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ABA WATCH

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AN INTERVIEW WITH ABA PRESIDENT-ELECT KAREN MATHIS

Karen Mathis: *I appreciate the opportunity to respond to the Federalist Society's questions and invite your readers to consider joining my efforts in the coming year. Before beginning, let's remind your readers that as the president of the ABA, my job will be to speak for the Association's 400,000-plus members, in keeping with the ABA's adopted policies. Whenever my personal views diverge from those policies, it is the Association's positions, and not my own opinions, which must control.*

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

A. I am already hard at work on planning and ensuring the implementation of my Presidential initiatives. In speaking to groups around the nation, I share my initiatives and invite participation. Next year the ABA will focus on recognizing and promoting service by the profession—to our members, our nation's youth, and its institutions. The legal profession is rooted in serving the

common good—most of us believe that service is an essential part of our calling as lawyers. I have taken “service” as my theme and commitment for my year as president. That theme is the guiding force behind my two Presidential initiatives. First, Youth at Risk, which holds at its heart service to the most vulnerable in our society; and, at the other end of the generational continuum, the Second Season of Service, which will address the needs of baby boom lawyers as they transition out of the full-time practice of law and into the next phase of their lives.

Youth at Risk—There is a growing crisis among the youth of our nation, which translates into significant harm to our country, our institutions, and our future. The ABA's Youth at Risk initiative will identify how the unique skills, education and training characteristic of the legal profession can best safeguard at-risk youth in America.

During my year as president, the American Bar Association will focus its resources on at-risk teens. For example:

- Teenagers whose families or behavioral problems place them at significantly heightened risk of involvement with the courts.
- Teens who suffer abuse and neglect within their homes enter and remain in the child protection and foster care systems, and cross from there into the juvenile justice system.
- Others who have emotional or behavioral problems that elevate the likelihood that they will later enter juvenile or criminal justice systems, especially if those problems are not addressed through adequate interventions.

The Youth at Risk Initiative will focus and partner with the ABA's many entities, state and local bar associations, minority and specialty bars, affiliated groups and youth services providers to create a national service program that reaches at-risk teens. We have already formed partnerships with state and local bars, law-related education and service groups such as the *Just the Beginning*

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THE ABA, THE WAR ON TERRORISM, AND CIVIL LIBERTIES

Since the September 11 attacks on the United States, the American Bar Association (ABA) has actively sought to shape public and legal policy toward the war on terrorism. In the past few years, the Association has adopted numerous policies in hopes of influencing the Bush Administration's positions. In particular, the ABA has strongly urged the Administration to pay greater attention to protecting civil liberties in its policies.

ABA Watch surveys some of the ABA's policies and public statements with respect to the war on terrorism.

Detention

The ABA identified “anti-terrorism and preservation of due process” as one of its top ten legal priorities for 2005. The ABA cautions that protection of civil liberties is of utmost importance in the wake of the terrorist attacks of September 11, 2001, as the government has struggled in the past to “strike the proper balance between the protection of the people and each person's individual rights.”

ABA President Michael Greco, who previously served as the Chairman of the ABA Individual Rights and Responsibilities Section, has been very critical of the Administration's

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Foundation and the Girl Scouts Council to develop pilot programs in Chicago.

Second Season of Service—This initiative focuses on the baby boom generation lawyers who are beginning to leave full-time practice to pursue other interests. It involves four related efforts:

1. Research: we will work within the ABA and with other organizations to gather data about the impact of baby boomer retirement on the legal profession. This research will help the ABA understand how the profession will manage these retirements, including identifying best practices and models for gradually decreasing involvement and transition of leadership for law firms, law departments, law schools and the judicial system.

2. Public Service Project: the ABA will build the structure necessary to evoke pro bono service and non-legal public service by lawyers leaving active practice. If each retired lawyer devotes just 50 hours a year—a lawyer's normal work week!—to volunteer service, it may add up to 2 million new volunteer hours each year. The benefits to our communities will be extraordinary, and will enable my generation of lawyers to continue our lifetime of service.

3. Baby Boom Law Project: we plan to produce products and services to help lawyers, law firms, law schools, and the court system address the retirement of a significant number of lawyers. Every Section and Division in the ABA will be asked to produce a product to help lawyers meet the needs of retiring baby boomers.

