ABA WATCH

AUGUST 2007

The ABA and Environmental Law

The American Bar Association has not assumed a particularly visible or controversial role in influencing environmental law and policy. Indeed, the Association's Business Section has been as prolific as its environmental law sections in setting policy. In the past year, however, two high-profile conferences and a new book seek to raise the profile of the ABA in influencing environmental policy. Additionally, a recommendation to be considered by the House of Delegates at the 2007 ABA Annual Meeting in San Francisco will seek to place the ABA's imprint on environmental legal policy. This article will survey the ABA's environmental policies and actions as well as examine the proposed recommendation that the ABA House of Delegates will consider on August 13.

Past ABA Policies

The ABA House of Delegates has only adopted about two-dozen policies since 1970 concerning environmental law and natural resources. Several of those policies were adopted in the early 1970s, at a time when major U.S. environmental policies were being forged. These policies concerned the Clean Air Act, citizen lawsuits, public land policies, and water quality.

In the 1990s, the House of Delegates adopted policies related to CERCLA (The Comprehensive Environmental Response, Compensation, and Liability Act, i.e. "Superfund"). In 1990, the ABA adopted policy supporting federal legislation clarifying liability exemptions for fiduciaries and recommended specific amendments affecting the allocation of responsibility and cleanup procedures. In 1999, the House of Delegates adopted a recommendation intended to reduce unnecessary litigation and to promote the economic use of brownfields. This policy urged legislation providing immunity from federal liability when contaminated property is subject to a state brownfields program that protects human health and the environment, ensures public notice and participation, and is adequately funded. The policy's accompanying report noted,

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ABA Honors Justice Kennedy, Judge Berzon & Stephen Oleskey At Annual Meeting

The ABA will honor a number of prominent judges and attorneys at its annual meeting in San Francisco. What follows are profiles of several of these individuals:

ABA Medal

In San Francisco, United States Supreme Court Justice Anthony M. Kennedy will receive the organization's highest honor, the ABA Medal.

In a press release, ABA President Karen J. Mathis praised the decision to honor Justice Kennedy: "There are so many reasons to honor this justice, including his dedication to

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INSIDE

FROM THE

EDITORS

In its mission statement, the American Bar Association declares that it is the "national representative of the legal profession." And, not surprisingly, as the largest professional legal organization in the world, many policy makers, journalists, and ordinary citizens do in fact look to the ABA as a bellwether of the legal profession on matters involving law and the justice system. This is why debate about the work and the activities of the ABA — and the role that it plays in shaping our legal culture — is so very important.

ABA WATCH has a very simple purpose — to provide facts and information on the Association, thereby helping readers to assess independently the value of the organization's activities and to decide for themselves what the proper role of the ABA should be in our legal culture. We believe this project is helping to foster a more robust debate about the legal profession and the ABA's role within it, and we invite you to be a part of this exchange by thinking about it and responding to the material contained in this and future issues.

In this issue, we offer an overview of the ABA's programming and policy toward environmental issues. We also recap a Young Lawyers Division meeting last February, where delegates proposed that the Association adopt a "supermajority" to adopt policy positions. We also profile several of the award winners at the ABA's Annual Meeting. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. You can email us at info@fed-soc.org.

Recommendations on the Katrina Commission, State Secrets Privilege, and Judicial Independence to Be Considered By the House of Delegates at ABA Annual Meeting

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in San Francisco on August 13 and 14. 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. What follows is a summary of these proposals.

Gender Identity Discrimination

Recommendation 104B, sponsored by the ABA's Commission on Youth at Risk, the National Lesbian and Gay Law Association, the Commission on Homelessness and Poverty, and the Commission on Domestic Violence, urges "federal, state, territorial, tribal, and local legislatures, government agencies, and courts to adopt and implement laws, regulations, policies, and court rules that promote the safety, well-being, and permanent placement of lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth who are homeless or involved with the foster care system."

The accompanying report contends, "The foster and homeless youth systems need to do more to serve LGBTQ youth in their care." The sponsors maintain that LGBTQ youth are especially vulnerable in these systems due to their disproportionate numbers and their susceptibility to discrimination in homeless youth facilities and foster homes. The report states that LGBTQ youth face consistent violence and harassment, and this violence can have starkly adverse affects such as mental health problems, continued homelessness, and a greater risk of entering the juvenile justice system.

The sponsors advocate a series of policies that can be found in detail in the Child Welfare League of America's report *Best Practice Guidelines for Serving LGBT Youth in Out-of-Home Care.* The report encourages LGBTQ-specific family counseling which should "provide families having difficulty accepting the sexual orientation or gender identity of a child with family counseling that addresses these issues." The report maintains, "Government social service agencies should mandate this type of counseling as part of a family reunification plan, where they have identified a child's sexual orientation or gender identity as an issue that contributed to his/her removal from the home." The recommendation likewise affirms the goal of placing LGBTQ youth in LGBTQ-friendly foster homes and laws and policies "must prohibit anti-LGBTQ discrimination in the provision of services."

According to the recommendation, lawyers and judges also should "adopt nondiscrimination policies in their workplace and talk with peers about LGBTQ issues."

They can make courtroom and interview environments comfortable for LGBTQ youth by:

- Using gender-neutral language in interviews and discussions with youth;
- Posting hate-free zone stickers in their offices;
- Requesting services by LGBTQ-friendly providers;
- Knowing about LGBTQ outreach services and local LGBTQ-friendly providers (especially for transgender youth who may need additional medical or mental healthcare providers); and
- Having file folders of resources and services ready to distribute to youths whom they feel might benefit from the information.

Finally, the report recommends that "foster and homeless youth programs and courts must train all staff and legal professionals handling dependency or other legal cases involving the custody and care of youth about nondiscrimination law and educate them on LGBTQ youth issues and sensitivity to LGBTQ youth." This sensitivity training should cover such topics as:

- The importance of using inclusive language that does not assume a client's sexual orientation or gender identity
- The mental health consequences to LGBTQ youth of LGBTQ discrimination and how to support LGBTQ youth who are coming out or questioning their sexual orientation or gender identity
- The medical and mental health needs of transgender youth
- Avoiding humor, slurs, and expression of views that are anti-LGBTQ or reinforce traditional sex roles
- Using youths' preferred pronoun when referring to the youth and supporting the youth in choosing a style of dress
- Including information relevant to LGBTQ youth in discussions on relationships and sexual health.

Website Accessibility

Recommendation 108, sponsored by the Commission on Mental and Physical Disability Law, urges that all legal websites "be created and maintained in an accessible manner which is compatible with new and evolving technologies (known as assistive technology) that permit individuals with visual, hearing, manual, and other disabilities to gain meaningful access to these web sites."

Young Lawyers Division Debate on "Super-Majority" To Take Policy Positions

During the ABA Midyear meeting, held in Miami in February, the Young Lawyers Division Assembly (YLDA) met to debate resolution 1YL, which proposes that the House of Delegates adopt a 60% "super-majority" before adopting any main motion as official policy of the American Bar Association. If the YLD adopted the resolution, it would sponsor 1YL as a recommendation to be adopted by the full House of Delegates at the ABA's annual meeting in August.

The report accompanying Resolution 07-M-1YL suggested that "the ABA's role as an advocate may be a cause of a decline in membership or membership market share." The report urges a 60% "super majority" be attained before adopting a main motion.

Some revelations of the Young Lawyers Division report:

- In the last fifteen years, the percentage of licensed lawyers who are members of the ABA has declined from 50% to 37%. (The total ABA membership numbers include law students.) In the last thirty years, the percentage of lawyers who are ABA members has declined twenty percentage points.
- The 2006 ABA-conducted "Pulse of the Profession" report revealed that "many lawyers are leery of the ABA's involvement in advocacy and policy." Lawyers prefer that the ABA play "an educational role rather than an advocacy role."
- Furthermore, in this same "Pulse of the Profession" report, many lawyers contended, "The ABA is not that available or relevant to them, or is not truly representative of all lawyers."
- The "Pulse" report noted: "Lawyers also recognize and appreciate that the ABA represents lawyer with divergent views. In light of this, lawyers say that, rather than taking political stands on issues that divide the profession, the ABA should work to unite the profession by focusing on things that lawyers have in

common. These include addressing many of the trends... such as work/life balance and access to justice."

• The Young Lawyers Division listed many of the "notable and controversial" positions adopted by the House of Delegates. These positions include: providing federal funding for abortions, supporting the adoption of the Equal Rights Amendment, supporting a pro-choice position on abortion, supporting the creation of a right to quality health care, and opposing federal legislation that would prohibit stem cell research.

Richik Sarkar, representing the 18th District in the YLDA, spoke in favor of the recommendation. He noted the history of both the ABA and the YLD taking policy positions, despite the fact that it has been a low priority of members. He suggested that the ABA's declining market share — from 58% to 37% in the past thirty years — could be attributed to the fact that most of its controversial policies have been adopted in that time span. Sarkar stated that ABA studies confirmed that the Association's positions on social and political issues have had a negative impact on its membership.

Sarkar contended that by requiring a 60% "super-majority," the ABA would build a greater consensus and add more legitimacy to these positions. He suggested that the ABA should primarily seek to educate its members and the public about public policy, only advocating when necessary. Sarkar emphasized that this proposal was not about politics, noting that he would have supported many of the controversial positions on abortion, welfare, and health care that the ABA has adopted.

Daniel Van Horn, the Assembly Speaker, also spoke in favor of the resolution. He argued that the resolution was about how to balance the advocacy and membership roles of the ABA. Van Horn contended that the House of Delegates was not representative of the body as a whole in its political perspectives.

An assembly member from Pennsylvania rose in opposition to the proposal. She contended that democracy in America means majority rule, and the ABA should not be held to a higher standard

In the accompanying report, the sponsors note that this recommendation is consistent with past ABA policies. Moreover, a number of laws, especially Titles I-III of the Americans with Disabilities Act and Section 508 of the Rehabilitation Act, support the principle "that in general legal websites should be accessible to persons with disabilities."

