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AN INTERVIEW WITH ABA PRESIDENT-ELECT MICHAEL GRECO

Q. What will be your most important goals for your upcoming ABA presidency, and have you mapped out any plans for achieving them?

A. Let me begin by thanking the Federalist Society for this opportunity to answer your questions and to share some thoughts with your members and with those who will read this interview.

My primary initiative as ABA President will be to inspire what I refer to as a “Renaissance of Idealism” within the legal profession. The main reason I chose to be a lawyer was to have the opportunity to serve the public, to help solve people’s and society’s problems, to make a difference in the lives of others. I believe that this idealism, this desire to help our neighbors and communities, is what attracted most of us to the profession, and is still what inspires most young men and women to become lawyers. During my term as ABA President I will focus on that ideal. I want to rekindle, to reinvigorate, to reenergize, the idealism and public

service commitment of our profession — and then nurture it, expand it and preserve it for generations to come.

Goal X of the American Bar Association is “*To preserve and enhance the ideals of the profession...and its dedication to public service.*” Many young lawyers today enter the practice of law expecting to find reasonable opportunity to perform public service. Too many soon become disappointed and frustrated as the demands of their law practice severely limit the time and the opportunities they have to contribute to society. For veteran lawyers, the pressures and the pace of the practice of law increasingly intrude on the time available for public service. I believe that the time has come, indeed it came some time ago, for lawyers to strike a balance in our lives and our practices, whether private or government practice — and for those of us in ABA leadership positions to help the lawyers of America strike that balance.

The key to that balance is time — freeing up time — in law firms, in government of-

fices, in any setting where a lawyer practices law — for lawyers to perform public service, to volunteer their legal training to those in great need, to help improve our communities, and in the process to obtain greater fulfillment in their legal careers. I intend to work hard to make the case with decision-makers in America’s law offices that it is clearly in the interest of the lawyer, the lawyer’s place of employment, the profession, and the American people, that we free up time — to honor and deliver on the profession’s long-standing commitment to public service. I have appointed a distinguished Renaissance of Idealism Planning Group that is looking at numerous issues relating to this subject, and next year I intend to appoint a Presidential Commission that will work with and help to implement the recommendations made by the Planning Group.

I also plan to continue the ABA’s commitment to diversity in the legal profession. I am planning initiatives that will address greater inclusion of lawyers of color, women

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THE ABA AND IRAQ

On Law Day 2003, the American Bar Association launched its Iraq Initiative in the wake of the country’s recent liberation from Saddam Hussein. It was commenced with the ABA’s goal—“to advance the rule of law around the world” in mind. The Association hoped its efforts, in the tradition of CEELI’s (the ABA’s Central European and Eurasian Law Initiative) initiatives to promote the rule of law in Eastern Europe after the fall of communism, would assist in the reconstruction of the Iraqi legal system.

In announcing the project on May 1, 2003 (Law Day), then-ABA President A.P. Carlton declared, “The American Bar Association will marshal the American legal community, which will offer its expertise to develop law that will foster a free market

economy in Iraq; which can sponsor workshops to assist Iraqis through fair-trial, free-press issues; which can participate in an exchange of ideas to help foster a vibrant and independent judiciary in Iraq. And we offer all this recognizing that the end product will be of, by, and for the Iraqi people.” The project was initially referred to as the “Post-Conflict Action Team for Iraq.” CEELI founder Talbot “Sandy” D’Alemberte joined Carlton in announcing the new initiative.

Promoting judicial independence and the rights of women quickly became two of the ABA’s chief goals in Iraq. Yet some critics of the ABA’s efforts contend that the ABA has fallen short in that the Association has not placed a premium on protecting re-

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private developers are “unwilling to shoulder the financial risks of these low-profit projects without some type of financial subsidy,” an “innovative” solution to this problem is the creation of housing trust funds.

The sponsors note a bill introduced by Rep. Bernard Sanders in the 108th Congress, the “National Affordable Housing Trust Fund Act,” which would provide capital from surplus Federal Housing Administration funds for the development, rehabilitation, and preservation of 1.5 million new homes over the next decade. The sponsors foresee the housing trust would be adequately capitalized, targeted toward households at or below 30% of the median income, and not serve as a substitute for other housing programs.

Some critics of the resolution question its germaneness, as it does not directly concern a legal issue. Others contend that the private sector has been more successful at building affordable housing than government has been. Critics of government housing trusts suggest other measures such as rezoning and reforming land use laws, encouraging developments in blighted areas, updating building codes, and offering low-interest rate loans to encourage renovation are better solutions.

