

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW & REGULATORY PRACTICE
Midyear Meeting
Beverly Hilton, Los Angeles, CA
February 9-10, 2008

February 9

Persons physically present: Chair Michael Asimow, Chair Elect Russ Frisby, Vice Chair Bill Luneburg, Secretary Jamie Conrad, Budget Officer Bill Morrow, Delegate Tom Susman, Councilmembers Michael Herz, Bill Jordan, Brett Kavanaugh (Federal Judiciary), Dan Meron (Executive Branch), Richard Murphy, Paul Noe, Lois Oakley (State Administrative Judiciary), Richard Parker, Steve Vieux, Joe Whitley and Ann Young, and Liaisons Nancy Eyl (Law Student) and James Muetzel (Young Lawyers Division).

Present by phone: Delegate Judy Kaleta.

Absent: Last Retiring Chair Dan Troy and Councilmembers Cary Coglianese, Ken Hurwitz, and Dick Stoll.

I. Administrative

The meeting began at 9:08 a.m. The Council was instructed on the use of the sound system, which members followed with differing degrees of success. Persons present introduced themselves. The minutes of the Fall Meeting were approved.

II. Chair's Report

Section Chair Michael Asimow reported that:

- (i) U.S. House of Representatives staff members who were interested in filling the Legislative Branch Liaison slot had been advised by House Ethics advisors that would not be able to serve on the Council, (ii) we were very fortunate that Mort Rosenberg of the Congressional Research Service will do so. Mort is a recipient of the Section's Lawton Award for Outstanding Government Service.
- Lisl Dunlop resigned her seat on Council, and that Nancy Bryson would be replacing her. Nancy was unable to attend this meeting due to her current transition to a new solo law practice.
- At ABA's urging, the Social Security Administration has withdrawn the "open files" aspect of a recent proposed rule.

- ABA ultimately was unable to weigh in, due to substantial disagreements between ABA entities, on the subject of whether the ITC should have a separate process for recruiting ALJs to hear Section 337 cases.
- ABA Board of Governors had approved the Section's creation of a Program Support Fund, maintained within the Fund for Justice and Education, to support the Section's public service activities.
- Quite a controversy had erupted over the online version of the *ABA Journal* naming Alberto Gonzales "Lawyer of the Year," followed by a revised paper version calling him "Newsmaker of the Year."

Chair Asimow thanked Caroline Newcombe for chairing the 2008 Midyear Meeting including several cutting edge and well-attended programs. The programs on subprime mortgage meltdown and on climate change received tremendous media attention. Asimow thanked the Section staff for their characteristically excellent work.

Paul Noe reported that Congress dropped language in the FY07 omnibus spending bill that would have barred the Administration from implementing E.O. 13422 and a related OMB bulletin regarding guidance documents. Paul drafted a letter that the ABA sent to Congress asking it not to do so insofar as these authorities address guidance documents.

III. Chair-Elect's Report

Russ Frisby urged people to nominate themselves or others for the many committee appointments he will soon make in planning for his year as Chair. (Michael noted parenthetically that he is looking for someone who would like to serve as the Section's liaison to the new ABA Special Committee on Sexual Orientation and Gender.) The "POTUS Committee" drafting the Section's recommendations to the next President should have a draft report for discussion at the Spring Meeting, with a goal of finalizing the document at the Annual Meeting. The Spring 2009 Meeting will be held in Tucson; Jean Cooper is the chair. The Fall Meeting is tentatively set for Oct 16-17 at the L'Enfant Plaza Hotel in Washington, D.C. Charlotte Bahin will stay on as co-chair, and she and Russ and are looking for a co-chair.

IV. Vice-Chair's Report

Bill Luneberg reported that the Rulemaking Institute will focus on issues related to guidance and provided a synopsis of the planned program. The Council discussed a generous offer from American University to host the Institute at their facilities in upper Northwest, D.C., and otherwise how to ensure that we do not lose money on the program. The Executive Committee will deliberate further on the Institute location.

V. Interstate Compact APA Report & Recommendation

Bill Morrow introduced his committee colleagues Kent Bishop and Jeff Litwak and requested that the Council approve the current draft proposal and recruit the support of other ABA entities. Bishop described the origin and history of the proposal, which addresses the fundamental problem that neither the federal APA nor state counterparts clearly apply to interstate compacts, and that, as a result, existing compacts have adopted their own, idiosyncratic procedures. Litwak described ways that the product would be useful. Morrow recited the shortcomings of most compacts' procedures.

Chair Asimow initiated a Council discussion of the recommendations. There was general consensus that the document was important but required more work, particularly to make the Appendix part of the recommendation, and to make it more clearly prescriptive. Michael asked Councilmembers to contact the committee's members with any further thoughts, so that the document could be considered at the Spring Meeting. Tom Susman urged the committee to solicit the input of other potentially supportive sections before the Spring Meeting.