The report presents several examples of how websites could be made more accessible. Websites should be made compatible with screen magnification software and screen-reading programs for the visually impaired. Programs such as Magpie can add captions to files containing audio for people with hearing impairments.

Finally, the sponsor cites existing guidelines that could help direct those who maintain legal websites. Two of the most prominent are the federal Architectural and Transportation Barriers Compliance Board, which "develops, and periodically updates, compliance standards to implement Section 508 of the Rehabilitation Act," and the Web Accessibility Initiative (WAI). These website accommodations are necessary, the recommendation asserts, as "if lawyers, judges, law students, paralegals, clients, and the public cannot use most, many, or even some legal websites, the legal profession is weakened as a result because all the individuals with disabilities who are excluded view the profession as being less than it could or should be."

Critics of Recommendation 108 recognize that it "is not intended to tell legal entities how their websites should be constructed," but is more "educational." Still, these critics are concerned that if the recommendations became a policy, rather than simply an educational tool, that it could lead to some unintended consequences. For example, they ask, at what point does greater accessibility become so expensive or unwieldy that it is unfair to require it, and, indeed, that requiring it may actually discourage some firms from having useful features on their websites altogether? For instance, critics suggest that a decision to include a video on the website could require a firm to spend considerably more to make it accessible to the blind and deaf, and, under those circumstances, the firm might conclude that it is simpler to have no video at all.

Global Corporate Citizenship

Recommendation 110B, sponsored by the ABA Task Force on International Rule of Law Symposia, "encourages corporations, lawyers, law firms and other professionals to promote corporate citizenship by supporting: compliant and ethical corporate behavior globally; global pro bono services; promotion of the rule of law; encouraging

governments to pursue policies that support corporate citizenship and the rule of law; and sharing of best practices in corporate citizenship." The sponsors cite "the high-profile corporate scandals of recent years, the challenges of globalization and widespread concerns about global warming, among other things" as contributing to the greater desire for "corporate accountability." The authors stress the interdependence of corporate citizenship and the rule of law. The sponsors claim that this recommendation would likewise provide support for the 2008 ABA World Justice Forum Project.

The accompanying report recognizes the three main entities in corporate citizenship: corporations, lawyers, and governments. According to the report, corporations should "undertake voluntary corporate citizenship programs that are based on three fundamental tenets of being a good corporate citizen — first, strong, sustained economic performance benefits all stakeholders; second, strict compliance with the law is required; and third, good corporate citizens undertake voluntary action beyond legal requirements to promote social and economic development." Moreover, corporations ought to support other enterprises in their citizenship efforts, support global pro bono services and promotion of the rule of law, and engage governments in pursuit of the rule of law.

Attorneys should be encouraged to support the rule of law wherever in the world clients operate, with the goal of being "lawyers without borders."

The sponsors also cite governments' role in corporate citizenship and the rule of law, as they are inextricably tied to "governmental policies that promote the rule of law and stable legal institutions, as well as ethical governance and corporate compliance." Governments ought to have legal regimes that are "transparent, ethical, fair and accountable." The report suggests this goal could include "(i) enactment and enforcement of laws against corruption, (ii) evenhanded enforcement of environmental, workers rights and wage laws, and (iii) preservation of an independent and unbiased judicial system."

The sponsors emphasize, "The ABA should play a leading role in the broader effort to develop and promote corporate citizenship, compliance and the rule of law."

This recommendation appears to be one in a series of ABA recommendations on corporate social responsibility ("CSR") that is quite general and seemingly non-controversial. Critics fear that a hortatory resolution such as this tends to be the preliminary step toward policies that present serious incursions on free market and rule of law principles.

than the federal government. She maintained that no empirical evidence existed that linked the ABA's adoption of controversial policy positions with its membership decline. She also maintained that few policy positions would have changed if a super-majority, rather than simple majority, was the standard employed. The ABA had a duty to "protect people who need to be protected," and its positions on the ERA, discrimination, quality health care, stem cell research, and prayer in public schools would ensure this.

Other opponents suggested the recommendation stemmed from disagreement with the ABA's position on abortion. Vermont delegate Ed Adrian declared that the recommendation is rooted in a "woman's right to choose." The ABA needs to stand for choice. He refuted any suggestion that the ABA's membership was declining because of its policy positions. Delegate Matt Nelson suggested that any attempt to deny that abortion was the recommendation's impetus was "hogwash." He stated that ABA membership numbers were increasing. He also praised the efforts of the ABA's membership team. He maintained that the ABA's membership division does not consider the ABA's policy positions as a reason why lawyers would leave the ABA.

Delegate Dan Schwartz, who described himself as a pro-choice Democrat, contended that this recommendation was not about abortion. It was about achieving consensus within the organization and the need to speak with one voice on the most controversial subjects in legal and public policy. The resolution would not stifle activism. Wisconsin Delegate Joseph Cardamone noted that his state bar required a supermajority, which made common sense because of the bar's diversity. A 60% majority is not "irresponsible or unreasonable."

A vote was taken to discuss whether to extend debate; however, the motion failed. A final opponent, who did not identify herself, offered the last critique of the recommendation. She stated that it was "shocking" that anyone could believe that ABA membership was falling because of its policy positions.

A vote was then taken. By a narrow margin, the resolution failed.

Law Student Participation in Pro Bono Activities

The Section of Legal Education and Admissions to the Bar sponsors Recommendation 103A, which states that the ABA's House of Delegates concurs "in adopting Interpretation 302-10 concerning opportunities for law student participation in pro bono activities, dated August 2007, as an addition to the Standards for Approval of Law Schools and the Interpretations of the Standards."

A recommendation urging the adoption of Interpretation 302-10 had been originally been on the agenda for the 2006 ABA Annual Meeting, but had been withdrawn at the last minute as there were concerns it did not "did not conform to 'the essence' of the ABA Model Rule of Professional Responsibility 6.1." This Model Rule "calls upon lawyers to render at least 50 hours of pro bono publico service per year, the substantial majority of which should involve legal services to persons of limited means and/or organizations designed to address the needs of persons of limited means. Only lawyers hold the special privilege to provide these fundamentally needed services. Law school is the appropriate time to introduce this concept to aspiring lawyers. Consequently, the Pro Bono Committee felt the interpretation should be clear that, as law students prepare for entry into the legal profession, it is essential that schools provide opportunities to expose them to the legal problems of the poor and encourage their involvement as practitioners."

Interpretation 302-10 now reads as follows (the revisions included since last year are italicized):

Each law school is encouraged to be creative in developing substantial opportunities for student participation in pro bono activities. Pro bono opportunities should *at a minimum* involve the rendering of meaningful service to persons of limited means or to organizations that serve such persons. While law school pro bono programs should generally involve law-related services, pro bono programs that involve meaningful services that are not law-related

According to these critics, the most prescriptive form of the CSR movement is represented by the 2003 drafting and pursuit of "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" by the United Nations Human Rights Council's Sub-Commission on the Promotion and Protection of Human Rights. Under these proposed norms, transnational businesses would have a duty to fulfill a broad range of economic and social rights, including the requirements: 1) to "encourage social progress and development by expanding economic opportunities — particularly in developing countries and, most importantly, in the least developed countries," and 2) to "respect the right to enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized and in which sustainable development can be achieved so as to protect the rights of future generations."

The detractors of the CSR movement also maintain that the movement has resulted in a call for imposing on businesses the requirement that they perform "human rights impact assessments" or HRIAs in connection with private sector projects. Before beginning any project, transnational corporations would have to submit an HRIA for government and public consideration. In the HRIA, the corporation would be required to:

- Describe the proposed business activity;
- Catalogue the legal, regulatory and administrative frameworks to which the activity is subject;
- Catalogue the human rights frameworks that apply to the business activity, even those arising from international conventions which the host country has not ratified;
- Explain how the business activity may change the human rights environment, an explanation that even normative imperialists acknowledge is a "difficult and subjective enterprise" that may require complying businesses to "devise multiple scenarios;"
- Prioritize the human rights challenges for the company and make recommendations to address those challenges (i.e., modify project design; collaborate with governments, local communities, and other "helpful" actors like civil society organizations and other companies in the area);
- Incorporate the human rights recommendations into a management plan, which includes ongoing monitoring, adjustments, and regular consultation with "affected" parties; and,
- Engage an "experienced team with knowledge of

relevant international standards and local culture" (i.e., a team of normative imperialists) to perform the HRIA.

Victims of Trafficking in Persons

The ABA's Task Force on International Rule of Law Symposia and seven other committees urge Congress to pass legislation to protect and assist the victims of human trafficking, for both citizens and non-citizens. Recommendation 108A offers principles concerning these victims. These proposals include:

- Providing emergency assistance to child victims of trafficking;
- Encompassing both direct victims of trafficking (victims who are present in the United States as a result of being trafficked) and victims who have not been directly trafficked but who are indirectly affected by either being summoned to the United States to testify against traffickers or by instituting civil claims against traffickers in U.S. courts;
- Ensuring that all trafficking victims who are willing to cooperate with law enforcement promptly receive a certification/endorsement from law enforcement such that they can be immediately eligible for protection and assistance;
- Modifying current visa conditions for trafficking victims to exclude requirements imposed on applicants to cooperate with law enforcement and to show "extreme hardship" upon removal from the United States;
- Modifying current permanent resident status conditions by providing an exception to the "good moral character" requirement for victims of trafficking and their family members when the applicant's conduct at issue is incident to or relates to the trafficking and allowing them to apply for permanent residence as soon as they are granted T-visas;
- Mandating that victims and their family members receive adequate protection from traffickers and deem them eligible for state and federal witness protection and other means of protection;
- Encouraging federal, state, territorial, local, and tribal laws and policies that support funding for legal assistance for trafficking victims in criminal, civil, and immigration cases; and
- Increasing resources for the investigation and prosecution of traffickers, as well as for protection and assistance for victims.

also may be included within the law school's overall program of pro bono opportunities. Law-related pro bono opportunities need not be structured to accomplish any of the professional skills training required by Standard 302(a)(4). While most existing law school pro bono programs include only activities for which students do not receive academic credit, Standard 302(b)(2) does not preclude the inclusion of credit-granting activities within a law school's overall program of pro bono opportunities *so long as non-credit bearing initiatives are also part of that program.*

The accompanying report states, "Interpretation 302-10 was adopted in part because of the request of law school deans for additional guidance for determining compliance with the requirements of Standard 302(b)(2)." According to the Recommendation's sponsors, the Interpretation "encourages law schools to be creative in developing their pro bono programs" and did not intend to "exclude any significant existing types of law school pro bono activities from being considered in fulfillment of the new requirement." As certain pro bono programs involve non-law-related activities, the Interpretation makes clear "that non-law-related activities may be included within a school's overall pro bono program. Some non-law-related activities could assist students in developing some useful professional skills; doing intake interviewing at a rescue mission, for example, would assist in honing interviewing and counseling skills."

