Minutes

Midwinter Council Meeting
American Bar Association
Section of Antitrust Law

The Windsor Court Hotel - Boardroom
New Orleans, LA
January 16, 2016
2:00 p.m. – 5:00 p.m.

Chair Henry called the Council Meeting to order at 2:00 p.m.
She welcomed the following Officers, Council Members, staff members and guests:

Officers/Voting Council Members
The following Council Members and Officers were present:

Representatives to the Council
Victor J. Domen (National Association of Attorneys General Representative), Amadeu C. Ribeiro (Non-U.S. Lawyer Representative) and Darrell L. Williams (Non-Lawyer Representative).
Other Attendees
Rod Frank, Timothy P. Gallivan, Layne F. Kruse, Ilunga Kalala, Scott Perlman, Paula W. Render, Donald Stockdale, April Tabor, and Joanna Tsai.

Section Staff
Deborah Morgan, Margret Stafford, and Joanne Travis.

The following voting members of Council were not in attendance:
Gail F. Levine, Seth C. Silber, and Christine J. Sommer.

The following Representatives to the Council were not in attendance:
William J. Baer (DOJ Representative), Susan Y. Illston (Judicial Representative), and Edith Ramirez (FTC Representative).

The Section’s Conflicts of Interest Policy was provided to Council Members with the agenda for the meeting posted on the Leadership Portal. The agenda includes links to documents submitted for this meeting. The below minutes are not necessarily in the order of occurrence during the Council Meeting. Due to the limited availability of certain speakers and other schedule changes, Chair Henry re-ordered certain portions of the meeting. Where Officers submitted written reports, those reports were accepted by Council and those Officers relied on such written reports without any substantive modification, unless otherwise noted. In addition, where approximate figures were mentioned during the meeting and the relevant written report submitted before the meeting included precise figures, the more precise figures provided in the written report are generally included below. Finally, certain material from the written reports submitted for the meeting may be included the minutes where such inclusion assists the Section in maintaining an accurate record of the meeting.

1. Officer Reports/Updates
   A. Chair Report – Roxann Henry
• Chair Henry reviewed the recent activities and plans for the 2016 Next Generation of Antitrust Scholars Conference (Conference Co-Organizers: Edward Cavanagh, Harry First, and D. Daniel Sokol), 11th International Cartels Workshop (ABA Conference Co-Chairs: Jarrett Arp and Donald Klawiter, IBA Conference Chair: Janet McDavid), the Spring Meeting (Chaired by Paul Friedman and Peggy Ward), Antitrust in Healthcare Conference, Antitrust in Asia (Chaired by Chris Hockett and Koren Ervin-Wong), and the Antitrust Sentencing Symposium (Chaired by Scott Hammond, Kathryn Hellings, and John Terzaken).

• Global Seminar Series. Chair Henry noted the difficulties in planning such international programs without the active assistance of a local bar association.

• RCM Responsibilities. Chair Henry reminded Council members of their responsibilities as Responsible Council Members. She requested each RCM to report to Council at the Spring Council Meeting on the use of Connect by the Committees for which they are the Responsible Council Member.

B. Chair-Elect Report – William MacLeod

• Chair-Elect MacLeod noted the program plans for the 2016 – 2017 year, including the Antitrust Masters Course (chaired by Kathryn M. Fenton and Nicholas A. Widnell), the Fall Forum (chaired by Kathleen Foote and Bernard A. Nigro Jr. - focusing on how to respond to an unexpected demand from the government and managing the investigation to achieve the best possible results), the Consumer Protection Conference (Atlanta, Georgia), and the Antitrust in the Americas (Mexico City, Mexico). He outlined plans for the Post Annual Meeting in Ojai, California and the Midwinter Meeting in Puerto Rico (subsequently changed) and the leadership selection process.

C. Immediate Past Chair Report – Howard Feller

• Immediate Past Chair Feller yielded his time to other Officers.
D. Vice Chair Report – Jonathan Jacobson

- **Long Range Planning.** Vice Chair Jacobson reported on the work of the Long Range Planning Committee.

- **Creation of a new Administrative Committee.** At the Fall Council Meeting, Vice Chair Jacobson mentioned that to facilitate content delivery, he would be recommending that the Section create a new administrative committee reporting to the Secretary and Communications Officer. He reported on the current status of the review and mentioned that the structure of this Committee is still under consideration (whether to have Co-Chairs like Committee Operations or a Chair and Vice Chairs). The proposed Committee would coordinate activities with the Committee Operations Committee. The Section’s Bylaws provide that Council “is authorized to establish, or to empower the Chair of the Section to establish, such committees as it may deem necessary and desirable to promote effectively the activities of the Section within the jurisdiction of the Section. In establishing a new committee the Council shall state the area of its proposed activities.” (Article VII, Section 1). During the discussion, it was noted that while some details needed to be addressed, there was no need to delay Council’s approval of this new Committee.

