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ABA Considers Recommendations on Judicial Conduct, Gun Control, & "Apology Legislation" at Mid-Year Meeting

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in Miami on February 12. If adopted, these resolutions become official policy of the Association. The ABA, maintaining that it serves as the national representative of the legal profession, may then engage in lobbying or advocacy of these policies on behalf of its members. At this meeting, recommendations scheduled to be debated include proposals concerning "apology legislation," diversity, domestic violence, and gun control. What follows is a review of some of the resolutions that will be considered in Miami.

Model Code of Judicial Conduct

Recommendation 212, proposed by the Joint Commission to Evaluate the Model Code of Judicial Conduct, urges the adoption of the revised Model Code of Judicial Conduct, dated February 2007. Among the proposed changes:

- Newly revised Canon 1 combines the previous Canons 1 and 2, "placing at the forefront of the document the judge's duties to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office."
- Rule 2.10, concerning judicial statements on pending and impending cases, declares "A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office."
- Canon 3 bars judges from belonging to groups that discriminate based on gender, ethnicity, and sexual orientation. Previously, judges were only barred from groups that banned members based on race,

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Michael Wallace Speaks with the Federalist Society

Michael Wallace, then of Phelps Dunbar and currently of Wise, Carter, Child & Caraway, was nominated by President George W. Bush to the United States Court of Appeals for the Fifth Circuit on February 8, 2006. The American Bar Association's Standing Committee on Federal Judiciary, which rates judicial candidates post-nomination, bestowed Wallace with a unanimous "not qualified" rating. Some critics of the Standing Committee speculated that Wallace received this rating because of his past contentious relationship with both current ABA President Michael Greco and the Association over several Legal Services Corporation (LSC) issues, as Wallace served as an LSC board member from 1984-90. In September, Wallace received a hearing before the United States Senate

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sex, religion, or national origin. The comments outline what determines whether a group's policies constitute "invidious discrimination." These factors include "whether the organization is 'dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members,' and whether it is an 'intimate, purely private organization" whose membership limitations could not constitutionally be prohibited.'" Groups like the Boy Scouts would not fall under the purview of this Canon.

- Rule 3.14 of Canon 3 addresses travel reimbursements for judges who participate in privately funded judicial seminars. According to the report, "A judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses." The comments emphasize, "Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law." However, judges must make a "reasonable inquiry" to make an "informed judgment" about their participation in such programs. This inquiry should consider whether the purpose of the seminar is educational or recreational, whether content will consider a subject pending before the judge, whether differing viewpoints are considered, whether funding information is available, and the make-up of the audience.
- Newly revised Canon 4 discusses campaign activities, recommending that "A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary." According to the report, "The Joint Commission has sought to find a balance that accommodates the political realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality are not undermined by the participation of judges and judicial candidates in political activity." The Commission recommends that judicial candidates be prohibited from "personally solicit[ing] or accept[ing] campaign contributions other than through an authorized campaign committee." Furthermore, in nonpartisan or retention elections, a candidate is prohibited "from seeking, accepting, or using nominations or endorsements from a partisan political organization." Candidates also cannot identify themselves as members of a political party in these kinds of elections.

The ABA Standing Committee on Ethics and Professional Responsibility questions the use of the phrase "the appearance of impropriety." Some contend it is "vague, unenforceable, and subject to potential abuse." This language, they contend, should not be used as a basis for disciplinary action against judges, particularly with respect to Scope Paragraph (2). According to this paragraph, "The Canons state overarching principles of judicial ethics that all judges must observe. For a judge to be disciplined for violating a Canon, violation of a Rule must be established. Where a Rule contains the term "shall" or "shall not," it establishes a mandatory standard to which the judge or candidate for judicial office will be held. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion."

Other critics contend that these recommendations do not consider developing federal case law in the wake of the *Minnesota vs. White* decision, which struck down a canon of judicial conduct prohibiting a judicial candidate from announcing his or her views on disputed legal or political issues.

