restatements were not to pay attention to trends, the ALI would be a roadblock to change, rather than a “law reform” organization. A third step is to determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law. And the fourth step is to ascertain the relative desirability of competing rules. Here social-science evidence and empirical analysis can be helpful.

One of the misconceptions that I’ve most encountered during my first year as Director concerned the view, sometimes expressed in meetings of our project Advisers, that Restatements needed to follow the majority rule. The preceding paragraph provides a clear answer to that question. But the Style Manual also cautions us (p. 6) that “if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.” Together with Stephanie Middleton, our spectacular Deputy Director and my partner in guiding the substance of each of our projects, I always remind Reporters of the importance of this command. By being transparent, we facilitate the opportunity for vigorous debate on the content of our rules—which is a hallmark of the ALI and what makes us both distinctive and influential.

On the nature of legal change, the analogy between a Restatement and the common law is very helpful (Style Manual, p. 6):

“Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.”

So, with this clarification of the nature of our own work under our belts, the ALI’s important work process clarifying the law can continue to move forward.