

**AMERICAN BAR ASSOCIATION  
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE  
FALL COUNCIL MEETING  
HAMILTON CROWNE PLAZA – OCTOBER 23, 2004**

**Call to Order, Approval of Minutes, and Introduction of Persons Present**

Section Chair Randolph May called the meeting to order at 9:07 a.m. With respect to the minutes of the 2004 annual meeting of the Section (Tab 1), Council Member Myles Eastwood noted that the meeting minutes should be revised to state that the Section's law student membership has been steadily increasing. The minutes were then approved.

The introduction of persons present included Section officers Chair Randolph May, Chair-Elect Eleanor Kinney, Vice Chair Daniel Troy, Last Retiring Chair Bill Funk, Secretary Jonathan Rusch, Budget Officer Dan Cohen, Section Delegate Judith Kaleta, and Council Members Paul Afonso, Bernard Bell, Myles Eastwood, Katie Kunzer, Sharan Levine, Christine Monte, Jennifer Newstead, Raymond Randolph, Alan Raul, Thomas Sargentich, Anna Shavers, Ron Smith, Wendy Wagner, Consuela Washington, and Ann Young, ABA Board of Governors Liaison Mark Agrest, Young Lawyers Division Liaison Christine Monte, and Law Student Division Selina Davis.

**Report on the 2004 Fall Conference**

John Duffy, who served as Conference Chair for the Section's 2004 Fall Conference, gave a report on the conference. Registration for the Conference included 100 passport sales and an overall attendance of 700. He urged the Council to begin planning for next year's fall conference.

**Report of the Chair**

Section Chair Randolph May reported on plans for the upcoming midwinter meeting of the Section in Salt Lake City, Utah (see Tab 2). The meeting chairs for that meeting are Gary Thorup and Kent Bishop. For the Friday reception, the Attorney General of Utah will give a talk, and the Saturday Section dinner will feature a speech by the Chief Justice of the Utah Supreme Court. May also noted the need to plan events for spouses and significant others during the midwinter meeting.

With respect to the Section's new technical comment authority, May stated that the Section's request on OMB and regulatory review matters is pending. Other Sections have requested to review this Section's technical comment authority, and this Section has requested similar review for other Sections. May noted that the ABA Tax Section was concerned about this Section's review of their comments. In subsequent discussion, Mark Agrast, the Section's Liaison to the Board of Governors, said that under this procedure, only those entities that had pre-identified themselves would be able to receive technical comments.

May said that he was inclined to work out procedures with other Sections on a less formal basis. Section Member Nina Olson indicated that she thought the Tax Section had tended to separate itself from administrative law concerns, and that there were not many experts in the Tax Section on administrative law. May noted that possibly a one-year experiment with the technical comment authority might have been a good thing, but that it is not likely to change now. Section Chair-Elect Eleanor Kinney asked what the Tax Section was concerned that this Section we would do. May replied that the concern was a veto of Tax Section recommendations. The Tax Section does 30-50 comments per year, which are technical comments within its technical expertise. After further discussion, May said that he would get back to the Tax Section and say that this Section would like to see how the process works.

May also commented that it would be important for the Section to do more stand-alone types of programs. He noted that the Transportation Committee's lunch program with Jeff Rosen of the General Counsel's Office at the Department of Transportation had drawn 50 to 60 or more attendees, and that Lynne Zusman had arranged a good brown-bag lunch program with John Vittone, who talked about his experience with conducting hearings for 9/11 victims' compensation. Upcoming programs include a Section Antitrust Committee program on improving health care, and programs with Jennifer Newstead, the General Counsel of OMB, Daniel Marcus, the General Counsel of the 9/11 Commission and Joe Whitley, the General Counsel of the Department of Homeland Security.

May also mentioned briefly that he was pleased about the Section's mentoring program. He felt that it is important that the Section get this program up and running well. Yesterday the Section had its first mentor-mentee lunch as part of the fall conference, with 30 mentors and mentees participating. Section Member Cynthia Drew thanked everyone for their participation in the project (see Tab 9). She encouraged people to get mentees involved and integrated into the work of the Section.

May finally noted that the Section's adjudication resolution, as approved in August, has had some final adjustments made. The plan is to get it out to ABA Sections to request co-sponsorship.

### **Report of Chair-Elect**

Chair-Elect Eleanor Kinney reported that with respect to the European Union Project, people were thinking about having some of its work featured in the 2005 fall conference. With respect to her upcoming term, she indicated that the Section can anticipate a health-related focus. She also thanked people for their expressions of sympathy regarding her mother's death.

