

## MINUTES

### AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTACT LAW MID-YEAR MEETING

ANNAPOLIS, MARYLAND  
MARCH 7, 2009  
LOEWS ANNAPOLIS HOTEL

#### **Call to Order**

At 8:30 a.m., the Section Chair, Michael Mutek, called the meeting to order.

#### **Presentation to Marilyn Neforas**

Pat Wittie thanked Section Director Marilyn Neforas for her many years of service to the Section and presented her with birthday cards signed by members of the Section on the occasion of her 65<sup>th</sup> birthday.

#### **Approval of November 15, 2008 Minutes**

A motion was made to approve the minutes of the November 15, 2008 Fall meeting. The motion was seconded and the minutes approved by unanimous voice vote.

#### **Section By-Law Revisions**

Michael Hordell explained that the proposed revisions to the Section By-Laws originated during the ABA Section Officers Conference in Chicago in September 2008. Proposed revisions are appended as Attachment A and reflect oversight responsibilities for the Chair-Elect, Vice Chair and Secretary. He also recommended another revision changing the Budget and Finance Officer's term to three years. A motion was made to approve the proposed written and oral revisions and forward them to the ABA Board of Governors for approval. The motion was seconded and approved by unanimous voice vote. Michael Hordell will make necessary revisions to the Section By-Laws and provide the final, approved revised version to the Section Chair.

#### **ABA Identity and Section Logo**

Marilyn Neforas addressed proposed changes to the Section's present logo which was adopted in 1982. The proposed new logos at Tab 3 of the Agenda Book advance the ABA unified logo design and are available at no charge to the Section. Either or both of the logos can be used. The Section will continue to use the old logo pins until the supply is exhausted. A

motion to approve the proposed new logo designs was made, seconded and approved by unanimous voice vote.

### **New Mandatory Disclosure Rule Task Force**

Bob Huffman reported on the New Mandatory Disclosure Task Force which includes broad representation from the private bar, in-house counsel and government. A draft outline of Guidelines for Best Practices reflects 12 topics relating to mandatory disclosures in implementing the new rule and two topics relating to Business Ethics Awareness and Internal Control Systems. He reported that there has been excellent dialogue among all of the participants.

### **Mergers and Acquisitions Task Force**

Section Chair Michael Mutek advised that the Best Practices Manual for Mergers and Acquisitions of a Government Contractor was progressing very well and that a report would be given by Allan Joseph at an upcoming Section meeting.

### **History of Section**

Jennifer Dauer explained that she has begun exploratory work on an oral history of the Section. She provided a five minute DVD demonstration of part of her one hour interview with Allan Joseph. She plans to begin work shortly on the history of the former Women in the Section Luncheon, now recognized as the Ruth C. Burg Luncheon for Women in Public Contract Law. She is looking for interviewers and topics. Don Featherstun suggested questions relating to major issues confronting the Section during the relevant historic time period. The Council expressed interest in pursuing the Section History project. By a motion, duly seconded and approved by unanimous voice vote, the Council asked Jennifer Dauer to prepare and submit a funding proposal to the Standing Committee on Section Funds Policy for her Section History project.

### **Email to Section Membership about Procurement Characterization Project and ABA Agreement with the Barchan Foundation**

Chair Michael Mutek reported briefly on his email announcing the partnership between the Section and the Barchan Foundation for public infrastructure projects, commenting that this was another excellent example of Section involvement in the public procurement arena.

### **ABA Task Force on Financial Markets Regulatory Reform**

The mission of the ABA Task Force is to address financial services regulatory reform. Allan Joseph is a member of the Task Force and Pat Wittie is the Section's Liaison to the Task Force. Allan Joseph reported that the Task Force meets every two weeks to discuss structural issues in the provision of financial services and has designated a Rapid Response group. The first Rapid Response relates to Department of Treasury regulations on conflicts of interest which

address (1) financial agents, such as legal, accounting and investment services, and (2) goods and services subject to Treasury and FAR regulations. Alison Doyle has been enlisted to help draft ABA comments. Of interest are the requirements that financial market employees file extensive financial disclosure statements to avoid personal conflicts of interest and mandatory disclosures for financial institutions subject to TARP.

