

Contracts I (102-001), Fall 2009

Professor Ross E. Davies

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Classes: Mondays, from 10:00 a.m. to 11:50 a.m., in Room 121

Office hours: Tuesdays, from 12 noon to 1:30 p.m., in Room 121 (except September 25 and November 28)

Texts:

Required: John P. Dawson, et al., *Contracts: Cases and Comment* (9th ed. 2008) (“Casebook”)

Required: James E. Byrne, *Contracts Texts: Restatement 2d Contracts, etc.* (4th ed. 2007) (“Supplement”)

Not required but strongly recommended: Bryan A. Garner, *Black’s Law Dictionary* (9th ed. 2009)

Assignments: They are subject to change based on the pace of the course and the whim of the instructor.

Date	Casebook	Restatement	UCC	Other reading & instructions
Aug. 24	291-296	1, 2, 3, 4, 17, 18, 19, 20, 21	1-103, 1-303, 2-102, 2-105(1)	Casebook: skip last sentence of first paragraph on 291 Read for class <i>Lucy v. Zehmer</i> (attached) Read for your edification (you will not be grilled about this material or tested on it, but it should be useful): Kerr, <i>How to Read a Legal Opinion</i> (attached); Boskey, <i>The American Law Institute</i> (attached)
Aug. 31	296-299	22, 23, 24, 25, 26, 29, 30, 32, 33, 35, 36, 38, 39, 40, 41, 42, 43, 45, 46, 48	2-205	Casebook: also read note cases <i>Robbins v. Lynch</i> (305-306) and <i>Bentzen v. H.N. Ranch</i> (308)
Sept. 7	327-338	50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 69		
Sept. 14	No class	No class	No class	No class: relax
Sept. 21	309-315, 324-326, 338-350	63, 64, 65, 66, 67, 68	2-204, 2-206	
Sept. 28	353-384	77, 78	1-302, 1-304, 2-305, 2-306, 2-308, 2-309	Casebook: skip Problem 2 on 357
Oct. 5	182-188, 191-201, 204-210	71, 74, 79, 81	2-203	Casebook: skip <i>DeLeo</i> and the note cases following it (188-191) and <i>Fischer</i> (201-203)
Oct. 13	210-225,	82, 83, 86		
Oct. 19	230-256	90		Casebook: skip NOTE on 233-234
Oct. 26	265-290	87, 364	2-205	
Nov. 2	1-20, 25-27	344, 345, 346, 347, 348, 349, 350	2-610, 2-703, 2-704, 2-706, 2-708, 2-709, 2-710, 2-711, 2-712, 2-713, 2-714, 2-715, 2-716, 2-719, 2-723	
Nov. 9	27-37, 41-60		2-718	
Nov. 16	60-78, 85-91	351, 352, 353		
Nov. 23	91-97, 102-113, 117-123	237, 240, 370, 371, 373, 374		
Nov. 30	134-166	356, 360		

For each class session, please:

- (a) Read the assigned pages in the Casebook.
- (b) Read (in the Supplement) the assigned sections (and the associated comments, illustrations, and notes) of the *Restatement 2d of Contracts* (“Restatement”) and the *Uniform Commercial Code* (“UCC”). During in-class discussions of the Restatement and the UCC we will focus on the language of the sections themselves. That means you will not be grilled about the material in the comments, illustrations, and notes. You will, however, find that studying the comments, illustrations, and notes is useful for understanding the sections themselves. And it might be that understanding tends to translate into better in-class performance and comprehension and better exam results.
- (c) Follow any guidance in the “Other reading & instructions” column above.
- (d) Follow any in-class instructions (including changes to assignments) by the instructor (which means, among other things, that if you miss all or part of a class session you are responsible for checking with a knowledgeable and reliable classmate to learn if there have been any in-class instructions).
- (e) Look up words you do not understand. I recommend *Black’s Law Dictionary* for legal terms and a good general dictionary (the *OED*, *American Heritage*, or whatever works for you) for everything else.

You do not need to memorize the Restatement or the UCC (or anything else, for that matter). Please don’t waste your time trying. Just have the relevant provisions at your fingertips in class (I suggest an outline or something similar), and, of course, be able to apply them in the contexts in which they are useful. Permit me to say again that an outline would be a good idea. When exam-cram time comes you are going to want a useful catalog of all the case names and UCC and Restatement sections that we cover in class, and of all the other doctrines and authorities and mnemonics and so on that might be good to know for the exam. By building your catalog with each assignment and class session, you will have it when you need it.

