

Opening Statement

Making a Difference

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I was first tempted to become active in the Section of Litigation because I believed it was a natural home for trial lawyers—a place where we could come together to make a difference and to better our profession and our country’s legal system. I still believe that, and I want to take the opportunity of writing my first column as Chair to explain why I do and ask for your help and ideas.

When I joined—much to my surprise—I learned that the Section had already exceeded my own fairly modest definition of making a difference. In the late 1970s, for example, the Section embarked on a project of outreach to trial lawyers in the Soviet Union under then-chair Weyman Lundquist. Shortly afterward, President Reagan described the Soviet Union as an “evil empire” and reaffirmed that its defeat and democratization were central objectives of American foreign policy. Against that background, the Section launched what ultimately was a 15-year campaign of outreach, advocacy, trial demonstrations, and exchange visits with Soviet lawyers and judges. Before it was common to refer in quite the way we do today to the importance of upholding and spreading “the rule of law,” the Section was already acting. The goals were varied: to understand the Soviet legal system, whatever our view of its perceived faults; to introduce its research lawyers and scholars to some of our practices; and through conversation and engagement along the way, to underline lawyers’ important role in shaping a free society.

Today, with change yet again reshaping Russia (perhaps for the worse), it is still worth noting that the Section’s Soviet Dialogue Committee, its meetings with Soviet lawyers in New York and in Moscow, and its focus on human rights may genuinely have had some influence in bringing about the initial wave of glasnost and perestroika.

Just the thought that the Section spearheaded a 2,000-strong meeting of lawyers in the Kremlin at the height of President Gorbachev’s efforts at reform

speaks volumes about how the Section has demonstrated a will to act. And from that effort also sprang the ABA’s Central and Eastern European Law Initiative, designed to institutionalize ABA assistance to Central and Eastern Europe through technical assistance and dealings, sister law school programs, and expanded legal exchanges.

This year the Section will be seeking to carry on this tradition of technical assistance and outreach in its Kosovo Project on Human Trafficking, a project developed in consultation with U.S. Department of Justice resident legal advisors in Kosovo.

The short-term goal of the Kosovo Project is to prepare Kosovo attorneys to be victim representatives in criminal trials against human traffickers. Human trafficking, a modern practice of slavery, is an increasingly complex and insidious problem in Kosovo and throughout the region. Since 1999, the number of women and girls trafficked into and through Kosovo has risen at an alarming rate, with a corresponding rise in the sophistication of the traffickers, who utilize highly organized networks to recruit and traffic victims into forced prostitution. Unfortunately, local law enforcement authorities have had difficulty effectively combating the worrisome growth of human trafficking.

In the Kosovo criminal/civil hybrid system, victim representatives may take part in criminal trials and seek civil damages/restitution for their victim clients. Obtaining such damages directly assists victims of human trafficking and also removes resources from the organized criminal groups that coordinate and profit from human trafficking activities. Further, the award of such damages sends a strong message to the public that the inhumane “business” of trafficking in human beings will not be tolerated.

The United Nations Mission in Kosovo (UNMIK) has promulgated regulations and additional provisions that cover the trafficking activities. The proposed training would focus on these regulations in order to provide victim representatives

with the tools to navigate effectively through the criminal code and criminal procedure. The long-term project goal is to create a much-needed self-sustaining victim-representative program that, by 2009, largely will be funded through damages/restitution awards.

At the initial training, the participants will include not only Section representatives but also district (regional) prosecutors, district judges, police officers, investigators, and victim advocates from the Ministry of Justice. The intended goal is to achieve agreement and a commitment from the many players who are needed to effectively combat human trafficking and secure restitution and damages for victims of trafficking.

