

ABA



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WATCH

ABA President William Neukom Speaks to The Federalist Society

TFS: What will be your most important goals for your upcoming ABA presidency, and have you mapped out any strategies for achieving them?

WN: In the United States and abroad, governments, businesses and nongovernmental organizations struggle to make people safe, create jobs, root out corruption, treat disease and offer access to quality education. All of them would be more successful if the rule of law were stronger in their communities. My goal is to help them do their jobs better by working with them to strengthen the rule of law around the world.

I want to broaden awareness in other professions of how they are stakeholders in the rule of law, and are in a position to help advance it. Even lawyers do not always fully make the connection between the rule of law in principle and their everyday practice. Our message inside and outside of the profession is: "If you strengthen the rule of law as part of your work, your work will be more successful."

The rule of law is the platform on which communities of opportunity and equity are built.

Through the World Justice Project, the ABA will partner with leading organizations from other fields of endeavor to develop a comprehensive approach to advancing the rule of law. The project will bring efforts to strengthen the rule of law into the mainstream of work done by various

disciplines, including the legal profession. That means that advancing the rule of law will be integrated into these disciplines' existing priorities and activities.

In addition to traditional rule of law constituents, such as government officials, academics and nongovernmental organizations, the project will engage representatives from such fields as architecture, the clergy, education, engineering, environment, labor, media, medicine and the military.

The presence of the rule of law is vital to the missions of almost every discipline. To take one example, efforts by health organizations to aid populations in underdeveloped nations often are undermined by corruption, black marketeering and the absence of systems for delivery of medical services. More groups need to make supporting rules-based systems for the delivery of medicine part of their work, so that their work—getting this medicine into patients' hands quickly and inexpensively—is more successful.

Lawyers in the United States can do more to mainstream strengthening the rule of law, too. When judicial candidates take millions of dollars in special interest money just to be competitive in the election, the rule of law in our country is weakened. More lawyers need to make protecting impartial courts part of their work, to help benefit their mission, which is giving all clients a fair day in court.

The World Justice Project has several near-term components: 1) convening multi-disciplinary outreach conferences to develop partnerships with other fields of endeavor; 2) assessing adherence

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to the rule of law in targeted countries, including the U.S., through a Rule of Law Index; 3) commissioning scholarship that rigorously examines how and why the rule of law is important; 4) hosting a World Justice Forum, set for spring 2008.

TFS: In your view, what is the role of the ABA in the legal profession, but also, more generally, in our society as a whole?

WN: The mission of the American Bar Association is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

That can take many forms. At times, it means championing the integrity of the legal process, by protecting a robust bar and a fair and impartial judiciary. To take one example, the ABA has been a leader, working with a wide array of groups including the U.S. Chamber of Commerce, the Association of Corporate Counsel and the Washington Legal Foundation, to protect the attorney-client privilege from federal policies that pressure corporate officials to waive this fundamental right.

It also means using the association's collective skills and expertise to illuminate issues where the law intersects with the needs of a just society. At our midyear meeting in Miami, for instance, the Commission on Disaster Preparedness will look at how the legal system must cope with the impact of disasters such as Hurricane Katrina.

And, of course, in the area of rule of law, the ABA has played an important role in educating our own society about our system of government and helping other societies begin building strong and fair legal systems, and the association will continue to do so. Of the ABA's 11 goals, Goal 8, "to advance the rule of law in the world," in many ways is the underpinning of all our association's other goals.

TFS: As a former preeminent general counsel, do you bring any special perspectives, background, or expertise to the ABA Presidency that may help the Association advance its mission?

WN: I've been fortunate to have a diverse professional background. As general counsel at Microsoft, I managed the company's legal, government affairs and philanthropic activities, and I was involved in high-profile litigation. I've also had the chance to serve on many boards and in the leadership of a law firm.

I think that's helped me understand a broad range of perspectives in the profession and association. And

it's allowed me to be a convener and to identify ways for people and groups of different backgrounds to work successfully together.

That's especially important at the American Bar Association, because we encompass so many different branches of the profession, which have very distinct perspectives on their areas of the law. The ability to find common ground is essential to the association's mission.