Civil Justice Reform

The Tort, Trial, and Insurance Practice Section and the Litigation Section sponsor Recommendation 109C, reaffirming its support for the judicial rulemaking process set forth in the Federal Rules Enabling Act. The sponsors oppose the “Lawsuit Abuse Reduction Act” (H.R. 4571) because of its changes to Rule 11 of the Federal Rules of Civil Procedure, as they are proposed without first being submitted to the ABA-supported process set forth in the Rules Enabling Act. The sponsors oppose enactment

of legislation that would “violate principles of federalism by 1) imposing the provisions of Rule 11 under any civil action filed in a state court; or 2) imposing venue designation rules or provisions upon a personal injury claim filed in a state court.”

The “Lawsuit Abuse Reduction Act” amends Rule 11 to require courts to impose sanctions on attorneys or parties who file frivolous lawsuits. The law would make Rule 11 applicable to state civil actions where the court determines that the action affects interstate commerce.

The sponsors reassert their support for the current version of Rule 11 of the Federal Rules of Civil Procedure “as a proven and effective means of discouraging dilatory motions practice and frivolous claims and defenses.” The current version “allows courts to focus on the merits of the cases instead of extensive Rule 11 motions, while maintaining the ability to sanction attorneys for frivolous claims or defenses, relying on the court’s established ability to adjudicate such issues.” The sponsors fear “a return to the mandatory imposition of sanctions for Rule 11 violations, without extensive study and public comment, would frustrate the purpose of the Rules Enabling Act and potentially harm the effective functioning of the judicial system.”

The recommendation “further opposes attempts by Congress to alter venue designation rules established in both federal and state courts.” While Congress has the power to designate venue for federal courts, it does not have the same power for state courts without due consideration. Doing so, contend the sponsors, would undermine federalism and cause confusion.

Recommendation 109C also “opposes any effort to enforce a mandatory suspension

of an attorney for Rule 11 violations.” The sponsors note, “A system that provides for mandatory suspension of attorneys with three Rule 11 violations would have an extremely chilling effect on the justice system and may disproportionately impact attorneys who practice in particular areas, such as civil rights.” The sponsors praise the current system allowing for judicial discretion in the imposition of sanctions for frivolous lawsuits as serving “the laudatory goal of reducing claims and defenses designed to waste time or intimidate without imposing mandatory sanctions on attorneys who may be representing clients with complex or new claims.” The sponsors refer to studies cited in House Report 108-682 stating that when sanctions were mandated, “many legitimate civil rights claims were stifled out of a fear that large attorney fees would be imposed as the sanction.” Therefore, “an arbitrary ‘three strikes you’re out’ rule does not effectively accomplish the goal of reducing frivolous lawsuits and would drastically impact the legal profession by suspending, indefinitely, many fine attorneys willing to take on controversial, yet important litigation.”

The Recommendation also opposes congressional efforts to extend Rule 11 to problematic discovery motions because other rules in the Federal Rules of Civil Procedure more effectively address these issues.

Supporters of the legislation maintain that reinstating Rule 11 would hold lawyers accountable to fair standards in the judicial system. It would halt “forum shopping” by plaintiff’s attorneys and curb the number of frivolous lawsuits. They support reinstating provisions of Rule 11 because of its positive effect on litigation in the federal courts, according to a Federal Judicial Center study taken shortly before Rule 11’s 1993 amendments.

In the 108th Congress, H.R. 4571 passed the House by a vote of 229-174.

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religious freedom in a country where religious minorities’ rights have been frequently violated. The Association maintains that their efforts thus far have been very successful. *ABA Watch* outlines what the ABA’s initiatives and priorities have been thus far and takes a closer look as to its future activities in Iraq.

Background

In 2003, the ABA conducted several projects and meetings as part of its Iraq Initiative. In organizing the venture, A.P. Carlton served as chairman of the Iraq Initiative, while current House of Delegates Chairman Stephen N. Zack served as the Initiative’s director. The Iraq Initiative first focused on assessing Iraqi nation-building requirements and began matching those requirements to the ABA and CEELI’s nation-building experience. Several meetings took place in the Middle East and others were

conducted by bringing Iraqi leaders to the United States to meet with legal and opinion leaders. The ABA’s early efforts to meet the Iraqi legal needs are outlined below.

