ABA WATCH

THE FEDERALIST SOCIETY
Building the Next Generation
Advancing the Rule of Law
1982 • 25th ANNIVERSARY • 2007

FEBRUARY
2007

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

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

Model Code of Judicial Conduct

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

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

Continued on page 14

Michael Wallace Speaks with the Federalist Society

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

Continued on page 11

INSIDE

ABA Partners with Diverse Coalition In Seeking Reforms to Thompson Memo
Page 2

Department of Education Reviews ABA Law School Accreditation Standards
Page 3

National Right to Work Legal Defense Foundation Seeks Participation in ABA Labor Conference
Page 6

ABA President Criticizes Charles Stimon's Remarks about Guantanamo Lawyers
Page 7

ABA Testimony in Michael Wallace Nomination
Page 8

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.

This issue features an interview with Michael Wallace, who was nominated to the United States Court of Appeals for the Fifth Circuit. He discusses his experience being vetted by the ABA Standing Committee on Federal Judiciary. The ABA's Testimony is included. We also discuss the ABA's work promoting the attorney-client privilege and recent developments concerning law school accreditation. And, as in the past, we digest and summarize actions before the House of Delegates.

Comments and criticisms about this publication are most welcome. Please write, call or E-mail:

The Federalist Society
1015 18th St., N.W., Suite 425
Washington, D.C. 20036
(202) 822 8138
info@fed-soc.org

ABA Partners with Diverse Coalition In Seeking Reforms to Thompson Memo

The American Bar Association has partnered with a diverse legal coalition to seek reforms to the "Thompson Memo," which outlines corporate prosecution guidelines of criminal offenses. Together with the United States Chamber of Commerce, the American Civil Liberties Union (ACLU), the Association of Corporate Counsel, former senior Department of Justice (DOJ) officials, and the National Association of Criminal Defense Lawyers, the ABA has maintained that provisions of the memo jeopardize the attorney-client privilege. This resulting scrutiny led the Thompson Memo to become the subject of several speeches and hearings in 2006. Despite a few recent revisions, announced by Deputy Attorney General Paul McNulty, the coalition critics are still urging further reforms. In particular, many of these coalition critics are endorsing reform legislation proposed by Senator Arlen Specter. *ABA Watch* examines the recent controversy and the ABA/coalition efforts to urge changes to the Thompson Memo.

Past ABA Activity Regarding A Attorney-Client Privilege

In 2004, the ABA launched a Task Force on Attorney-Client Privilege to "study and address the policies and practices of various federal agencies that have eroded attorney-client privilege and work product protections." The Task Force was organized one year after the January 2003 issuance of the Thompson Memo, which was announced by then-Deputy Attorney General Larry Thompson. The ABA Task Force was directed to consider recent federal amendments to the federal sentencing guidelines and Justice Department actions—including the Thompson Memo—affecting the privilege.

The Task Force's recommendations were unanimously adopted at the ABA's Annual Meeting in 2005. The resolution declared its support for the preservation of the attorney-client privilege and opposed "policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections." It further "oppose[d] the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage."

Letters to the Department of Justice

In 2006, the ABA used its new policy to lobby for reforms to the Thompson Memo. In May, then-ABA President Michael Greco sent a letter to Attorney General Alberto Gonzales voicing the ABA's concern over the Thompson Memo guidelines. He urged the Department to consider modifying its "internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product privilege protections as a condition for receiving cooperation credit during investigations." Greco also criticized an October 2005 memo released by then-Acting Deputy Attorney General Robert McCallum to all United States Attorneys and Department Component Heads instructing them to adopt "a written waiver review process for your district or component." Greco warned that this memo "likely will result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver."

Greco also discussed the ABA's concern that the government waiver policies would weaken companies' internal compliance programs. According to Greco, the waiver policies "discourage entities from consulting with their lawyers…and conducting internal investigations designed to quickly detect and remedy misconduct."

Greco outlined three suggestions that the ABA Task Force on Attorney-Client Privilege and its coalition partners proposed to remedy the problems. These reforms would: "1) prevent prosecutors from seeking privilege waiver during investigations; 2) specify the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation; and 3) clarify that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation." According to Greco, these changes "would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections."

In July, Attorney General Gonzales responded, reiterating the government's "zero tolerance" policy toward corporate fraud. He emphasized that there were a number of ways in which a corporation could cooperate with the government under the Thompson Memo guidelines. He affirmed, "One such factor,

Education Department Reviews ABA Law School Accreditation Standards

On December 4, 2006, the Department of Education held a hearing examining the ABA's standards for accrediting law schools. Currently, supreme courts and bar examiners of all 50 states use ABA accreditation approval as a factor in granting law school graduate licenses. The National Advisory Committee on Institutional Quality and Integrity, the Department's appointed panel, considered whether to re-certify the ABA as the official accrediting agency.

The hearing included a heated discussion about the ABA's recently adopted diversity standards. Recently adopted Standard 212 states that each law school "shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity." The Standard also states that "concrete action" should ensure that the faculty and staff are also diverse.

