

**AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
MIDWINTER MEETING - SALT LAKE CITY, UTAH
FEBRUARY 12, 2005**

Council Meeting Minutes

February 12, 2005

Call to Order and Introduction of Persons Present

Section Chair Randolph May called the meeting to order at approximately 9:00 a.m. Introduction of persons present included Section officers Chair-Elect Eleanor Kinney, Vice Chair Daniel Troy, Section Delegates Judith Kaleta and Thomas Susman, and Council members Michael Asimow, Bernard Bell, Myles Eastwood, Katie Kunzer, Sharan Levine, Jennifer Newstead, Raymond Randolph,¹ Ron Smith, Wendy Wagner, Edward Warren, and Ann Marshall Young, and Young Lawyers Division Liaison Christine Monte, Law Student Division liaison Selina Davis.

Report of the Chair

Section Chair Randolph May reported (see Tab 2) that the Fall Conference, which had a \$15,000 profit this past fall, has become increasingly important in attracting current and potential Section members. This year, the Section has institutionalized a series of General Counsel meetings. In the next six to eight weeks, there will be Section programs on the final OMB peer review guidelines, information-sharing in the terrorism environment, and civil liberties and privacy, among others. In addition, on April 6 and 7 the Section will hold the first Administrative Law and Regulatory Practice Institute. He noted that it was important for Section members, especially Council members, to help the Section market this Institute. The Section's Spring meeting will be held in Savannah, April 29 - May 2. With respect to the Annual Meeting in Chicago, May emphasized that for Section programs that we want to do or cosponsor, people need to develop those programs quickly.

On the technical comments proposal, May noted that there will be a revised proposal before the Board of Governors in August. The gist of the proposal is that if one Section files technical comments, another Section can file its own technical comments that may conflict with the first Section's technical comments. Board Liaison Mark Agrast added that it was his understanding that under the new proposal, the ABA President would have the discretion to decide under what circumstances the second section could file technical comments.

With respect to the ABA's decennial governance review, May noted that the recommendations of the Governance Committee, following the recommendations of the Section

¹ Judge Randolph abstained from all votes during the meeting.

Officers Conference (SOC) Governance Committee, are in the direction of proposing that Sections receive a greater role and authority in the ABA's affairs.

With respect to one Council member, who had missed two meetings and therefore would be subject to the Section's provisions on suspension of Council members for nonattendance, May moved that the member be reinstated to serve the balance of his remaining term on the Council, which would end in August 2005. On motion and second, the motion was adopted by voice vote.

Report of the Chair-Elect

In her report (see Tabs 3A and 3B), Section Chair-Elect Eleanor Kinney indicated that one of her missions was to staff Committee chairs. She invited people to make suggestions for Committee Chairs and Vice Chairs. A second mission involves planning for the 2005 fall meeting, which is expected to showcase the European Union project in an afternoon program and to include a joint program with the Health Law Section and a dinner at the Cosmos Club in Washington. She indicated that the Section is still looking for a site for the 2006 spring meeting. Vice Chair Dan Troy suggested Austin, Texas as a state capital and university town. Finally, she noted her interest in having Committees generate more policy-type issues and recommendations for House of Delegates consideration.

Report of the ABA Board Liaison

Mark Agrast, Section Liaison to the Board of Governors, reported on various developments of possible Section interest. He noted that the ABA might raise dues at the end of the current dues cycle, given the state of Association finances. He also informed the Council that tomorrow the ABA would have an open candidates forum for key ABA officer positions, including President, Chair of the House, Secretary, and Treasurer. At the moment, there is no contested election for President, but the Chair of the House election is contested.

On the ABA decennial governance issue, the Governance Committee is meeting now. Three of the reforms under consideration include (1) reducing the term limit for Delegates, including Section delegates, from nine years (i.e., three three-year terms) to six years, to encourage bringing new blood into the House's membership more quickly; (2) increasing the Sections' representation on the Nominating Committee from seven to 14; (3) increasing Section representation on the Board by three positions. He added that this meeting will be the last that Sections will have for serious input.

The big issue that the Board of Governors will face at its April meeting is whether there should be a dues increase. There has not been a dues increase for several years. In the wake of hiring freezes within the ABA and other belt-tightening measures, they are trying to project revenue very conservatively. The estimate by the ABA Treasurer is now that without a dues increase, there will be a \$4 million shortfall in the 2006-2007 ABA year. Agrast added that he was not optimistic that the ABA could stretch its finances to put off a dues increase for another year. He also noted the importance of non-dues revenue to Sections and the ABA: in 2003-2004, non-dues revenue accounted for \$27 million of the \$90 million total ABA revenue.