4. Baby Boom Member Project: the ABA will develop products and services to meet the needs of lawyers entering active retirement. This project will be of primary importance to lawyers who need these products and services as they leave active practice.

This is an aggressive and exciting agenda. The response to both initiatives has been very gratifying.

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. As I field this question, it seems important to discuss who and what the American Bar Association is. The ABA is its 400,000-plus members, who are lawyers, judges, law students, professors, and legal professionals. Its members represent the spectrum of careers and legal specialties within the United States. The diversity and breadth of our membership creates the richness of the Association, and it is one reason why the ABA is seen as the voice of the American legal profession.

The Association is committed to promoting meaningful access to legal representation; helping our profession achieve the highest standards of professionalism, competence, and ethical conduct; and providing ongoing leadership in

improving the law to serve the changing needs of society.

In pursuit of these goals, the ABA provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public. Through its international technical legal assistance programs, the ABA seeks to advance the rule of law by supporting legal reform around the world.

I am proud of the broad scope of programs and products the ABA offers to its members, the legal profession, our government, the public and society in the U.S. and abroad. This is a question I'd need a book to fully answer, so let me refer your readers to our award-winning website at www.abanet.org for more examples of what we're all about.

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 simple answer is "yes." The ABA can and does represent America's legal profession and is properly described as the "national voice of the legal profession."

Any suggestion that 400,000 people of any common footing will agree on every aspect of every controversial issue seems implausible. We live in a representative democracy. Our association mirrors this democratic model, and we take up a wide range of policy issues, many targeted at protecting and enhancing the legal profession.

Now, the topics you've chronicled make for an interesting list, but it's not a very representative one. Behind the carefully considered positions the ABA has taken on over 1,500 issues is a large body of law and empirical evidence. To reduce a few issues to "sound bites," and the ABA's positions to "simplistic media jargon," does a great disservice to the ABA and its legislative body. This body represents about 90% of America's lawyers through its bar association representation.

The policy of the ABA is set by the House of Delegates, which I had the honor of chairing. The 547 members in the House represent all 50 states, the District of Columbia and Puerto Rico, every practice setting and area of legal practice and affiliated legal organizations, including minority, women's bar associations and specialty bar associations. House membership also includes, as ex-officio members, the Attorney General of the United States and the director of

the Administrative Office of the United States Courts. Like the U.S. Congress, this body votes, and in most cases the majority rules.

The ABA House of Delegates is the national legislature of the legal profession, and its decisions and positions reflect the diversity of its members and their opinions. After open discussion and debate, these members reach decisions, which become ABA policy. The House of Delegates is a democratic institution, and as such, not every opinion is represented in its final actions. As with our federal government, people who choose not to participate in the debate cannot argue that their opinions were not reflected in the outcome.

Your readers can impact the ABA policies by joining the ABA and by advancing their own points of view through proposing recommendations and reports to the House; by seeking an at-large or other type of seat in the House; and even through addressing the House of Delegates, which any ABA member may request the privilege of doing.

I welcome continued and increased participation by ABA members in House of Delegates' deliberations.

Q. 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? Setting aside any particular ABA positions, do you believe that enemy combatants deserve a right to counsel? Do you hold civil liberties concerns about the USA PATRIOT Act? Are you concerned about the administration's policy on domestic surveillance of terrorist suspects?

A. These are momentous issues, and one hopes the decisions our nation reaches on them will result in protecting our citizens.

The desire to ensure this protection of Americans must be carefully weighed against the need to protect our citizens' civil liberties. I don't believe any American wants to be endangered by terrorists, nor do I think they want to lose the protections afforded by the Constitution. The ABA has supported the establishment of a federal board to examine the nuanced issues and tensions created by these competing goals, and we are pleased that such a board is being created. Carol Dinkins from Houston, TX, a member of the ABA's Board of Governors, has been nominated by President Bush to chair this panel. I am hopeful regarding the board's work and urge Congress to move forward with confirmation of Ms. Dinkins.

Historically, our nation has struggled to maintain the proper balance provided by our Constitution between individual rights and national security. The tragedy of September 11, and the resulting war on terror, is the latest challenge to our ability to maintain that balance. During times of war

or great threat, the balance may shift—appropriately—toward security. But Americans know from experience that such a shift can undermine the very principles that we seek to protect.