The Interpretations of Standard 212 assert that the rule is consistent with *Grutter v. Bollinger* (2003), which allowed the consideration of race and ethnicity in law school admissions. The Interpretations state that the Standard "does not specify the forms of concrete actions a law school must take" but that the "commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students, and [initiatives] that create a more favorable environment for students from underrepresented groups."

This new diversity Standards has provoked much discussion from critics on both sides of

the legal spectrum (See *ABA Watch,* August 2006 for more details). Last summer, the United States Commission on Civil Rights held hearings to discuss whether the Standards were unconstitutionally required the use of racial preferences in hiring and law school admissions. The National Association of Scholars also asked the Department of Education to not renew the ABA's accrediting power unless the rewritten rules were removed. Other critics, such as the Congressional Black Caucus, maintained that the Standards did not sufficiently support minorities.

These conflicting perspectives were debated at the December Department of Education hearing. Roger Clegg, President and General Counsel for the Center for Equal Opportunity, urged non-renewal of the accrediting authority unless there was formal assurance that the ABA would not coerce law schools into racial, ethnic, and sex discrimination and preferences of any kind. Bill James, an Education Department official, contended that while Standard 212 did not explicitly require quotas, "The language is so vague that they can be reasonably read to require just that."

Members of the ABA defended the rewritten policy, maintaining that they had been defending diversity for over two decades. Some members charged that the attacks on Standard 212 stemmed from an anti-affirmative action agenda. William Rakes, the chairman of the ABA's Section of Legal Education and Admissions to the Bar, countered that the debate had been twisted into "a policy issue relating to affirmative action, relating to diversity." Rakes went on to say that diversity standards should not play a role in whether or not the ABA was reauthorized as an accreditation authority.

The National Advisory Committee on Institutional Quality and Integrity decided to renew the ABA's accreditation powers for 18 months, rather than the usual 5 years. The body also charged the Association with improving its system for accrediting law schools, although the staff did not make any specific requirements regarding the rewritten diversity standard. The next authorization hearings will occur before the end of President Bush's second term.

but certainly not the only factor, can be whether the corporation has waived its attorney-client privilege and work product protections. In such circumstances, corporations are generally represented by sophisticated counsel and make informed and considered decisions on whether to offer such waivers, to agree to make requests for them from prosecutors, or to refuse such requests." He dismissed the idea that prosecutors create a "culture of waiver," contending that waivers were "sought only when based upon a need for timely, complete, and accurate information and only with supervisory approval after a review of the underlying facts and circumstances."

ABA President Karen Mathis later stated that the ABA was "very disappointed" by Gonzales' response.

Senate Judiciary Committee Hearing

On September 12, 2006, new ABA President Karen Mathis testified before the Senate Judiciary Committee concerning "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations." Mathis reiterated Greco's concerns about the attorney-client privilege and other provisions in the Thompson Memo that erode "employee's constitutional and other legal rights, including the right to effective legal counsel and the right against self-incrimination."

Mathis outlined what many view as the unintended consequences of prosecutorial demands for privilege waiver. First, the ABA contends that waiver policies "resulted routinely in the compelled waiver of attorney-client privilege and work product protections…[T]hese polices have led many prosecutors to pressure companies and other entities to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations." Mathis asserted that the government's threat to label companies as "uncooperative" forces companies to waive when asked to do so. Mathis also discussed the findings of a March 2006 survey of over 1,200 corporate counsel compiled by the Association of Corporation Counsel, the National Association of Criminal Defense Lawyers, and the ABA. Almost 75% of respondents replied that a 'culture of waiver' had developed in which "governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections."

Second, Mathis maintained that these policies "seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public." These requirements serve to discourage

entities from cooperating with their lawyers, impeding the ability of attorneys to comply with the law. Third, Mathis contended that these waiver polices "are likely to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures," including internal investigations. These requirements all serve to "undermine rather than enhance compliance with the law."

Mathis discussed the findings of the ABA Task Force and its collaboration with coalition partners such as the Chamber of Commerce, the Association of Corporate Counsel, and the ACLU. She highlighted the "political and philosophical diversity" of these partners as a reason to give credence to their recommendations. She also maintained that the coalition's suggestions contributed to the U.S. Sentencing Commission decision to reverse unanimously its 2004 privilege waiver amendment. The coalition continues to work together to provoke changes to the Thompson Memo.

The ABA's proposal "would amend the Department's policy by prohibiting prosecutors from seeking privilege waiver during investigations, specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and clarifying that any voluntary waiver of privilege shall be considered when assessing whether the entity provided effective cooperation. This language would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege and work product protections."

In addition to promoting the attorney-client privilege, Mathis also declared, "It is equally important to protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation." Specifically, Mathis criticized the Thompson Memo's provisions encouraging prosecutors to deny cooperation credit to companies that assist or support their "so-called 'culpable employees and agents'" who are under investigation. Mathis outlined in her testimony the reasons why the ABA opposes these provisions. First, the "policy is inconsistent with fundamental legal principles that all prospective defendants…are presumed innocent." Second, "it should be the prerogative of a company to make an independent decision as to whether an employee should be provided defense or not." Third, "these provisions…improperly weaken the entity's ability to help its employees to defend themselves in criminal actions." Fourth, U.S. District Court Judge Lewis A. Kaplan in *U.S. vs. Stein* had already declared several of the provisions questionable. In the decision, Judge Kaplan suggested that these provisions violated the employee's Fifth and Sixth Amendment rights.