Grading: Your grade in this course will be based on a final exam and participation. During our first class I will say more about exams and participation, and I will offer a load of mostly useful and soothing (I hope) information about the Contracts course we will be navigating together.

Exam: The exam will be a 2-hour, open-book/open-notes/closed-electronics, multiple-choice event. You will receive a paper exam containing all the questions and answers (of course, there will be a lot of wrong answers, and it will be your mission to pick out the correct ones), along with a conventional bubble sheet on which you will mark your answers with a #2 pencil by filling in a bubble for each question, just like a conventional standardized test. You will be free to bring any paper you desire (notes, books, note cards, study aids, tarot cards, and so on) into the exam room. You will not be allowed to bring any electronics (no laptops, no cell phones, no pdas, and so on). For each question, credit will be given only for selecting the correct (that is, best available) answer, and no credit will be taken away for an incorrect answer. There will be roughly 60 questions on the exam.

Participation: First, participation means showing up for class. You are responsible for complying with GMU’s regulations regarding attendance (they are available on the law school’s web site, and you should read them). In addition, if you are going to be absent from or unprepared for any class you must notify me in advance by calling me at the telephone number on the first page of this syllabus before I leave my office for the classroom (that is, no later than 9:50 a.m.). Second, participation more generally means good citizenship in the classroom and outside it – it is good, for example, to make short, well-chosen, thoughtful comments in class, in office hours, or via email, and to treat classmates with dignity and respect; it is bad, for example, to engage in “gunning,” sycophancy, or rudeness. Because each class session will be mostly a question-and-answer exercise (with me asking most of the questions), it will be hard to understand what is going on unless you have done the reading and followed it with some serious thinking before class. In other words, the key to doing well in (and enjoying) Contracts classes is showing up ready to participate constructively or follow along intelligently. Your grade in the course may be adjusted up or down one step from your exam grade (for example, from B to B- or from B to B+) based on participation.

Intellectual property: I own all course content that I create, regardless of form (electronic, print, audio/video, oral, etc.), including class sessions, office hours, and other meetings, and recordings of those events. You are free to share copies, records, and recordings of course content with your classmates for the duration of the course, but other than that you and your classmates must keep all such things in any format to yourselves.

Lucy v. Zehmer

Supreme Court of Appeals of Virginia

84 S.E.2d 516 (Va. 1954)

Buchanan, J., delivered the opinion of the court.

This suit was instituted by W.O. Lucy and J.C. Lucy, complainants, against A.H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W.O. Lucy a tract of land owned by A.H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for \$50,000. J.C. Lucy, the other complainant, is a brother of W.O. Lucy, to whom W.O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A.H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W.O. Lucy the Ferguson Farm complete for \$50,000.00, title satisfactory to buyer," and signed by the defendants, A.H. Zehmer and Ida S. Zehmer.

The answer of A.H. Zehmer admitted that at the time mentioned W.O. Lucy offered him \$50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer \$5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

W.O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer \$20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, "I bet you wouldn't take \$50,000.00 for that place." Zehmer replied, "Yes, I would too; you wouldn't give fifty." Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, "I do hereby agree to sell to W.O. Lucy the Ferguson Farm for \$50,000 complete." Lucy told him he had better change it to "We" because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for \$50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him \$5 which Zehmer refused, saying, "You don't need to give me any money, you got the agreement there signed by both of us."

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise \$50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it "complete, everything there," and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J.C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for \$11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he could see that he was "pretty high." He said to Lucy, "Boy, you got some good liquor, drinking, ain't you?" Lucy then offered him a drink. "I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too."

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, "I bet you wouldn't take \$50,000.00 for it." Zehmer asked him if he would give \$50,000 and Lucy said yes. Zehmer replied, "You haven't got \$50,000 in cash." Lucy said he did and Zehmer replied that he did not believe it. They argued "pro and con for a long time," mainly about "whether he had \$50,000 in cash that he could put up right then and buy that farm."

Finally, said Zehmer, Lucy told him if he didn't believe he had \$50,000, "you sign that piece of paper here and say you will take \$50,000.00 for the farm." He, Zehmer, "just grabbed the back off of a guest check there" and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to "see if I recognize my own handwriting." He examined the paper and exclaimed, "Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine."