The sponsor declares, "As a baseline, law schools should offer students opportunities to render meaningful pro bono legal services to those unable to pay, without expectation of compensation or academic credit." Furthermore, the report states that the authors "thought it important to emphasize in the Interpretation that such pro bono opportunities need not be designed to fulfill curricular professional skills training objectives (and thus would not necessarily require the level of law school supervision required of field placement or externship programs under Standard 305)."

The sponsor cites both the utility and the flexibility of the Interpretation, as it "provides guidance that is useful and necessary with respect to the pro bono requirement without

being unduly prescriptive and without unduly impairing the Accreditation Committee's ability to make appropriate individualized determinations as it applies Standard 302(b)(2) to the particular facts presented by the programs of specific law schools."

The sponsor acknowledges that these standards may be reconsidered in the future, "after some period of experience."

Critics raise a number of concerns regarding this recommendation. Detractors question how the Interpretation encourages "creativity" in pro bono programs and how the sponsor wants to offer guidance regarding these programs "without being unduly prescriptive." This could result in lax pro bono requirements, leaving the Association to endorse standard-less, unsupervised initiatives as part of a legal education. Furthermore, detractors are troubled by the inclusion of non-legal activities as qualifying for pro bono credit. They question what non-legal services would be defined as "meaningful." The one example given by the sponsor, doing intake interviewing at a rescue mission to improve professional skills, is too vague be defined as a pro bono activity. Furthermore, critics would question why law schools should have to provide such services as part of their accredited activities.

Another criticism of the proposed policy is aimed at its level of supervision. The Interpretation states that these activities can be performed without "the level of law school supervision required of field placement or externship" supervision standards. This raises concerns not only with respect to how the work constitutes legal education, but opens up such administrative problems such as students claiming to do such work without offering evidence of supervision.

Critics also wonder which "existing" programs prompted the sponsor to declare that it "did not intend to exclude any significant existing types of law school pro bono activities?"

Additionally, the recommendation supports a call for lawyers to provide pro bono services to the victims of trafficking, both in the United States and internationally.

Judicial Independence & Fair and Impartial Courts

Recommendation 110D, sponsored by the Task Force on International Rule of Law Symposia, urges the ABA to adopt the *Principles on Judicial Independence and Fair and Impartial Courts*. There are five major principles of judicial independence and fair and impartial courts: decisional independence, institutional independence, competent judges, adequate resources, and accountability. The sponsors reference an index formulated by the ABA Central European and Eurasian Law Initiative (CEELI), which defined thirty different factors which provide the architecture for an independent, accountable and efficient judicial system. These thirty factors are encompassed in the five major principles.

The sponsors define decisional independence as allowing judges to pursue the rule of law unaffected by personal interests or outside pressure and threats. This principle includes the factors of guaranteed tenure, objective judicial advancement criteria, judicial immunity for official actions, case assignment, judicial decisions and improper influence.

The second major principle, institutional independence, recognizes the judiciary as a separate and co-equal branch of government. It encompasses the factors of judicial review of legislation, judicial oversight of administrative practice, judicial jurisdiction over civil liberties, a system of appellate review, contempt/subpoena/enforcement, and judicial associations.

The installation of competent judges, the third major principle of the *Principles on Judicial Independence and Fair and Impartial Courts*, involves picking jurists "who have been selected for their merit, who represent the diversity of their community, and who are provided with access to the law and continuing legal education." This principle can be evaluated by examining judicial qualification and preparation, the selection/appointment process, continuing legal education opportunities, distribution and indexing of current law, and minority and gender representation. Ideology or legal philosophy is not mentioned in the criteria.

The fourth major principle urges "adequate facilities and equipment, security and just compensation for judges." This principle includes the factors of budgetary input, adequacy of judicial salaries, judicial buildings,

judicial security, court support staff, judicial positions, and the computers and office equipment.

The fifth principle promotes a system of accountability including "a judicial code of ethics as well as a process for citizens to file complaints against judges for illegal or unethical conduct and an impartial disciplinary system that allows for a range of sanctions and removal of errant judges." This principle can be judged by the code of ethics, the judicial conduct complaint process, removal and discipline of judges, public and media access to proceedings, publication of judicial decisions, and the maintenance of trial records.

International Standards on Judicial Independence

Recommendation 110E, sponsored by the Task Force on International Rule of Law Symposia, resolves that the ABA supports the following international standards of judicial independence: The United Nations Basic Principles on the Independence of the Judiciary; The International Bar Association Minimum Standards for Judicial Independence; and The Bangalore Principles of Judicial Conduct. Furthermore, the recommendation resolves that the ABA "should urge the United States government to support these standards."

The recommendation's accompanying report notes that the ABA currently has no policy supporting these "prominent international standards on judicial independence." The report contends that it is vital that the ABA officially support these recognized standards in its efforts on international rule of law and judicial independence. Specifically, the authors state that the planned ABA World Justice Forum Project in 2008 would be enhanced by the adoption of this recommendation.

The United Nations Basic Principles on the Independence of the Judiciary was endorsed by the General Assembly in 1985. The principles state that they "should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general." There are thirty two principles defined, ranging from the independence of the judiciary, to judicial freedom of expression, qualifications, and guidelines for disciplining judges.

Adopted in 1982, The International Bar Association Minimum Standards for Judicial Independence address eight areas: "Judges and the Executive; Judges and the Legislature; Terms and Nature of Judicial Appointments; The Press, The Judiciary and The Courts; Standards of Conduct; Securing Impartiality and Independence and The internal Independence of the Judiciary."

The Bangalore Principles of Judicial Conduct, developed between 2000 and 2006, "represent a further development and are complementary to the U.N. Basic Principles on the Independence of the Judiciary." These principles list six overarching values for the independence of the judiciary: Independence, Impartiality, Integrity, Propriety, Equality and Competence and Diligence. Under the Competence and Diligence Value, the principles state, "a judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms."

Major Disasters & The "Katrina Commission"

The ABA's Section of Litigation sponsors Recommendation 113, which advocates appropriate entities to adopt eleven guiding principles that "govern the planning, preparation and training for responses to a major disaster." The accompanying report refers to September 11 and Hurricane Katrina to show how major disasters not only threaten the lives of Americans but "the legal fabric that binds our society together." The sponsors, while admitting that they do not consider themselves "to be experts in disaster planning," maintain that the principles are intended to "help insure that justice will continue to be dispensed despite the damage and disruption caused by a major disaster." The principles will also encourage "reliance on legal mechanisms when the effort is undertaken to restore a disaster-torn community through programs designed to compensate for loss or render assistance in recovery."

The Recommendation promotes the following eleven principles:

- The rule of law must be preserved when a major disaster occurs.
- The preservation of the rule of law requires proactive planning, preparation and training before a major disaster strikes.
- All those involved in the justice system must work to assure the ongoing integrity of the system in times of a major disaster.
- In times of a major disaster the requirements of the Constitution regarding criminal prosecution must be respected.
- Where the acts or omissions of individuals or organizations result in a major disaster, or exacerbate a major natural disaster, the executive and legislative

branches of national or state government should consider establishing an independent commission of inquiry to examine the reasons for and consequences of such acts or omissions.

• To the fullest extent permitted by law, persons affected by a major disaster should be compensated for their losses through insurance coverage and the operation of the judicial system.

• Government payment of compensation to persons affected by a major disaster should be considered when government is either implicated in the major disaster or public authorities determine that it is in the public interest to provide compensation. Principles of equal treatment, due process and transparency should govern the distribution of compensation.

• Government assistance mandated by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency.

• Charitable assistance to persons affected by a major disaster should be encouraged, and benefits to persons affected by a major disaster should be maximized.

• Federal, state, territorial, tribal and local governments should work with each other and with the public and private sectors to plan, prepare and train for a major disaster. Such efforts should focus on means to preserve order, protect vulnerable populations and insure adequate communications.

• To the extent feasible, attorneys should provide pro bono representation to persons affected by a major disaster who seek either compensation or assistance.

The ABA's Section of Individual Rights and Responsibilities sponsored Recommendation 116B, which "urges Congress to create an independent, bipartisan commission to investigate the preparedness for, and the immediate and ongoing responses by, federal, state and local governments to Hurricane Katrina, and to recommend appropriate measures designed to prevent or mitigate problems in responding to natural disasters in the future."

The sponsors emphasize the need for a Katrina Commission modeled after the 9/11 Commission. While the report acknowledges that both the Executive and Legislative branches have issued reports addressing the response to Katrina and proposing steps to prevent future natural disasters, they are dismissed "as products of partisanship" that "did not bear the hallmarks of credibility and consensus that would accompany the type of review conducted by an independent and wholly bipartisan Commission." For example, the sponsors cite how Democrats, unsatisfied with the number of representatives and the amount of authority they would have had on the House Katrina committee, refused to participate, resulting in the House report's release by a committee composed of eleven Republicans. The sponsors fault the Senate Katrina report, entitled "Hurricane Katrina: A Nation Still Unprepared," as incomplete, as the committee did not have sufficient access to administration officials and documents. Finally, the recommendation cites the White House report, entitled "The Federal Response to Hurricane Katrina: Lessons Learned," as having received widespread criticism for failing to affix "enough blame for the problems."