The challenge is to fight the war on terror without sacrificing Americans' basic liberties. It is for times such as these that our founding fathers had the foresight to create a system of checks and balances—three co-equal branches of government—and that is why the ABA urges appropriate congressional oversight, and judicial review, when necessary, of laws and policies that affect the civil liberties of Americans.

Civil liberties' concerns have been expressed over certain aspects of the USA PATRIOT Act since it was enacted in 2001. The ABA supports strong oversight and review of the original Act's provisions through sunset limitations, so that Congress will have an obligation and opportunity to consider whether they remain necessary over time.

The ABA also has adopted policies to support access to counsel and meaningful judicial review for all U.S. citizens detained as enemy combatants, and to ensure that all defendants in military commission trials have an opportunity to receive the assistance of civilian defense counsel.

National security must be maintained while not sacrificing accepted norms of due process and fundamental fairness—of which access to counsel is a critical component.

Maintaining these cherished principles is one way we demonstrate to the world what distinguishes the United States from its enemy.

Q. The ABA's Standing Committee on Federal Judiciary awarded both John Roberts and Samuel Alito unanimous, well-qualified ratings. Despite this rating, 22 Democratic Senators voted against Judge Roberts, including Senator Charles Schumer, who once described the ABA's rating as the "gold standard." Should the ABA continue rating judicial candidates, and how should its rating be considered in evaluating nominees?

A. The legal profession, acting through the ABA Standing Committee on Federal Judiciary, performs a unique and important role in assisting the Administration and the Senate evaluate the professional qualifications of federal judicial nominees, including every Supreme Court nominee starting with Earl Warren in 1954.

More than 50 years ago, President Eisenhower asked the ABA to evaluate the professional qualifications of prospective judicial nominees, by reaching into the legal community and talking to those who know firsthand a nominee's professional strengths and weaknesses.

The ABA's Standing Committee does not consider a nominee's ideology or politics. It

focuses entirely on professional qualifications—a nominee's integrity, professional competence, and judicial temperament. Our only goal has been, and is, to advance the fair and impartial administration of justice by helping to assure an independent and qualified judiciary for the American people. We believe the ABA serves an important and necessary role in this process.

Of course, the ABA should continue to provide this service to the American people, and we will.

Q. The Bush Administration is calling for reform of America's tort system. Does the ABA agree that such reform is needed? What role, if any, will the ABA be playing in medical malpractice reform? Will the ABA support national legislation to reform the system?

A. States have overseen medical malpractice laws for more than 200 years. ABA policy has for many years opposed federal laws that would preempt states' authority in this area. Because of the role they have played, the states are the repositories of experience and expertise in these matters.

On the issue of proposed caps on pain and suffering awards, the ABA policies recognize some principles that should be stated here:

- Damage caps hurt patients or others who can prove in a court of law that they have been severely injured by the negligence of others; laws designed to avoid a situation in which occasional award may be excessive should not result in additional harm to severely injured victims by denying them the relief they truly deserve. Rather, the ABA's policies suggest that courts make greater use of their powers to set aside excessive or inadequate verdicts.

- Empirical evidence suggests that damage caps do not achieve their aim. Caps on non-economic damages have failed to prevent sharp increases in medical malpractice insurance premiums, and there is no evidence that capping pain and suffering awards reduces overall health care costs.

This is not to say that the tort liability system cannot be improved. The system is not perfect, so the ABA has adopted policies supporting a number of improvements that states should consider.

In addition, the ABA has adopted policy supporting federal legislation in specific areas, such as asbestos litigation. The ABA supports reforming the asbestos litigation system to protect all parties. The ABA's House of Delegates will continue to examine policies to improve the American tort system, and I support such efforts.

Q. Michael Greco has described the criminal justice system as one "that imposes the death penalty without first assuring due process." Do you agree, and if so, why? Do you support the ABA's call

for a death penalty moratorium? If so, what reforms would you propose?

A. President Greco is charged with stating the position of the ABA on the many issues affecting the death sentence, just as I will be during my term. So let me tell you in my own words how I understand the Association's policy. As I understand it, our policy arises from the premise that before the state takes a life, through a judicially mandated death sentence, the state must first ensure that justice is done.