Section Chair May commented to Agrast that the Administrative Law Section is the fastest-growing Section, with the greatest amount of growth, of any Section in the ABA, and that those numbers are useful to have in mind in discussing these issues with other Board members. In response to a question from former Section Chair Neil Eisner about the ABA surplus, Agrast stated that the SOC has advocated that the head tax be reduced, but that the surplus has already been allocated to cover an anticipated loss this year.

Report of the Joint Committee on ADR and Confidentiality

Deborah Kant and Steve Shapiro reported on the Joint Committee on Alternative Dispute Resolution (ADR) and Confidentiality (see Tabs 5A and 5B). They asked that anyone who has comments on the Committee's draft report get back to them within the next couple of weeks. The Guidebook that it has produced is a nuts-and-bolts source of practical advice on confidentiality practice in the context of federal ADR programs. It covers topics such as record-keeping, evaluation, and Inspector General requests for documentation, with a view to minimizing conflicts and balancing program and Inspector General needs.

Section Chair May suggested that the Guide, once finalized, should be published, and that it would be a good thing if we could get the three Sections that sponsored the Committee's creation to provide joint support for publication. In response to a question by Section Vice Chair Dan Troy about the potential market for and cost of the book, comments highlighted a prior survey of agency ombuds and agencies' lack of guidance on the complexities of confidentiality issues. On a motion and second to pursue publishing the Guidebook, subject to cost considerations, the motion was adopted by voice vote.

Potential New Section Resolutions

William Luneborg, Chair of the Legislative Process and Lobbying Committee, gave a report on a potential new Section resolution on riders in appropriations bills. His Committee convened an ad hoc subcommittee, which considered whether and what to say on the issue. The subcommittee's view was that it would need strong empirical support for a recommendation, and that a recommendation should be targeted at particular areas rather than all aspects of the use of riders. It also felt that guidance from the Council would be desirable.

Section Chair-Elect Eleanor Kinney noted that the Medicare appeals system was changed significantly in the Medicare prescription drug bill enacted in 2003. She suggested that the Health Committee and Benefits Committee could get together and make some recommendations on that process. Kinney agreed to take the lead on that issue. After comments from Section members Jeffrey Lubbers and Anna Shavers on the contemplated increase in the number of administrative law judges (perhaps 60) that would be needed at the Department of Health and Human Services to hear these Medicare cases, May asked that there be followup on that issue.

Administrative Law Institute

Former Section Chair John Hardin Young reported on the upcoming National Institute on Administrative Law (see Tab 12), which will focus on making agency law. What the organizers had in mind, according to Young, was to put together a mini-course for practitioners, lobbyists, and others. This Institute will use the *State Farm* decision in walking through the process as a case study.

Program: Rulemaking vs. Guidance: Practical Implications

After a short break, the meeting presented a program on "Rulemaking vs. Guidance: Practical Implications for Agencies, Regulated Entities, and the Public." (See Tabs 6-7) The panelists included Jennifer Newstead, General Counsel of the Office of Management and Budget; Judge Raymond Randolph of the U.S. Court of Appeals for the District of Columbia Circuit; Richard G. Stoll, a partner with Foley & Lardner; and Professor Peter L. Strauss of Columbia Law School.

Judge Randolph began, after introducing his fellow panelists, by referring to three axioms: (1) Lord Acton's dictum that "power tends to corrupt, and absolute power corrupts absolutely"; (2) "the greater the power, the greater the possibility of abuse"; and (3) "the less the power, the more willing to exercise it." He noted that in his court, various kinds of tests have been discarded for interpretive rules, such as "substantial effects" or "conduct-altering vs. non-conduct-altering." There is a line one can extract from the court's cases to the effect that legislative rules involve policy-making and interpretive rules do not, but that line will not survive after the Supreme Court's decision in *Chevron*. The most popular line today is "binding" vs. "non-binding."

Richard Stoll began by referring to the March 28, 2002 Federal Register notice in which OMB requested public comment on "problematic agency guidance," and an article by Professor Strauss in which he argued that there is a lot of guidance with which there is nothing wrong and ought to be issued. At the same time, he noted a line of decisions in the D.C. Circuit, starting with *Appalachian Power*, that are getting tougher on agencies going beyond just filling in some obvious questions and adding new requirements that were not discernible in the regulations when those regulations were first issued. One question is, when those new requirements appear to be added, when one can challenge those rules. In a number of regulatory areas, such as environmental law, you are supposed to get judicial review when such requirements are imposed. One of the fears that he would have as an agency counsel is the kind of requirements that come out in this kind of informal guidance that may be practically effective may be tougher and more costly, and not as appropriate when you consider all of the statutory factors, than those that would have gone through the rulemaking process.