Mathis concludes that the ABA's proposed changes "would strike the proper balance between effective law enforcement and the preservation of essential attorney-client, work product, and employee legal protections."

Proposed Changes

On December 12, U.S. Deputy Attorney General Paul McNulty announced in a speech before the Lawyers for Civil Justice meeting that the Department of Justice (DOJ) would be revising some provisions of the Thompson Memo. According to a DOJ press release, "Prosecutors must first establish a legitimate need for privileged information, and that they must then seek approval before they can request it. When federal prosecutors seek privileged attorney-client communications or legal advice from a company, the U.S. Attorney must obtain written approval from the Deputy Attorney General. When prosecutors seek privileged factual information from a company…prosecutors must seek the approval of their U.S. Attorney. The U.S. Attorney must then consult with the Assistant Attorney General of the Criminal Division before approving these requests."

In his speech, McNulty disagreed with the assertion that blanket waivers were routinely sought in the past, contrary to the findings of the March 2006 ABA survey. He affirmed that such attorney-client communications would only be sought in limited occasions, and prosecutors must show a "legitimate need" for such information. However, "this is not to say that if the corporation decides to give us the information, we will not consider it favorably."

With respect to whether the advancement of attorney fees would be considered in corporate prosecutions, McNulty also emphasized that this was only a "rare" consideration. However, revisions to the guidelines would "now generally prohibit prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment. So the guidance generally prohibits consideration of fees, but in those extremely rare cases, fee advancement can be considered where the totality of the circumstances shows that it was intended to impede a government investigation." McNulty asserted, "The revisions in our guidance make sense, while still preserving the Department's right to obtain needed privileged information where appropriate. And they encourage the company's compliance efforts."

Reaction to this announcement was mixed amongst

National Right to Work Legal Defense Foundation Seeks Participation in ABA Labor Conference

Between March 4-7, 2007, the ABA's Labor and Employment Law Section's Committee on Development of the Law Under the National Labor Relations Act will be hosting its Midwinter Meeting in Hawaii. Conference panels will analyze labor court cases, with members of management, unions, and the National Labor Relations Board all represented. Panels at this conference will consider *Heartland Industrial Partners*, *Dana/UAW*, and Section 302 cases, all of which are being litigated by the National Right to Work Legal Defense Foundation (NRTW).

NRTW describes itself as a non-profit organization that provides legal assistance to employees "whose human and civil rights have been violated by compulsory unionism abuses." NRTW leadership maintains that the ABA panels are not balanced. Representatives of management, unions, and the government are represented, but attorneys representing employees, particularly non-union employees, are not included on the panel, and, NRTW contends, this is an altogether different perspective in many of the areas covered by the conference.

Recent correspondence between Stefan Gleason, Vice President of the NRTW Legal Defense Foundation, and W.V. Bernie Siebert, Co-Chairman of the ABA committee, provides some background regarding the composition of NRTW lawyers at the conference. On November 22, Mr. Gleason wrote that the attorneys who worked on these cases would gladly participate in the panels, offering a third perspective that would "enhance members of the coalition opposing the Thompson Memo provisions. Stanton Anderson, Senior Counsel at the U.S. Chamber of Commerce, acknowledged that while the policy contained some improvements, it still did "not adequately protect the right to attorney-client privilege, and unwisely ignores many of the recommendations of former senior Justice Department officials, the ABA, and a massive coalition of some of the nation's most prominent business, legal, and civil rights groups." He called for DOJ to "take its cue" from proposed legislation offered by Senator Arlen Specter calling for reforms.

Karen Mathis offered an even more harshly worded response. The new guidelines "fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations. They are but a modest improvement over the Department's previous policy." In particular, she singled out two of McNulty's provisions. First, she criticized the decision to require a high level Department approval of a waiver request rather than eliminating the practice of waiver. Second, she criticized the policy's lack of protection of employee legal rights as it continued to permit prosecutors to force companies to take punitive actions against employees before guilt was established. Mathis also endorsed the Specter bill and urged the Senate to consider the legislation in January.

Recent Developments

In recent months, scrutiny of the Memo has continued, extending even to the Department of Justice officials who originally formulated the policy. At a November panel discussion co-sponsored by the Heritage Foundation and the Federalist Society, Larry Thompson defended the goal of the policy, while also questioning whether prosecutors may have become overly aggressive in persuading businesses to cooperate with prosecutors. He suggested that the instances in which prosecutors should ask companies to waive the attorney-client privilege should be "extremely limited." Thompson suggested that "appropriate revisions" should be considered.

In December, Senator Specter introduced legislation to limit the impact of the Thompson Memo. The bill would prohibit prosecutors from offering a waiver to determine the level of cooperation of companies under investigation. In January, at the start of the 110th Congress, Senator Specter reintroduced the "Attorney-Client Privilege Protection Act of 2007" (S. 186). In his floor statement reintroducing the bill, Senator Specter stated that McNulty's proposed revisions did not go far enough in deterring prosecutors from requesting privileged attorney-client communication.