Thus, the sponsors of Recommendation 116B argue that a Katrina Commission is both needed and still timely. Past legislative efforts to create such a bipartisan commission have failed, and the authors urge Congress to move forward. The Commission could address the following issues: "review and evaluate the information available to governmental agencies relating to Katrina prior to its impact; evaluate the decisions made by governmental agencies regarding the planning and preparation for Katrina; ascertain the efforts to provide response and recovery to all communities within the target areas of the Hurricane; build upon the investigations of other entities, and avoid unnecessary duplication, by reviewing the findings, conclusions, and recommendations of investigations by other entities; make a full and complete accounting of the extent of the government's preparedness for, and immediate response to, Katrina; and, investigate and report to the President and Congress on its findings, conclusions and recommendations for corrective measures to mitigate the impact of future natural disasters."

State Secrets Privilege

Recommendation 116A, sponsored by the Section of Individual Rights and Responsibilities, seeks to define a set of procedures regarding the use of the state secrets privilege in civil cases and "urges Congress to enact legislation consistent with these procedures." Guidelines for civil cases are needed so that "courts make every effort to avoid dismissing a civil action based on the state secrets privilege." Additionally, legislation regarding the application of the privilege is pending in Congress, lending further urgency to this recommendation.

The IRI Section holds deep concerns about the past use of the state secrets privilege. The Section notes that private plaintiffs "should be able to seek judicial remedies

for injuries caused by unconstitutional actions and other government wrongs." The state secrets privilege has occasionally resulted in the dismissal of these civil suits if the disclosure of sensitive national security information was threatened. According to the IRI Section, "Such dismissals prejudice the interests of private plaintiffs, denying them any forum to litigate their claims against the government even if egregious government misconduct is involved. By dismissing civil actions on these grounds, courts also may abdicate their responsibility under the constitutional system of checks and balances to review and reverse Executive Branch excesses."

The IRI section urges "balance" between the state's need to protect sensitive information and a plaintiff's ability to seek redress in civil cases. The report states that this balance is possible, as the proposed policies guide "courts to take steps to avoid dismissing civil actions when the state secrets privilege is asserted, while nonetheless recognizing that in limited circumstances, the privilege will require dismissal." But despite this desire for balance, the IRI section affirms, "This proposed ABA policy urges that cases should not be dismissed based on the state secrets privilege, except as a very last resort, and recommends a non-exhaustive list of procedures to accomplish that goal."

The recommendation sets out the following list of guidelines for such civil cases:

- Permit the government to plead the privilege in its answer to particular allegations in the complaint without admitting or denying those allegations, and draw no adverse inferences against the government for doing so;
- Defer ruling on a motion to dismiss until after the completion of discovery if facts relevant to the motion are subject to a claim of privilege;
- Require the government to submit for *in camera* review the evidence the government claims is subject to the privilege;
- Deem privileged only evidence disclosure of which the court finds is reasonably likely to be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States;
- Permit the discovery of non-privileged evidence that may tend to prove the plaintiff's claim or the defendant's defense, provided that such evidence can be effectively segregated from privileged evidence, and employ, where appropriate, protective orders, *in camera* hearings, or other measures where necessary to protect the government's legitimate national security interests; and
- Require the government to produce a non-privileged substitute for privileged evidence, consisting of a summary of the privileged evidence, a redacted version of the evidence, or a statement admitting relevant facts that the privileged evidence would tend to prove, provided that:
  - The evidence is essential to prove a claim or defense in the case;
  - The court finds that it is possible for the government to produce a substitute that provides a substantially equivalent opportunity to litigate the claim or defense as would the privileged evidence;
  - In cases in which the government is a party asserting a claim or defense that implicates the privilege, the government is given the opportunity to elect between producing the non-privileged substitute and conceding the claim or defense to which the privileged evidence pertains.

After these steps, "The court should not dismiss an action based on the state secrets privilege if the court finds that the plaintiff is able to prove a *prima facie* case with non-privileged evidence (including non-privileged evidence from sources outside the U.S. government), unless the court also finds, following *in camera* review, that the defendant's ability to defend against the plaintiff's case would be substantially impaired because the defendant is unable to present specific privileged evidence."

Recently, the state secrets privilege has been invoked with respect to the Bush Administration's NSA terrorist surveillance program, the Administration's rendition practice, and a lawsuit by former detainee Khaled al-Masri. Defenders of the privilege note it is well established in federal law and is necessary to prevent critical national security information from disclosure. As the sponsor notes in its report, the state secrets privilege has existed for two hundred years, since United States v. Burr.

Critics of Recommendation 116A claim that it continues the ABA's recent pattern of opposing all government efforts to effectively balance public safety and private rights. From the Patriot Act, to the warrantless surveillance program, to the Guantanamo detainees, to rendition, and now to the state secrets privilege, the ABA has attempted to "balance" state and individual interests in a way that would limit the government's ability to protect national security. Carefully policing the government's use

of coercive powers is not a bad thing — indeed, it is one of the underpinnings of the constitutional system. However, the critics claim that over the past seven years the ABA has strayed beyond this careful policing, recommending a substantial gutting of the government's traditional wartime powers.

According to the critics, this is the case even though these powers, such as the use of military commissions to process unprivileged enemy belligerents and warrantless interception of battlefield communications, are constitutionally well-founded and have been exercised by all of the American wartime Administrations. Meanwhile, when it came to the interpretation of the various congressional statutes, e.g., FISA, the ABA has opted for the construction that would be the most onerous to the Executive Branch. ABA's underlying political philosophy seemed to be animated by a hostility to the notion of discretionary exercise of Executive power and a predilection to put the Judiciary and Congress in the driver's seat.

When it comes to the state secrets privilege, the ABA maintains it is ostensibly promoting only the position that plaintiffs "should be able to seek judicial remedies for injuries caused by unconstitutional actions and other governmental wrongs." Critics suggest that the reality is that this is not about protecting the interests of a few private parties who have been put upon by the government. On this view, the ABA is seeking to expand the ability of public interest groups to organize and channel, under the guise of private lawsuits, well-funded efforts to challenge and litigate endlessly about all national security-related governmental activity with which they disagree. Critics therefore note that these are quintessentially public policy exercises, masquerading as litigation, and addressed to the courts rather than the political branches of the federal government. These critics claim that the ultimate result, if successful, would eliminate the Executive Branch's ability to make a judgment about what material would potentially damage national security, and instead vest this judgment with the Judiciary.

Taken together, critics declare that the ABA's position statements and recommendations can only be seen as an attempt to interpose the Judiciary in national security issues in unprecedented ways, and an attempt to alter systematically the way the government addresses national security issues without passing legislation to do so.

The Voting Rights of People with Disabilities

Recommendation 121, sponsored by the ABA's Commission on Law and Aging, consists of seven clauses all of which are designed to protect and facilitate voting by people with disabilities, with a special focus on cognitive impairments and other disabilities that increase in frequency with age. The clauses are based on an ABA-sponsored working symposium, entitled *Facilitating Voting as People Age: Implications of Cognitive Impairment*, which took place in March 2007.

Enfranchisement, rather than preventing voter fraud, is the focus of this recommendation. The sponsor affirms, "A premise of this recommendation is that, because voting is a fundamental constitutional right and a hallmark of democracy, the emphasis should be on expanding the franchise and enhancing access to and assistance with the ballot for persons who are capable of voting."

This recommendation is offered in light of the aging of the population and the fact that the elderly are more likely to vote. The sponsor emphasizes that the need to protect the right to vote for this population is crucial. Indeed, the sponsors maintain that these protections are "consistent with the highest values of the ABA in preserving fundamental civil rights for all citizens."

The seven clauses of Recommendation 121 are as follows:

- The sponsor urges federal, state, local, and territorial governments to improve the administration of elections to facilitate voting by all individuals with disabilities, including people with cognitive impairments, by:
  - Studying and developing best practice guidelines for ballot design to maximize access;
  - Adapting their laws, practices and technologies to permit "mobile polling" stations;
  - Ensuring that instructions, signage, and other communications regarding elections are accessible; and
  - Permitting sufficient alternative forms of identification verification to facilitate registering and voting.
- The sponsor urges the federal government to ensure a private right of action under the Help America Vote Act for persons who have been denied access to vote privately and independently.
- The sponsor urges federal, state, local, and territorial governments to ensure that no governmental entity exclude any otherwise qualified person from voting based on medical diagnosis, disability status, or type of residence. State constitutions and statutes, including guardianship and election laws, should explicitly state that the right to vote is retained, except by court order, where the following criteria must be met:

- The exclusion is based on a determination by a court of competent jurisdiction;
- Appropriate due process protections have been afforded;
- The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and
- The findings are established by clear and convincing evidence.

- That the sponsor urges federal, state, local, and territorial governments to permit citizens to opt freely for absentee ("vote at home") balloting, permanently or temporarily, including at the time of registration, with the ability to change one's choice thereafter.
- That the sponsor urges state, local, and territorial governments to improve access to voting by residents of long-term care facilities that provide room, board, and any level of personal care to persons in need of assistance. Such efforts should include the following:
  - Establishing mobile polling stations in long-term care facilities;
  - Where mobile polling is not available, providing teams of election officials at the local level to conduct absentee voting in long-term care facilities; and
  - Training residents, staff, and others involved in the care of residents about the rights of persons with disabilities in relation to voting and the community resources available to provide assistance.
- That the sponsor urges federal, state, local, and territorial governments to require and fund the development of voting systems that achieve universal design, such that all voters can cast ballots privately and independently on the same voting machine, adaptable to accommodate any impairment, including physical, sensory, cognitive, intellectual, or mental.
- That the sponsor urges federal, state, local, and territorial governments to recruit and train election workers to address the needs of voters with disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities.

