

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW & REGULATORY PRACTICE
Fall Meeting
L'Enfant Plaza Hotel, Washington, D.C.
Saturday, October 18, 2008

Persons members present: Chair H. Russell Frisby, Jr., Chair-Elect William V. Luneburg, Last Retiring Chair Michael Asimow, Vice-Chair Jonathan Rusch, Secretary Anna Williams Shavers, Budget Officer William S. Morrow, Jr., Section Delegate Randolph May, Section Delegate John Micael Vittone; Council Members: Charlotte Bahin, Ken Hurwitz, William Jordan, Richard Parker, Cary Coglianese, Richard Murphy, Paul Robert Noe, Daniel Cohen, James Conrad, Linda Lasley Ford, Robin Arzt, Jeffrey Rosen, Edward Schoenbaum, Brandon Sherr (Law Student Liaison) and James Muetzel (Young Lawyers Division Liaison).

Absent: Ronald Smith, Assistant Budget Officer; Council Members Joe Whitley, Steve Vieux, Brett Kavanaugh, Morton Rosenberg, David Gienapp, Jessica Johnson

I. Administrative

The meeting began at 9:01 am. Persons present introduced themselves. Minutes of the 2008 Annual Meeting were approved as amended. The minutes were amended to replace “GSA” two times with “OPM” in the last paragraph of section II.

II. Chair's Report

Section Chair Russ Frisby:

- Thanked Charlotte Bahn and Marc Scheineson, for putting together a great fall program. He also thanked the staff: Director Anne Kiefer, Program Associate and Katrina Pariera as well as our Program Administrator Claire Lenihan who will be leaving us.
- Discussed his vision. His goal is to help promote and facilitate what the section does best :
 - i. Studying and making significant recommendations. The section needs to get better at moving them forward. Therefore, the Legislative Committee has been created.
 - ii. Education and training. The section has successful institutes such as the Homeland Security and Administrative Law Institutes and looking for things to do in the election law area. Progress can be made in this area with programs on issues that need to be considered by the new administration and Congress.
 - iii. Inclusion. Getting young lawyers involved and moving them forward – e.g. Young Lawyers committee involvement.

- Remember Adlaw Rules! The section will keep moving forward together as a family.
- In terms of what the section has been doing:
 - i. It is expected that POTUS will be through Blanket Authority by Monday; E-rulemaking through Blanket Authority before the election, and could be approved at Midyear Delegates meeting.
 - ii. On January 30 and 31st, the council meeting will be held in Washington at ABA headquarters two weeks before midyear meeting.
 - iii. There will be a call for programming at the Midyear Meeting and Renee Landers and Paul Alfonso will be chairing the meeting.
 - iv. Janet Belkin is continuing with the election efforts taskforce.
 - v. The State Administrative law Committee had a great meeting yesterday and state and local government sharing is moving forward.
 - vi. Nancy Skancke will speak to the OPM letter later in the meeting.
 - vii. The preemption issue is back and TIPS is expected to present a proposal at the annual meeting.
 - viii. Ron Levin's Model APA report forthcoming.
- The Chair expressed the sentiment that it is an honor to serve the section.

III. Chair-elect's Report

Bill Luneberg reported that he will be helping Jonathan Rusch with the AdLaw institute in the spring. He anticipates a series of panel discussions on global warming in the next year to 2 years. Jamie Conrad and Ken Hurwitz have put on great panel discussions in the past and the section has a chance to work with other sections as well as focus on state administrative law. Bill is also planning on dealing with issues of lobbying and self-regulation. It was noted that at least one of the presidential candidates has said lobbying issues will be a focus. With respect to one of his major decisions, the 2010 spring meeting, Bill suggested for consideration a location near Pittsburgh and Frank Lloyd Wright's Fallingwater.

IV. Vice-Chair's Report

Jonathan Rusch reported that the spring institute is his main concern. The dates have not been set yet but it will probably focus on issues of particular interest of the new administration. New general counsels will probably be the focus of one session. The plan is to have a broad appeal. A more detailed report will be given at the January council meeting. FTC staff has drafted a handbook that we will be using in connection with our project regarding assistance to lawyers in representing identity theft victims. ABA headquarters' assistance will be enlisted to help identify jurisdictions for rollout of the pro bono project. Jonathan noted that this is an example of real impact and contributions of the section.

V. Letter Regarding OPM 2007 Recruitment Program: Ad Hoc Committee on Recruitment of ALJs by OPM

Nancy Skancke spoke on behalf of the ad hoc committee. She was accompanied by John Miller and Ed Grenier who also addressed the Council regarding procedures for selecting ALJs. The Skancke memo of August 28, 2008 and section comments were discussed with respect to the proposal to submit a list of questions to OPM and the possibility of using the section's new legislative process. Council concerns included the appropriate format to submit the questions and the possibility that the ABA would be viewed as hostile to OPM and not get very much cooperation. Consensus was reached to use a compromise approach and the section will work with Nancy.