ABA President Criticizes Charles Stimson's Remarks about Guantanamo Lawyers

In both a video and an op-ed, ABA President Karen J. Mathis criticized recent remarks made by Charles Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs. In a January 11 radio interview, Stimson suggested that corporations would be troubled to learn that they employed law firms whose lawyers also provided pro bono support to Guantanamo detainees. Mathis has called these comments "deeply misguided" and "almost universally repudiated." She goes on to say that "Americans recognize that punishing [these] firms is wrong."

Mathis maintains that every person, even suspected terrorists, have the right to legal representation. She writes, "The lawyers representing Guantanamo's detainees are attempting to assure justice, despite extremely challenging circumstances, and they have done so as volunteers, in the finest tradition of this country's legal profession." She goes on to add that habeas review is also a pillar of the American legal tradition. Mathis states that the ABA "continues to urge Congress to restore the right of habeas appeal to those prisoners." Only by providing competent defense, she maintains, can the United States prove the justice of its cause and champion "our finest values as a nation."

Some contrast this position to one that the ABA Standing Committee on Federal Judiciary advanced during its assessment of Michael Wallace, nominee to the United States Court of Appeals for the Fifth Circuit. In testimony to the United States Judiciary Committee, Chairman Robert Liebenberg indicated that several lawyers interviewed by the ABA Committee questioned Wallace's representation of the Mississippi Republican Party in Voting Rights Act cases. However, Liebenberg attested that it was not Wallace's mere representation of clients in these cases, but the "'ferocious' manner" in which he litigated the cases.

the discussion." On November 28, Mr. Siebert responded, writing that all the presenters had been selected earlier in the month so that they could have publishable papers ready by January.

Mr. Gleason wrote back on December 1, expressing his disappointment that the NRTW attorneys would not be given the chance to participate. Mr. Gleason maintained that his organization's attorneys could easily have papers prepared by January. He stated that this was the fourth consecutive ABA labor law conference featuring NRTW cases where the primary attorneys were not invited to participate. On December 4, Mr. Siebert replied that the Committee was not trying to exclude the NRTW lawyers, but rather it had already selected the conference speakers. He also disagreed with an assertion by Mr. Gleason that the ABA's credibility would be undermined by failing to fill out the panels, maintaining that the ABA's dedication to traditional labor law had never been questioned.

This is not the first time that NRTW members have been unable to participate in ABA events. A March/April 2005 NRTW publication, *Foundation Action*, detailed how, at the behest of a group of union lawyers, Mr. Gleason had nearly been ejected from a 2005 ABA labor law conclave which discussed several NRTW cases.

At press time, NRTW attorneys were not included as panelists for the ABA conference, though additional speakers have been added.

ABA Testimony in Michael Wallace Nomination

What follows are excerpts from testimony from the question and answer portion of Michael Wallace's hearing before the United States Senate Judiciary Committee on September 26, 2006.

SENATOR JOHN CORNYN: Can you explain to me what the circumstances are under which a member of the Standing Committee would recuse themselves for a conflict of interest or an appearance of partiality?

ROBERTA LIEBENBERG, CHAIR, ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: Yes. As set forth in our backgrounder, we do set forth a recusal standard that sets forth that, if there is any appearance of impartiality or if the participation would be incompatible with the purposes and functions of the committee, then the member of the committee should recuse him or herself.

In the case of Mr. [Stephen] Tober, I think it's important to emphasize that Mr. Tober did not participate in any way in the rating. The chair does not participate unless there is a tie vote. And, of course, there was not a tie vote. The vote here was unanimous.

In addition, Mr. Tober had no influence over any of the members of the committee. Each of the members, the 14 members, as I said, represents different judicial districts. They have unique backgrounds. They exercise and take very seriously their obligation to evaluate all the materials and to vote independently, which is what they did.

And Mr. Tober, since he did not participate in either the evaluation or the rating, did not have to recuse himself under our standards as they existed.

CORNYN: I understand, in 1989, while Mr. Wallace was chairman of the board of Legal Services Corporation, he was invited to appear in that capacity on a panel of a meeting of the ABA in Honolulu, where the role of the federal government in providing legal services to the poor was one topic of discussion. And there erupted quite a disagreement apparently among the panel members. There's a letter, Mr. Chairman, from a Mr. Fred M. Bush Jr., of the Phelps Dunbar Firm in Tupelo, Mississippi, that describes what I'm about to talk about, which I'd ask to be made a part of the record by unanimous consent.

SENATOR JEFF SESSIONS: It will be made a part of the record.

CORNYN: Mr. Bush says that during this debate, he said, "The ABA panelists were so vicious and personal in their attack on Mike that many of us were offended and expressed our displeasure at the time. One of the members of that panel is now the president of the American Bar Association." That's Mr. [Michael] Greco. And I believe another is on the Standing Committee." Similarly, there was another -- and that letter -- and it'll be made a part of the record -- is July 5, 2006.

Similarly, there's another letter from the Bar Leaders for the Preservation of Legal Services to the Poor, dated September 15, 1999. This is a letter signed by a Gail Kinney, coordinator. Mr. Chairman, I'd like to ask this be made part of the record by unanimous consent as well.