After Zehmer had, as he described it, "scribbled this thing off," Lucy said, "Get your wife to sign it." Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he "was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm." Zehmer then "took it back over there ... and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' ... I said, 'Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.'"

Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, "I bet you wouldn't take \$50,000 cash for that farm," and Zehmer replied, "You haven't got \$50,000 cash." Lucy said, "I can get it." Zehmer said he might form a company and get it, "but you haven't got \$50,000.00 cash to pay me tonight." Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, "I agree to sell the Ferguson Place to W.O. Lucy for \$50,000.00 cash." Lucy said, "All right, get your wife to sign it." Zehmer came back to where she was standing and said, "You want to put your name to this?" She said "No," but he said in an undertone, "It is nothing but a joke," and she signed it.

She said that only one paper was written and it said: "I hereby agree to sell," but the "I" had been changed to "We". However, she said she read what she signed and was then asked, "When you read 'We hereby agree to sell to W.O. Lucy,' what did you interpret that to mean, that particular phrase?" She said she thought that was a cash sale that night; but she also said that when she read that part about "title satisfactory to buyer" she understood that if the title was good Lucy would pay \$50,000 but if the title was bad he would have a right to reject it, and that that was her understanding at the time she signed her name.

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it in his wallet, then said to Zehmer, "Let me give you \$5.00," but Zehmer said, "No, this is liquor talking. I don't want to sell the farm, I have told you that I want my son to have it. This is all a joke." Lucy then said at least twice, "Zehmer, you have sold your farm," wheeled around and started for the door. He paused at the door and said, "I will bring you \$50,000.00 tomorrow. ... No, tomorrow is Sunday. I will bring it to you Monday." She said you could tell definitely that he was drinking and she said to her husband, "You should have taken him home," but he said, "Well, I am just about as bad off as he is."

The waitress referred to by Mrs. Zehmer testified that when Lucy first came in "he was mouthy." When Zehmer came in they were laughing and joking and she thought they took a drink or two. She was sweeping and cleaning up for next day. She said she heard Lucy tell Zehmer, "I will give you so much for the farm," and Zehmer said, "You

In his testimony Zehmer claimed that he “was high as a Georgia pine,” and that the transaction “was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most.” That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, § 133 b., p.483; *Taliaferro v. Emery*, 124 Va. 674. It was in fact conceded by defendants’ counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

The evidence is convincing also that Zehmer wrote two agreements, the first one beginning “I hereby agree to sell.” Zehmer first said he could not remember about that, then that “I don’t think I wrote but one out.” Mrs. Zehmer said that what he wrote was “I hereby agree,” but that the “I” was changed to “We” after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy’s objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, \$50,000 was mentioned, whereupon she stepped up and said, “Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap.” Lucy testified that at that time Zehmer told him that he did not want to “stick” him or hold him to the agreement because he, Lucy, was too tight and didn’t know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer’s version was that he said to Lucy: “I am not trying to claim it wasn’t a deal on account of the fact the price was too low. If I had wanted to sell \$50,000.00 would be a good price, in fact I think you would get stuck at \$50,000.00.” A disinterested witness testified that what Zehmer said to Lucy was that “he was going to let him up off the deal, because he thought he was too tight, didn’t know what he was doing. Lucy said something to the effect that ‘I have been stuck before and I will go through with it.’”

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer’s place and there Zehmer told him for the first time, Lucy said, that he wasn’t going to sell and he told Zehmer, “You know you sold that place fair and square.” After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, “We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. ‘The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.’” *First Nat. Bank v. Roanoke Oil Co.*, 169 Va. 99, 114.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying \$50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a

written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer \$5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p.74.

"... The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them." Clark on Contracts, 4 ed., § 3, p.4.

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, § 32, p.361; 12 Am. Jur., Contracts, § 19, p.515.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement, 17 C.J.S., Contracts, § 47, p.390; Clark on Contracts, 4 ed., § 27, at p.54.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.

Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for \$11,000 and was assessed for taxation at \$6,300. The purchase price was \$50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

Specific performance, it is true, is not a matter of absolute or arbitrary right, but is addressed to the reasonable and sound discretion of the court. *First Nat. Bank v. Roanoke Oil Co.*, *supra*, 169 Va. at p.116. But it is likewise true that the discretion which may be exercised is not an arbitrary or capricious one, but one which is controlled by the established doctrines and settled principles of equity; and, generally, where a contract is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. *Bond v. Crawford*, 193 Va. 437, 444.