VI. Letter Regarding OPM 2007 Recruitment Program

Chair Asimow reported that the ABA had withdrawn the letter to OPM signed by John Miller for procedural rather than substantive reasons, and introduced John Vittone to explain the problem that inspired the letter. The Council agreed that the letter had an improperly interrogatory tone. The Council asked the committee to send a more respectful letter to OPM asking for a meeting to discuss the issues. Dan Meron offered to contact the General Counsel of OPM to facilitate such a meeting. Proposed attendees at the meeting will be the committee that drafted the letter and Russ Frisby.

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

VII. Delegates' Report

Tom began by describing a proposed amendment to the Section's report and recommendation regarding a pro bono program to aid victims of identity theft: to change "for representation of" to "to assist or provide legal representation of." The Council approved this change.

Tom reported that past Section Chair John Hardin Young, now on the ABA Board of Governors, had secured the Board's endorsement of our report and recommendation regarding redistricting. The Board discussed the matter in their February meeting just days before.

The Council voted to cosponsor resolution #108 regarding the provision of legal services to veterans and members of the armed services in seeking the full range of health care benefits and services.

The Council provided no instruction to the Delegates regarding resolution #110B on a proposed uniform state law on representation of children in abuse, neglect and custody proceedings.

The Section postponed until the next day discussion of #111A to determine whether the Commission on Immigration had made requested changes and consulted with DHS lawyers, two conditions of cosponsorship established at our Fall Meeting.

Jamie Conrad spoke in support of #109 regarding the United States' government taking a leadership role in addressing global climate change. The Council deferred discussion of the document until the next day so that Council members could review it.

VIII. EU Project

Neil Eisner reported on the status of this project. Neil has received feedback indicating that the American Chamber of Commerce is possibly interested in sponsoring, and paying for, a conference on the report in May. The project committee is exploring a day-long program on the Report as part of the Annual Meeting in New York in August. Finally, the International Law Section has expressed interest in cosponsoring a program in Brussels in September, however to do so would be financially risky for this Section and not consistent with many of our practices (e.g., letting speakers attend for free). Bill Morrow cautioned against drawing more funds from reserves, given that reserves (\$300,000) are well below Section policy (one year's budget; ~\$500,000). There was consensus that we could not afford the program with the International Law Section. Michael Herz offered to explore the prospect of Cardozo hosting the New York program and potentially supporting it. Nancy Eyl will explore the interest of Georgetown University. Several folks expressed confidence that Brussels-based firms would support the cost of sending some EU officials to New York. The Executive Committee will further discuss and decide upon the proposed programs.

IX. Veterans Advocacy Pro Bono Project

Holly Robinson, Assistant Director of the ABA Commission on Law and Aging, reported to the Council on a proposed ABA Enterprise Fund project to create pilot state programs to develop emeritus attorney pro bono programs for veterans' assistance. The Veterans Committee endorsed the proposal and offered to help find interested lawyers. The Section will be listed as a co-sponsor of the project. There is no monetary commitment for the Section, rather if the project is funded through the ABA, funds would be given from the ABA to execute the project.

The meeting adjourned at 11:41 am.

February 10

Persons present in person: Chair Michael Asimow, Chair Elect Russ Frisby, Vice Chair Bill Luneburg, Secretary Jamie Conrad, Budget Officer Bill Morrow, Delegate Tom

Susman, Councilmembers Michael Herz, Brett Kavanaugh (Federal Judiciary), Dan Meron (Executive Branch), Richard Murphy, Paul Noe, Lois Oakley (State Administrative Judiciary), Richard Parker, Steve Vieux, Joe Whitley and Ann Young, and Liaison James Muetzel (Young Lawyers Division).

Absent: Last Retiring Chair Dan Troy, Delegate Judy Kaleta, Councilmembers Cary Coglianesi, Ken Hurwitz, Bill Jordan and Dick Stoll, and Liaison Nancy Eyl.

I. Administrative

The meeting began at 9:07 a.m. Persons present introduced themselves.

II. Homeland Security Law Institute

Joe Whitley reported on the very successful third annual Institute last month. Several very senior current and former DHS officials participated as speakers. Russ Frisby commended Joe and his co-chair Lynne Zusman for the remarkable turnout. Next year's event will be held later than January 2009, to accommodate the change in Administration.

III. Budget Report

A draft budget was circulated to the Council. Bill Morrow reported that the Section is projected to end the fiscal year with a loss. He reminded the Council that the recently-approved dues increase (to \$60) does not take effect until next year. Russ Frisby recommended that the draft budget be tabled and brought back to the Council at the Spring Meeting, affording the executive committee an opportunity to review the expenses and see where budget cuts could be made to reach a balanced budget.

A wider discussion of Section spending practices launched with one proposal offered that the Section begin holding its Midyear Meeting as strictly a business meeting in Washington, DC (no CLE programs). If the meeting was held two weeks before the ABA Midyear Meeting, the Council would have access to all of the House of Delegates reports and recommendations filed to date in order to deliberate on them and vote for co-sponsorships, etc. The Executive Committee would still be expected to attend the Midyear Meeting in order to decide upon last-minute requests for co-sponsorship or proposed changes to our own resolutions. Kim Knight suggested that the Section think broadly about intermediate options such as: eliminating CLE programs, which sometimes can have abysmal attendance but substantial costs; having the Council meet on one day instead of over two days, etc. The Council decided to table the discussion and revisit the Budget at the Spring Meeting. Bill and Kim will look at the history of meeting expenses and attempt to offer various options for consideration. Randy May urged the Section also to think about ways to generate revenue, not just cut expenses. Russ seconded that recommendation. He also noted that we could email CLE program materials to participants and let them print them out (as we do with Council materials). This would work if the speakers provided the materials to the staff in a timely fashion, which is not the norm.