- **Council Approval of Creation of New Committee to Facilitate Content Delivery.** It was moved, seconded and APPROVED by voice acclaim: Resolved: that Council establishes a new administrative committee reporting to the Secretary and Communications Officer to facilitate the delivery of content created by the Section and its Committees through the formulation of content delivery policy and the execution of content delivery and empowers the Chair to establish the precise name and structure of such Committee.

- **Committee Long Range Plans.** Vice Chair Jacobson presented the Committee Long Range Plans for the for the following committees: Advertising Disputes &
Litigation (ADL) Committee, Competition Torts Committee, Exemptions and Immunities Committee, Federal Civil Enforcement Committee, Insurance and Financial Services Committee, Media and Technology Committee, Privacy and Information Security Committee, Trade, Sports, and Professional Associations Committee, and Unilateral Conduct Committee.

- **Approval of Committee Long Range Plans.** It was moved, seconded and APPROVED by voice acclaim: Resolved: that the Committee Long Range Plans for the following committees: Advertising Disputes & Litigation (ADL) Committee, Competition Torts Committee, Exemptions and Immunities Committee, Federal Civil Enforcement Committee, Insurance and Financial Services Committee, Media and Technology Committee, Privacy and Information Security Committee, Trade, Sports, and Professional Associations Committee, and Unilateral Conduct Committee, be APPROVED.

E. **Committee Officer Report – Deborah Garza**

- **Committee Activities Chart.**

- **Committee Operations.** Officer Garza reported on the activities of Committee Operations and the work of the Co-Chairs.

- **New Committee Brochure.** Officer Garza noted that the Section’s a new Committee brochure should be prepared by the Spring Meeting.

**Committee Reports**

- **Economics Committee Report – Co-Chairs Donald Stockdale and Joanna Tsai**
  
  o The committee submitted a [written report](#).
  
  o The Committee’s membership (587 in Dec. 2015) has increased by over 20% over the past two years. The membership appears to consist of 45% lawyers, 23% economists, 8% government, and 6% academics. In addition, 26% of the members are women and 14% are international. The Committee is working on increasing participation by women, minorities,
young members, international lawyers, government economists and academic economists.

- In addition to the Committee’s Spring Meeting program on Fundamentals – Economics, the Committee plans to offer a series of brownbag programs on Fundamentals of Antitrust Economics. The Committee is fortunate this year to have two vice-chairs who are European, and will take advantage of their expertise to sponsor programs in the EU and to develop program ideas that cover EU. The Committee will continuing holding brown bags for the DOJ and FTC chief economists and will add a brownbag for DG Comp’s Chief Economist, Massimo Motta.

- The Committee is has a team drafting Chapter 6 of the ALD Annual Update, a separate team drafting ALD8 and is in the process of completing revisions to the Distribution Handbook and Proving Antitrust Damages. Additionally, the Committee has been asked to review two treatises – Market Power Handbook and Market Definition in Antitrust and recommend whether a new edition is warranted.

- The Committee has started the ABA Antitrust Section Economics Grant Program and expects that awards will be announce on April 29, 2016.

- During the discussion, Council members offered suggestions on membership outreach.

- **Exemptions and Immunities Committee Report** – Chair Layne Kruse
  - The committee submitted a [written report](#).
  - The Committee currently has 250 members. While the E&I Committee overlaps with many other substantive committees, such as Health Care, Agriculture, Trade, Sports, the Committee believes that it should take the lead on answering what should be the scope of antitrust for both domestic and international issues. As an example, E&I provided a representative this year to meet with representatives of the JFTC in D.C. on shipping exemptions since Japan is considering changes to its law.
One of the Committee’s best books is the *Handbook on the Scope of Antitrust* (2015). Professor Chris Sagers was the editorial chair and principal author. It is a first-of-its-kind, one-stop book that treats all exemptions and immunities in an integrated fashion as components of one body of law. The Third Edition of the Committee's State Action Handbook should be published in 2016.

The Committee publishes three newsletters a year and on Connect, the Committee is providing posts regarding new opinions and engaging its members to do the same. With respect to possible membership growth, the Committee identified the following areas: international, lawyers, women, and young lawyers.

