ABA WATCH

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

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

Model Code of Judicial Conduct

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

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

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Michael Wallace Speaks with the Federalist Society

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

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Michael Wallace Interview

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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.