### **Letter to Stimulus Conferees on ABA Model Procurement Code**

Chair Michael Mutek explained that John Miller, along with Norm Thorpe, Allan Joseph, Maggie McConnell and others from the Section, were instrumental in addressing the original language in the Stimulus Bill which required that State and Local entities awarding contracts funded by the Stimulus Bill use the FAR. John Miller noticed that the original Stimulus Bill required use of the FAR and recognized that State and Local entities would not be able to implement contracts under the FAR. He enlisted the aid of others in the Section to help prepare a written explanation of the problem and worked with Tom Susman, Director of the ABA Governmental Affairs Office, to send a letter to Bill Conferees urging that such funds not be subject to the FAR and offering the Model Procurement Code as an alternative. (See Tab 8 of the Agenda Book.) The Section received an email from Hank White, ABA Executive Director, thanking us for the cooperative efforts.

### **Change in New York Procurement Process**

John Miller participated in a multi-disciplinary panel discussion on public construction law reform for the state of New York on November 25, 2008, during which he explained the construction-related provisions of the Model Procurement Code. The discussion resulted in a recommendation to the New York State Asset Maximization Commission to use the Model Procurement Code. The New York City Bar was a sponsor of the panel discussion and has asked the Section to support the recommendation and to assist the Commission as necessary. The New York City Bar suggested a letter from the Chair offering the Section's assistance. A motion was made to send a letter offering the Section's assistance. The motion was amended to require circulation of the letter to the Council for approval before sending it. The motion, as amended, was seconded and approved by unanimous voice vote.

### **ABA House of Delegates Resolution Recommendations**

John Pachter reported on the ABA Mid-Year Meeting of the House of Delegates in Boston on February 15, 2009, and summarized his handouts of two House of Delegates resolution recommendations. The first was to amend Model Rule of Professional Conduct 1.10 ("Imputations of Conflicts of Interest: General Rule") to permit the screening of a lawyer who moves laterally from one firm to another so that conflicts are not imputed to all of the lawyers in the new firm, with notice of the screening and related requirements to the lawyer's former client. The screening provisions were the subject of much debate by the House of Delegates. The second was to provide consistency with the Supreme Court's directive in *Boumediene v. Bush* and President Obama's January 22, 2009 Executive Order on "Review and Disposition of

Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities from Task Force” on Treatment of Enemy Combatants.

### **Legislative Coordinating Committee**

Chair Michael Mutek referred Section members to the Procurement-Related Legislative Chart at Tab 10 of the Agenda Book which tracks legislative matters and complimented the committee on its fine work.

### **Regulatory Coordinating Committee**

Kara Sacilotto reported that there had been a great deal of regulatory activity in January shortly before the change of administrations, but that now it was relatively quiet. A summary of the Committee’s activity is found at Tab 11 of the Agenda Book.

Kevin Maynard discussed the highlights of the Section’s comment letter on the GSA Multiple Award Schedule Advisory Panel found at Tab 12 of the Agenda Book.

Paul Khoury discussed the Section’s comment letter supporting efforts to increase competition for task and delivery orders and to limit single award order contracts greater than \$100 million and urging clarification on the kinds of procurements qualifying for the \$10 million protest threshold.

### **Tributes**

Tom Madden gave a tribute to John Pavlick who died on November 13, 2008, remembering him as a having wise counsel, good humor and inner strength. John Pavlick was a graduate of West Point and University of Pennsylvania Law School. He served in the Army JAG until 1990, when he joined the Venable firm. He contributed much to the Section, serving on the Council and numerous committees and helping author the *ABA Practitioner’s Guide to Suspension and Debarment*.

Greg Bingham, substituting for Alan Peterson, remembered Jim Booth as a man of strong character and humor who was fair and compassionate. Jim Booth was a clear writer, as evidenced by the decisions written while a judge on the ASBCA and his book, *Interest and Federal Contracts*. He was a bridge builder of the kind reflected in the poem “The Bridge Builder” written by Will Allen Dromgoole, copies of which were distributed to Section members.

### **Special Committee Presentations by Division I, Federal Procurement Division**

Co-Chairs Peter Balch and John Burkholder explained that reports would be presented by the Chairs of representative committees in Division I.