Stoll commented that there are too many incentives in an agency to issue a document that has the effect of a rule without being called a rule. If anything, the incentives become greater the more than OMB does its job in requiring greater stringency on cost-benefit issues, peer review, and the like. The problem with deferring judicial review, Stoll commented, is that if a company waits until the agency challenges its conduct to challenge the agency guidance, it comes into

federal district court as a “recalcitrant polluter.” Rather than taking that risk, companies may choose instead to spend the money to comply with the agency guidance. He also expressed concern about the possibility of legislative fixes that might undercut the trend in the cases such as *Appalachian Power*. It seems backwards that an agency that does things the right way, by going through the full rulemaking process, will be subject to pre-enforcement judicial review, whereas if it does not call what it does a “rule” it will not be subject to judicial review for some time.

Professor Strauss began by saying that he agreed with almost everything that Stoll had just said, with the understanding that he was hearing a call for review on the merits. The case he made was an *Abbott Laboratories* case for pre-enforcement review on the merits. His worries about that are the same as Justice Fortas expressed in his dissent, that this might be manipulated by private parties to get review when they ought not to get it. The *Abbott Laboratories* inquiry, to him, seems about right.

Professor Strauss also said that Stoll is precisely right about the difference between rulemaking and guidance, where the former is done at the top of the agency and guidance and policy documents are not. At the Nuclear Regulatory Commission while he was General Counsel, every rule that the Commission issued was discussed by the Commission, while its Bureau of Standards had hundreds of people who turned out new regulatory documents; few of those guidance documents came before the Commission for review or adoption. The Ninth Circuit (but not the D.C. Circuit) draws a distinction between hierarchical enforcement within an agency of its guidance and external enforcement (i.e., binding courts or binding outside parties). The proposition that one can hold staff to follow what the agency has said its policy is neither surprising nor a reason for the agency to give instruction through notice-and-comment rulemaking.

Professor Strauss observed that one consequence of the current run of cases is that it will lead agencies to take more and more stuff out of public view. The European Commission, which uses the term soft law,” issues white papers in which it states, again and again, (a) “This is not law and is not binding” and (b) “We’ve thought seriously about it, staff, and this is what we want you to do.” There is a certain tension between those propositions, but he does not find them completely inconsistent.

Newstead said that she agreed with much of what her fellow panelists had said. She believes that there is a significant scope of utility in these guidance documents. They provide a way for agencies to communicate regulatory policy and interpretations much more quickly and efficiently than they can by legislative rulemaking. Also, the public and regulated communities benefit from getting clear notice of where the agency intends to draw the line. The universe of guidance documents can include some things that industry can find objectionable, but also very useful limits on the exercise of discretion by agency enforcement officials and staff. With respect to cost issues, there are public values and procedural values served by notice-and-comment rulemaking. OMB review can be a value-added proposition in the rulemaking context.

Newstead reported that as a result of OMB's 2002 notice, OMB received 49 nominations from the public covering 14 agencies; of those, 2 dealt with programs, regulations of independent agencies, and those were referred to those agencies without further OMB involvement. The remainder were sent to the agencies concerned, which were directed by OMB to consider whether any steps needed to be taken to address the commenters' concerns. Of the 47 referred, 11 were actually substantially revised, or in some cases repealed, on the subjects of discussion; another 13 of the nominations concerned items that agencies had already decided, prior to the public comment, to undertake review. OMB concluded that it was a fairly successful effort.

Newstead indicated that OMB is thinking about whether there is a way, through some OMB guidance, to encourage agencies to have more centralized internal practices on how they issue guidance documents. The FDA, for example, has been using its "Good Guidance Practices for FDA" document since 2000. This document might be a useful model for other agencies to consider.

In the general question session that followed, Michael Herz asked whether there was some kind of legislative "fix" to the problem. Professor Strauss responded that there might be some room for Congress to make clear that interpretive rules are reviewable through either the Court of Appeals or the District Court (as long as it is clear about it). He saw that the D.C. Circuit has been driven, in some respects, by the procedural complexities of acquiring jurisdiction for any other reason than telling the agency it should have done this by section 553 rulemaking. Stoll added that there might be some clarification of when an affected entity should file its petition for review; in *GM*, the corporation was both too early and too late.