The successful completion of this Kosovo training effort may lead to several possible next steps. For example, there may be an opportunity to set up an office and designate an individual at a partner nongovernmental organization who will be responsible for activities such as coordinating future victim-representative trainings, overseeing and providing logistical and research assistance to victims and attorneys involved in ongoing cases, conducting outreach to ensure that victims and attorneys are aware of the available victim assistance, setting up a website providing resources and points of contact for victim representatives, and coordinating with other organizations in the region that are involved in similar victim representation. Also, an interested U.S. law school legal clinic might be incorporated into a second phase to provide students opportunities to discuss strategy with the attorneys and conduct research in coordination with the victim representatives, either in person during school breaks or via e-mail.

At the time of this writing, the Section has also just completed its Darfur Legal Training Program. There is a theme here—we are trying, admittedly in a modest way, to advance human rights by doing what we do best abroad as well as at home: training in advocacy and trial skills. Section members of all ages can contribute to these efforts.

Last summer, the Section of Litigation awarded Salih Mahmoud Osman, a Sudanese lawyer and legislator, the Section's 2006 International Human Rights Award in recognition of his substantial work as a lawyer and human rights advocate on behalf of the many victims of the Darfur genocide. In accepting the award, Mr. Osman eloquently spoke to the Sec-

tion of the devastating effects of the crisis on the people of Darfur. When Section leaders asked how the Section could aid his human rights work, Mr. Osman said that he and other lawyers needed training to ensure they will be effective advocates on behalf of Sudanese victims of genocide. We immediately began planning with him to provide that training, and the Darfur Legal Training Project was born.

Of course, as trial lawyers, we Section members believed we possessed the expertise to bring leadership to such an endeavor. Plus, the Section was focused on being able more concretely to address issues of concern in the profession. We also believed a program of this nature afforded a unique opportunity to allow the Section to work with fellow ABA entities. In December 2006, the Section received a MacArthur Foundation grant in support of the program.

Since the violence began in 2003—as has been well documented in the media—the Darfur region has become the scene of one of the worst humanitarian crises in the world. The violence has devastated much of Western Sudan and threatens to spread to neighboring countries. Since the conflict began, hundreds of thousands of civilians have been killed and millions have been raped, arrested, tortured, or displaced from their communities.

Mr. Osman and his fellow Sudanese lawyers who participated in the training project currently provide legal representation to those detained, tortured, and otherwise subjected to the most egregious human rights abuses. These brave lawyers attempt to bring legal action against these human rights violators, but because there is no rule of law in the Sudan, there is no secure place in their nation to bring the perpetrators to justice. The International Criminal Court (ICC) promised to provide that impartial forum, but this could be realized only if the Sudanese lawyers acquired the specialized skills and training they did not yet possess for this important task. Here, the Darfur training program was able to make a difference and educate the Sudanese lawyers in how to locate, collect, preserve, and present evidence of war crimes and crimes against humanity, and how to be effective representatives for victims in the investigation being conducted by the ICC. The program curriculum provided for an intensive five-day training to broaden the Sudanese lawyers' understanding of the ICC, international law, and trial skills.

The Section convened an extraordinary faculty to participate in curriculum development and materials preparation for this program, including many with extensive backgrounds in criminal law, human rights, and/or international tribunal experience. The London faculty included Terree Bowers, Los Angeles; Brad Brian, Los Angeles; Genevieve Cox, San Francisco, CA; Hon. Bernice Donald, U.S. District Court, Memphis, TN; Jeffrey Eglash, Fairfield, CT; JoAnne Epps, Philadelphia, PA; Laura Ariana Miller, Washington, D.C.; and Jerry Roth, San Francisco, CA.

We also asked for and received help from several ABA groups: the Section of International Law, Center for Human Rights, Coordinating Council of the Justice Center, and Africa Law Initiative. Each had within its ranks a lawyer with the breadth of expertise and the willingness to serve that helped to make the initial phase of this program successful. Additionally, Paolina Massidda, principal counsel for the ICC's Office of Public Counsel for Victims, was with us, as were others from the ICC's location in The Hague.