The Accounting, Cost and Pricing Committee presentation was given by Co-Chair Nicole Owren-Wiest with reference to the report at Tab 15 of the Agenda Book. The committee meets

the second Tuesday of every other month at noon and typically attracts 25 members in person and another 25 by telephone. A presentation by Terry Albertson at the February meeting on the recent DCAA audit guidance memorandum attracted greater participation.

The Bid Protest Committee report was presented by Co-Chair David Kasanow who noted the long history of active committee leadership and membership. Committee meetings are typically attended by about 65 people in person and more by telephone with broad representation of all stakeholders, including Court of Federal Claims judges and clerks, representatives from GAO, DOJ and other agencies, and the private bar. The meetings focus upon hot topic or cases. The committee is planning to update the monograph practice guide to bid protests at the Court of Federal Claims. The committee written report is at Tab 18 of the Agenda Book.

The Ethics, Compliance and Professional Responsibility Committee presentation was given by Co-Chair Alison Doyle based upon the written report at Tab 22 of the Agenda Book. The committee meets monthly and typically draws participation by about 20 people representing the committee's diverse membership. It is an excellent forum for discussion of present and potential problems, including professional and personal conflicts of interest, the revolving door, and compliance.

The Health Care Contracting Committee report was given by Co-Chair Donna Lee Yesner. The committee meets monthly and focuses upon contracting for drugs, medical devices and equipment for government facilities providing direct patient care. The committee also addresses matters of interest to providers of health plans, such as Tri-Care, fiscal intermediaries, claims processors, consultants, and R&D for pandemic issues. The committee sponsors a major conference every two years.

The Procurement Fraud Committee presentation was given by Co-Chair Bob Huffman. The three matters currently being addressed are the new Mandatory Disclosure Rule, amendments to False Claims Act, and current cases (*qui tam*, false claims and DOJ counter claims). Meetings are well-attended. The written report is found at Tab 22 of the Agenda Book. Rob Vogel, also a Co-Chair, then discussed pending legislation. Two pieces of legislation involve the False Claims Act: (1) the first relates to fraud enforcement and recovery provisions which broaden liability and address the *Allison Engine* and *Totten* cases; and (2) the other is denominated the False Claims Clarification Act and addresses many procedural issues. There was an amendment included with the Stimulus Bill that permits suit for discrimination due to reporting certain violations.

The Strategic Alliances, Teaming, and Subcontracting Committee report was presented by Co-Chair Robin Ricketts based upon the written report at Tab 28 of the Agenda Book. The committee meets the first Monday of the month day at 1:00 pm eastern time and frequently hosts guest speakers. The committee also has joint meetings with other committees in an effort to increase communication. The committee has a number of special projects relating to subcontractors.

### **Miscellaneous Matters**

Section Chair Michael Mutek advised that the State Law Database project is underway using law students from George Washington University as a special project coordinated by Missy Copeland. The Construction Division hosted a teleconference program on terminations and regularly publishes articles in the *Procurement Lawyer*. The Battle Space and Contingency Procurements Committee is very active and has an excellent web site providing extensive information. The Electronic Access Committee has added a link to the ABA Newsroom. The Young Lawyers Committee co-hosted an event with the Court of Federal Claims Bar Association at the Court of Federal Claims. The ADR Committee is offering a free program on Effective Advocacy before the Boards of Contract Appeals. The Teleconference Educational Programs Committee enjoyed the best quarter ever, with five programs.

Karen Manos reported that increasing the prize for the *Public Contract Law Journal* writing competition has resulted in much higher and more diverse participation. Young lawyers can now be matched with more experienced lawyers to co-author articles for the *Journal*.

### **Nominating Committee**

The 2009-2010 Nominating Committee consists of Patricia Meagher, Chair, Peter Balch, and Sharon Larkin.

### **Programs**

Section Chair Michael Mutek thanked the FPI co-chairs for a superb program, noting that the Practicum on the New FAR Mandatory Disclosure Rule and Implementation was timely and informative. Michael Hordell and Jennifer Dauer summarized the program for the State and Local Spring Symposium to be held on May 14-15, 2006 in New Orleans. There will be a Practicum on Thursday evening followed by a Meet & Greet Reception. Plans for the Annual Meeting are well underway.