The Committee will sponsor two Spring Meeting programs: One on North Carolina Dental fallout and another co-sponsored program is on marijuana.

- **Federal Civil Enforcement Committee Report** – Co-Chair Paula Render

  - The committee submitted a [written report](#).

  - The Committee currently has 422 members and its focus is on agency developments and actions on the civil side in the United States and members are private attorneys whose practice focuses on merger review and other civil antitrust enforcement, private attorneys who focus on CP (primarily in concert with the CP committee), and agency attorneys. The Committee’s “*Nuts and Bolts of Mergers*” series has been very well-attended, especially by private attorneys. The Committee has twice-monthly Round-Ups that summarize activities, developments, and news from the agencies. Finally, the Committee is considering putting together a library of case management orders, protective orders, confidentiality and trial procedures orders, and other orders from prior cases for use by agency and private lawyers in future litigation cases.
F. Consumer Protection Officer Report – Thomas Zych
   • Officer Zych submitted a written report.
   • Consumer Protection Officer Zych noted the strategic projects underway to build on the current consumer protection structure and offerings to make the Section a more compelling destination for practitioners, enforcers and academics involved in the full range of consumer protection disciplines. The Section strategic planning report to be presented to Council will provide the high-level view of this process. The second edition of Consumer Protection Law Developments is nearing completion, as is the Claims Substantiation Handbook.
   • He reviewed marketing outreach activities to state enforcers, in-house counsel, CP plaintiff’s counsel, international CP professionals, and academics.

G. Delegates Report by Douglas Ross and Gary Zanfagna.
   • A Summary of Resolutions before the House of delegates at the 2016 ABA Midyear Meeting was provided. The Resolutions of most interest to the Section’s members are Resolution 100 urging the use of ADR processes to resolve healthcare disputes and Resolution 107 urging bar associations with MCLE requirements to include as a separate credit, programs on diversity and inclusion in the profession.
   • Delegates Ross and Zangfagna reported on 2016 ABA Midyear Meeting and noted that the reception that the Section hosted for other delegates was well received.

H. Finance Officer Report – Kevin O’Connor
   • Finance Officer O’Connor submitted a written report.
• **Monthly Operating Report.** The Section's revenues and expenses for the first four months of FY2016 appear to be on track as compared to the budget and the previous year.

• **Long Term Investments.** As of January 7, 2016, the value of the Section's long term investment funds was $10,995,248. The current weighting is 62% stocks and 38% bonds. The Section also has short term money market position of $436,904.

• **Advisory Board on Section Reserves.** In December 2015, with the assistance of Section staff, the Reserves Board sent an email to the entire leadership of the Section soliciting ideas for new projects that potentially could be funded from the Sections reserves for FY2017. The list of [previously approved reserves projects funded for FY2016](#) and brief summaries of the projects are posted on the Leadership Portal. The Reserves Board will present its recommendations for the funding of reserves projects for FY2017 at the Spring Council Meeting. The addition of Julianna Theberge to the SAL staff has greatly facilitated the work of the Reserves Board and her efforts and expertise are greatly appreciated.

• **Research Institute.** The Research Institute is considering research and writing projects for FY2017 under the leadership of Ted Voorhees and Bill Kolasky. The Institute will be forwarding recommendations to Council as they finalize their review.

• **Research grant for a biography of Victor Morawetz.** Finance Officer O’Connor reviewed a proposed $5,000 research grant to Marc McClure, Associate Professor of History at Walters State Community College, Morristown, Tennessee, to help fund Professor McClure’s ongoing research for a monograph on Victor Morawetz. The proposal was submitted by Bill Kolasky on behalf of Marc McClure. The assessed benefits: “Marc’s book on Victor Morawetz should help deepen our understanding of the events leading up to the formation of the Federal Trade Commission and of the purpose underlying
Section 5 of the FTC Act, which outlaws ‘unfair methods of competition.’ There is still continuing debate over the scope of the FTC’s authority under Section 5, which further scholarship should help inform.” There was considerable discussion by Council over the connection between the research covered by the proposed grant and the mission of the Section, whether Council had sufficient information to approve, and whether the research would be undertaken even if the grant were not granted. During the discussion, a few members noted the value in trusting the judgment of those involved in the Section’s Research Institute. Before the vote, Hill Wellford offered a proposed modification that would condition the grant upon the resulting work being made available to members of the Section.