International Legal Consortium

In August 2003, Los Angeles Superior Court Judge and ABA Member Judith Chirlin participated in the International Legal Consortium’s (ILAC) legal assessment of Iraq. The mission was conducted in cooperation with the United Nations and its Special Representative to Iraq, Sergio Vieira de Mello (who was killed shortly after the mission), along with the Coalition Provisional Authority (CPA). The mission served to identify pressing problems facing the Iraqi judicial system. These problems were identified as international isolation and executive interference, security, the right to legal representation for those initially accused

of lawlessness and looting in the wake of the overthrow of Saddam Hussein, and a lack of criminal procedure review. Another concern arose that Iraqis had not received access to counsel until trial, despite Iraq’s ratification of the International Covenant on Civil and Political Rights mandating such access. The ILAC Assessment proceeded to identify several high-priority project proposals, including training judges, the public, and the media on judicial independence and structural aspects of court systems; training Iraqi lawyers and judges in international human rights law; and increasing support for the bar.

Arab Judicial Forum

In September 2003, the ABA helped organize the Arab Judicial Forum with the U.S. Department of State & the government of Bahrain to discuss justice sector reform in the

Arab world. The Forum brought together the newly appointed Iraqi Minister of Justice, Governing Council Member Judge Dara Noor al-Din, and three leading Iraqi legal representatives. Over 150 other senior government and non-government legal officials attended this Forum. Chief topics included judicial training, ethics, and selection; procedural systems; the role of judges in protecting international human rights law; and transnational cooperation on criminal and commercial matters. U.S. Supreme Court Justice Sandra Day O'Connor led a U.S. delegation to the Forum. Members of the ABA delegation include Angela Conway, RIGHTS Director/Middle East Coordinator; legal specialist Jim Corsiglia; and program associates Sokol Shtylla and Penelope Fidas.

Discussed at the Forum were the Bangalore Principles of Judicial Conduct, which were adopted in November 2002. The ABA and CEELI assisted in the drafting of these principles. These principles discuss six core values for an independent judiciary: impartiality, integrity, propriety, equality, competence, and diligence. Though the substance of these principles was debated during the Forum, the general principle of judicial independence was heralded by all participants.

Principles of Iraqi Constitutionalism Program

In September 2003, the ABA organized and convened a four-day training program in Bahrain on "Principles of Iraqi Constitutionalism: Putting Theory into Practice." The primary goal of the program was "to prepare the Iraqi participants to discuss constitutional issues in their communities in preparation for Iraqi constitutional reform." The participants discussed their perspectives on key constitutional issues, examined challenges to Iraqi constitutional reform, and developed strategic plans for community outreach on constitutional issues in order to educate others.

One presentation, "How to Ensure Religious Freedom and Tolerance through the Constitution," discussed the protection of religious freedom. Professor Noah Feldman of NYU Law School, a former clerk to Judge Harry Edwards and Supreme Court Justice David Souter, led the discussion. Noah Feldman has authored two books on Iraq, Islam, and the Middle East: *What We Owe Iraq: War and the Ethics of Nation Building* (published in October 2004) and *After Jihad: America and the Struggle for Islamic Democracy* (published in October 2003).

Other speakers examined democracy, the rule of law and federalism, minority rights, and other constitutional approaches. Second Circuit U.S. Court of Appeals Judge John Walker discussed constitutional interpretation.

Women's Conference

In November 2003, the ABA sponsored

a high-level delegation of Iraqi women in Washington, D.C. in conjunction with the Woodrow Wilson International Center for Scholars and the World Bank. The meetings focused on training women on their roles in the legal reconstruction of Iraq and discussing more general issues of women and the law. Several panels and interactive presentations on women and the legal profession were conducted, focusing on the role of professional associations, equality, and human rights in U.S. and international law, and the role of women's associations in promoting women's issues. The discussion also provided a comparative analysis of family law in Muslim countries and an overview of the U.S. judiciary, separation of powers, and comparative constitutional treatment of the judiciary. Attendees met with President George W. Bush, National Security Advisor Condoleezza Rice, and Senators Mary Landrieu and Hillary Clinton, along with other female legislators.

Judicial Training

In September 2004, 48 senior Iraqi judges traveled to the CEELI institute for a seminar on basic principles of democratic justice. CEELI developed the seminar, titled "Judging in a Democratic Society," in cooperation with a number of international legal experts. A previous version of the course had been offered to other judges, but this particular course specifically addressed problems faced by Iraqi judges.