### **Financial Report**

Budget & Finance Officer Mark Colley reported that the Section is on track with its budgeted expenses and that despite the economic downturn, the Section is financially sound. The Financial Report is at Tab 41 of the Agenda Book. The Standing Committee on Section Funds Policy funded travel and per diem expenses for a federal employee's attendance at an important Task Force meeting.

### **Peterson Foundation Gift**

The Section received a generous \$15,000 contribution from The Alan and Mildred Peterson Charitable Foundation on February 11, 2009.

### **Future Matters**

Section Chair Michael Mutek commented upon the Presidential Memorandum issued to the Heads of Executive Agencies and Departments on March 4, 2009 regarding government contracting. He expressed the view that the Section should provide its expertise and be involved in any regulatory reform that flows from the Memorandum and asked Section members to think about the proper role for the Section and its committees.

### **Adjournment of Meeting**

At 11:40 a.m., a motion was made to adjourn the meeting. The motion was seconded and carried by unanimous voice vote.

**Respectfully submitted,**

**Carol N. Park-Conroy  
Secretary  
Section of Public Contract Law  
American Bar Association**

**ABA Section of Public Contract Law  
March 7, 2009 Council Meeting  
Attendance Sheet**

<b>Last Name</b>	<b>First Name</b>	<b>Title</b>
Doke	Marshall	Past Chair
Madden	Tom	Past Chair
Williams	Mary Ellen	Past Chair
Weiner	Heather Kilgore	YLD Liaison
Nibley	Stu	Council Member
Larkin	Sharon L.	Council Member
Thorpe	Norm	Past Chair
Pickens	Scott	Council Member
Allen	Rand	Past Chair
Schaefer	Rob	Past Chair
Meagher	Patricia	Immediate Past Chair
Innis	David	Council Member
Joseph	Allan	Section Delegate
Colley	Mark	Budget & Finance Officer
Park-Conroy	Carol	Secretary
Manos	Karen	Chair-Elect
Mutek	Michael	Chair
Featherstun	Don	Vice Chair
Hordell	Michael	Previous Past Chair
Hughes	James A. (Ty)	Council Member
Yukins	Chris	Council Member
Pachter	Burkholder	Section Delegate
Bell	H.J., Jr. (Hugh)	Past Chair
Maramba	Linda	Council Member
Levy	Herman D.	Council Member
Heckman Pickens	Annejanette	Council Member
Burg	Ruth	Past Chair
Kasanow	David	Council Member
Wittie	Pat	Past Chair
Smith	Greg	Past Chair
Copeland	Missy	Council Member
Hanson	Mark	Council Member
Maffei	Rocco	Council Member

<b>Last Name</b>	<b>First Name</b>	<b>Title</b>
Brown	James W.	V-C, Commercial Products & Services Committee
Mellies	Charlie	Raytheon Company
Romero	Lorraine	Raytheon Company, Sr. Counsel
Sacilotto	Kara	Wiley Rein
Davis	Philip	V-C, Ethics, Compliance and Professional Responsibility Committee
Caldwell	Herman	GSA, Section Member
Caldwell	Mary Ellen	
Arnholt	Richard	Crowell & Moring
Ford	Burt	Lockheed Martin Corp, Assoc. Gen. Counsel
Collins Ocumarez	Felicia	Special Counsel/Contracts, Amtrak
Khoury	Paul	Wiley Rein
Prairie	John	Wiley Rein
Burd	Jon	Wiley Rein
Owren-Wiest	Nicole	C-C, Accounting Cost & Pricing Committee
Pearson	Rebecca E.	Venable, PCLJ Editor
Burton	Rob	Venable
Dauer	Jennifer	C-C, State & Local Division and Mbshp. Committee
Grant	Elizabeth	DLA – Scholarship Recipient
Kassekert	Kristine	Corp. Counsel, Immix Group, Inc.
Huffman	Bob	C-C, Procurement Fraud & R&D/IP Committees
Vogel	Rob	Vogel Slade & Goldstein
Molari	Russ	Directed Award
Rose	Mike	Section Member
O'Sullivan	Lynda	V-C, ADR & Tele Conferences Committees; Liaison to DR Section