February 13, 2005 Meeting

Section Chair Randolph May called the meeting to order at approximately 8:35 a.m.

Section Delegates Report

With respect to requests for cosponsorship (see Tabs 4A-4C), Section Delegate Judith Kaleta introduced Council Member Anna Shavers, former Chair of the Immigration Committee, to speak concerning the report on Resolution 112. Shavers spoke in support of the resolution, which proposes repeal of the annual 10,000-person cap on the number of permanent resident visas granted to persons who have been granted asylum, and the 1,000-person cap on the number of visas granted to persons fleeing coercive population-control measures. The Council, on voice vote, approved the request for cosponsorship.

Kaleta then noted that there had been a change to Resolution 110, concerning scientific research and supporting policies to enhance homeland and national security. The Science and Technology Section has made changes and come back to the Section to see whether the Section's concerns had been addressed. The Council had no comments.

Kaleta and Section Delegate Thomas Susman introduced several representatives of other Sections to speak about Resolution 104, the "patients' bill of rights" proposal. Robert Stein,

Vice Chair of the Individual Rights and Responsibilities (IRR) Section, said that the resolution is intended to ensure that patients get appropriate information both about treatment options and where to get those options. Susan Fogel, Co-Chair of the Health and Bioethics Committee of the IRR Section, and Andy Demetriou, Secretary of the Health Law Section, spoke in support of the resolution. Their comments indicated that the resolution is directed at statutory or administrative approaches intended to reframe the standard of care of informed consent. They also indicated that the resolution would not cover advising patients of homeopathic remedies or other treatments that did not meet the standard of care. After discussion, on motion and second, the Council, by voice vote, approved cosponsorship.

Susman then reported on changes to the Section resolution on APA adjudication, with a focus on three issues. First, Judge John Vittone raised a question about the provision requiring transcripts be made available at cost. He indicated that this requirement would have a major cost impact on the administrative judiciary. Susman indicated that they had agreed to leave the law as it is and not include the transcript requirement in the APA itself. Second, in response to concerns of the Public Contracts Section about references of boards of contract appeals and bid protests in the report, we have deleted those references and added language of disclaimer in the report. Third, there was a last-minute effort to have the National Conference of Administrative Law Judges (NCALJ) withdraw its support, on the ground that by codifying in the APA the existence of non-ALJ adjudications we are inviting Congress to opt to enact future “Type B” legislation. In response, the resolution would include an additional “resolved” clause to state that the ABA action prefers ALJ adjudication.

Council Members Asimow and Ann Young indicated that these changes represented a good outcome from the previous day’s meeting with NCALJ. Jeffrey Lubbers proposed that the latter change should be limited to evidentiary hearings conducted under the APA, and expressed concern about the resolution appearing to endorse the “current system,” which has flaws documented elsewhere. In subsequent discussion, the Delegates indicated that they would seek to confer with NCALJ during the meeting about the first proposed change.

Administrative Conference of the United States (ACUS)

Joe Hunter, Chief of Staff to Representative Chris Cannon, a principal sponsor of efforts to reestablish the Administrative Conference of the United States (ACUS), spoke about ongoing efforts to obtain funding for ACUS. He indicated they hoped to have several opportunities in the next few months, perhaps in supplemental appropriations bills, to gain some funding. He also commented that they would need help in the coming months to gain support for the appropriation. Vice Chair Dan Troy suggested that it would be useful to develop a list of four “success stories” resulting from ACUS activity. Hunter responded that they had some, but suggested that others would be helpful.

Section Delegates Report (Continued)

On the adjudication resolution, Section Delegate Susman reported that the NCALJ representatives had reconvened and voted to approve changes in the resolution. The language

includes the following “resolved” clause: “. . . the American Bar Association continues to support administrative law judge adjudication as the preferred types of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.” On motion and second, the Council voted to approved the amended resolution.

John Marshall Award

Judge John Vittone, Chair of the ABA Justice Center, talked about the John Marshall Award, an annual award given to someone who has promoted judicial independence and the advancement of the law and the legal system. He indicated that the Center was seeking nominations from all components of the ABA for this year’s award.

Section Delegates Report (Continued)

The Council voted, by a show of hands, to cosponsor Resolution 109B.

Publications Committee Report

Council Member and Publications Committee Chair Anna Shavers reported on a number of Section publications that will be coming out soon or are in process, such as the judicial review book that John Duffy is shepherding. The Committee is still looking for book projects.

Membership Report

Section Chair Randolph May reported that the Section has been the fastest-growing ABA section. membership over the past year. (See Tab 10 for details.)