SESSIONS: Without objection.

CORNYN: Where Ms. Kinney said, "I understand," -- this is a letter to Mr. Wallace. She said, "I understand that you or perhaps some of your Mississippi colleagues may have come away from the presentation feeling insulted by a remark that Mike Greco made about your being a, quote, 'gentleman from Mississippi,' or something like that, during a spirited opposition to the activities of the current Legal Services board." That doesn't sound like too much of a nasty exchange there.

I guess my point is though that Mr. Greco and, to some extent, Mr. Tober were on opposite sides in an ongoing and very public and heated debate about the proper role of the Legal Services Corporation during Mr. Wallace's tenure there. Isn't that right?

LIEBENBERG: I don't know the complete details of the disagreement. But I'll just reemphasize that neither Mr. Tober nor Mr. Greco participated in the evaluation or the rating of Mr. Wallace. And I would just add one additional factor as that, just recently, as chair of the committee, we conducted a new supplemental evaluation of Mr. Wallace. Ms. Bresnahan will be here to testify about that evaluation.

CORNYN: That was a supplemental evaluation, was it not?

LIEBENBERG: Yes, it was.

CORNYN: It didn't go back and revisit the matters previously investigated or for possible taint or bias or...

LIEBENBERG: In general, what our procedures call for

is that, in a supplemental evaluation, the investigator looks at any new information that might have developed between the last rating and evaluation and brings the evaluation forward. Under our rules, however, an investigator can look at information prior to the time before the nomination to make sure that there has been a thorough and complete evaluation, and to make sure that the evaluation and, as I asked Mr. Hopkins and Ms. Bresnahan to make sure, that the evaluation was even-handed, complete and balanced. And as you will hear from Ms. Bresnahan, that's exactly what they did do, given the time. That was a very expedited basis that we had to conduct this supplemental evaluation.

CORNYN: Is that...

SESSIONS: Senator, get a couple of things straight. First, I think obviously the writer of the letter from Legal Services that you offered felt that the tone and the tenor of suggesting he was someone from Mississippi probably, having been from Alabama, was dismissive and perceived as not courteous. But the point of which is that letter indicated that they believed he had been mistreated or had been disrespected in some way. Secondly, who was participating in that panel that that occurred? I want to get this straight. The president of the American Bar Association at the time the committee was appointed that evaluated Mr. Wallace?

CORNYN: This was the immediate past president of the American Bar Association, Michael Greco, in his capacity as co-founder of Bar Leaders for the Preservation of Legal Services to the Poor. This is in 1989 and...

SESSIONS: And was the lady member of that committee that was participating in that panel, did she participate in this evaluation? Is that correct, Ms. Liebenberg?

CORNYN: Mr. Tober was this chair of the Standing Committee, immediate past, that oversaw the evaluation process for Mr. Wallace. And he was -- if I can just try to clarify my point -- apparently, in opposing a proposed regulation to require that the boards receiving Legal Services Corporation funds have bipartisan membership, as does the LSC itself, Mr. Tober was reported to flamboyantly accuse Wallace of attempting to fashion a political bias litmus test and of having a hidden agenda. And he vowed to disobey the regulation if it became law. Have any of you heard about that exchange?

LIEBENBERG: I would just, again, add that Mr. Tober did not participate in the evaluation. Ms. Askew is here. She can...

SESSIONS: But Mr. Tober was chairman of the committee that oversees these evaluations. Isn't that correct?

LIEBENBERG: He was the chair. He was the chair of the committee. But he does not oversee the evaluation. Ms. Askew, as the investigator, and then Mr. Hayward, as a second investigator, were charged with the responsibility of conducting the evaluation.

SESSIONS: Who appoints these committees?

LIEBENBERG: The individuals appointed to the ABA Standing Committee are appointed by the ABA president.

SESSIONS: So that would be Mr. Greco?

KIM J. ASKEW: No.

LIEBENBERG: Yes.

SESSIONS: So Mr. Greco, who participated in this...

ASKEW: He's only a third.

LIEBENBERG: Yes, only a third of the Standing Committee.

SESSIONS: You know, we don't need to go too much further I don't think. I would just say to you, I remember the bitterness of this fight. And I remember what I believe was a very wrong position of the American Bar Association in opposing reform of Legal Services Corporation. They opposed it aggressively, hostilely and openly, and lost. And now, we have a man who participated in that reform, consistent with what the president of the United States desired and the Congress has ratified as a reorganization method for Legal Services Corporation, and they are now judging him. And if you are participating in a trial, Ms. Liebenberg, and you were being adjudicated by a judge, do you think a Motion to Recuse would be appropriate under these circumstances?

LIEBENBERG: In these circumstance, where Mr. Tober would not be acting as a judge, no, I do not think it would be appropriate. He was not...

SESSIONS: Yes. He was in a position to vote if there were a tie, was he not?

LIEBENBERG: If there had been a tie. But the vote was unanimous.

SESSIONS: But he was in a position...

LIEBENBERG: He didn't...

SESSIONS: So you're saying he can be on a panel and have opportunity to cast a vote, and you don't think that's

improper? And remember, you're under oath.

