

THE ABA AND THE AMERICAN JURY SYSTEM

During the ABA's Midyear Meeting, the House of Delegates will consider Recommendation 113, which urges the Association to adopt the ABA Principles Relating to Juries and Jury Trials. The recommendations stem from ABA President Robert Grey's initiative on the American jury system. To draw attention to the jury system and to study any reforms needed to improve the system, two separate projects were formally launched in August at the 2004 ABA Annual Meeting in Atlanta. The first, the Commission on the American Jury, "is an outreach effort to highlight the great democratic tradition of trial by jury." The goal "is to promote appreciation of our prized American jury system, and thereby to encourage participation by the public and reform by the Bar and the Courts." The project highlights the history of the jury system, its legal importance, and the responsibility of Americans to participate when called to serve on a jury.

The second initiative is the American Jury Project, which drafted the "ABA Principles Relating to Juries and Jury Trials." These proposed standards update existing ABA policy. Patricia Refo is the project's chairman, and co-chairing the project are Litigation Section Chairman Dennis Drasco, Judicial Division Chairman Louraine Arkfeld, and Criminal Justice Section Chairman Catherine Anderson. DePaul University College of Law Professor Stephan Landsman, an expert on the American jury system, serves as reporter for the project. They spearheaded an advisory committee whose members offered written comment and testimony at an October 2004 National Symposium on the American Jury System to

evaluate the proposed draft of the principles.

President Grey presented the draft proposals to U.S. Supreme Court Justice Sandra Day O'Connor, the honorary chairman of the Commission on the American Jury, in December. He described the principles' purpose as seeking "to spark a dialogue about how to decrease the percentage of people who view jury duty as a burden and increase the number of people who report when summoned."

A summary of the proposals follows:

- The right to a jury trial shall be preserved. It should be fair, accurate, and timely. A defendant may waive the right to a jury trial if the act is knowing and voluntary.
- Citizens have the right to participate in jury service if they meet the necessary age, language, and citizenship requirements, and their service should be facilitated. Jurors should receive a fair fee that would defray travel, parking, meals, and child-care. Employers should be prohibited from laying off employees who are called to jury duty, and they should be prohibited from requiring jurors to use vacation or leave to make up lost time for their service.
- Ideally, juries should have twelve members.
- Jury decisions should be unanimous.
- Courts should enforce and protect juror privacy.
- The courts should enforce and protect the rights to jury trial and service.
- Courts should educate jurors regarding the essential aspects of a jury trial in order to help them better understand of the judicial system. Instructions should be provided in understandable language.

- Jurors should only be removed for compelling reasons.
- Courts should conduct jury trials in venues required by applicable law or in the interests of justice.
- Juror selection should be open, fair, flexible, and representative. The process used should be effective in assembling a fair and impartial jury.
- Jury trial length should not be longer than necessary, and jurors should be informed of the trial schedule.
- The court and parties should promote juror understanding of the facts of the case and the law. Jurors should be permitted to take notes and should be permitted to submit written questions to witnesses in civil cases. In certain situations, they should be permitted to submit written questions in criminal cases.
- Jurors in civil cases may be instructed that they will be permitted to discuss the evidence with their fellow jurors in the jury room during recesses from trial when all jurors are present, as long as they reserve judgment about the outcome of the case until deliberations commence.
- Courts and parties have the duty to facilitate effective and impartial deliberations by the jury. Jurors should be offered assistance when an impasse is reported.
- Decisions should be offered the greatest deference consistent with the law. Courts should give jurors legally permissible post-verdict advice.
- Appropriate inquiries should be conducted into allegations of juror misconduct.

The House of Delegates is expected to consider this recommendation on February 14-15.

2005 DISTINGUISHED SERVICE AND SPIRIT OF EXCELLENCE AWARD WINNERS

The Individual Rights and Responsibilities (IRR) Section will award its former chairman, Cruz Reynoso, with its 2005 Father Robert F. Drinan Distinguished Service Award. The award, named for the controversial Catholic priest who also served as a past IRR section chairman, honors individuals "who have shown sustained and extraordinary commitment to the section and/or its mission of providing leadership to the profession in preserving and advancing human rights, civil liberties, and social justice."

Cruz Reynoso is a former associate justice on the California Supreme Court. Along with Chief Justice Rose Bird and Justice Joseph Grodin, Reynoso failed to win reelection under California's mandatory retention election system. They were the first supreme court justices who lost their seats

on the court because they failed to be retained by the voters. Along with his colleagues, Reynoso was accused of an anti-death penalty bias, as he voted to uphold only three of the 61 death penalty convictions that came before him on the court. Reynoso insisted he upheld the law in those cases.

In 2000, former President Bill Clinton awarded Reynoso with the Presidential Medal of Freedom. He most recently completed his service on the U.S. Commission on Civil Rights, where he served as vice-chairman. His tenure was controversial, as he and former Commission Chairman Mary Frances Berry were sharply critical of the civil rights record of President Bush and the 2000 presidential election.

Five attorneys will be honored with

the Commission on Racial and Ethnic Diversity in the Profession's Spirit of Excellence Awards. The award "celebrates the achievements of diverse lawyers and others who contribute to the legal profession and society."

The recipients include:

Senior Judge Arthur Louis Burnett, Sr. served on the Superior Court of the District of Columbia. Judge Burnett is the liaison to the Standing Committee on Minorities in the Judiciary from the Judicial Division's National Conference of State Trial Judges and serves as a member of the ABA Steering Committee on the Unmet Legal Needs of Children. Currently he serves as the executive director of the National African American Drug Policy Coalition. The Coalition hopes to persuade judges to recommend treat-

ment over incarceration for drug crimes and seeks to promote education and prevention in communities. The Coalition also opposes mandatory minimum sentences on the grounds that they discriminate against minorities.