The House is scheduled to debate these provisions at 2:30 p.m. on February 12.

Prison Litigation Reform Act

Recommendation 102B, sponsored by the ABA Criminal Justice Section, "urges federal, state, local, territorial, and tribal governments to ensure that prisoners are afforded meaningful access to the judicial process to vindicate their constitutional and other legal rights and are subject to procedures applicable to the general public when bringing lawsuits."

The sponsor urges Congress to repeal or amend certain provisions of the Prison Litigation Reform Act (PLRA), which was enacted by Congress in 1996. According to the report, the bill was never fully examined by Congress, and it was later inserted and approved as

a rider to an omnibus appropriations bill. The ABA previously expressed criticisms of this law, contending that it places difficult obstacles in the paths of incarcerated individuals seeking redress from the courts for violations of their federally secured rights. The ABA also contends that the law ignores the principle that it is just as important for prisoners to have ready access to the courts to enforce their legal rights as it is for everyone else.

This resolution makes several recommendations of amendments to the PLRA. First, the ABA urges Congress to repeal the PLRA's physical-injury requirement, which prohibits a prisoner from recovering damages for mental or emotional injuries suffered while in custody unless the prisoner was also injured physically. According to the sponsor, "The effect of this provision is to leave a wide range of constitutional violations beyond redress, including some forms of torture." For example, they contend, this requirement led to the dismissal of the Eighth Amendment claim of a prisoner who became physically ill from the smell of the raw sewage that was on the floor of his isolation cell. Further, because most courts have interpreted the physical-injury requirement to apply to constitutional violations that usually do not cause physical injuries, such as First Amendment or equal protection violations, sponsors argue that prisoners cannot obtain compensatory relief for violations of these rights either.

Second, the sponsors recommend that Congress "[a]mend the requirement for exhaustion of administrative remedies to provide that prisoners who have filed a lawsuit within the time period set by the statute of limitations but have not exhausted their administrative remedies can pursue their claim through an administrative-remedy process while the lawsuit is stayed." Under PLRA requirements, if a prisoner does not file a grievance within the timelines set by prison officials, the prisoner has failed to exhaust administrative remedies and is barred from bringing suit. The sponsors contend that this requirement effectively closes the courthouse door to many prisoners, as deadlines for filing a prison grievance are usually insufficient to allow inmates to realize whether their civil rights have been violated. Further, "Since prisoners live in an environment fraught with suspicion and fears of retaliation, they are even less likely to muster the courage, particularly under such tight time constraints, to seek the redress to which they are or may be entitled." Therefore, the PLRA's exhaustion-of-remedies requirement should be amended to allow prisoners just as much time as other individuals to recognize and pursue their legal rights.

Third, the recommendation also encourages Congress to "eliminate the restrictions on the equitable authority of courts in conditions-of-confinement cases." The report cites the unsanitary and unsafe conditions in which, the sponsors maintain, prisoners are often held. The PLRA significantly restricts the "traditional equitable power of courts to redress unconstitutional conditions of confinement," a power which has been "wrested" from the courts by the PLRA.

Fourth, the sponsors urge Congress to amend the PLRA "to allow prisoners who prevail on civil-rights claims to recover the same attorney's fees on the same basis as the general public in civil rights cases." According to the report, the PLRA places a number of additional restrictions on the attorney's fees that can be recovered by prisoner-plaintiffs who prevail in civil-rights suits that do not apply to other prevailing litigants. These restrictions on attorney's fees make it difficult for prisoners to secure counsel to represent them in cases concerning violations of their civil rights.

Fifth, the sponsors urge a repeal of the PLRA provisions extending its requirements to juveniles confined in juvenile detention and correctional facilities. According to the report, the PLRA's proponents claimed that its provisions were designed to limit the filing of frivolous lawsuits by prisoners. Yet, "juveniles incarcerated in juvenile detention and correctional facilities had not filed the frivolous lawsuits that those lobbying for the PLRA's enactment referred to in largely unsubstantiated anecdotes." In fact, because of their age, incarcerated juveniles rarely ever file lawsuits at all, "even when they have suffered gross violations of their constitutional rights."