Critics of this recommendation cite three main areas of concern. First, at some point accommodations can become very expensive. Money spent by a local government on improving voting accessibility to the n^{th} degree is money that will not be spent on education, hospitals, firefighting, and law enforcement; nor, for that matter, will it be spent on improving voting machines in non-disability-related ways.

Second, critics point out that some of the accommodations make it more likely that voter fraud will occur. Voting law aims to ensure that no eligible person be discouraged from voting, and that no ineligible person be allowed to vote; unfortunately, while both aims are legitimate, there is frequently a tension between the two.

Third, the Recommendation stresses that it is not just physical but "cognitive" and "mental" impairments that ought to be accommodated. Critics argue that many people think it is perfectly legitimate to deny the franchise to people who are cognitively or mentally impaired, and many states in fact do.

Reproductive Technology

The ABA Section of Family Law's Committee on Assisted Reproductive Technology and Genetics sponsors Recommendation 112, urging the consideration and adoption by states and territories of "The Model Act Governing Assisted Reproductive Technology," which is intended to provide model legislation for the regulation of technologies used in assisted human reproduction. The purpose of the Act is "to bring to light current issues that legislators might consider when examining the new problems created by assisted reproduction with the goal of drafting legislation." These model provisions can be considered in whole or in part by legislatures.

The sponsor states that the need for such regulation arises from the rapid advancements in assisted reproductive technology (ATR) over recent years. Technologies such as in vitro fertilization and crypopreservation (freezing and storing tissues for use in assisted conception) have created a vast amount of legal issues that have caused "confusion and contradiction in the application of a body of existing statutory and common law." To remedy this confusion, the Act will provide "clear legal rights, obligations, and protections" for those who use or are involved in the use of assisted reproductive technologies. In this way, the sponsor hopes to "guide the expansion of ways by which families are formed."

The sponsor notes that the ABA does not either advocate or oppose the technologies discussed in the Recommendation; it merely acknowledged their existence and seeks to provide protections for those involved, regardless of the reason they are using these technologies. The accompanying report acknowledges that there are many reasons why people use such technologies, including infertility, being in a homosexual relationship, etc.

The Act provides legal standards for the use, storage, and other disposition of gametes and embryos. For example, the Act requires that, for the collection of gametes or embryos from crypopreserved tissue taken from dead or incompetent people, there must be prior written consent given by that person when he was alive or competent.

The Act also addresses societal concerns about assisted reproductive technology. It provides for a mandatory offer of mental health consultation to all participants of the ATR procedure — though it does not require them to accept — and it defines necessary qualifications of mental health professionals who can provide the consultations.

The Act establishes legal standards for informed consent, reporting, and quality assurance. This includes the need for intended parents to reach an advance agreement concerning who should acquire the right to possess and control the embryos in the event of divorce or one parent's death.

Late Recommendations

The following Recommendations were received after the May 9 filing deadline. They will be considered by the House if the Committee on Rules and Calendar recommends a waiver of the time requirement for each and the recommendations are approved by a two-thirds vote of the delegates voting.

The Law of Armed Conflict

Recommendation 300A, sponsored by the ABA's Section of International Law, urges that the United States ratify four "Amendment and Protocols to the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects."

The accompanying report states that this recommendation would expand "the ABA's policy platform with respect to the law of armed conflict." The authors write that the four items will be submitted for advice and consent in the Senate as a package and that the policies "have the support of President Bush and his administration." The sponsors claim that the approval of this recommendation would "enable the ABA to advocate favorable Senate action on the entire package."

The four items are derived from the UN Convention on Certain Conventional Weapons (CCW), which "seeks to prohibit or limit the use of certain conventional weapons that are deemed excessively injurious or have indiscriminate effects." The CCW consists of five protocols. The United States has signed and ratified Protocol I, Protocol II, and amended Protocol II. The Bush Administration has requested the Senate's advice and consent on an Amendment of Article 1, as well as on Protocols III, IV, and V.

The four proposed items are:

- Amendment of Article 1: This amendment "eliminates the distinction between international and non-international armed conflict for the purposes of the rules governing the prohibitions and restrictions on the use of certain conventional weapons."

- Protocol III: Protocol III of the CCW, as adopted in 1980, allows the use of incendiary weapons to attack military targets located near concentrations of civilians only when the military target is clearly separated from the concentration of civilians and all feasible precautions are taken to minimize civilian casualties and collateral damage. While incendiary weapons have significant potential military value, particularly with respect to flammable military targets that cannot as readily be destroyed with conventional explosives, these weapons can be misused in a manner that could cause heavy civilian casualties. Protocol III prohibits the use of air-delivered incendiary weapons against targets located in a city, town, village, or other concentration of civilians, a practice that has caused very heavy civilian casualties in past conflicts. The United States would reserve the right to use incendiaries against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and less collateral damage than alternative weapons.

- Protocol IV: Protocol IV of the CCW as adopted in 1980 completely prohibits the use of laser weapons primarily used for causing permanent blindness to combatants. The Protocol aims to reduce risk of widespread development, proliferation, and use of blinding laser weapons; it also clarifies the legitimacy of other types and uses of battlefield lasers.

- Protocol V: Protocol V of the CCW as adopted in 2003, addresses the post-conflict threats generated by conventional munitions such as unexploded or abandoned mortar shells, grenades, artillery rounds, and bombs. It recognizes the threat that these munitions pose to civilians and to post-conflict reconstruction. The Protocol provides for the marking, clearance, removal, and destruction of such remnants by the party in control of the territory in which the munitions are located.

The sponsors argue that these items help to "improve the CCW's efficacy in reducing, civilian casualties both during and following situations of armed conflict." Additionally, they contend that "U.S. ratification would further the United States' humanitarian objectives without compromising the appropriate use of important military technologies."

Sustainable Development

Recommendation 300B, sponsored by the Section of Law Practice Management, urges that the ABA "assist lawyers and law practice managers in applying *to law practice management* the sustainability principles set forth in ABA policy resolution #108 (August 2003)."

In the accompanying report, the sponsors explain "'sustainable development' concepts and trends, their impacts on US-based lawyers and law practice management, and how the American Bar Association should (1) take the lead in educating lawyers and (2) coordinate internally and externally to develop the business case, best practices, and other tools and products necessary to help US-based lawyers understand why and how to create and maintain sustainable law practices."

Specifically, the Recommendation proposed the following commitments:

- To legal education, promoting better understanding of sustainable development by lawyers and other members of the legal services delivery team;
- To develop, document and promote the business case for sustainable growth strategies;
- To leadership in the delivery of legal services, by encouraging adoption of sustainable growth strategies and providing recognition for exemplary efforts to integrate sustainability into law practice management planning;
- To policy development that will create framework conditions for the contribution of lawyers to sustainable development
- To sharing of best practices that demonstrate the business contribution to sustainable development being made by lawyers; and
- To global outreach that will contribute to a sustainable future for developed nations, including the United States, and for developing nations and nations in transition.

The sponsors claim these steps are necessary as a paradigm shift has occurred with regards to sustainable development. Indeed, the proponents argue that "in order to build and/or retain key advisory roles to clients confronting challenges that present legal issues — and to avoid marginalization by other advisors who *do* understand the concept — lawyers and law practice managers must comprehend the critical global trends transforming their clients' business models," especially sustainable development.

ABA Honors Kennedy, Berzon & Oleskey *Continued from Cover...*

preserving and promoting the rule of law, and his tireless work on federal sentencing reform. He deserves this honor most, however, because he singly represents the best of our profession. He is a fighter for justice and an advocate for all — an example for every judge, every lawyer and every law professor, not just in America but all over the world."

Justice Kennedy has a long history of work with the ABA. He is a member of the ABA's Asia Law Council. Additionally, at the Association's 2006 annual meeting, he explained how half the world had still not embraced the Western idea of democracy and the Rule of Law. He then implored the attendees to promote a Rule of Law that embodied three key principles: "That the law binds governments as well as individuals, leaving no one above the law; that the law must respect the equality and dignity of all persons; and, that people need to understand the law and their rights under it." Mathis declared that Kennedy's speech "has been widely discussed among lawyers and has been described as a 'milestone' in the ABA's effort to promote the Rule of Law."

Mathis also lauds Kennedy's leadership in seeking reforms to the Federal Sentencing Guidelines. In a 2003 address to ABA members, Kennedy explained that mandatory minimum sentences were "in too many cases… unwise and unjust," and "urged the members of the profession to put their talents to work in reforming the system." This resulted in the founding of the Justice Kennedy Commission, whose "report the following year contained a series of policy recommendations that have been hailed as providing a blueprint for sentencing and corrections reform." Mathis explains that this work continues "under the banner of the ABA Commission on Effective Criminal Sanctions."

The ABA Medal "is given only in years when the ABA Board of Governors determines a nominee has provided exceptional and distinguished service to the law and the legal profession." Other Supreme Court justices have received the award in the past, including Oliver Wendell Holmes, Felix Frankfurter, Thurgood Marshall, William J. Brennan, Jr., and Sandra Day O'Connor.

Commission on Women in the Profession

On Sunday, August 12, 2007, the ABA Commission on Women in the Profession will present its annual Margaret Brent Women Lawyers of Achievement Awards to seven honorees. According to the Commission, the awards recognize and celebrate "the accomplishments of women lawyers who have excelled in their field and have paved the way to success for other women lawyers." What follows are brief profiles of the 2007 honorees:

Roxana C. Bacon

Ms. Bacon, currently an immigration attorney at Bacon & Dear PLC, is the first female president of the State Bar of Arizona and the Executive Director of Western Progress. According to its website, Western Progress is "an independent, non-partisan organization dedicated to the coordination and advancement of progressive policy solutions in the Rocky Mountain West." Furthermore, Western Progress "strengthens the progressive movement in the intermountain region by identifying and developing bold, practical policy solutions, serving as a conduit of best practices, and communicating a western progressive narrative."

Western Progress advocates for a variety of issues, varying from renewable energy to "climate change" and better jobs for the poor. The organization also favors universal health care, greater "tax equity," and increased education spending.