LIEBENBERG: I understand that, Senator.

SESSIONS: And my question was, if you were being tried, would you accept such a position?

LIEBENBERG: If I was being tried for some offense, there might be an issue with respect to an appearance of impropriety. This is not a process where Mr. Tober had any role whatsoever in the evaluation or in the vote. This has been a very thorough and comprehensive evaluation. As I said, over 120 different judges and lawyers have been interviewed. Mr. Wallace has been interview for over 12 hours. There have been 21 separate...

SESSIONS: Interviewing him doesn't make any difference if the jury is stacked. That's the question we have here.

LIEBENBERG: Well, there have been 21 separate...

SESSIONS: Well, let me ask Senator Cornyn. He has to ask a question. Then, I'll let you respond to mine.

CORNYN: Unfortunately, I'm going to have to leave. But there's a letter, Mr. Chairman, that was written by Senator Specter to Michael S. Greco, president of the American Bar Association, and Stephen L. Tober, then-chairman of the Standing Committee on the Federal Judiciary. And I would like to -- this is dated August 7, 2006 -- ask unanimous consent that it be made part of the record.

SESSIONS: Without objection.

CORNYN: Let me just ask to highlight just a couple of paragraphs, and the whole letter will be part of the record.

Senator Specter said, "I've had the opportunity to review the testimony with regard to both nominees." He's talking about Judge Bryant and Mr. Wallace. And he said, "I'm troubled by your submission. Your testimony raises serious charges but only supports those allegations with anonymous quotations presented without context. Testimony of this sort is impossible to verify or otherwise further investigate. Worse, it can give some the unfortunate impression of a smear campaign conducted against the nominees. The nominees publicly branded not qualified and in your testimony, worse, do not have the opportunity to confront their accusers."

The letter goes on. But Senator Specter asked specifically that the American Bar Association promptly take the step of immediately revoking its not-qualified rating of Mr. Wallace and begin a new review process. Have you had a chance to look at the letter and make a decision one way or the other?

LIEBENBERG: We did have an opportunity to look at the letter and obviously took Senator Specter's concerns very seriously. As a result, as I think has been mentioned by the chairman, we retained Mr. Olson who did help us and respond to the concerns raised by the chairman. And as a result of that, we have clarified certain of our procedures.

CORNYN: And you've changed your procedures?

LIEBENBERG: No. I said we clarified our procedures to make them...

CORNYN: You clarified what you did and not clarified your procedures for prospective applications?

LIEBENBERG: Both. We've clarified our procedures, as the ABA committee has done over the years. We continuously refine and reexamine our procedures. So in this instance...

CORNYN: So you changed your procedures as a result of the concerns that were raised in this letter and...

LIEBENBERG: I don't believe I said change. I'm sorry, Senator Cornyn. I said we've clarified those procedures to make sure that our procedures are known and understood to the nominees and to the public.

CORNYN: But you turned Senator Specter down?

LIEBENBERG: We conducted a new evaluation.

CORNYN: You didn't revoke the not-qualified finding, correct?

LIEBENBERG: We did not revoke. It has been superseded by the new rating that was done by a new committee where seven of the 14 members were appointed by a new ABA president. And as a result of the careful consideration of those materials, they have voted, and they have voted unanimously that Mr. Wallace is not qualified.

CORNYN: Thank you.

Michael Wallace Interview

Continued from Cover...

Judiciary Committee, with several members of the ABA testifying. On December 26, Wallace asked President Bush to withdraw his nomination.

ABA Watch is pleased to present this interview, conducted over email, with Wallace about his experiences being vetted by the ABA Committee. Excerpts from the ABA's testimony at the Wallace hearing can be found on page 8.

TFS: What are some of your observations about the vetting process by the ABA Standing Committee on Federal Judiciary, as well as the interview you underwent?

MW: I underwent, not one interview, but five interviews by the ABA. Not until its submission of written answers after my hearing before the Senate Judiciary Committee did the ABA make clear that it had taken into consideration the investigation it conducted in 1992, when President George H. W. Bush had selected me for a vacancy on the Fifth Circuit; that investigation was cut short by the results of the 1992 election. The ABA apparently considered the two interviews it conducted with me in 1992, as well as the anonymous interviews it conducted with others at that time, notwithstanding assurances I received from the initial investigator in 2006 that charges raised against me in 1992 were no longer an issue in 2006. Certainly, the ABA never informed either me or the Senate Judiciary Committee that it had considered evidence more than 14 years old until after I had concluded my own testimony before the Committee.

TFS: Roberta Liebenberg, the current chair of the ABA's Standing Committee on Federal Judiciary, testified before the Senate Judiciary Committee that the ABA Committee is "sensitive to the critical need to be fair to the nominee with respect to any adverse comments that are received during the course of the evaluation process." Investigators will disclose to the nominee "as much of the underlying basis for the adverse comments as reasonably possible." Nominees "are afforded a full opportunity to rebut the adverse comments and provide any additional information relevant to them." Do you believe this was true in your case? If not, when were you apprised of any problems in the ABA's investigation? Was there an explanation?