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded.



HOW TO READ A LEGAL OPINION

A GUIDE FOR NEW LAW STUDENTS

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. WHAT'S IN A LEGAL OPINION?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an “opinion.” The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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Orin S. Kerr

section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the “caption.” Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the “parties” or as the “litigants” in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.¹

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, “U.S. Supreme Court, 485 U.S. 759 (1988)” refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

¹ English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren’t the victims: the words are Latin for “King” and “Queen.” During the reign of a King, English courts use “Rex”; during the reign of a Queen, they switch to “Regina.”

How to Read a Legal Opinion

with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial “J.” No, judges don’t all have the first initial “J.” The letter stands for “Judge” or “Justice,” depending on the court. On occasion, the opinion will use the Latin phrase “per curiam” instead of a judge’s name. Per curiam means “by the court.” It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let’s move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally \$100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the “procedural history” of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as “precedents”) that are related to the case the court is de-

ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are “majority” opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called “concurring opinions” or “dissenting opinions,” and they appear after the majority opinion. A “concurring opinion” (sometimes just called a “concurrence”) explains a vote in favor of the winning side but based on a different legal rationale. A “dissenting opinion” (sometimes just called a “dissent”) explains a vote in favor of the losing side.

II. COMMON LEGAL TERMS FOUND IN OPINIONS

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

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Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

ing “attorney” and “counsel.” There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as “your honor,” just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as “the Court.”

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An “appeal” is a legal proceeding that considers whether another court’s legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that’s where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one “Chief Justice” and the other eight are just plain “Justices” (technically they are “Associate Justices,” but everyone just calls them “Justices”).

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the “appellant.” The party that won in the lower court and must defend the lower court’s decision is known as the “appellee” (accent on the last syllable). Some older opinions may refer to the appellant as the “plaintiff in error” and the appellee as the “defendant

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in error.” Finally, some courts label an appeal as a “petition,” and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the “petitioner.” The party that won before the lower court and is responding to the petition in the higher court is called the “respondent.”

Confused yet? You probably are, but don’t worry. You’ll read so many cases in the next few weeks that you’ll get used to all of this very soon.

III. WHAT YOU NEED TO LEARN FROM READING A CASE

Okay, so you’ve just read a case for class. You think you understand it, but you’re not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don’t know the facts, you can’t really understand the case and can’t understand the law.

Most law students don’t appreciate the importance of the facts when they read a case. Students think, “I’m in law school, not fact school; I want to know what the law is, not just what happened in this one case.” But trust me: the facts are really important.²

² If you don’t believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to “spot” and analyze the legal issues presented by those facts. These exam questions are known as “issue-spotters,” as they test the student’s ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The “disposition” of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might “affirm” a lower court decision, upholding it, or it might “reverse” the decision, ruling for the other side. Alternatively, an appeals court might “vacate” the lower court decision, wiping the lower-court decision off the books, and then “remand” the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court “affirms” it means that the lower court had it right (in result, if not in reasoning). Words like “reverse,” “remand,” and “vacate” means that the higher court thought the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

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interpret “statutes,” which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret “the common law,” which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.³

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court’s role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of “stare decisis,” an abbreviation of a Latin phrase meaning “That which has been already decided should remain settled.”

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

³ The phrase “common law” started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word “common” in the phrase “common law” means common in the sense of “shared by all,” not common in the sense of “not very special.” The “common law” was announced in judicial opinions. As a result, you will sometimes hear the phrase “common law” used to refer to areas of judge-made law as opposed to legislatively-made law.

their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

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when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. WHY DO LAW PROFESSORS USE THE CASE METHOD?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

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need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!





THE AMERICAN LAW INSTITUTE

A GLIMPSE AT ITS FUTURE

Bennett Boskey

ON THE OTHER SIDE OF THE ATLANTIC eminent institutions abound that possess a challenging history many centuries long. For example, Exeter College at Oxford University is actively preparing to celebrate its 700th anniversary in 2014. Here at home we are accustomed to much shorter spans. When President Lincoln at Gettysburg talked about “four score and seven years ago,” he was giving eloquent expression to a modest stretch of time that measured basic institutions then and has not multiplied so very much since.