<b>Last Name</b>	<b>First Name</b>	<b>Title</b>
McAlwee	Marty	V-C, Ethics, Compliance and Professional Responsibility Committee
Yesner	Donna	C-C, Health Care Contracting Committee
Svetz	Holly Emrick	C-C, Annual Meeting and R&D/IP Committee
Donohue	Anne	C-C, IT Procurement (State & Local) and R&D/IP Committees
Nylen	Daniel	Wiley Rein
Moss	Frederick E.	V-C, State & Local Procurement Division
Walz	Jerry	Chair, Electronic Access Committee
Ebner	Susan Warshaw	V-C, Ethics, Compliance and Professional Resp. & Acq. Reform Committees
Smith	John	Section Member
Stoughton	David	C-C, Strategic Alliances Committee
Miles	Jerry	
Balch	Peter	C-C, Federal Procurement Division
Pushkar	Ray	V-C, Battle Space & Contingency Procurements
Whiteman	Neil	Director, Com Law & Lit, USAF
Cockerell	Perry	Section Member
Staats	Dennis	Assoc. Section Member
Collins	Steven	Assoc. Section Member
Flanagan	Kevin	V-C, Battle Space & Contingency Procurements
Maynard	Kevin	C-C, Commercial Products
Fuller	Tony	C-C, Commercial Products
Ricketts	Robin	C-C, Strategic Alliances Committee
Chudd	Daniel	C-C, Young Lawyers
Burkholder	John	C-C. Fed. Pro. Div; Editor-in-Chief, Pro. Lawyer

<b>Last Name</b>	<b>First Name</b>	<b>Title</b>
Kienlen	Ronald	Section Member
Langevin	Mark	V-C, Accounting Cost & Pricing Committee
Neforas	Marilyn	Section Director
Leibas	Ernestine	Section Assistant
Woods	Bill	GAO
Seya	Stan	Section Member
Gassman	Ed	V-C, Acquisition Reform Committee
Dauer	Paul	Section Member
Somers	Jeri	CBCA
Kidaler	Max	Naval Postgraduate School
Hoe	Sandy	C-C, Privatization & Financing Committee
Bingham	Greg	V-C, Accounting Cost & Pricing Committee
Doyle	Gerry	V-C, Bid Protest and ADR Committees

**MEMORANDUM**

**TO:** Section Officers and Council  
**FROM:** Michael A. Hordell, Previous Past Chair  
**DATE:** March 7, 2009  
**SUBJECT:** Proposed Revisions to the Section By-Laws

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On September 19, 2008, the Section Officers had their annual retreat. During that meeting the issue of Officer oversight responsibility was discussed. The discussion focused on each officer assuming oversight responsibility for certain aspects of the business conducted by the Section. Chair Michael Mutek discussed this issue with me, asked that I review the meeting minutes and propose revisions to the By-Laws, as appropriate

The proposed revisions to the Section By-Laws were all made to provide each Section Officer, from the beginning of his/her term, with specific oversight duties and responsibilities that will help to establish a strong foundation for each to better perform each successive Section officer position. Further, performing these series of oversight duties and responsibilities will permit each Chair to more effectively perform and oversee Section business and provide him/her with the tools to perform Lessons Learned Reviews to ensure the Section operates as effectively, efficiently and comprehensively as practicable to maintain its elite status within the Procurement Community.

In addition, it was decided that the term of the Budget and Finance Officer should be increased from 2 years to 3 years.

Attached for your review and approval are the By-Law revisions. The substantive changes are found in Article IV, Sections 2 – 4 and Article III, Section 2. Also attached is the cover memo to be sent by Chair Mutek to the Board of Governors.