The training program in London is just the beginning. The materials developed and the faculty convened will be a rich resource for any future needs of lawyers in countries living without the rule of law and lawyers who wish to bring human rights cases before the ICC or established tribunals. Most of the materials provided will not be specific to the Darfur experience and can be used in future training programs of this type. We are also currently considering next steps specific to Darfur—for example, partnering with Sudanese lawyers to represent victims, assisting in the development of position papers for submission to the ICC on subjects such as admissibility (i.e., should the ICC take jurisdiction?), and reparations for villages damaged by the conflict.

I believe we can speak with pride about our current efforts to begin to make a difference in Kosovo and in Darfur. Each reflects an effort to do our part to bolster the rule of law internationally while building on the rich advocacy talent base of the Section. The Darfur and Kosovo Projects also build on a long-standing core competency of the Section—training advocates, whether for American jury trials or proceedings by international tribunals. But obviously our “bread and

butter” focus, year in, year out, day in, day out, has been on making a difference here at home. Last quarter's LITIGATION described the Section's efforts under the leadership of Immediate Past Chair Kim Askew, to draft Principles for the Rule of Law in Times of Calamity. That effort was inspired by a recognition that whether we confront terrorism or a major disaster like Hurricane Katrina, lawyers and the judiciary have a major role to play in helping victims *within* our constitutional framework.

We also responded in a more immediate way to Katrina by helping legal aid groups in the most affected states respond to the extraordinary—and still ongoing—demands of the disaster. One fruit of that support (along with the pro bono efforts of many others inspired to help) is the recent victory of the Mississippi Center for Justice on behalf of Katrina survivors who still lack adequate shelter almost two years after the hurricane. The U.S. District Court for the Eastern District of Louisiana recently certified a national class of hurricane survivors and barred FEMA from terminating housing assistance or seeking repayment of benefits without due process protection.

To underscore its commitment to advocacy training for young lawyers, the Section this year also established the Litigation Institute for Trial Training, popularly known as LITT. The purpose of LITT is to enhance the trial skills of young lawyers so they can more effectively represent their clients in the courtroom. The faculty includes trial lawyers and judges of extraordinary skill and experience from throughout the country.

LITT's “boot camp” trial training program offers an intense and fascinating opportunity for attendees to hear inspirational lectures and observe remarkable demonstrations followed by stimulating critiques, as well as to practice witness examinations, opening statements, and closing arguments in small groups with one or two faculty members offering constructive observations. Each performance is videotaped and separately critiqued in private to enhance the learning experience.

This past year also saw us complete an update to our Civil Trial Practice Standards—guidelines state and federal courts have turned to for assistance especially in managing complicated civil trials. The current update focuses on

enhancing jury participation and deliberations, and builds on the Section's prior Vanishing Jury Trial project. We have also continued to play a forceful and informed liaison role with the Advisory Committees on Evidence and on Civil Rules, as they continued deliberations on such questions as attorney-client privilege and work product waiver, major procedural revisions to the summary judgment rule, and changes to Rule 26 governing draft expert reports and attorney-client communications.

When I first thought about running for chair several years ago, we as a profession were in the initial throes of *Sarbanes-Oxley* and the potential new role of lawyer as “gatekeeper.” I thought then, and continue to think now, that this shift in thinking about attorney responsibilities introduced a fundamental challenge to the traditional way we think about our responsibilities to our clients and to third parties who interact with them. Coincidentally, 2008 also marks the centennial of the ABA's 1908 adoption of the first Canons of Ethics. To mark that event, we will be convening (at the end of the Section's Annual Conference in Washington, D.C., in April) a symposium on ethics issues and challenges of particular importance to trial lawyers as the second century of practice under a formal code of ethics begins. Issues currently on the table for discussion include confidentiality and privilege (under particular assault in the aftermath of Enron), civility, diversity, and zealous lawyering—or what are the limits of proper professional behavior.

I have written this opening column with a broad brush—I haven't begun to touch on the many efforts our committees and publications make each day to serve you. What I am hoping to do, however, is get your feedback—where should the Section be doing more, or less; what hot topics you would like us to take up in publications and programming—or in efforts to influence the public debate? I really would like to hear from you; please send me your thoughts at pengelhard@staff.abanet.org. □