So it is with The American Law Institute, a preeminent law reform organization that was founded in 1923. The Institute has conducted its activities over a continuum that today almost precisely fits into four score and seven years. What were the initial majestic aims of the Institute? What have its principal accomplishments been? How has it been adapting to the everlasting changes in the

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needs of society? And, perhaps of even more importance, where is its future heading?

First, a brief word as to the founding.

In western civilizations the need for legal reform is probably perpetual. In the United States this became particularly acute in the period before and after World War I. Bench and bar, as well as the academy, expressed deep dismay over what they regarded as the sad state into which law and legal administration had fallen. Yet the numerous remedies suggested were widely diverse and often conflicting. One particular lament was that the federal system was leading to undue disparities (as well as unseemly error) among the States as to what had been the fundamental and largely common-law areas of the law. In the early 1920s a blue-ribbon committee recommended the establishment of an independent organization to be composed of outstanding practicing lawyers, judges, and academics that might have the stature and the intellectual firepower to be effective in helping to find a better path for developing the law.

Accordingly, the first three signatures on the February 23, 1923, certificate of incorporation of The American Law Institute were William Howard Taft, Charles Evans Hughes, and Elihu Root, and the certificate's statement of purposes said that "The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." With the help of a generous grant from the Carnegie Corporation, the ALI's project that later became known as the Restatement First was inaugurated.¹

¹ Although I am not an enthusiast for footnotes, I feel it may be a service to the reader to be assured that there exists an extensive available literature relating to the origin, the history, and the activities of The American Law Institute. Chief among these, but by no means even a substantial fraction of the full inventory, are: (1) N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *Law and History Review* 55 (1990); (2) Herbert F. Goodrich and Paul A. Wolkin, *THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961* (ALI Publishers 1961); (3) Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 St.

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The 19 volumes of the Restatement First,² although produced under the guidance of reporters who were recognized leaders in their respective fields, nevertheless turned out to have certain idiosyncrasies. They tended to be cast in terms of stark black-letter rules of law, often without the benefit of supporting comment or even citations by way of explanation or justification. As a result, they attracted severe criticism, particularly from portions of the academy that had not been involved in their production. Some of this reflected the meanness of spirit that all too often can creep into academic controversies between strong-willed protagonists, each convinced that he or she is absolutely right. But some of the criticism was, by any objective standards, well founded. Notwithstanding whatever negative assaults were made, however, the judiciary and the bar welcomed the help of most of the Restatement First (possibly excepting the Restatement of the Conflict of Laws, for which the ideologically-imprisoned Professor Joseph H. Beale had been the reporter). Thus over time the judicial citations of the Restatement First volumes as a source of the better view of the law multiplied with some rapidity.

By the early 1950s it was becoming evident that the needs of society had moved on considerably, that much of the law was changing or needed to be changed in response, and that many new problems had arisen or were arising that had not been contemplated in the era when the Restatement First was being drafted. Thus the Institute embarked on a project that became known as the Restate-

Louis ULJ 185 (1968); (4) Norris Darrell and Paul A. Wolkin, *American Law Institute*, 52 *New York State Bar Journal* 99 (February 1980); (5) G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 *Law and History Review* 1 (1997); (6) THE AMERICAN LAW INSTITUTE SEVENTY-FIFTH ANNIVERSARY 1923-1998 (ALI 1998); (7) Geoffrey C. Hazard, Jr., *The American Law Institute Is Alive and Well*, 26 *Hofstra Law Review* 661 (1998); (8) Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 *Southern Illinois ULJ* 145 (2007); (9) Lance Liebman, *The American Law Institute: A Model for the New Europe?*, paper available from ALI (2008).

² The initial series of Restatements of the Law when issued were not called Restatement First (it was not then assumed that there would ever be a Restatement Second), but for convenience and simplicity they are so referred to here.

ment Second. The Restatement Second volumes built upon what remained valid from the Restatement First; they sought to endorse what was deemed to be the better view of the law in the light of the changed needs of society; and they overcame some of the structural shortcomings that had hampered the Restatement First. It is fair to say that, on the whole (though of course not 100 percent of the time), the Restatement Second became a benign influence that moved the law along progressively and toward greater certainty but without undue disruption.