The recommendation also urges a repeal of the PLRA's filing-fee provisions because "these provisions impose a heavy financial burden on poor prisoners who want and need to file a federal lawsuit in order to obtain relief from violations of their civil rights." The size of the filing fee -- now $350 in federal district courts – is also of concern because it "dissuades impoverished prisoners from bringing potentially meritorious claims to court."

On January 22, after the publication of this report, the United States Supreme Court unanimously ruled that the PLRA does not require that all alternative remedies to a lawsuit have been exhausted. Chief Justice John Roberts wrote in the Court's opinion that inmates are not required to demonstrate that they have exhausted the administrative complaint process before they may sue in court. A lawsuit may still proceed even if a defendant was not previously named in an earlier complaint. The Court also ruled that the PLRA does not require dismissing the

entire lawsuit when an inmate has failed to exhaust some but not all of the claims administratively. The ruling came in the consolidated cases of *Jones v. Bock* (05-7058) and *Williams v. Overton* (05-7142), overturning a previous Sixth Circuit decision.

Goal IX

Recommendation 115, proposed by the Individual Rights and Responsibilities Section, seeks to amend the ABA's Goal IX to include the language: "To promote full and equal participation in the legal profession by minorities, women, persons with disabilities, *and persons of different sexual orientations and gender identities."*

The Section seeks the amendment because "the ABA has recognized that lesbian, gay, bisexual, and transgender people face pervasive discrimination in all aspects of life, including within the legal profession." The Section declares it is "particularly important" to extend Goal IX "not only to further the ABA's diversity commitment, but also because persons still receive little statutory protection from discriminatory employment practices." The recommendation's accompanying report quotes from a number of bar studies conducted over the past fifteen years purporting that prejudice and harassment based on sexual orientation and gender identity is "pervasive" in the legal profession.

An expanded Goal IX will ensure that these lawyers "are provided with full and equal opportunities within the legal profession" and affirm "that diversity in the legal profession is beneficial for all lawyers, just as it is for the community at large."

"Apology Legislation"

The Standing Committee on Medical Professional Liability and the Section of Tort Trial and Insurance Practice offer Recommendation 112 that "supports enactment of apology legislation at the state and territorial level relating to the pain, suffering, or death of a person." It would provide that "certain apologies…as the result of unanticipated outcomes of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest for any purpose in a civil action for medical malpractice."

The sponsors, in the recommendation's accompanying report, endorse apology legislation at the state level as "good sense" to protect "expressions of sympathy or benevolence." They contend that doctors will be more likely to apologize if they do not fear such an expression would be used against them in court, and patients will be less likely to pursue litigation if doctors apologize.

The sponsors endorse legislation at the state and local level as "the state and territorial courts and legislatures are the appropriate bodies to modify tort laws." They also fear that "federal legislation might interfere with the initiatives currently underway."

Homelessness

Recommendation 106, offered by the Commission on Homelessness and Poverty and the Commission on Mental and Physical Disability Law, opposes policies and laws that "punish persons experiencing homelessness for carrying out otherwise non-criminal, life-sustaining practices or acts in public spaces, such as eating, sitting, sleeping, or camping, when no alternative private spaces are available; and are enforced against persons experiencing homelessness to a greater extent than others who are engaged in the same practice or act." The recommendation also opposes punishing individuals who provide food or shelter to the homeless.

The recommendation's accompanying report discusses the rising homeless problem and the "unfortunate trend" of the "criminalization of homelessness." According to the sponsors, these laws "do not make sense" from a public policy standpoint. The laws force the homeless away from getting public assistance and outreach. They would also result in more homeless individuals having criminal records, making it more difficult to obtain housing and employment. Finally, the sponsors maintain that it would be more cost-efficient to provide services rather than incarceration for the homeless.