Since 2002, Bacon has donated to John Kerry, Hillary Rodham Clinton, Howard Dean, Paul Babbitt, and Jim Pederson. She has also given to the DNC Service Committee, the Hope Fund, and Emily's List.

Marsha S. Berzon

Judge Berzon serves as a Circuit Judge for the U.S. Court of Appeals for the Ninth Circuit in San Francisco, CA. After receiving her JD from Berkeley in 1973, Judge Berzon clerked for Ninth Circuit Judge James Browning and later for United States Supreme Court Justice William Brennan. From 1978 to 1999, she worked at Altshuler, Berzon, Nussbaum, Berzon & Rubin, a San Francisco law firm that specializes in labor and employment, environmental, constitutional, campaign and election, and civil rights law. From 1987-99, she also served as Associate General Counsel for the AFL-CIO.

Judge Berzon was nominated by President Clinton to the Ninth Circuit in 1998, and she was confirmed 64-34 March of 2000. Her nomination attracted some controversy, as Republican Senators charged her with judicial activism. Democratic senators, then in the minority, contended that the Republicans unfairly filibustered her nomination.

Angela M. Bradstreet

Described by the ABA as a "champion for the advancement of women," Angela Bradstreet is currently the Labor Commissioner for the state of California. Prior

to her appointment by Governor Arnold Schwarzenegger in June 2007, she was the firm-wide Managing Partner of Carroll, Burdick & McDonough LLP. During her 25 years in private practice at CB&M, she defended employers in sexual discrimination, harassment, disability, wrongful termination, and racial discrimination claims. She also represented employers in wage and hour matters, and conducts sensitive investigations. Bradstreet is a former President of the Bar Association of San Francisco, a former President of the Queen's Bench Bar Association, and the creator of the No Glass Ceiling Task Force. Additionally, Ms. Bradstreet was President of the California Women Lawyers, during which she testified before Congress in support of Justice Ruth Bader Ginsburg's confirmation to the United States Supreme Court. In 2002, she spearheaded the unanimous adoption by the San Francisco Superior Court of the first policy of a U.S. trial court banning membership by judges in organizations that discriminate based on sexual orientation, including the Boy Scouts of America. She is a recipient of the California State Bar's Annual Diversity Award and the Anti Defamation League's Jurisprudence Award.

Bradstreet co-chaired the 2006 Dianne Feinstein Senatorial Reelection Campaign. She has given to candidates John Kerry, Bob Casey, Ellen Tauscher, and Al Gore. She has also donated to Emily's List, the Democratic Senatorial Campaign Committee, the Human Rights Campaign, and the Democratic National Committee.

Marva Jones Brooks

Ms. Brooks is a partner in the firm of Arnall Golden Gregory LLP and was the first woman and first African-American City Attorney for Atlanta, GA. According to the ABA, her appointment in 1980 "heralded a new era for women and for African-American lawyers throughout the country as the Maynard Jackson administration set a new standard for leadership diversity in major American cities." During the Andrew Young administration, Ms. Brooks "appointed many talented young women lawyers to key leadership positions in the city law department and helped them move on to successful careers." From 1991 to 2000, Ms. Brooks served as associate general counsel for the Atlanta Committee for the Olympic Games and was one of the two highest-ranking women involved in the 1996 Games.

Irma S. Raker

Described as a "pioneering jurist and leader in criminal justice policy development," Judge Raker was appointed to the Court of Appeals of Maryland, the state's highest court, in 1993 by Democratic Governor William Donald Schaefer. The ABA's biography of Judge Raker states, "Throughout her legal career, she has been recognized for her intellectual approach to the law as well as for her commitment to issues relating to women and children." In 1973, Raker became Montgomery County's first woman prosecutor, where she "championed change — working to revise the sexual offense laws and modernize jury instructions in rape cases, and advocating for victims of domestic violence and child abuse at a time when the law enforcement community was only just beginning to acknowledge the devastating nature of these crimes." While a judge in the Circuit Court for Montgomery County, she issued her well-publicized "Burning Tree" opinion, which rejected a special tax exemption for a private club because it refused to admit women to its membership. This decision has resulted "in many country clubs nationwide changing their practices."

Judge Raker has opined that the Maryland death penalty is unconstitutional. She has maintained that prosecutors need to prove an argument for the death penalty beyond a reasonable doubt. She is due to retire in 2008.

Pro Bono Publico Award

The Standing Committee on Pro Bono and Public Service will present five awards to individual lawyers and law firms at this year's Annual Meeting. According to the Committee's website, "The Pro Bono Publico Awards program seeks to identify and honor individual lawyers, small and large law firms, government attorney offices, corporate law departments and other institutions in the legal profession that have enhanced the human dignity of others by improving or delivering volunteer legal services to our nation's poor and disadvantaged. These services are of critical importance to the increasing number of people in this country living in a state of poverty who are in need of legal representation to improve their lives."

This year's award winners included Stephen H. Oleskey, a partner in the Boston, Massachusetts office of WilmerHale. According to the ABA, Oleskey "has been an integral part of the firm's Pro Bono and Community Service Committee since 1969. He is deeply concerned with the efficacy of the delivery system of legal services to the poor and committed to fostering the spirit of pro bono in future generations of attorneys." The ABA also declares, "Mr. Oleskey has not only made pro bono representation a priority in his own career, but has also been an inspirational leader. He strives to make a lasting impact on the delivery and quality of services available

to indigent clients, undertake high-impact, precedent-setting matters and give a voice to the least powerful in our society."

Oleskey was involved in WilmerHale 's "largest and most significant pro bono matter," *Boumediene et al. v. Bush*, representing six detainees at the United States Naval Base Guantanamo Bay. In an article on radicalsociety.com and in other interviews, he has alleged that his clients were illegally deported from Bosnia and then tortured at Guantanamo.

Oleskey also has served on the national board and as general counsel to the National Organization for Women's Legal Defense and Education Fund (now known as Legal Momentum), which, according to his WilmerHale biography, is "the preeminent national legal advocacy and education entity for women's rights." Legal Momentum's website lists "Lesbian, Gay, Bisexual and Transgender Rights" and "Reproductive Rights" among their core issues.

Oleskey has been a frequent donor to Democratic campaigns. During the past fifteen years, he has donated to Ted Kennedy, to Bill Clinton, to Bill Bradley, to Barney Frank, to Tom Daschle, and six different donations to John Kerry. In March, Mr. Oleskey donated to the Barack Obama campaign.

Other Pro Bono Publico awardees include:

• Robert E. Borton of San Francisco. According to the ABA, "Borton has paired many teams of pro bono attorneys from his firm with public interest attorneys bringing civil rights cases and class actions on behalf of immigrants, children and families, women prisoners, and other groups. He has assisted in setting up pro bono legal clinics and has himself contributed hundreds of hours of his own time to representing indigent people in class action lawsuits and individual cases." He has been particularly active helping Central American asylum seekers. Borton has donated to John Kerry, DNC Services Corp., the Democratic Senatorial Campaign Committee, and the Democratic Party of Ohio.

• Derfner, Altman & Wilborn of Charleston, SC. According to the ABA, the firm, "specialize[s] in representing community groups in controversies that often end in litigation. Some of their recent projects have involved a successful suit to redraw County Council election districts to end discrimination, a successful suit saving a historic African-American cemetery, and a series of suits that have saved the land and homes of a group of African-Americans who were the targets — and almost the victims — of highly sophisticated real estate scams."

• Sidley & Austin LLP of Chicago. The ABA describes, "In 2005 Sidley initiated a firm-wide death penalty litigation project. In response to the overwhelming need for legal assistance for poor prisoners on death row in Alabama, Sidley attorneys have stepped in to represent an unprecedented 18 death row inmates. Over 112 Sidley attorneys from around the country are participating in this effort and donated more than 18,000 hours of their time in 2006. In recognition of this tremendous contribution, the ABA presented Sidley with its first ever Death Penalty Representation Volunteer Award in 2006."

• Patricia Yoedicke of Minneapolis. Yoedicke has been particularly active in helping children through the Children's Law Center.

Silver Gavel Awards

On Tuesday, July 24, the ABA presented its 50th Annual Silver Gavel Awards at the National Press Club in Washington, DC. According to the ABA, the Gavel Awards are designed "to recognize annually eligible entries from communications media that have been exemplary in helping to foster the American public's understanding of the law and the legal system." Specifically, the awards are designed to recognize publications and programs that meet one or more of the following objectives:

• Educate the public about the American constitutional/legal system and the fundamental principles and values upon which it is based (this may include both domestic and international issues or comparative perspectives);

• Educate the public about the operations of legal institutions (e.g., the courts, legislatures, regulatory agencies, prisons, and law enforcement agencies) and the role lawyers and other legal professionals play in the justice system; and

• Encourage public support for improvements in the American justice system by informing the public about current practices, policies, and issues.

This year's ceremony included Patrick Leahy, Chairman of the Senate Committee on the Judiciary as the featured speaker.

The following are the 2007 Silver Gavel Award recipients:

Guantanamo and the Abuse of Presidential Power

The first Gavel Award was given to Joe Margulies for his book, *Guantanamo and the Abuse of Presidential Power*, which analyzes the Bush administration's detainee policies. Margulies was lead counsel in *Rasul v. Bush*, involving the detentions at the Guantánamo Bay, and in *Habib v. Bush*, involving the rendition of Mamdouh Habib from Pakistan to Egypt. According to the publisher's website, *Guantanamo and the Abuse of Presidential Power* "paints a portrait of a country divided, on the brink of ethical collapse, where the loss of personal freedoms is under greater threat than ever before." Furthermore, "Margulies takes readers deep into the Guantánamo Bay prison, into the interrogation rooms and secret cells where hundreds of men and boys have been designated 'enemy combatants.' Held without legal process, they have been consigned to live out their days in isolation until the Bush administration sees fit to release them — if it ever does. Margulies warns Americans to be especially concerned by the administration's assertion that the President can have unlimited and unchecked legal authority."