## ARTICLE IV

### **DUTIES AND POWERS OF OFFICERS**

- Section 2.** The Chair-Elect shall, in consultation with the Chair, appoint the chairs and members of all Committees of the Section who are to hold office during his/her term as Chair. All such appointments shall be made at least seventy-five days preceding the Annual Meeting of the Section at which the Chair-Elect becomes Chair. The Chair-Elect shall assume oversight responsibility for all Section Division co-chairs providing counsel to assure each is actively monitoring committees within their respective Division to make sure the committees have substantive meetings and their activities stay within Section and ABA policies. He/She shall report to the Chair in this regard as appropriate or specifically required by the Chair. Chair-Elect shall aid the Chair in the performance of his/her responsibilities in such manner and to such extent as the Chair may request. He/she shall perform such further duties and have such further powers as usually pertain to his/her office or as may be designated by the Council or by the Chair. In case of the death, resignation or disability of the Chair, the Chair-Elect shall perform the duties of the Chair for the remainder of the Chair's term or during his/her disability or until the Council acts as provided in Article VII, Section 2(a), as the case may be. [Amended August 7, 2004 and August 1, 2009]
- Section 3.** The Vice Chair shall consult with and assist the Chair and Chair-Elect in the discharge of their duties as set forth above. He/she She shall also assume oversight responsibility for Section Programs providing counsel and support to the Annual and Quarterly Program Co-Chairs and the individual program Co-Chairs to assure that the Section's Programs and associated materials maintain the high standards established by the Section. He/She shall report to the Chair or Chair-Elect in this regard as appropriate or specifically required by the Chair and/or Chair-Elect. The Vice-Chair shall perform such special assignments and duties and have such further powers as may be designated or conferred upon him or her by the Council or Chair. In the case of the death, resignation or disability of the Chair-Elect, the Vice Chair shall perform the duties of the Chair-Elect for the remainder of the Chair-Elect's term or during his/her disability or until the Council acts as provided in Article VII, Section 2(a), as the case may be. [Added August 10, 1981 and 1981, amended August 7, 2004 2004, and August 1, 2009]
- Section 4.** The Secretary shall consult with and assist the officers of the Section in the work of the Section generally. The Secretary shall be the custodian of all the books, papers, documents, and other property of the Section, except money. He/she She shall keep a true record of the proceedings of all meetings of the Section and of the Council, whether assembled or acting under submission. He/she She, in conjunction with the Chair, as authorized by the Council, shall attend generally to the business of the Section. The Secretary shall assume oversight responsibility for membership activities providing counsel and support to the Membership Diversity and Outreach Committee Co-Chairs to assure that the Committee accomplishes the Chair and Section's goals relating to membership, diversity and outreach issues. He/she shall perform such further duties and have such further powers as may be designated by the Chair of the Section or the Section Council. In case of death, resignation or disability of the Chair, Chair-Elect, and Vice Chair, the Secretary shall perform the duties of the Chair until the end of the next Annual Meeting or during such disability, as the case may be. [Renumbered August 10, 1981, and amended July 9, 1985 1985, and August 11, 2009]

## ARTICLE III

### OFFICERS AND COUNCIL

- Section 1.** The officers of this Section shall be a Chair, a Chair-Elect, a Vice Chair, a Secretary, and a Budget and Finance Officer. [Amended August 10, 1981 and July 9, 1985]
- Section 2.** There shall be a Council, which shall consist of the Chair, Chair-Elect, Vice Chair, Secretary, Budget and Finance Officer, two Section Delegates to the House of Delegates, thirteen other Council Members and the two immediate past Chairs *ex officio*. The Budget and Finance Officer shall be elected for a ~~two~~ three-year term at the Annual Meeting in 1985 and in every succeeding odd-numbered year. The Section Delegates to the House of Delegates may be one of said two immediate past Chairs *ex officio*. The First Section Delegate, initially elected at the Annual Meeting in 1987, shall hold office for a three year term and each succeeding First Section Delegate shall be elected for a similar three year term. The Second Section Delegate, initially authorized by the ABA House of Delegates in August 2005, shall hold office for an initial two-year term through the Annual Meeting in 2007, and each succeeding Second Section delegate shall be elected for a three-year term. Other past Chairs of the Section shall be honorary members of the Council, but no past Chair shall serve as an elected officer or Council Member of the Section. As such, they shall be given notice of and have the right to attend all meetings of the Council, and to participate in the discussions, but shall not have any voting right at any such meeting. [Amended January 28, 1969; February 4, 1974; August 10, 1981; July 9, 1985; August 8, 1989; August 7, 2004 and August 7, 2004, 2009.]