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.