## **European Union Project**

James O'Reilly, Co-Assistant Chief Reporter for the European Union Project, reported on the project's current status, including the work of the five teams in place (see Tab 6). The Section has the assistance of the International Law Section and other Sections. Chair-Elect Eleanor Kinney commented on the fundraising status of the project. She indicated that the Section has enough funding (\$33,000) to proceed at the "bare-bones" level, but would like more funding to do the project properly. Several law schools and universities have now pledged to host conferences relating to the project. Now the Section wants to focus on getting grants from trade associations and corporations. Kinney urged Section members to look for funds close to home. O'Reilly concluded with a list of "deliverables," such as five volumes with analyses of the five critical issues in the project.

In response to a question from Council Member Anna Shavers, Kinney said that the Section does have a pro forma and would shortly have a package that could be distributed. May noted that for this year's fall conference, the Section had 19 sponsors, and said that when you have value, you need to sell it. Council Member Alan Raul commented that the process in the European Union is embryonic, and that EU representatives seem quite cognizant that they have not regularized their process in the way the United States has. He indicated that the EU will likely find this process useful.

Kinney also reported that as of September 30, 2004, the Section's overall membership had grown by 14 percent and lawyer membership by more than 8 percent. She stated that she was proud of the Section's membership growth.

## **ABA President-Elect Michael Greco**

Section Chair Randolph May introduced the President-Elect of the American Bar Association, Michael Greco, who addressed the Council (see Tab 3). Greco noted the eagerness of the Hawaii bar to help with arrangements for the 2006 annual meeting. With respect to the format of the annual meeting, he thought that they would have the educational programs start early, perhaps at 8:00 a.m., so that members would be free by 1:00 p.m. ABA would also make audio-visual equipment available free of charge to Sections. He urged Section members to take advantage of that meeting.

Greco also said that he had been familiar with the work of the Section for a long time. He said that year after year, it comes to the House of Delegates with significant issues. He described the EU project as outstanding, and cited it as an example of the continuing leadership of the Section. He also acknowledged the work of Section Delegates Judith Kaleta and Thomas Susman, Mark Agrest, Randolph May, and Eleanor Kinney.

Greco said that he had decided his contribution as ABA President would be to find a way to enable lawyers to contribute more to their communities. He wants to reinvigorate lawyers' commitment, noting that the desire for public service is there, but

not the time. Because he wants to find creative ways to make that happen, he has appointed a 15-person planning group that includes distinguished lawyers, academicians, and younger and older lawyers. This group will meet soon in Princeton to have an honest discussion on what we have allowed the profession to become, and what we can do to put it right. He also commented that the attack on the attorney-client privilege concerned him greatly; in this regard, he noted that ABA President Robert Gray had just appointed a task force on attorney-client privilege. He also indicated an interest in looking at the billable hour issue. He said that he has talked of this in terms of a renaissance of idealism in our profession.

### **Delegates Report**

Section Delegate Judith Kaleta noted that the Section's resolution on encouraging administratively imposed civil penalties passed the House of Delegates in August. She gave credit to Professor Jamie Colburn for that resolution. She also reported that she has been appointed to the ABA Committee on Rules and Calendar, which means that she will get to see all proposed resolutions before anyone else. She suggested that perhaps resolutions could be put out sooner for other sections' consideration. In response to a question from Immediate Past Chair Bill Funk, Kaleta said that the Federal Bar Association was concerned about the adjudication resolution, and that the Section potentially would have a meeting with the FBA. Section Chair May commented that the letter was written by Gail Randall of an FBA committee, and that the letter did not purport to say that the FBA as an association was opposed to the resolution. He added that the next step was to get the resolution out for everyone to see.

### **Update on ACUS Reauthorization**

Section Chair Randolph May said that he had asked former Section Chairs Phil Harter and Warren Belmar to monitor the progress of efforts to reauthorize and revive the Administrative Conference of the United States (ACUS) (see Tab 4). Harter said that the Section has been involved in monitoring the reauthorization proposal and talking with Congressional staff. Starting with an intensive round of telephone calls in spring 2004, Justices Breyer and Scalia gave Congressional testimony in support of ACUS. The House then passed provisions to reauthorize \$3million for ACUS in Fiscal Year 2005; the Senate also passed reauthorization provisions.