Jose Feliciano is a partner at Baker & Hostetler and an at-large delegate in the ABA House of Delegates. He is a former member of the ABA Board of Governors and a former chairman of the Section of Dispute Resolution. Feliciano served as a liaison to former ABA President AP Carlton's Commission on the 21st Century.

Emanuel B. Halper is the President of the American Development & Consulting Group. He is a Special Professor of Law at Hofstra

University School of Law. He is currently a member of the Supervisory Council of the ABA's Real Property, Probate & Trust Law Section and served as past chairman of the Section's Commercial and Industrial Leasing Group.

Karen Narasaki is the President and Executive Director of the National Asian Pacific American Legal Consortium (NAPALC). At NAPALC, Narasaki lobbied to preserve racial preferences, filing an *amicus* brief in the University of Michigan cases. She has also testified before Congress on immigration issues. She also serves as the Chairman of the Compliance/Enforcement Committee of the Executive Committee of the Leadership Conference on Civil

Rights. Narasaki was an outspoken critic of the nomination of John Ashcroft as Attorney General in 2001.

At a panel at last August's ABA Annual Meeting, she maintained that we have seen a number of instances of discrimination by this administration, including its failure to enforce a language discrimination case brought by non-English speaking Chinese-Americans in San Francisco. Ms. Narasaki went on to describe how President Bush and Attorney General Ashcroft created a system of racial profiling in the wake of the events of 9/11.

Judge Raymond S. Uno served on the Third Judicial District Court in Salt Lake City. He served as one of the founding members of the Utah Minority Bar Association.

RESOLUTIONS TO BE ADDRESSED AT MID-YEAR MEETING

The American Bar Association House of Delegates will consider a number of resolutions at its annual meeting in Salt Lake City on February 14 & 15. 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. Resolutions scheduled to be debated at this meeting include recommendations concerning immigration, asbestos litigation, health care, and criminal justice. What follows is a review of some of the resolutions that will be considered in Salt Lake City.

Intellectual Property

The Section of Intellectual Property offers Recommendation 102, urging the ABA to support "enactment of legislation providing that the right to a patent shall belong to the inventor who first files an application for a patent containing an adequate disclosure under 35 U.S.C. § 112 of the invention or, in the event of an assignment of rights, shall belong to the assignee thereof." The sponsor further urges the ABA to support "concomitant efforts to conclude international patent harmonization agreements that incorporate such principles."

The sponsors note that the House of Delegates first considered this issue in 1993, though the recommendation failed. The sponsors note that U.S. patent law has significantly changed since that time—most notably, in 1994, when Congress reversed a principle of patent law that provided U.S.-based inventors with advantages in gaining patents vis-à-vis foreign-based inventors under a "first-to-invent" system. Recently, the National Academy of Sciences endorsed the principle of awarding patents to the first inventor to file for a patent, along with six other recommendations to reform patent law. In order for the ABA to play a role in formulating policy in this area, the

Intellectual Property Section urges the ABA to adopt this recommendation. Furthermore, this position would align the ABA with other NGOs on patent law, such as the Biotechnology Industry Association, the National Association of Manufacturers, and the American Intellectual Property Law Association.

According to critics, a shift to a first-to-file system may lead to an increased likelihood that neither party in a priority dispute will remain with a valid patent. These critics assert that the increased incentive to file early that may operate to make one party a winner on priority might also cause that party to file an application with a disclosure that is inadequate to make the patent valid. Indeed, even under the present system many of the high profile cases in which the patent has been left invalid after appeal to the Federal Circuit have been based on issues of inadequate disclosure, not prior art.

Under a first-to-invent system, critics maintain there is less of an incentive to rush to file because priority is not determined by filing. As a result, a lower likelihood exists that the winner on priority will be left with a patent that fails the disclosure requirements. The first-to-invent system thereby at least protects the investments of one of the claimants. In addition, first-to-file may lead to a winner-take-all mind set for those seeking patents, which in turn may cause a reduction in the beneficial inducing power of the reward because each potential claimant may find the possibility of winning the race to be too low. Alternatively, it may cause the harmful, rent-dissipating power to increase as the increase in uncertainty causes even more individuals to gamble on winning the race.

Additionally, critics claim a first-to-invent regime may increase litigation frequency by bringing priority disputes to available contests. However, this may be beneficial because

such disputes can also reach issues of validity in a manner in which the costs of determining validity are lower.

Health Care

The Section of Individual Rights and Responsibilities (IRR) and the Health Law Section urge the ABA to oppose "governmental actions and policies that interfere with patients' abilities to receive from their healthcare providers...in a timely manner: (a) all of the relevant and medically accurate information necessary for fully informed healthcare decision-making; and (b) information with respect to their access to medically appropriate care, as defined by the applicable medical standard of care."

The recommendation is very similar to a resolution offered by the IRR Section at the 2004 ABA Annual Meeting, which was withdrawn. That recommendation also recognized the "importance of fully informed consent" and sought to promote existing ABA policies to protect the rights of all patients to access federally funded family planning clinics in order "to receive counseling and referrals with respect to all medical options related to pregnancy." Both recommendations noted the "rapid expansion of religiously-controlled hospital systems and managed care plans" which consequently restricts "not only the availability of certain health care services, but also the disclosure of information about and/or referrals for treatment options." Specifically, the recommendation singles out Catholic hospitals' limitation of treatment alternatives to those recognized as "morally legitimate" in accordance with Catholic doctrine.

The sponsors noted procedures and services—such as sterilization, emergency contraception, and family planning—that religious hospitals were less likely to perform or to discuss with patients as treatment options. According to the sponsors, this infringes upon a