The sponsors also note that criminalization raises "troubling constitutional questions." They highlight a recent Ninth Circuit decision ruling that a Los Angeles ordinance that "criminalizes sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within the city limits" violates the Eighth Amendment rights of the homeless to be free from cruel and unusual punishment. The sponsors also note a Second Circuit decision finding a New York law banning panhandling violated the begger's First Amendment free speech rights.

The sponsors suggest that "more constructive approaches" such as outreach, additional resource allocation to affordable housing and shelter space, and homeless day centers should be employed.

The dissent in the Ninth Circuit case suggested flaws in these arguments. According to Judge Pamela Ann Rymer, the majority relied on the wrong constitutional provision to enjoin the ordinance. According to her dissent, "Wholly apart from whatever substantive limits

the Eighth Amendment may impose on what can be made criminal and punished as such, the Cruel and Unusual Punishment Clause places no limits on the state's ability to arrest." Judge Rymer also observed that anyone could be arrested for violating the Los Angeles provision, regardless of whether or not the individual was homeless; conduct rather than status is therefore being punished. Finally, the Fourteenth Amendment's due process clause usually determines whether a criminal statute is unconstitutional, not the Eighth.

Domestic Violence

Recommendation 102A, sponsored by the ABA Criminal Justice Section Commission on Domestic Violence, "urges bar associations and law schools to develop programs that encourage and train lawyers to assist victims of domestic violence with applying for pardon, restoration of legal rights and privileges, relief from other collateral sanctions, and reduction of sentence." Further, the recommendation "urges federal, state, local, territorial, and tribal governments to ensure that judicial, administrative, legislative, and executive authorities consider and expand, as appropriate, the use of measures such as clemency, parole, and reduction of sentence in cases where incarcerated persons were subjected to domestic violence that played a significant role in their offense but the effect of that domestic violence was not fully litigated at trial or sentencing." The recommendation also urges such governments to establish re-entry services for domestic violence victims released from incarceration.

The accompanying report asserts that evidence suggests that domestic violence affects the culpability of a crime that was committed by a battered person, resulting in "unfair sentences." Parole or clemency are rarely considered as alternatives to incarceration. The report states that an overwhelming number of women prisoners attribute their incarceration to relationships with batterers; in fact, the Department of Justice reports that six out of ten women in state prisons are victims of abuse. According to the sponsor, these women are often unaware of the importance of fully litigating the role that abuse played in their criminal acts; therefore, they often end up serving unnecessarily long and unfair sentences.

The sponsor asserts that this problem stems from a lack of training in domestic violence law in law schools. The report contends that abused women often end up serving unfair sentences because some attorneys, judges, and law enforcement officials are "unaware of the effects of domestic violence in criminal cases." Some defense attorneys fail to make the case that domestic violence was linked to the abuse suffered by the battered women, and this "incompetence lands them in prison." Further, "some judges fail to apply the law" in such matters. In order to educate attorneys and judges, bar associations and law schools should provide more vigorous educational programs that focus specifically on domestic violence and its consequences. Law schools can incorporate education on domestic violence into their core curriculum and offer elective courses that focus on this subject. They can also have interdisciplinary clinical programs that will provide "both theoretical and practical knowledge concerning the complexities of helping battered individuals find post-conviction relief." Such clinics can even work with local attorneys and non-profit organizations to "lobby for legislative initiatives." In addition, bar associations should encourage CLE work on the subject of domestic violence, and funding should be provided to make domestic violence experts directly available. The report emphasizes that these programs must be "sensitive to cultural distinctions." If the programs fail to include issues of race, class, ethnicity, etc., they will fail to equip law students and lawyers "to navigate the landscape of cultural differences or relief options."