MW: In their testimony ABA witnesses claimed that I asked them to reveal the identities of individuals who had charged me with improper behavior. That is not true. Instead, I asked them to reveal the circumstances so that objective evidence could be checked. I repeatedly emphasized that most of what I have done in a courtroom and everything that I did as a director of the Legal Services Corporation had been transcribed. The identification of particular incidents would not identify the ABA's informant; anyone who had been at the hearing or had later viewed the transcript could be the ABA's source. Nevertheless, with one exception, the ABA refused to identify any situation where I had allegedly behaved with an inappropriate temperament.

A former President of the New Hampshire Bar named Jonathan Ross authorized the third group of ABA interviewers in 2006 to identify him as an informant. He told the ABA that I had behaved rudely and disrespectfully at an LSC committee meeting that I chaired in New Hampshire in 1985. The transcript of that meeting reveals that Mr. Ross did not testify before my committee, although it is possible that he attended that public hearing. Our committee spent most of that day amending the Code of Federal Regulations to specify the rules governing recipients of LSC funds in encouraging private attorneys to provide legal assistance to the poor. The meeting was as boring as it sounds; it contains no evidence to support Mr. Ross's charges against me.

Although the ABA implied that they had heard reports of other incidents involving alleged rudeness on my part, they never identified any others. Obviously, the alleged incident in New Hampshire could have been disclosed to me without disclosing Mr. Ross's identity; likewise, other alleged incidents could be disclosed without revealing the name of the informant, as no one would have any way of knowing which of the many participants had disclosed the incident to the ABA. Because the ABA chose not to disclose any of those supposed incidents, I never had any opportunity to rebut adverse opinions by producing actual transcribed facts.

TFS: Do you have any comments regarding the ABA's public statements describing the vetting process connected with your nomination?

MW: I have already noted the inaccuracy of the ABA's contention that I was given the opportunity to rebut adverse comments. In its testimony before the Senate Judiciary Committee, the ABA further admitted that it relied on anomymous charges.

The policy which the ABA sent to me expressly declared that the investigator "will advise the nominee of such [adverse] information if he or she can do so

without breaking the promise of confidentiality;" absent such disclosure, "the Committee will not consider those facts in its evaluation." The ABA witnesses told the Judiciary Committee that they had nevertheless relied on anonymous charges. As they explained their policy, it was sufficient if the members of the ABA Committee knew the name of the accusing witness. They declared that their policy required anonymous charges to be disregarded only when the ABA Committee members as well as the nominees were kept in ignorance of the accuser's name.

Not everyone in the ABA agrees with its witnesses' reading of the policy. Scott Welch of Mississippi, a member of the ABA Board of Governors, testified on my behalf before the Senate Judiciary Committee. He testified that he found the testimony of the ABA witnesses to contravene the clear meaning of the policy. He agreed that the ABA written policy precludes the ABA Committee from relying upon anonymous charges when the nominee cannot be given sufficient information to answer them. The ABA Committee nevertheless admitted that it relied on such charges in forming its judgment.

Only recently, in response to questions from Ed Whelan, has Roberta Liebenberg, the new chair of the ABA Committee, revealed that the first 2006 investigator circulated to the entire Committee "the documents pertaining to the Standing Committee's 1992 evaluations of Mr. Wallace." This belated revelation sheds new light on her sworn testimony to the Senate Judiciary Committee that "neither Mr. Tober nor Mr. Greco participated in the evaluation or the rating of Mr. Wallace." Whether or not they participated in the rating in 2006, it would be astonishing if neither Mr. Greco nor Mr. Tober had given evidence in the 1992 documents circulated to the ABA Committee in 2006. I was told by investigators in both 1992 and 2006 that bar leaders had complained about my supposed rudeness to them during my service at LSC. Both Mr. Greco and Mr. Tober were involved in an organization called Bar Leaders for the Preservation of Legal Services to the Poor. Although Mr. Greco's letter to the *Wall Street Journal* declared that "I did not express any opinion to anyone during the evaluation process," neither he nor Mr. Tober, so far as I am aware, has denied giving evidence to the ABA Committee's investigators in 1992. Any such anonymous charges from the president of the ABA and the chair of the ABA Committee could hardly have failed to carry weight with Committee members.

TFS: In her Senate testimony, Liebenberg emphasized that, "Our processes and procedures have been carefully structured and modified over the years to produce a *fair, thorough, and objective* peer evaluation of each nominee." Do you believe that you received a fair, thorough, and objective evaluation by the ABA? Why or why not?

MW: The only modifications to ABA practices that I can detect between 1992 and 2006 have made them worse. When the initial ABA interviewer disapproved me in 1992, the chairman of the committee advised the Bush Administration of the nature of the supposed problems. I engaged in an extensive correspondence with the Committee to present evidence in opposition to the charges. Because of the result of the 1992 election, no formal resolution of those charges was ever reached.

When the initial investigator found me unqualified in 2006, the chairman of the ABA Committee refused to tell the Bush Administration any of the charges on which the judgment was based. Although a second investigator came to see me before the Committee voted, I still was not advised of any specific charges. In fact, the second investigator told me that there were no specific charges; he said that a lot of people were simply afraid of what I might do if I ever got the chance.