Another couple of generations slid by. Although much of the Restatement Second had not become obsolete, the necessity for revising certain of the Restatement Second volumes, starting with the Foreign Relations Law of the United States, made obvious the need to undertake a Restatement Third. The Institute accepted the challenge, and today that work appears to be well past midstream. Some of the areas of law being covered by the Restatement Third volumes are new, representing subject matter additions to what was previously done; and certain of the traditional areas undergoing a revisit are being divided into more manageable discrete segments. Again, what remains valid from the two predecessor series is being preserved. But the willingness to recognize the need for modifications in the law and to enter upon new territory has been guiding the effort to identify the better legal rule to govern changed conditions.

The ALI's efforts at law reform have by no means been confined to Restatement volumes. Much has gone into statutory projects. Perhaps the most influential has been the Model Penal Code adopted by the Institute in 1962, for which Herbert Wechsler was the reporter before he became the Institute's director. The strong influence of this project and its wide acceptability helped to modernize the penal codes of many of the States; and after several decades one segment of it, namely Sentencing, is the subject of a fresh ongoing project aimed to take into account the massive changes that the State sentencing regimes must now confront. To mention another example, an earlier Model Code of Evidence issued by the Institute in 1942 contributed considerably to clarifying and simpli-

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fyng the rules of evidence in actual practice. And a well-executed statutory project aimed at clarifying and codifying the complex federal securities laws failed to win enactment by Congress but nevertheless helped in the judicial interpretation of the network of applicable securities statutes.

Statutory projects, particularly when the subjects are controversial, can face many obstacles, some of them foreseeable and some of them unforeseeable. Thus several scholarly exercises by the Institute aimed at showing a need for modifying certain federal statutes dealing with federal court jurisdictional matters have enlightened the academy but thus far have had virtually no discernible influence on the actual state of the law. And a variety of federal tax projects managed to consume an almost inordinate amount of the Institute's effort without achieving very much in the way of visible practical results. In vivid contrast is the Institute's long-term partnership relating to the Uniform Commercial Code. This has been a hugely successful enterprise whereby the Uniform Commercial Code has been originated and periodically kept current by the joint efforts of the Institute and of NCCUSL (National Conference of the Commissioners on Uniform State Laws), which recently has had the good grace to shorten its popular name to Uniform Laws Commission (ULC).

ALI-ABA is another shared activity. Since 1947 the Institute has had a joint venture with the American Bar Association to conduct what has turned out to be the outstanding national continuing legal education program known as ALI-ABA. ALI-ABA, which is administered by ALI from the headquarters in Philadelphia, has had an interesting history of its own.³ Currently ALI-ABA has been undergoing an exceptional and sometimes arduous transition in order to (1) take full advantage of the capabilities available to CLE from the electronic revolution, (2) adapt to the shifts in demand as to meth-

³ The events of the first 40 years are described in abundant detail in a volume by Paul A. Wolkin, *ALI-ABA . . . XL!* (ALI-ABA 1988). By a 2005 restatement of their memorandum of understanding, the two sponsoring organizations substituted an ALI-ABA Board of Directors for the previous ALI-ABA Committee.

ods of delivery of CLE, and (3) revise its marketing programs accordingly.

The Institute's ability to act collaboratively need not be, and has not been, only in matters that are truly domestic to the United States. Already its value has been demonstrated in projects where the law's globalization has increasingly been injecting a foreign component into ALI's work. An instructive example is the Institute's joint effort over a period of about four years with UNIDROIT (International Institute for the Unification of Private Law), which led to the joint ALI/UNIDROIT adoption and promulgation in 2004 of the ground-breaking Principles of Transnational Civil Procedure, containing recommendations of a fair procedure to facilitate the resolution of disputes arising from transnational commercial transactions, whether the forum is in a common-law or a civil-law jurisdiction.

Another occasional line of ALI work has been the commissioning of legal research and analysis that will be published as useful studies but without bearing endorsement as a position of the Institute. In a way this harks back to the Institute's relatively early days. In 1945, as World War II was winding down, there was published a Statement of Essential Human Rights that had been composed by a distinguished drafting committee appointed by ALI and representing principal cultures of the world; although the document was not deemed appropriate for the imprimatur of the Institute, it was widely distributed by Americans United For World Organization, and had a substantial influence on the later Universal Declaration of Human Rights. As another example, many years later ALI commissioned and was able to publish in 1991, not for adoption by the Institute but to serve as background for work being done on portions of the Restatement Third of Torts, an important Reporters' Study entitled Enterprise Responsibility for Personal Injury.