TFS: In its mission, the ABA states that it is the national representative of the legal profession. Can the Association achieve this goal, and at the same time, stake out positions on controversial issues that significantly divide the ranks of the legal profession? Policy recommendations dealing with the right to abortion, racial preferences, and stem cell research come to mind most readily here.

WN: The ABA is a member-driven association, and its policies originate from members and are approved by the House of Delegates. The House has a deliberative process that invites substantive debate from all perspective, and because the ABA has 413,000 members that reflect a broad spectrum of the profession, some measure of disagreement is inevitable.

You've cited a few particular issues, but a great deal of ABA policy is not controversial. Our Government Affairs Office works with Congress to enact legislation consistent with the policy agenda set by the House, which can include professional issues as well as broader issues of the law. Our success rate has consistently been about 85 percent, which is a strong reflection that our policy process is deliberative and mainstream.

What I think your question points up is the need and benefit of all lawyers getting involved. The ABA is a representative democracy within the legal profession. The House has a strong tradition of open and respectful debate, and it welcomes all viewpoints.

I do want to make sure your readers have a correct understanding of the ABA's positions in the three areas you cited. The ABA does not support racial quotas of any kind. Our policy on choice affirmed the Supreme Court's recognition of the right to privacy, including a woman's right to choose. And we did, in 2002, oppose legislation that would prohibit scientific research conducted for therapeutic purposes, as long as it conformed with accepted research, ethical and legal safeguards.

TFS: Regarding the war on terror, what perspectives or views do you have regarding the way our government has been balancing national security and civil liberties, and what role is the ABA playing in this area?

The ABA has been very active on this issue since the immediate months after Sept. 11, when the House voted to support the president in vigorously fighting terrorists.

As your question suggests, it is crucial to balance the liberties that define our nation against the very real needs to protect our nation from violent attack. It's vital, above all, that we maintain our rule of law as we defend our safety, and many ABA policies have served to strike that balance.

Several issues have been in the news recently and are worth commenting on in this context.

After it became known that electronic eavesdropping was being done outside the existing statutory framework and without court order, the ABA House voted at its 2006 midyear meeting to declare that national security eavesdropping in the United States should be done under the framework of the Foreign Intelligence Surveillance Act, and that if the act was in any way outdated, Congress should be asked to amend it.

The ABA supports the government's efforts to track terrorists, but the key principle of FISA is that this surveillance be conducted under a system of case-by-case review by a special national security court. This law has helped protect our nation since 1978. It allows investigators to begin surveillance without a warrant in extreme emergencies, but judicial review ensures that the surveillance technologies are used appropriately. I consider that a responsible and necessary balance.

Also, last month, Charles D. Stimson, an official in the Pentagon, urged corporations to stop doing business with law firms whose lawyers gave pro bono assistance to detainees in Guantanamo.

His comments were rightly repudiated by the legal community, the American Conservative Union, the Defense Department, the Attorney General and the White House, because they threatened a fundamental American value. In our country, everyone has a right to some form of review of their imprisonment, no matter what they are accused of. These volunteer lawyers have served society by trying to make sure the process is working fairly and properly.

Even the most vigilant government servant can make mistakes. In America, we don't lock people away without making sure their incarceration is justified. That is why the ABA has strongly advocated that detainees in Guantanamo have the right to petition for habeas corpus review to make that kind of determination. The association has continued

to advocate this position with the new Congress.

I believe that history has shown we are strong enough as a nation to defend our security and our liberties. That premise is at the core of ABA policy in this area.

TFS: The ABA's Standing Committee on Federal Judiciary awarded a "Not Qualified" rating to 5th Circuit U.S. Court of Appeals nominee Michael Wallace. Critics assert that the rating reflected the biases of then-Committee Chair Stephen Tober and then-ABA President Michael Greco, who both previously clashed with Wallace during Wallace's tenure at the Legal Services Corporation. Others question the impartiality of other members of the ABA Committee. For example, Fifth Circuit Member Kim Askew served on the Board of Trustees of the Lawyers' Committee on Civil Rights, a group that has opposed several of President Bush's nominees and served as plaintiffs' counsel in a Voting Rights case discussed in the Wallace nomination report. How do you respond to these critics who accuse the Standing Committee of handling the nomination without adhering to its own standards of fairness, objectivity, and thoroughness? Should Stephen Tober have recused himself of any role (including procedural) in the vetting of the Wallace nomination?