[James Muetzel excused himself from the room for this portion of the meeting]

VI. Delegates' Report

John acknowledged success of Judy Kaleta and Tom Susman and described the passing of resolutions including land use planning and the model state land use ordinance. The Delegates are looking forward to Boston. There is a November 19th deadline for submitting reports and recommendations. John and Randy are looking forward to hearing from members and the Council regarding proposed resolutions; they will pass on information as soon as available. All are encouraged to read the report on what occurred before the House of Delegates. Randy added that committees can also play a role with respect to requests for co-sponsorships, etc.

VII. New Initiatives

- Russ reported reauthorization of ACUS. Although not yet funded, funding is expected.
- Discussion of lack of structure to move proposals and projects forward in conjunction with the ABA. Our new Legislation Committee will aid in this process. Jamie Conrad will chair and Jeff Lubbers has agreed to help. Russ asked for others interested in being involved to let him know. ACUS, POTUS, E-Rulemaking are our priorities.
- Richard Parker raised the issue of reaching out to the Executive branch. Dan Cohen questioned the government attorneys' role as members of the section. James Muetzel suggested a brown bag on government employees' involvement. I was the sense of the Council to pursue this idea. Russ will arrange a conference call to discuss along with the ABA mid-90s report.

VIII. Preemption

Bill Funk reported on a number of matters involving preemption issues including *Riegel v. Medtronic, Inc.*, a case involving medical devices and state law preemption which was affirmed by the Supreme Court 8:1; 2 bills introduced into Congress; the 8th cir 2006 FRSA case on railroad safety issues which Congress overruled; and *Altria v. Good* and *Wyatt v Levine* and other relevant cases. Bill suggested three possibilities:

- i. Get involved with TIPS proposal
- ii. Wait and see
- iii. Take out own action, building on the earlier ABA resolution that came out of this section regarding deregulation of federal program effect on preemption; executive order on federalism issued by Clinton adopted by Bush but not acted on by either; create an ad hoc committee to create draft report and recommendation by the January meeting and if lucky ready by annual meeting.

A motion was moved by Russ and seconded by Richard Parker to create the committee. Discussion followed. Hearing no objection, the motion was approved by consensus.

IX. Model State APA

The discussion was continued from the Annual meeting in NYC and led by Ron Levin.

- The rulemaking section was the primary focus for this meeting. Seeking drafting improvements and policy suggestion. Discussion of policy suggestions. Drafting suggestions should be sent to Ron. See cover memo from Ron 10/13/08. One of the committees' main focuses is transparency of government.
- Discussion included a number of sections. Jeff Lubbers suggestion that Ron draft a letter and the section will sign it. Jeff agreed to help. The Council agreed to this process. Council will review the letter and try technical blanket authority if necessary for nongovernmental authority. The target date is for an upcoming meeting in January or February. Other sections will be discussed later.

Russ congratulated and thanked Ron for all of his hard work.

X. Report on Annual Meeting Programs

- Annual meeting in Chicago. October 31st is the deadline for showcase programs. Janet Belkin and Chris Franklin are the co-chairs. Proposals should be submitted to Anne and she will forward to Janet and Chris. Janet and Katy Antarctica – she and Katy Kunzer are looking for someone to work with on an Antarctica program. Contact Anne or submit questions to Janet at jebelkin@aol.com.
- Russ reemphasized deadline for Chicago program

XI. Budget

Report by Bill Morrow

- Refer to Budget Report in the materials. Selecting venue for section meetings is important. Difficult to determine the effect of the increase in section dues to \$60 at this point. 85% to 95% of dues paid, so in better position than last year. By February we can tell how many dropped out, but not exact reasons.
- Budget Committee Assistant Budget Officer, Ron Smith; the Section Vice Chair, Jonathan Rusch; Councilmember Ken Hurwitz; and former councilmember Lynne Zusman; Councilmember Linda Lasley Ford and Councilmember Dan Cohen. 3 to 5 year terms.

XII. Publications

A brief report on publications was made and an invitation was extended by Anna Shavers to those present to attend the Publications Committee meeting scheduled to take place immediately following the Council meeting.

XIII. Nominating Committee

Judy Kaleta reported. Arti K. Rai and Ken Hurwitz are serving along with Judy Kaleta . Four positions on the council and one delegate position will be considered. Suggestions are welcome.

XIV. Administrative Law Review

Report by Andrew Paul Kawel, Editor In Chief.

- The Law Review has an unbroken streak of publishing on time. The Red Lion symposium is in next issue. The Administrative Law discussion forum will be published around April. A forthcoming energy symposium will have transcripts published online. A second symposium is on the 25th anniversary of Chevron. Judge Abner Mikva will be a speaker.
- The number of subscribers is growing. Professor Lubbers' class for ALR members is a success. All members of the staff are members of the section. Andy also gave an update on editors and staff and their training. Submissions are invited regarding recent developments such as the economic meltdown and POTUS. Members are encouraged to contact Andy if they have an interest in mentoring executive board members.
- The possibility of submitting the journal for electronic publication such as SSRN and Jurist was discussed.

The meeting adjourned at 12:30 p.m.