A diverse faculty, including retired Chief Justice of the Washington Supreme Court Robert Utter and Judge Chirlin, led the sessions. In particular, according to a CEELI Institute newsletter, the faculty addressed "what it means to be a judge in an open and democratic society, analyzing the practical steps judges can take to protect judicial independence and build relations with the media and general public." Other topics included judicial ethics, separation of powers, public access to courts, and transparency.

Participants heard from U.S. Deputy Secretary of State Richard Armitage, who spoke on democracy, justice, and the rule of law.

Future Plans and the Iraq Constitution

In the future, the remainder of Iraq's 400 judges will be trained by CEELI with financial support from the British Government's Department for International Development under an agreement with ILAC. About thirty world bar associations, including representatives from Egypt and Dubai, will be involved with judicial training. The aim for these courses will not be to school judges in American legal traditions. According to CEELI director Elizabeth Anderson in the *Recorder*, "One of the hallmarks of the ABA approach is that we're modest about the American tradition. Models from Europe and international law are the surest basis for the rule of law. We let the host countries choose. We're not about imposing."

In addition to offering judicial training, the ABA is currently forming an Iraqi Constitutional Advisory Group, which will begin drafting the constitution after the January 30 elections. The U.S. government selected the ABA to lead this effort. Members of the Advisory Group will include representatives from the Iraqi Lawyers Union, academia (including Noah Feldman), non-governmental organizations (NGOs), and members of the Iraqi judiciary. The Group members will serve as consultants on specific aspects of the constitution-drafting effort, and members will participate in retreats and workshops, offer technical advice, and review research. The Group will be funded by USAID and the State Department.

Early concerns have arisen that religious freedom will not be protected in the new constitution. Religious freedom NGOs such as Freedom House and the Institute on Religion and Public Policy, as well as independent federal agencies such as the U.S. Commission on International Religious Freedom (USCIRF), have approached the Association to ensure their input will be taken into account in the process. In recent months, Christian minorities in Iraq such as Chaldeans and Assyrians and other small groups of non-Muslim minorities have faced increased kidnappings, assassinations, and bombings because they are perceived by Muslim extremists to have connections with the West. Indeed, the Chaldo-Assyrians in Iraq are strong supporters of liberty and democracy in Iraq. According to Nina Shea of Freedom House on *National Review Online*, "Their presence bolsters Muslim moderates who claim religious pluralism as a rationale for staving off governance by Islamic sharia law."

The religious freedom NGOs fear that the value-neutral approach to the drafting of an Iraqi constitution could create even greater danger to these minorities. They grew alarmed by statements by constitutional contractors involved with the drafting process who called for Islamic models, including those modeled on Islamic sharia law, to be advanced. For example, Jonathan Morrow of the U.S. Institute for Peace wrote in a *Los Angeles Times* editorial in December, "Outsiders should not, for example, seek to prevent Shiite parties from advancing models for an Islamic republic." Constitutions modeled on sharia law do not offer constitutional protections to individual liberties or religious freedoms. Without such safeguards, these NGOs fear the constitution will fail and violence could doom the security of the region, as thousands of religious minorities could be persecuted for their non-Islamic beliefs.

The ABA reiterated that its approach would center on process, not values, and that it would not seek a specific constitutional framework. The Association would wholly focus on providing objective assistance and responding to needs requested by Iraqis. To promote this

neutrality, the ABA expressed its concerns in a December conference call that religious freedom groups, such as the USCIRF, would seek to foist an outcome on Iraqis or would oppose a constitution insufficiently protective (in the USCIRF's view) of religious liberties. The ABA feared that any interference would violate the integrity of the process.

In January, Robert Horowitz, the current staff director of ABA-Iraq, spoke to Congressional staff and others interested in religious freedom on the ABA's advisory role. The meeting was organized by a new religious freedom coalition chaired by Representative Roy Blunt and Senator Rick Santorum. James R. Kunder, the Assistant Administrator for Asia and the Near East for USAID, first described the initial plans for constitution-drafting and USAID's diplomatic and technical assistance efforts. Horowitz then introduced the ABA's efforts and its partnership with the National Democratic Institute, the International Republican Institute, and SUNY. He described how the ABA and its partners hoped to offer a com-

parative experience to provide models from other constitutional processes and best practices to Iraqis, while respecting the UN Declaration of Human Rights and other international guidelines. The ABA hoped to reach out as broadly as possible to gain different perspectives on what should be included in the constitution, while leaving the final decision to Iraqis.