In connection with this mention of the Restatements, it is fitting to refer to what has turned out to be a major outgrowth of the Restatement work – namely, the Institute's series entitled Principles. When ALI undertook to do much-needed work on corporate governance of for-profit corporations, it soon became evident that re-

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stating the law was only a fraction of what should be done and that prudent arrangements for corporate governance would also require substantive changes in the law beyond what courts would be able to achieve by themselves. This led to a kind of hybrid structure that more suitably could be called Principles of the Law rather than Restatement of the Law. From this experience with the Principles of Corporate Governance, other Principles projects have followed. Two already completed are, first, Family Dissolution; and, second, Intellectual Property – Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes. Two more Principles – on Software Contracts; and on Aggregate Litigation – are scheduled to receive final approval at the 2009 ALI Annual Meeting and if approved should be ready for issuance either late in 2009 or early in 2010. In general, the Principles have the advantage of more flexibility; they fit well in areas where the law is somewhat less settled, or more emerging, than in Restatement areas. Thus by concentrating on the cutting edge of the law the Institute can contribute recommendations for sound and useful development in what is often a fast-paced arena.

What then does all this suggest about the road ahead?

1. It is almost certain that the Restatement work will continue, though perhaps at a diminished rate. New Restatement volumes are to be expected either in those areas where serious revision of previous Restatement work is called for or in those additional areas where Restatement work can be seen to have a solid beneficial role, like our current work to develop initial Restatements in Employment Law and in The U.S. Law of International Commercial Arbitration. Breaking up Restatement topics into definable segments, even more so than in the past, is likely to occur, primarily in order to shorten the life span of the project and to enlarge the prospects for finding first-class reporters willing to make the commitment to undertake and complete the task. In due course a body of work can be expected to emerge that will be known as Restatement Fourth.

2. It is also to be expected that the Principles will be an expanding series. Their flexibility is attractive. Their ability to probe into areas where the law is particularly unsettled or even partially un-

known gives them the opportunity to achieve substantial and timely law reform.

3. New statutory projects can be expected to be undertaken by the Institute from time to time. In a world where statutes have become so much the norm in many areas, this seems inevitable. However, it can also be expected that the Institute will tend to refrain from launching statutory projects that would needlessly duplicate work being done by another responsible organization (such as the Uniform Laws Commission) – except where that presents an opportunity for joint effort on a collaborative basis, such as has been the continuing collaboration on the Uniform Commercial Code.

4. During the past decade, largely as a result of the law's globalization, a foreign component has increasingly been reflected in much of the Institute's work. This can be expected to continue and is very likely to accelerate. The novel project now under way to define principles of world trade law, based primarily on representative decisions of the World Trade Organization, is illustrative. The importance of addressing comparative law also presents opportunities for joint efforts with foreign or international organizations, as the UNIDROIT experience has demonstrated. In law, as elsewhere in life, working with a foreign organization that springs from a substantially different culture is not always easy for either party. But the high rewards of successful achievement can make the endeavor worthwhile.

5. The Institute now has slightly over 4,000 members. It is deliberately aiming to attract outstanding younger individuals in the profession – both the academics and the practicing lawyers⁴ – who will commit themselves to participating meaningfully in the work of the Institute. It seems likely that the median age of the Institute's membership will be noticeably sliding downward.

6. A vast domain awaits treatment by the Institute in public law areas of consequence to the nation. Typical areas with aspects to be

⁴ For the judges who might be sought to become new members, youthfulness is hardly a factor (many of these judges will have previous distinguished careers in practice or in the academy or both); the Institute must accept whatever ages they happen to be.

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considered might be the legal ramifications of national security matters, or the status of aliens, or the system of federal regulations, or the mandates against conflict of interest, or legal aspects of adapting to climate change. On occasion, shorter projects, rather narrowly focused, may turn out to be both feasible and useful. It seems essential that a vital law reform organization looking forward to its 21st Century agenda would not neglect significant areas of public law. But the controlling considerations in each instance must be how to define the study or project so that it will be doable, how to avoid needless duplication with work being done by others, how to assure reportorial leadership so that the work will be done in a timely fashion, and how to assess the degree of usefulness that the end product can be expected to have. In a general sense, these criteria are applicable to any project the Institute is considering undertaking. Yet they have a special impact on proposals in important areas of public law. It is nevertheless to be expected that the Institute over the next decade will find ways to move ahead in select areas of public law and we can hope that the world will become a better place for the effort.