In addition to encouraging law schools and bar associations to develop educational programs, the Resolution is also designed to encourage governments to implement post-conviction remedies that will be helpful to incarcerated victims of domestic violence. For example, a few state governments have standards that ensure available processes by which incarcerated victims of abuse can request sentence reductions or a writ of habeas corpus for a new trial. Federal courts may modify a sentence that has already been imposed when it finds an "extraordinary and compelling reason that warrants such a reduction." This Recommendation suggests that a history of domestic violence be considered as an extraordinary and compelling reason; the Department of Justice can ensure that full consideration be given to prisoners who claim a history of domestic violence. Executive commutations by governors could also be used to achieve sentence reductions or clemency.

The sponsor suggests that it is vital for domestic violence victims who leave prison to be provided with re-entry services, including safety planning, housing, counseling, and job placement.

Gun Control

Recommendation 107, sponsored by the ABA Special Committee on Gun Violence, "supports the traditional property rights of private employers and other private

property owners to exclude from the workplace and other private property, persons in possession of firearms or other weapons and opposes federal, state, territorial, and local legislation that abrogates those rights."

The accompanying report states that this initiative is being proposed in light of thousands of incidents in which supervisors and co-workers have been victims of gun violence on the premises of their own businesses. As an attempt to prevent such incidents, many companies have begun to prohibit individuals from bringing weapons onto their property, particularly in parking lots and business premises. However, a nationwide legislative effort is currently underway that will prohibit businesses from barring weapons on their property. Modeled after a statute enacted in Oklahoma in 2004 and amended in 2005, bills are being introduced in various state legislatures that will enable gun owners to possess and carry guns on the private property of businesses. These statutes were introduced in most state legislatures during the 2006 legislative term.

The ABA and other critics of this legislation refer to it as "forced entry" legislation because it "seeks to override the traditional right of a private property owner to exclude whomever he or she chooses from his or her property and determine the terms on which others may enter on or use that property." The Resolution claims that these laws would violate the due process and property rights of owners because "the ready accessibility of firearms in any work environment creates potential liabilities and risks" from which business owners would not be able to protect themselves; therefore, the ABA asserts that these laws violate the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, as well as the due process clauses in State constitutions. The article also argues that these laws would be a government "taking" of private property: "[F]orced entry laws override or 'take' rights to control entry and use of one's private property." They are a "mandatory easement for individuals with weapons," which results in heightened duties to supervise those individuals, as well as exposure to liability due to the increased risk of harm on the property. This imposes costs and risks of additional costs to these property owners without compensation. Because of this, requiring a business to allow firearms in its parking lot "may be considered a physical invasion or otherwise violate the Fifth Amendment."

According to the ABA, these laws also conflict with federal and state obligations to provide a safe workplace. The federal Occupational Health and Safety Act of 1970 (OSHA) requires that employers furnish their employees with a place of employment free from hazards that are likely to cause death or serious harm to their employees. Courts have interpreted criminal acts of violence to be "feasibly preventable" hazards under this law. Employers would be unable to meet their duty under this statute if they are not able to prohibit employees from carrying firearms onto their property.

Critics of the ABA's position on this matter maintain that the private property rights of business owners do not trump the right to self-defense guaranteed to all individuals by the Second Amendment. They contend that businesses do not have an *absolute* right to regulate all behavior in the workplace; while they can certainly regulate such things as employee dress codes, they cannot attempt to regulate an individual's ability to exercise his constitutionally protected rights. The NRA is currently campaigning for Workers Protection laws, which will prevent employers from discriminating against workers who choose to keep guns in locked cars in the company parking lot.

Editor's Note :

In the February issue of *ABA Watch*, the Federalist Society traditionally interviews the President-Elect of the ABA. In December, the Society contacted ABA President-Elect William Neukom about an interview. He consented to an interview conducted over E-mail. At press time, *ABA Watch* had not yet received his responses; however, The Federalist Society will publish his answers on its webpage (www.fed-soc.org) as soon as they are received. Please keep checking in.