"Nobody's Hero"

"Nobody's Hero" is an article written by Maximillian Potter in *5280: Denver's City Magazine*. The October 2006 issue analyzes the plight of soldiers returning from duty who have lost their civilian jobs upon their return. The byline for the article reads: "Reservists and National Guardsmen returning from Iraq are guaranteed to get their civilian jobs back. But is Uncle Sam really looking out for our troops? Not in Colorado. Just ask Jim Vigil." Potter focuses the article on the experiences of Jim Vigil and other Colorado citizens who have unfairly lost their civilian jobs and their difficulties seeking redress under 1994's Uniformed Services Employment and Reemployment Rights Act.

www.votingforjudges.org

The website www.votingforjudges.org describes itself as "a nonpartisan source of information on judicial elections in the state of Washington." The website asserts that it neither endorses nor evaluates any of the judicial candidates in the state, but rather seeks to "provide information to voters in connection with the judicial candidates running for election." For example, the website provides links to media stories concerning the courts in Washington state, shows the ratings various organizations have offered for judicial candidates, and details campaign contributors for the candidates.

Signing Statements

The Boston Globe's Charlie Savage was awarded a Gavel Award for his series of articles analyzing President Bush's use of signing statements, official documents in which a president lays out his interpretation of a new law. In the lead article, entitled "Bush challenges hundreds of laws, "Savage asserts that the President "has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution." His articles contain numerous quotations that claim the use of signing statements represents a troubling power grab for the Executive Branch, and repeatedly produced articles highlighting the President's use of these documents. In another article, entitled "Hail to the chief: Dick Cheney's mission to expand — or 'restore' — the powers of the presidency," Savage attempts to trace Vice-President Cheney's views of executive power and contends that Cheney, through signing statements and other methods, is trying to expand the power of the White House.

In June of 2006, the ABA had created a "Task Force on Presidential Signing Statements and the Separation of Powers Doctrine" to investigate whether such statements conflict with express statutory language or congressional intent. This task force was created in response to Savage's series of articles. Frequent ABA task force member Neal Sonnett, a Miami lawyer, was chosen to chair this task force. Other members included Center for American Progress fellow Mark Agrast, George Washington Professor Stephen Saltzburg, former FBI director William Sessions, and Yale Dean Harold Koh.

On January 31, 2007, ABA President Karen Mathis appeared before the U.S. House Committee on the Judiciary. She outlined the ABA's recommendations regarding signing statements and warned, "The potential for misuse in the issuance of presidential signing statements has reached the point where it poses a real threat to our system of checks and balances and the rule of law."

Savage shared the award with editor Peter Canellos.

"Judge Vows to Free Inmates Held Since Katrina"

National Public Radio reporter Ari Shapiro also received a Gavel Award for his investigative report "Judge Vows to Free Inmates Held Since Katrina." The August 2006 report focused on New Orleans inmates who became lost in the criminal justice system following Hurricane Katrina. According to a press release by NPR, "Shapiro investigated injustices in the New Orleans prison system a year after Hurricane Katrina and found that dozens

of inmates were essentially 'lost' in the system due to a shortage of public defenders. He reported on how several inmates had never seen a lawyer, while others were being held well past their scheduled release dates and one judge's efforts to release them." Shapiro shares the award with the program's editor, Barbara Campbell, and producer, Emily Ochsenschlager.

The Untold Story of Emmett Louis Till

The Court TV and Think Film production, *The Untold Story of Emmett Louis Till*, won the final Gavel Award. Court TV's website describes the documentary: "In 1955, 14-year-old Emmett Louis Till was visiting relatives in the Mississippi Delta when he was abducted, beaten and brutally murdered for one of the oldest Southern taboos: whistling at a white woman in public. This groundbreaking film, nine years in the making, explores this infamous unsolved case that helped mobilize the American Civil Rights Movement. With unprecedented accounts by first-hand witnesses and the discovery of potentially guilty parties still living and liable for prosecution, this documentary reopened the case that still cries out for justice."

The award is shared by Keith A. Beauchamp, the Producer and Director, and Ceola Beauchamp, the Executive Producer.

The ABA & Environmental Law

Continued from Cover...

"The continuing threat of CERCLA liability remains a disincentive to the voluntary remediation of contaminated property."

Since the 1990s, both civil rights concerns and international law have played an increased role in shaping environmental policy. In 1995, the ABA adopted a policy promoting "environmental justice," urging policies "that prevent a disproportionate share of environmental harm from falling on minorities and/or low-income individuals or communities." Policies in recent years have focused on sustainable development, ocean regulation, and the protection of marine resources. The 2003 sustainable development recommendation urged the adoption of "internationally accepted concepts" in balancing human needs with environmental protection.

Little lobbying has been done on a federal level. In 2006, the ABA Governmental Affairs Office submitted letters to House and Senate Committee leadership urging support for key provisions in two bills concerning fishery conservation.

ABA Leadership

Two major ABA entities are responsible for much of the ABA's environmental policy and action. The Section of Environment, Energy, and Resources (SEER) is led by Chairman Lauren James Caster. In addition to programming and newsletters, SEER sponsors law student fellowships "designed to encourage disadvantaged or traditionally underrepresented law students to study and pursue careers in environmental law." Students are placed in the North Carolina Attorney's General Office, the Southern Environmental Law Center, The Conservation Fund, Environmental Defense, the Land Loss Prevention Project, Legal Aid of North Carolina in Hillsborough, Catawba Lands Conservancy, Pfizer, California Rural Legal Assistance, and local government agencies.

SEER also sponsors a Nanotechnology Project. The Project analyzes environmental statutes to "assess the suitability of each to address issues pertinent to human health and the environment arising from applications of nanotechnology," as well as briefing the EPA and other agencies on nanotech-related issues.

The Standing Committee on Environmental Law "is devoted to examination and analysis of emerging environmental law and policy issues; development of ABA

policies in the field; and communication about the myriad environmental law activities taking place throughout the Association." R. Kinnan Goleman, an attorney at Brown McCarroll in Austin, is the Committee Chairman.

Both the Standing Committee on Environmental Law and SEER jointly award the "ABA Award for Distinguished Achievement in Environmental Law Policy." Past winners include Barry E. Hill, Director of the U.S. EPA Office of Environmental Justice; John Quarles, the first general counsel of the EPA; and J. William Futrell, past president of both the Environmental Law Institute and the Sierra Club.

The 2007 recipients, to be awarded on August 12, are:

- Ken Alex, Supervising Deputy Attorney General, Environment Section, Public Rights Division, Office of California Attorney General. Alex "is recognized as a leader at the state, national, and international levels in efforts to combat global warming. Long before climate change predictions were accepted by the public, [he] identified global warming as the most important environmental problem of our time." Alex has donated to John Kerrey and the DNC Services Corp.

- James Milkey, Assistant Attorney General, Chief of the Environmental Protection Division, Office of Massachusetts Attorney General." Milkey "organized a multi-state effort to use negotiation, administrative processes, and litigation as tools for change in addressing global warming." He organized a coalition of state governmental leaders that successfully challenged the EPA to regulate greenhouse gas emissions under the Clean Air Act in *Massachusetts v. EPA*. Milkey previously donated to Senator Paul Wellstone's campaign.

The Environmental and Natural Resources Law Program of the University of Denver Sturm College of Law was also honored. The school's building was described as the "nation's first independently certified 'green' law school."

Other ABA sections have been active in helping set environmental policy.

The Business Law Section has a Committee on Environment, Energy, and Natural Resources Law. According to the Section, "The Committee's activities encompass all aspects of environmental, energy and natural resources law and regulation, inasmuch as their regulation is an integral aspect of modern business practice. Given the business law context, the emphasis in the various areas of regulation is on its impact on corporate and other business activities and operations, including transactional issues, liability, auditing and compliance, civil and criminal policy and enforcement, insurance coverage issues, brownfield and other real estate development and finance aspects, lender liability/fiduciary considerations, Superfund and other remediation matters, and SEC reporting protocols and requirements."

The Business Law Section, in its July/August 2007 issue of *Business Law Today*, focused its attention on the regulation of air. Features focused on changes in the legal landscape regarding air quality since the 1977 amendments to the Clean Air Act. Articles offered an overview of air quality laws and regulations, emissions trading of greenhouse gas credits, and the generation of wind power.

Other ABA entities with committees focusing on environmental law issues include:

- Under the auspices of its Environmental Law Committee, the Section of State and Local Government Law addresses issues such as brownfields, solid waste, Superfund, and land use.

- The Litigation Section also has an "Environmental Litigation" Committee. The Committee's most recent newsletter contained articles on "Young Lawyers: Comprehensive Reading of CERCLA after *Cooper v. Aviall*," "Strategy and Storytelling in Environmental Litigation," and "Disagreement in the Courts' Jurisdiction under the Clean Water Act in Light of *Rapanos*."

- The Section of International Law has an International Environmental Law Committee.

- The Individual Rights & Responsibilities Section's "Environmental Justice" Subcommittee released a report in 2004 titled, "Environmental Justice For All: A Fifty-State Survey of Legislation, Policy, and Initiatives." SEER co-sponsored the report's publication.

- The Tort, Trial, and Insurance Practice Section has a "Toxic Torts and Environmental Law Committee" which addresses all issues relating to litigation and regulation involving toxic tort, hazardous waste, chemical and pharmaceutical exposure, among other topics.

2007 Activities

Conferences

Programming is a key means by which the ABA has attempted to address law and environmental policy.

SEER sponsored a conference March 8-11, 2007 that covered topics such as the state of the EPA, environmental crime, waste management, sustainability, and clean water. One panel featured several journalists discussing "Covering Climate: Telling the Unfolding Story of Global Warming."