Budget Report

Section Budget Officer Dan Cohen reported on the Section budget (see Tab 11). He noted that the financial results of the Fall Conference were favorable, not only because the Section turned a profit but because it had been budgeted to break even. One cautionary note is that Section dues revenue is off by nearly \$23,000. A letter has been sent to about 600 members who have not yet paid Section dues. Cohen also noted that the Board of Governors requires that the Section submit its budget information to ABA headquarters by the end of April, a bit ahead of our normal schedule. While the ABA indicates that it needs the information to fulfill its fiduciary responsibilities, to require the Section to submit this information before it has had time to prepare the budget raises questions about why it is needed so soon since the Board will not do anything with the information until the August meeting.

Congressional Research Service Project

Former Section Chair Neil Eisner reported on discussions with Congressional Research Service representatives about a possible project with the Section to develop a series of studies on administrative law and practice issues.

Nominating Committee Report

Former Section Chair and Nominations Committee Chair Neil Eisner gave a status report on the progress of the Nominating Committee (see Tab 8).

Report on the European Union Project

Former Section Chair Neil Eisner gave a progress report on the European Union Project. He stated that the Section is about two months behind schedule, in general, in getting in reports. The Project has major plans for a fall conference to report on each of the five major projects. There is also an Internet site where papers and materials can be posted. The Section is working with four other sections, including the International Law Section. Chair-Elect Eleanor Kinney reiterated the continuing need for funds for the project, and urged that people reach out to law firms, law schools, and other organizations for their support.

OMB Final Peer Review Bulletin

Professor Jamie Colburn reported on the December 15, 2004, publication of OMB's Information Quality Bulletin for Peer Review (see Tab 13 for description). Professor Colburn, who has an upcoming program on this topic, stated that this was an effort by OMB to put some "flesh on the bones" of the predissemination review concept in its Information Quality Act guidelines. This bulletin, on which the Section had commented, includes a baseline standard for "influential scientific information," additional requirements for "scientific assessments" and "highly influential assessments," and a requirement for agencies to maintain web-based agendas of all planned and pending peer reviews.

The meeting then adjourned at approximately 11:00 a.m., to reconvene for the program on informal notice and comment rulemaking and interstate compacts.

Program: Informal Notice and Comment Rulemaking in Interstate Compacts

The Section held a program on informal notice and comment rulemaking in interstate compacts. The panelists for this program included Kent Bishop of the Utah Governor's Office of Planning and Budget, who introduced and moderated the program; Michael L. Buenger, the Missouri State Courts Administrator; Dr. Molly Klapper, an administrative law judge for the City of New York and an administrative law professor at Touro Law Center; and John Marshall, General Counsel to the Tahoe Regional Planning Agency (TRPA).

Bishop observed that in 1999 the Adult Offender Compact became the first interstate compact prescribing that rulemaking substantially conform to the provisions of the federal APA. This, in Bishop's view, signified a new direction in interstate compact rulemaking.

Dr. Klapper first noted how little writing there has been on rulemaking in the context of interstate compacts. Caselaw holds that while an interstate compact is not an "agency" for

federal APA purposes, once it gets Congressional consent it becomes law of the United States; that state administrative procedure law does not apply to interstate compacts; that there are interpretive rules under interstate compacts. It appears that interpretive rules may provide a loophole for states under interstate compacts.

Marshall discussed his experience with the TRPA, a bistate compact that regulates land use in the Tahoe Basin. The TRPA issues more than 1,000 permits a year, without any affiliation with local, state, or federal APAs. The Supreme Court has said that the TRPA is not a state agency., and various district court opinions state that it is not a federal agency. Recent questions raised by a state legislator have prompted the TRPA how to address the issue of ex parte contacts.

Buenger noted that rulemaking in interstate compacts and regulatory compacts was really very ad hoc. In talking with interstate compact authorities about certain compacts, he found that some rules under some compacts flagrantly violated the terms of the compact, quite exceeded the authority of the compact, and in some cases were even unconstitutional for exceeding the compact's authority. This ad hoc approach to interstate compact rulemaking will continue to move forward with the compacts.

Bishop referred to four issues pertinent to interstate compacts that he raised in his memorandum to the Section (see Tab 14): (1) the use of documents being incorporated by reference in rules; (2) emergency rulemaking; (3) final rules adopted with changes; and (4) interpretive rules. He indicated that he intends to stay in close touch with people involved with the National Council of Commissioners on Uniform State Law who are interested in revision of the model state APA.

The meeting adjourned at approximately 12:15 p.m.

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