Harter observed that there would still have to be appropriations for ACUS, and that some of hostilities that led to ACUS's termination are still there. Rep. Ernest Istook of Oklahoma is the chair of the Subcommittee that would handle that. He added that he is hopeful that this will happen, but that it is by no means a sure thing.

### **9/11 Task Force Report**

Council Member Ron Smith reported on the creation of the 9/11 Task Force Report (see Tab 5). He noted that the task force had decided, after a September 30 meeting, that few of its recommendations had anything to do with administrative law. He

said that they would monitor the bill as it moves through Congress. Council Member Ann Young reported that something had been added to the 9/11 Commission bill regarding immigration issues, and that Council Member Anna Shavers was a source of expertise on such issues.

Former Section Chair Ron Levin reported that there are provisions in the 9/11 bill that relate to the appointment process for national security positions. He proposed that the Section could send a letter in support of streamlining the appointment process, as such an action would be consistent with prior work of this Section. Hannah Sistare of the Commission on Public Service added that this was a rare opportunity to have some forward progress on these issues. Section Chair Randolph May urged that Sistare, Levin, and Council Member Thomas Sargentich come up with a letter that the Section could send. Board of Governors Liaison Mark Agrest indicated that because this is based on prior policy, the Government Affairs Office should send such a letter, rather than having the Section do so under blanket authority. Council Member Shavers added that she would check on the immigration provisions in H.R. 10, the House version of the 9/11 bill.

### **Budget Report**

Budget Officer Dan Cohen reported that this year's fall conference may actually make money (although the final numbers are not yet in), or at least will break even (see Tab 10). On the overall budget, he stated that the Section had done something different this year, by taking a portion of funds out of the reserve to fund the prior year's shortfall and creating a cushion for this year. The total amount involved about \$50,000, \$20,000 of which was for the shortfall. Cohen also said that the Section has rebalanced its reserves to move away from a heavily bond-invested position and into a more evenly balanced stock-bond position. He added that going forward, perhaps the Section could think about rebuilding the reserve.

### **Publications Committee Report**

Publications Committee Co-Chair Anna Shavers reported that the John Duffy – Ron Levin book was due to be published in January 2005 (see Tab 7). The Committee has a number of other books in the pipeline, but is looking for new proposals. She also noted that the Section had success with book sales at the Fall Conference.

### **Interstate Compact Project**

Council Member William Morrow provided a brief report on the Section's interstate compact project. The project, which had a very successful panel on October 18, now has 40 people working on it, including a caselaw and literature review.

### **Membership Report**

Membership Committee Chair Renee Landers noted that the committee had met that morning (see Tab 8). The Section has about 19,500 members total, compared to

17,000 last year, and almost 12,000 law student members. She noted that this Section is one of the few Sections showing a membership increase, and that most ABA Sections have declining membership. The numbers for nonpayment of dues appear to be lower than last year. Landers also stated that the Section had a new membership brochure printed up. Two hundred of these brochures were picked up at the Fall Conference. She indicated that the Section's National Institute on Administrative Law can be another recruiting vehicle for the Section.

### **Administrative Law Review Report**

Heather Kilgore, the Editor-in-Chief of the Administrative Law Review, and Chris Thatch, Managing Editor of the Review, reported on developments at the Review (see Tab 11). The Review has 88 members. The Review editors are very excited about the fall book, which will include an article by Section Chair Randolph May. The Review is planning an annual symposium for February 2005, which will focus on the relationship between international dispute resolution and administrative law. Kilgore also noted that the Review was receiving more unsolicited articles from professors. Thatch added his appreciation for the Section's support of the Review.

### **Nominating Committee Report**

Nominating Committee Chair Neil Eisner gave a status report on the Committee's work. He reported that the Section needed to fill the Vice Chair position as well as four Council seats, Secretary, and Assistant Budget Officer. He noted that this year the Vice Chair position should be filled by someone from outside the Washington, D.C. area.

### **National Institute on Administrative Law**

Jack Young, Chair of the National Institute on Administrative Law, reported on the final outline for the Institute (see Tab 12). He stated that Kim Knight and others are looking for an April 2005 date for the Institute in Washington, D.C. He said that he thinks the Section has the right mix of lectures on making agency law and building a case study. He also indicated that he thinks the Institute should be an annual spring event, to "bookend" with the Section's Fall Conference.

The Council meeting adjourned at 12:20 p.m.

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