All of us take great pride in the U.S. criminal justice system, with its constitutional guarantee of presumed innocence and the protection of individual rights. Our criminal justice system has often served as a model for other nations. Increasingly it appears that the reality in death penalty cases is far from our ideal. The ABA's position reflects a belief that, on the whole, the death penalty in America is not being administered in a fair or consistent manner.

The ABA has taken no position on the merits of capital punishment, and there is no call for an end to it. The ABA supports a moratorium on executions until the profound and systemic problems in the death penalty system are remedied. We have asked the "death penalty states" to examine their systems and conclude that the administration of the death penalty is fair and accurate. In particular, when a defendant's life is at stake, he or she must have experienced counsel who is adequately compensated and has sufficient financial resources to investigate and defend their clients.

This is an issue of great moment to our criminal justice system. The ABA's posture is a conservative and well-grounded one where the stakes involve life and death.

Q. 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 does the ABA reconcile these differences?

A. I reject the characterization in your question that the ABA's positions on these very different issues are inconsistent.

The ABA adopted policy that supported the Supreme Court's decision in *Roe v. Wade*. This was an affirmation by the ABA's House of Delegates that there is a constitutionally protected right to privacy, which includes a woman's right to choose. As a federal and constitutionally protected right, no state or federal law can now abridge that right.

Therefore, the ABA opposes legislation, state or federal, that attempts to restrict that right as currently interpreted by the U.S. Supreme Court.

With regard to the federal marriage amendment, the ABA's position is based upon over 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.

Q. 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?

A. Yes and no. Let me explain.

No profession or trade in our society is immune from criticism, and no one is immune from the need for accountability. We often hear that public confidence in lawyers has declined. When people are asked if they like lawyers in general, they often say, "No." If the second question is "Do you like your lawyer?" The overwhelming answer is, "Yes." So let's keep these survey results in focus.

There is a legitimate concern about the effects of constant, often unmerited and vitriolic, attacks on the legal and judicial professions as a whole. This past year, judges have faced particularly vicious attacks, and in some cases threats of retaliation, for specific decisions. Justice Kennedy has said, "Judges need independence not to do what they want to do,

but so they can do what they must do." Attacks on the judiciary have a negative effect on the entire legal profession, and on the rule of law, which is essential to our democratic system of government.

Let me say this again, I believe that most Americans respect lawyers and understand that our profession is essential to our system of justice and preserving the rights of clients through an adversarial system.

One way to foster respect for lawyers and judges is through public education, reinforcing the role that lawyers and judges play in our democratic form of government. Similarly, we need to remind Americans of the importance of a fair, impartial judiciary that is free from political or other outside influence.

The ABA and other bars work hard to illustrate these essential truths, and we will always strive to bring home these truths to our government and our nation's citizens.

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

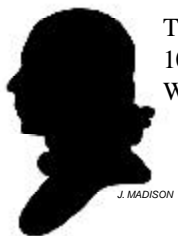
A. I learned as a kid that I could stand on the sidelines, watching others play ball, or get out on the court and join them! The lesson is the same as an adult—you can't influence something you eschew! So I invite your members to join the ABA and restyle it in a fashion more to their liking. I welcome your presence and your participation. The ABA is 400,000-plus strong. We aren't going away; get involved and make a

difference.

Your members would find out that the ABA is working hard to improve the administration of justice and to help the practicing lawyer. Sometimes media headlines leave a false sense of "who" the ABA is and what it does. Many of the important issues the ABA works on do not make headlines or receive media attention. They are policies and programs aimed at making the justice system better, and providing legal expertise to members, and helping them be better lawyers.

As a member, a lawyer can get involved and help shape the policies and direction of the ABA. Ultimately, the ABA is the voice of our members and if your voice isn't present, it can't be heard. We are absolutely committed to diversity within the ABA, and part of that is intellectual diversity. We welcome conservative, liberal, and nonpolitical alike. I truly hope your members will bring their ideas and issues to the fore.

As a footnote I am privileged as the ABA president-elect to have an interview printed in your publication. I appreciate the opportunity to share this information with your readers. Our organizations have many more similarities than they do distinctions. They both enrich our profession and support our system of government and the rule of law. I will work to strengthen the ties that bind us in a common pursuit of liberty and justice for all, as well as the betterment of the legal profession and an independent and impartial judiciary. Thank you.



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