WN: The ABA has evaluated the professional qualifications of federal judicial nominees since the 1950s, when President Eisenhower asked us to do so. The goal is to support and encourage the selection of the best qualified persons, to ensure we have a highly qualified and competent federal bench.

There is a strict separation between the work of the Standing Committee on Federal Judiciary and the rest of the ABA, to insure the confidentiality and impartiality of its work. The committee is composed of distinguished lawyers, and uses criteria to evaluate judges that are not partisan or ideological. It evaluates only three factors: judicial temperament, professional competence and integrity. While a nominee's political disposition may be appropriately considered by the President and the Senate, it is not a factor in the Standing Committee's analysis.

The ABA Standing Committee is the only entity that does a peer review of professional qualifications of all Article III judicial nominees. Senators from both parties have praised the quality and value of information that this review has made available to them. The evaluations reflect the views of the lawyers, judges and others in the community who have first-hand knowledge of the professional qualifications of the candidate. I have the utmost confidence in the work of the Standing

Committee.

TFS: The ABA has spoken out against a federal marriage amendment. The ABA urges the amendment's rejection, as passage would be an attempt to use the constitutional amendment process to impose upon the states a particular moral viewpoint about a controversial issue. The ABA's current position, therefore, is that each state should establish its own laws regarding civil marriage—an argument on federalism grounds. Yet in other areas concerning public policies where moral viewpoints come into play, such as abortion, the ABA supports federal legislation. How has the ABA tried to reconcile or distinguish these positions?

WN: ABA entities recommend policy on issues important to the public and the profession as they become relevant in public discourse. The House of Delegates then debates the merits according to the context in which each issue comes up, and they weigh different considerations on a case-by-case basis. In some cases, the debate might reveal that a principle like Federalism should govern, and in other contexts, debate might make clear that other considerations, such as public health issues, make it important to have a national law.

To take two issues you cited, the ABA's position on the federal marriage amendment is based on more than 200 years of jurisprudence that marriage be regulated by each state. The ABA's House of Delegates supported the concept that regulation of marriage should continue to be determined at the state level and that it is not an issue in which the federal government should be involved. The ABA has consistently, and for the same reasons, maintained that tort liability issues are, and should remain, state and not federal issues.

When the House of Delegates voted to support the Supreme Court's decision in *Roe v. Wade*, it was affirming that there is a constitutionally protected right to privacy, including a woman's right to choose.

Because it is a federal and constitutionally protected right, no state or federal law can now abridge that right. Therefore, the ABA opposes any state or federal legislation that restricts that right, as it is now interpreted by the U.S. Supreme Court.

TFS: Last August, revisions to Standards 210-212 regarding diversity and legal education, were adopted after considerable debate. Some critics, including U.S. Department of Education officials, contend that these

revisions promote quotas and could force schools to employ unlawful racial preferences. How would you respond to these critics? Do you believe, for example, that the Standards reflect a correct understanding of the Grutter decision?

Since the 1960s, the ABA has promoted diversity in the profession so that the justice system reflects the diverse population we serve. It is important to note that the Section of Legal Education, which accredits law schools, is an independent arm of the Association, and its decisions and standards are not influenced by the policies or governance of the larger ABA. At the ABA's 2006 annual meeting, the Section proposed revisions to its standards to be consistent with court decisions. After extensive and open debate, the ABA House concurred with the revisions.