IV. World Justice Project

Claudia Dumas, Project Director, thanked the Council for our contribution to the Project and reported on the breadth of interest in the project, particularly from non-legal groups. She described the Project's global outreach meetings, Rule of Law Index, scholarship, and targeted initiatives.

V. Board of Governors Liaison Report

The Section's new Board Liaison, Judge David Gienapp, spoke of some of the issues concerning the Board, particularly membership. The Board has decided to resume (after more than a decade) the practice of opining to the House on pending recommendations. Judge Gienapp commended Jack Young for successfully defending our redistricting recommendation and our Program Support Fund application during Board deliberations.

VI. Publications Committee

Anna Shavers reported that the Section's publications are more profitable than the ABA average, and Jeff Lubbers added that every Section book but one has been profitable. Nonetheless, there is an ineluctable trend toward electronic publication, and we will be piloting this with *2006-2007 Annual Developments in Administrative Law and Regulatory Practice* book. The next edition of the *Sourcebook* is at the publisher now. Other books in the pipeline are the EU Project and an update of the Lobbying Manual. Michael Herz recommended that people interested in seeing an example of an electronic book update website should look at the one for Mike Gerrard's *Law of Climate Change* book on the ABA's website. Right now, the ABA publications webmaster is helping us with electronic publications; as we move to greater use of the web, we may have to fund such technical assistance.

VII. Delegate's Report, con't

The Council agreed to a technical correction to the redistricting recommendation (#101) to add "the District of Columbia" after "states."

Tom was told by Mark Agrast, Chair of the Commission on Immigration, that proponents of the immigration recommendation (#111A) did consult with DHS. However, they did not receive from our Immigration Committee the changes that we had proposed at the Fall Meeting. Dan Meron raised questions about paragraph (c) to which Anna Shavers responded. Joe Whitley raised again his concern about paragraph (d) regarding the connection of costs to the applicant's benefit. Various participants offered proposed amendments, but the Chair concluded that it was too late to try and make changes of such subtlety. The Council approved the recommendation on a split vote, with Meron, Murphy, Noe and Whitley opposing.

Tom read the late-filed resolution from the Criminal Justice Section calling on Pakistan to stop mistreating lawyers and judges. There was no move to cosponsor.

On resolution #109 regarding climate change, Paul Noe offered an amendment to the last further resolved clause to state more specifically that international discussions and treaties should focus on reducing emissions from high-emitting nations. Several participants expressed agreement with his sentiment, but the majority view was that the proposed change would inevitably raise a subtext of developed vs. developing countries that would raise more problems than it would solve. Tom added that he would attempt to make the change if an opportunity arose. The Council then voted to unanimously to co-sponsor the recommendation.

VIII. Model Land Use Ordinance

Before introducing Ed Sullivan who is immediate past chair of the Section of State and Local Government, Michael Asimow emphasized the importance of the land use recommendation to him. Asimow also indicated that in response to a suggestion, he had spoken to NCUSL and confirmed that they were not concerned about this effort intruding on their turf. Sullivan then ran through the list of changes he had made to the document in response to questions and concerns expressed at our discussion at the Fall Meeting. Council members identified a host of clarifying and perfecting changes, which Ed agreed to make. Councilmembers who identify other issues should email them to Michael within the next month.

Subject to the foregoing, the Council approved the recommendation unanimously.

IX. President's Identity Theft Task Force

Criminal Process Committee Chair Jon Rusch provided an update on this Section-sponsored resolution, which will go to the House tomorrow. It will have at least a half-dozen cosponsors and has no known opposition. The Task Force has already begun drafting a handbook to assist lawyers in representing identity theft victims. It will be reviewed by numerous ABA entities, and then will be pushed to state bars for them to expand it by adding state-specific provisions. At present, he does not see any ways in which this project will require Section funding.

X. Spring Meeting

Jon Rusch, in his capacity as Spring Meeting Chair, described plans for this meeting, which be held at the Paris Las Vegas hotel on April 11-13. Panels will address gaming law and the Yucca Mountain nuclear waste disposal siting controversy. He is working on plans to promote the programs to the local legal community. Michael urged Council members to attend the Spring Meeting.

XI. Young Lawyers Committee

James Muetzel described his vision for the newly created Young Lawyers Committee within the Section. The Council spoke favorably and encouraged Muetzel's efforts.

XII. Nominating Committee

On behalf of Eleanor Kinney, Nominating Committee Chair, Jeff Lubbers reported that he, Eleanor, and James Ho are still eager for nominations for Section delegate, vice-chair (Washington-based), secretary, assistant budget officer, and four council members.

The meeting adjourned at 11:53 a.m.