Not until two days before the originally scheduled date for my confirmation hearing did the ABA file testimony with the Senate Judiciary Committee which set out in general terms the accusations against me. The result was that the Committee postponed my hearing until after the summer recess to give me the opportunity to reply to those charges for the first time. The current practice of concealing charges until the last minute hardly seems to be an improvement over the limited communications that were available in 1992.

TFS: What changes, if any, would you propose to the ABA process?

MW: As I told the Committee, I am not a member of the ABA, and their procedures are properly none of my concern. If I were a member of the ABA, it would concern me greatly that their written policies differ substantially from the practices the ABA's witnesses described to the Senate Judiciary Committee. I would likewise be concerned by the discrepancy between their witnesses' descriptions of their interviews with me and my own testimony. I would want to call the Committee members before higher authorities in the ABA in an attempt to determine the truth. Although I am not a member of the ABA, I would be happy to cooperate in any such investigation.

Because the ABA is purely a private organization,

I see no need for them to change their recusal policies. If the ABA were supposed to be an impartial public adjudicatory body, it would be cause for concern that the first interviewer they sent to see me in 2006 was a member of the board of the Lawyers' Committee for Civil Rights under Law, and that the only litigation she raised in the interview was my representation of the Mississippi Republican Party in defense of a redistricting suit brought by the Lawyers' Committee in 1983. If she were a judge, the need for her recusal would seem obvious. Because the ABA is only a private organization, she would have no more reason to refrain from voting on my qualifications than would a Senator in identical circumstances. So long as such potential biases are revealed and taken into account in considering the ABA Committee's evaluation, I see no reason why the ABA should not be able to pick anyone it wants to vote on nominations.

TFS: Have your experiences affected how you think about the role that private organizations play in the judicial selection and confirmation process?

MW: Under our Constitution, it is the role of the President and the Senate to select and confirm judges. Private organizations have no constitutional role apart from that guaranteed to every citizen by the First Amendment. The ABA has as much right to be heard as any other private citizen, and no more.

TFS: What advice would you offer to other nominees about to enter into the ABA vetting process?

MW: The role of the ABA is determined by the Senate Judiciary Committee and the President. The nominee presently has no choice in the matter. The Senate Judiciary Committee wants to hear a recommendation from the ABA, and the President wants his nominees to submit to interviews. The nominee should be aware, however, that the interviewer's report of the interview may be as inaccurate as the anonymous charges upon which the interview is based. The nominee should take extensive notes of the interview and should prepare a written report for his own benefit immediately after its conclusion. In the event any specific charges are revealed by the investigator, the nominees should supply documentary evidence to the investigator as soon as possible, keeping a copy for verification purposes. In the event of a swearing contest between the investigator and the nominee at the confirmation hearings, the nominee should have the best possible evidence.

TFS: Do you have any other comments you would like to offer?

MW: In 2006, the Bush Administration was able to be of very little help to me in dealing with the ABA, in contrast to the extensive help I received from their predecessors in 1992. It was explained to me that the President's decision not to involve the ABA in his nomination process had left his Administration with very little ability to influence the ABA's conduct. Although the ABA continues to participate in the process by invitation of the Senate Judiciary Committee, the ABA in 2006 was no more willing to cooperate with the Senate than with the President. Under those circumstances, a nominee who is attacked by the ABA is effectively defenseless before the public for months until his hearing. I see two possible solutions to the problems.

The first is for the President to forbid his nominees to meet with the ABA. The President's decision to remove the ABA from his own nomination procedures suggests that he has concluded that the ABA differs in no essential respect from any other private organization. The President does not allow his nominees to be interviewed by the press or other private organizations; there is no reason the ABA should be treated any differently. This will not stop the ABA from bringing anonymous charges before the Senate Judiciary Committee; it will stop the ABA from pretending that the nominee has had a chance to answer those charges, and it will require the Senators to base their votes on evidence presented at a public hearing.

The second alternative is to record all nominee interviews before a court reporter. This would seem like an abundance of caution in most cases, since most nominees are not particularly controversial. Nevertheless, for those nominees who are controversial, an interview transcript would resolve the question of whether any particular nominee had been afforded a fair opportunity to address the charges against him. Now, the ABA expects the Senate Judiciary Committee to accept its witnesses' word on that subject, even where there is sworn evidence to the contrary. That controversy, at least, can be easily eliminated by the use of a transcript.

I prefer the first alternative. If the President has concluded that the ABA is no different from any other group of private citizens, then he should instruct his nominees to act that way. Rather than to waste months in repeated interviews with a procession of ABA investigators, the best possible course of action for a nominee is to answer the charges against him before the Judiciary Committee as soon as possible. Because the ABA delays that process, the President should tell his nominees to speak only to the Judiciary Committee.

ABA Considers Recommendations at Mid-Year Meeting

Continued from Cover...

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

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

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

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

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

Prison Litigation Reform Act

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

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

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

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

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

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

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

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

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

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

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

Goal IX

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

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

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

"Apology Legislation"

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

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

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

Homelessness

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

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

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

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

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

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

Domestic Violence

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

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

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

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

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

Gun Control

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

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

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

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

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

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

Editor's Note :

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

The Federalist Society for Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036