Nothing in these, or any of the ABA Standards, requires schools to violate any state or federal laws. The ABA has had a standard on diversity in law school admissions since the 1980s. Following a number of developments in the interceding years, including the Supreme Court decision in *Grutter v. Bollinger*, the Section elected to modify its standard to ensure that ABA-accredited law schools demonstrate their commitment to diversity through concrete action. The new standard reflects the importance of encouraging—but not requiring—a diverse student body. The Education Secretary's own National Advisory Committee on Institutional Quality and Integrity, after several hours of third-party testimony and debate, overwhelmingly rejected the argument that the new Standard explicitly or implicitly would require schools to violate the law, even in states that prohibit race-based admissions. The Section agrees with that decision and will continue to work with the Department of Education and law schools to ensure that the standards are legally and affirmatively implemented.

TFS: What role is the ABA playing in helping Congress and the Executive Branch work through the application of the attorney-client privilege to criminal investigations of business? Do you have any perspectives about the broader issue of corporate criminalization?

WN: The attorney-client privilege dates back centuries, and it is essential to providing clients with effective legal representation—as is the work product doctrine. The ABA is concerned about federal policies that have seriously eroded these fundamental protections in the corporate context. Although all of these government policies raise concerns, the most troublesome is the Justice Department's

policy—set forth in the 2003 “Thompson Memorandum” and the 2006 “McNulty Memorandum”—that encourages prosecutors to pressure companies and other organizations to waive their privileges as a condition for receiving credit for cooperation during investigations. The ABA also has become concerned about separate provisions in these memoranda that pressure companies not to pay their employees’ legal fees, or to take other punitive actions against those employees, in certain cases long before any guilt has been established. These measures erode employees’ constitutional and other legal rights.

The ABA has responded to these challenges in a number of ways. In 2004, the ABA created a Task Force on Attorney-Client Privilege to study and address the relevant federal policies and practices. The ABA also has worked closely with other bars and with a broad coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—to try to reverse these government policies. In addition, the ABA and the coalition have worked closely with Sen. Arlen Specter (R-PA) to craft legislation that would reverse these harmful federal policies.

Although the McNulty Memorandum, issued in December, requires prosecutors to obtain high-level Department approval before they can demand waiver of a company’s attorney-client privilege and work product protections, it fails to end the practice entirely. In addition, it still allows prosecutors to pressure companies to take some punitive actions against their employees, long before any guilt is established. Because of these shortcomings, the ABA continues to work with coalition partners to encourage Congress to promptly enact Sen. Specter’s legislation, which is S. 186 in the 110th Congress.

TFS: Do you believe that there has been a decline in public respect for the legal profession, and if so, what can the ABA do about it?

WN: Often individuals find the legal system frustrating. The ABA and the organized bar are working hard to improve the administration of justice, and to improve public understanding of the process and the important role lawyers play in our democracy. These efforts include our standard calling on lawyers to perform 50 hours a year of *pro bono* legal service at no charge, by offering a wide range of continuing legal education, and by setting ethical standards for lawyers and judges.

Is every lawyer perfect? Of course, not. But lawyers played a central role in framing our Constitution, and they have directly contributed throughout our history to

making our nation more just. The World Justice Project, which I mentioned earlier, will be a continuation of this tradition of expanding our understanding of, and commitment to, the rule of law as a platform for creating societies of opportunity and equity.

TFS: What would you say to disgruntled conservatives and others who might feel that it is a waste of time to join the ABA?

WN: First, I think your focus on “disgruntled conservatives” skews the issue. I can say from personal experience that the ABA is a very broad-based organization.

In nearly 40 years, I’ve seen liberals who thought the association was moving too slowly on certain issues, and I’ve seen moderates who were frustrated. That’s an inevitable by-product of a broad and diverse organization.

The ABA is a member-driven organization that makes policy decisions through a deliberative process involving public debate. To any lawyer who might be unhappy, I’d say, “Take part in that process as vigorously as you can.”

By doing so, they will see that the ABA includes members from all legal specialties and has a wide variety of backgrounds and viewpoints on a range of subjects. Many people fail to realize, for example, that the ABA includes one of the largest groups of corporate lawyers of any legal organization in the country. In fact, the ABA Business Law Section—with over 50,000 corporate lawyers from around the country—is one of our largest and most influential sections.

By getting involved, lawyers will have the ability to influence the debate on important legal issues. Just as in the larger political process in American democracy, if they choose not to get involved, they can only blame themselves for not being represented.