- **Approval of $5,000 Research Grant to Marc McClure.** It was moved, seconded and APPROVED by a majority of Council members then present: Resolved: that the Section approve a $5,000 research grant to Marc McClure, Associate Professor of History at Walters State Community College, Morristown, Tennessee, to help fund Professor McClure’s ongoing research for a monograph on Victor Morawetz, provided that the resulting manuscript be available to members of the Section free of charge, for printing by the Section or electronically. There were four votes opposed to the motion.

- During the discussion, Council requested additional information on the intended use of the grant, which was provided by Professor McClure and forwarded to Council on February 11, 2016. No member of Council raised any further questions or concerns and Professor McClure was notified that Council had approved his proposal.

I. **International Officer Report – Jonathan Gleklen**

- Officer Gleklen outlined the work underway in preparing proposed comments and provided a general outline on when proposed comments would be provided for Council review.
J. Program Officer Report – Brian Henry

- Program Officer Henry submitted a written report.
- Program Officer Henry reviewed the Section programs conducted this ABA year and the programs planned for the remainder of the 2015-2016 ABA year as well as programs planned for the 2016-2017 ABA year and for the 2017-2018 ABA year. He explained the reasons for the proposed co-sponsorship of the Regulation/Competition Symposium (healthcare/financial services) with Loyola University Chicago School of Law in Chicago, IL (September 2016) and the proposed co-sponsorship of the Antitrust in Americas 2017 with Barra Mexicana in Mexico City, Mexico (June 2017).

- Approval of Co-Sponsorship of the Regulation/Competition Symposium (healthcare/financial services) with Loyola University Chicago School of Law. It was moved, seconded and APPROVED by voice acclaim: Resolved: that the Section co-sponsor the Regulation/Competition Symposium (healthcare/financial services) with Loyola University Chicago School of Law in Chicago, IL (September 2016).

- Approval of Co-Sponsorship of the Antitrust in Americas 2017 with Barra Mexicana. It was moved, seconded and APPROVED by voice acclaim: Resolved: that the Section co-sponsor the Antitrust in Americas 2017 conference with Barra Mexicana in Mexico City, Mexico (June 2017).


- Officer Nigro submitted a written report.
- Officer Nigro outlined the status of the Section’s publications, including publications that would be published before the Spring Meeting and publications that would be submitted for Council approval before the Spring Meeting.
L. Secretary and Communications Officer Report – Anthony Chavez

- Officer Chavez submitted a written report.

- Transition to Connect. Officer Chavez reviewed the progress made since the 2015 Midwinter Meeting when the Corporate Counseling Committee was encouraged to be the first Committee to “volunteer” to help lead the transition to Connect by phasing-out its existing listserv. After a long year with resistance to phasing-out committee listservs from Committee Leadership and difficulties with the implementation of Connect, there were only two Committees (Consumer Protection and Intellectual Property) that had not started the process of phasing-out their respective listservs. He outlined plans to deactivate the listservs of the Committees that had fully transitioned to Connect, set up the Open Forum with Full Moderation to limit posts, and plans to continue coordinating periodic posts on the Open Forum with Round Ups of activity on Connect. He noted that he would be submitting a proposal to the Reserves Board to increase the level of support provided by Higher Logic under the Section’s existing contract to a premium level if a possible new master contract between Higher Logic and the ABA does not provide for additional ongoing community management support from Higher Logic at a premium level.

- Approval of Fall Council Meeting Minutes. It was moved, seconded and APPROVED by voice acclaim: Resolved: That the Fall Council Meeting Minutes be APPROVED.

- Approval of Summary of Action Items Taken by Council between the Fall Council Meeting and the Midwinter Council Meeting. Officer Chavez’ Report for the Midwinter Council Meeting included a summary of all action items taken by Council between the Fall Council Meeting and January 10, 2016. Officer Chavez moved to include an updated summary, with the addition of any relevant updates on to the date that comments were submitted and insertion of links to the submitted comments, in the Minutes of the Midwinter
Council Meeting. It was moved, seconded and APPROVED by voice acclaim:
Resolved: That such Summary of Action Items Taken by Council between the
Fall Council Meeting and the Midwinter Council Meeting be included in the
Minutes of the Midwinter Council Meeting.

Membership and Diversity Committee (“MAD”) Report. Co-Chairs April Tabor
and Scott Perlman.

- The Membership and Diversity Committee submitted a written report.
- Co-Chairs Tabor and Perlman reviewed, Section’s Why Antitrust and Why
Consumer Protection/Privacy programs, changes in Section membership,
networking events with Section Committees (including an event co-hosted
with Federal Civil Enforcement Committee (December 3, 2015), and the
Mentorship Program, and Ambassador Pilot Program.
- The agenda for the meeting included as an Action Item consideration of a
proposed Diversity and Inclusion Strategic Plan. Chair Henry suggested that
Council defer consideration of the proposed Plan until the Spring Council
Meeting and Council members should provide comments to Co-Chairs Tabor
and Perlman.