"Global Warming: How the Law Can Best Address Climate Change" was the theme of a day-long conference at the University of Maryland School of Law sponsored by the Standing Committee on Environmental Law on June 8. The conference materials warned of the dire consequences of climate change:

> In recent years, climate change has become an increasingly urgent global concern. It is now generally well-accepted that the atmosphere of our planet is warming, largely as the result of carbon dioxide and other greenhouse gas emissions. Further, there is wide recognition that this warming trend will have serious environmental, economic, and geopolitical consequences. Projections of increased global temperatures present the prospect of rising sea levels and associated risks to coastal areas, increased risks of floods and droughts, new and exacerbated public health problems, and threats to biodiversity and the viability of numerous ecosystems. In addition, these risks, and the prospect of various means of addressing them, point towards major impacts on our economy and potentially dramatic shifts in the relative strengths and stability of various industry sectors. The impacts of climate change also involve substantial political problems and policy issues, both domestically and internationally. We face enormous risks and daunting challenges.

The conference sponsor emphasized that lawyers have "critical opportunities" to shape existing law to "address climate change issues in a constructive, pro-active, effective way" as well as "provide leadership and produce positive changes." Lawyers are described as having a key role in "changing the climate" of discussion "away from the sometimes polarized and unproductive talk that has affected much of the 'debate' in recent years."

The conference discussed both domestic and global climate initiatives to curb climate change. The final panel discussed how the ABA could provide leadership in addressing climate change.

Publication of Book on Global Climate Change

In April, the Section of Environment, Energy, and Resources published a book entitled *Global Climate Change and U.S. Law* edited by Michael Gerrard, a former chairman of the Section. The book attempts to describe both the current state of environmental law and regulation in the United States and what challenges are ahead. According to the book's description:

> Because global climate change presents extraordinary challenges to the environment and the economy of the United States as well as those of other nations, the debate about how to effectively implement more climate-friendly policies is sure to continue and amplify. The scientific case for strong action is becoming more compelling every month, and opinion polls show that the American public increasingly agrees. The law will play an important part in developing mechanisms to protect the climate, such as conserving energy, using renewable sources of energy, and implementing emission caps and trading programs.

The book offers a summary of the "factual and scientific background" of climate change, outlines the current state of the law and related litigation, and reviews state and local policies in the United States. The book also examines the legal repercussions of efforts to reduce greenhouse gases, from carbon trading to voluntary efforts.

Nanotechnology

SEER's Nanotechnology Project recently conducted a comprehensive review of major federal environmental statutes to assess whether they were applicable to nanotechnology. Project members also offered to brief federal government officials, including the EPA General Counsel, on the legal and regulatory issues concerning nanotechnology and federal environmental statutes. The Project has also sponsored a series of teleconference briefings on nanotechnology and the Clean Air Act, the Clean Water Act, CERCLA, the Toxic Substances Control Act, and other major environmental statutes. Additionally, white papers on nanotechnology and related policies have also been published. According to SEER, "These papers collectively provide the first comprehensive, scholarly review of the core federal environmental statutes with a view toward assessing the utility of each in addressing the legal and regulatory issues pertinent to EPA's jurisdiction presented by nanotechnology. In general, the papers concluded that the core environmental statutes were found to provide EPA with sufficient legal authority to address adequately the challenges EPA is expected to encounter as it assesses the enormous benefits of and potential risks associated with nanotechnology."

Goal VIII Campaign and Recommendation 110A

In 2006, the ABA's Goal VIII Campaign ("To advance the rule of law in the world") began constructing a strategy that would encompass several areas of international

law, including policies regarding the environment. The campaign is part of a major ABA presidential initiative launched in a September 2006 International Rule of Law Symposium in Chicago. A Symposium breakout session focused on "Environmental Issues and the Rule of Law in a Global Village." Afterwards, ABA President Karen Mathis established six working groups, including one on environmental issues, to study how the international rule of law affects policy.

In April, the working groups convened in New York City to disseminate their white papers and draft recommendations that would be considered by the ABA House of Delegates in August. The resulting white paper by the environmental issues group evolved into Recommendation 110A, officially sponsored by the ABA's Task Force on International Rule of Law Symposia; the Sections of Environment, Energy, and Resources and State and Local Government Law; the Standing Committee on Environmental Law; and the Rule of Law Initiative. The Recommendation urges "governments, businesses, nongovernmental organizations, and other organizations to consider and integrate Rule of Law initiatives with global environmental issues."

The sponsors note that the recommendation is needed because in the years since the last major environmental proposal (2003's sustainable development resolution), a "dramatic rise in global concerns regarding the planet's environment" has occurred. Both the 2005 United Nations Environment Programme's (UNEP) "A Report of the Millennium Ecosystem Assessment: Ecosystems and Human Well-Being" and the February 2007 reports by the Intergovernmental Panel on Climate Change have warned about damage to the environments caused by humans.

The recommendation seeks to:

a) Identify and illustrate certain fundamental principles that underlie the Rule of Law as it relates to environmental issues;

b) Identify ABA policies and activities that directly or indirectly impact the Rule of Law in the environmental field;

c) Propose a course of action for the ABA that would promote a greater understanding of those fundamental principles enjoying sufficient national and international acceptance to serve as a foundation for the ABA to address the Rule of Law in relation to the environment.

The sponsors acknowledge, "Many of the principles are not yet universally accepted in the international environmental law area," including by the United States. Thus, the sponsors present the report as "illustrative of the fundamental principles only."

These "fundamental principles" include:

1) State Sovereignty: "Each nation-state has complete political and legal control over its environment and natural resources."

2) Good Neighborliness: the duty to cooperate.

3) No-Harm Rule: Based on Stockholm Principle 21, states "have an obligation not to cause or allow environmental harm outside their borders."

4) Sustainable Development: Although its definition remains "uncertain and controversial," the sponsors mention principles identified by a Professor Pring. These principles include the supremacy of human needs, intergenerational and intra-generational equity, international cooperation, and the need to conserve natural resources.

5) Right to Develop: This includes the right of individual states to control their own economies and development along with the right "to expect a minimum level of economic development or wealth."

6) Right to a Clean, Healthful Environment: The sponsors note that some experts "believe that the right to a healthful environment is becoming an international human right, it remains largely an aspirational goal." The United States has not created a legal right to a healthful environment, although some states such as Mexico and India have.

7) Environmental Justice: This includes principles of both inter- and intra-generational equity, referred to several times in the Rio Principles.

8) Equitable Utilization of Shared Resources: This is "based on a balancing of many equitable factors in addition to the first-in-time-first-in-right historic use rule."

9) Conservation.

10) The Global Commons: This includes areas outside the boundaries of any state. The "Common Heritage of Humankind" regimes include the 1967 Outer Space Treaty, the 1979 Moon Treaty, and the 1982 Law of the Sea.

11) Common Concern of Humankind (CCH): This contends "the planet is ecologically interdependent and that humanity may have a collective interest in certain activities that take place or resources that are located wholly within state borders." The international

community "has the right and duty to take joint or separate action to prevent environmental harm" in areas such as ozone layer depletion, global climate change, and endangered species protection. CCH is often described as a "doctrine of standing."

12) Common But Differentiated Responsibilities (CBDR): This acknowledges the dichotomy between developed and developing nations.

13) Polluter-Pays Principle.

14) State Responsibility and Liability: "There is a general principle of international law that states are responsible for violations or breaches of their duties or obligations under international law."

15) Public Participation: Several factors, including the internet, sustainable development, democratization, and international human rights law, recognize the increased desire of the public to participate. This includes access to information, public participation in decision-making, and access to justice (including citizen lawsuits).

16) Transboundary Impacts: This is a "substantive and procedural principle which cuts across all aspects of public participation and holds that states should treat both other states' environments and people as well as they treat their own."

17) Prior notification, Consultation, and Negotiation Duties: The duty of "good neighborliness" suggests that states notify other states of their plans, engage in consultation, and possibly even negotiate in good faith.

18) Prevention Principle: This requires "anticipatory investigation, planning, and action before undertaking activities which can cause environmental harm."

19) The Precautionary Principle or Approach: This "attempts to address the scientific uncertainty underlying much of the environmental regulation and public policy." The sponsors note "there is considerable debate concerning whether there is an international principle of caution."

20) Duty to Conduct Environmental Impact Assessment: This includes investigation and analysis of proposed projects.

21) Duty to Adopt Effective National Law and the Duty to Enforce: The sponsors note "international environmental laws are only as effective as the states' willingness to implement and enforce them." Effective national laws are needed to implement and enforce international treaties.

22) The Integration Principle: "Environmental considerations must be made an integral part of government and development decision making."

The sponsors conclude, "This resolution is necessary to clearly and affirmatively establish that the ABA supports integration and consideration of environmental laws."

CONCLUSION

With so many entities within the ABA vying to voice its perspectives on U.S. environmental regulation, climate change, emissions trading, and international environmental issues, the debate within the ABA concerning these policies will only intensify in the years ahead. At press time, the ABA Business and Litigation Sections have not co-sponsored Recommendation 110A. The Goal VIII Campaign will ensure that these issues will remain on the forefront of the ABA's agenda in the coming year. ABA panels and conferences will also highlight these issues.

Barwatch will report on environmental law-related CLE discussions at the annual meeting in August and offer a report on Recommendation 110A.

Congressional Oversight and Executive Power in Today's World

A Debate
Sponsored by
The American Bar Association Section of
Individual Rights and Responsibilities
and
The Federalist Society for Law and Public Policy

August 12, 2007
2:00 p.m.—3:30 p.m.

Moscone Center West, Room 2004
San Francisco, California

In the wake of concerns about the scope of executive power in the war on terror, detention, interrogation, surveillance, signing statements and U.S. Attorney firings, what level of Congressional oversight is permitted and how much discretion does the President have as Commander-in-Chief? These and related issues will be discussed in a debate co-sponsored by the ABA Section of Individual Rights and Responsibilities and the Federalist Society, and moderated by ABA Past President Robert Grey.

Speakers

Robert Grey, Past ABA President (moderator)
Mark Agrast, Senior Fellow, Center for American Progress
John Payton, Partner, Wilmer Hale
David Rivkin, Baker & Hostetler
Glenn Sulmasy, National Security Commentator

Reception to follow (sponsored by the Federalist Society).

Section of
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and Responsibilities
AMERICAN BAR ASSOCIATION

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