Angela Conway of the ABA discussed the Association's more specific action items in offering support to the constitution drafters and civil society groups and enhancing participation by women in the process. She outlined plans for a mid-February retreat with senior leaders of Iraqi political parties and legal advisors in Jordan. The ABA, she revealed, would also launch a website on comparative constitutions for Iraqi review, with the website containing a section on religious liberties. In partnership with DePaul's International Human Rights Law Initiative and the U.S. Institute for Peace, the ABA will also assemble a briefing book on constitutional issues.

Horowitz emphasized the ABA's goal to

provide technical legal assistance in the "open" constitutional process. Despite concerns that values would be ignored by the ABA because of its emphasis on providing neutral constitutional models, he stressed that "process was not valueless" and through process, the ABA hoped values would be "shaken" into participants. He stated that the ABA was "open to as much information as we can get" and was "always open to suggestions." When asked if a specific role for religious freedom NGOs had been delineated, Horowitz replied that the ABA "does hope to have a DC-based component" from which it can receive advice. However, it is a "work-in-progress." Later, when asked by an NGO representative if the ABA believed the inclusion of language in the Iraqi constitution about religious freedom was anti-Islamic, Horowitz replied he had not thought about the question and declined to answer.

ABA Watch will continue to monitor developments in the constitution-drafting process and will report on progress made in a future *ABA Watch*.

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lawyers, and lawyers with disabilities in the Association and profession. I am working with the ABA Presidential Advisory Council on Diversity in the Profession on a major conference to be held a year from now — a national ABA Presidential Conference focusing on diversity pipeline issues that will evaluate what progress has been made in the five years since the 1999 "Colloquium on Diversity" that was convened by ABA President Bill Paul. It is troubling that minority law school admissions have declined in the past three years, and that last year saw the largest decline since the ABA started to track the data in 1976-77. We need to increase the number of youngsters of color in the pipeline, from grade school to law school, and to attract them to our profession, so that the legal profession reflects the diversity and the many roots of the nation. All people must have confidence in the fairness of and access to our justice system if our democracy is to work as it should. That confidence is strengthened when the legal profession and the judiciary reflect the makeup of the general population.

I will also address as a priority the mounting challenges to the attorney-client relationship, to the attorney-client privilege, and to the role of the lawyer in society. Several months ago President Robert Grey appointed a distinguished ABA Task Force on the Attorney-Client Privilege, and we await the recommendations of the Task Force. An erosion of the privilege, I believe, has serious long-term consequences for the public and the profession, and for our democratic form of government. Protecting the privilege, which belongs to the people and not to lawyers, must be a priority

for the ABA and the profession.

The year 2006 will mark the centennial of the seminal speech delivered by Dean Roscoe Pound at the ABA's Annual Meeting in St. Paul, Minn., in 1906. His paper on "The Causes of the Popular Dissatisfaction with the Administration of Justice" precipitated numerous needed reforms in the legal profession, the judiciary, and the justice system. We are now in the process of planning a major conference for next year in which leading experts will consider unfinished work a century after Pound's paper, as well as current issues that the Association and profession must address regarding the administration of justice in America.

There are other issues that we will address, but these rank right up there with the more pressing ones.

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

A. The American Bar Association is the national voice of the legal profession, representing all aspects of the legal profession: business and trial lawyers, legal aid lawyers, prosecutors and defense lawyers, judges, law professors and law students. Lawyers who work day in and day out in the justice system are an important resource for identifying what needs to be done to improve the administration of justice in this country. The ABA is an advocate for the profession and for every segment of the public served by it. We have a responsibility — one we take very seriously — to help make the justice system work better for everyone in

America, to uphold the rule of law, and to ensure the fair administration of justice. After all, fairness in our justice system translates to fairness in society.

Q. 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 capital punishment, the right to abortion, racial preferences, and same-sex marriage come to mind most readily here.

A. The ABA is indeed the national representative of the profession. The ABA is the ideal forum in which to present and hear all points of view on important national issues having constitutional and legal implications, and to develop policy recommendations to assist decision-makers in government. The Association has adopted policies on more than 1000 such issues and lobbies on more than 100 issues in each Congress. It is not possible to expect that every member will be in total agreement on every one of these issues. But our House of Delegates consists of representatives from all segments of the profession and the country, and it works diligently to distill the best collective thinking of the profession. The policy-making debates on the floor of the House are full, they are eloquent, and often they are inspirational. And the final policy decisions taken by the House are fully informed and constitute the views of the majority — as is the case, and should be the case, with the demo-