2. Reports - Council Liaisons/Special Guests

A. Canadian Bar Association, National Competition Law Section (CBA Section)–
Report – Rod Frank (for Susan Hutton)

- Mr. Frank reviewed recent activities of the CBA Section, with particular
emphasis on existing and future cooperation with the Section.

B. U.S. Department of Justice, Antitrust Division – Assistant Attorney General
William Baer (via telephone on January 18, 2016 during Leadership Meeting).

C. Federal Trade Commission Report – Chair Edith Ramirez (during Leadership
D. Young Lawyers Division Report – Jesus M. Alvarado Rivera (Written report only)

  • Reported on the on-going activities of State Attorneys General.

F. Law Student Division Report – Jason Hyatt (Written report only)


  • Section Director Travis submitted a written report.
  • She noted that the Section has retained Eugenia Jefferson as a Program Specialist and that she finally succeeded in having the vacant Meeting Planner I position upgraded to Senior Meeting Planner.

Chair Henry adjourned the Council meeting at 5:00 p.m.
Actions taken by Council between the Fall Council Meeting and the Midwinter Council Meeting

International Comments


- Submitted for review and approval by Council on January 1, 2016 by International Officer Jonathan Gleklen.
  - The KFTC draft is a result of its recent consultation, on which the Sections commented this past October (Comments of the American Bar Association Sections of Antitrust Law, International Law, Intellectual Property Law, and Science and Technology Law on the Korea Fair Trade Commission's Proposed Guidelines for Unfair Exercise of IP Rights).
- Voting via electronic mail before the close of business of January 6, 2016.
- Approved by Council on January 6, 2016 “with such non-substantive changes as the International Officer, in consultation with the Chair, deems reasonable and appropriate.”
  - There were no votes in opposition to the proposed comments.
- Upon approval by Council, the proposed Comments were submitted and cleared in accordance with the ABA Expedited Blanket Authority Procedure.
- Final comments were submitted on January 12, 2016.
- The SAL participants in the drafting were Koren Wong-Ervin, Dina Kallay, and Steve Harris. The Section received the KFTC’s draft on December 20, 2015 with a response date of January 13, 2016 so Koren, Dina, and Steve (and their counterparts in the other Sections) did exceptional work over the holidays to turn these around. Chair Henry and International Officer Gleklen expressed their sincere thanks to Koren, Dina, and Steve for their efforts.
Other Council Action Items

FY15 Retrospective Analysis of Merger Decision Outcomes Award

- On December 11, 2015, Chair Roxann Henry informed the Council of the recommendation of the Retrospective Analysis of Merger Decisions Outcomes Award Committee to grant the 2014-2015 First Place Award to the paper titled, “Efficiencies Brewed: Pricing and Consolidation in the U.S. Beer Industry,” by Orley C. Ashenfelter, Daniel S. Hosken, and Matthew C. Weinberg and requested Council approval of the FY15 Retrospective Analysis of Merger Decision Outcomes Award.

- Background: The Retrospective Analysis of Merger Decisions Outcomes Award Committee consisted of: James F. Rill (Chair), Ilene K. Gotts, Hillary Greene, William Kovacic; Philip Nelson, David Scheffman, Daniel Sokol, and Ted Voorhees. The selection criteria required that the article had to have been published before January 1, 2015. Council discontinued this reserves project award after this year and rolled further work in this area to be considered under the new Research Institute reserves project.

- Voting via electronic mail before the close of business on December 16, 2015.

- Approved by Council on December 16, 2015.

- There were no votes in opposition.

Section Sponsorship level for the ABA Spirit of Excellence Award

- On December 15, 2015, Chair Roxann Henry informed the Council that the Director of the ABA Commission on Racial and Ethnic Diversity has requested that the Section increase the Section’s sponsorship level for the ABA Spirit of Excellence Award from $1,000 level to $2,500 (a total commitment by the Section of $2,500).

- Background: The ABA Spirit of Excellence Awards celebrate the efforts and accomplishments of lawyers who work to promote a more racially and ethnically diverse legal profession and are presented to the lawyers who excel in their professional settings; who personify excellence on the national and international level; and who have
demonstrated a commitment to racial and ethnic diversity in the legal profession.

- Voting via electronic mail before the close of business on December 16, 2015.
- Approved by Council on December 16, 2015.
- There were no votes in opposition.