

SUMMARY OF THE SETTLEMENT - INSIGHTS

While it is good to see this dispute resolved to the satisfaction, apparently, of both parties, there are many things that the settlement does not settle.

The major disputes that were settled by mutual agreement are the following:

- Schobel resigns and agrees not to run for two years.
- Schobel helps AAA repair their reputational damage.
- AAA pays Schobel \$600,000.
- There are mutual releases of liability relative to matters relevant to the lawsuit.
- Neither party admits guilt, liability, etc.

The 8/5/09 Vote

The beginning WHEREAS's posit the disputed 8/5/09 vote to remove Schobel. However, the agreement sidesteps any resolution of whether or not the Academy Board's vote on 8/5/09 was valid or invalid.

This may be and probably is the way of "settlements" but it is very unsatisfying. Paragraph 2 of the Settlement has the key component (other than the financial settlement) of the agreement:

WHEREAS, the Academy's Board of Directors voted on August 5, 2009 to remove Mr. Schobel from the office of President-Elect and, in its view, thereby as a member of its Board of Directors as well; and

WHEREAS, Mr. Schobel disputes the validity of the August 5, 2009 vote of the Board of Directors to remove him and has filed a lawsuit in the United States District Court for the District of Columbia ("Court") (Civil Action No. 1:09-cv- 01664 (EGS) (JMF)) (the "Litigation") in which he contests the validity and legality of the actions of the Academy's Board of Directors and asserts certain related claims;

2. Effective upon the parties' execution of this Agreement, Mr. Schobel hereby resigns from any and all positions he asserts that he holds as a result of his having been President-Elect with the Academy and a member of its Board of Directors, including the position of President-Elect.

With Schobel agreeing to resign as President-Elect and all other positions he *asserts* he holds – meaning, presumably, also being a Director and the remaining three years of the 4-year presidential term cycle to which he was elected by virtue of being elected President-Elect – the issue of the validity of the vote is no longer a factor.

One hopes the Academy Board would never again do such a dumb thing but this settlement is, clearly, no assurance of that. We will have to look elsewhere for such assurance.

Agreement Not to Run (for a while)

The second sentence of paragraph 2 points out an interesting inconsistency:

Mr. Schobel further agrees that at no time prior to December 31, 2010 will he: (a) seek or accept a position, or the nomination for a position, as an officer of the

Academy or as a member of its Board of Directors; or (b) encourage others to propose or nominate him for such a position.

This means that Schobel has, apparently, agreed not to run for the Academy board either as a director or officer for the next two election cycles. That is interesting for at least two reasons:

Inconsistency with Claims made

The Academy spent \$600,000 plus its own probably significant attorneys fees and has undoubtedly done harm to its reputation (which Schobel has agreed to help repair), in a firm belief one must assume, that Schobel was unwanted as President by the Academy members – certainly he did not appear wanted by the current Academy Board.

3. Mr. Schobel will make affirmative efforts to help repair any reputational damage to the Academy resulting from the Litigation and the related dispute.

Testimony from the 9/9/09 Hearing went like this:

*MR. REES: Well, it understood -- it understood. But its position, and every single e-mail reflects that, was that the Board had received a letter with the sealed matter attached reflecting serious concern that **in the best judgment of the Academy there was a serious question as to whether Mr. Schobel could serve as President-Elect and then as President.***

*And if you **consider the fundamental purpose of an organization's being able to ensure that the person at the helm belongs there** and can act and serve the best interest of the Academy or any other Not For Profit Organization, that demonstrates why such latitude would be provided to a board of directors.*

It is really strange, isn't it, to include a settlement condition that Schobel agree not to run?

- If the Academy Board were so confident that Schobel was the worst possible choice for President, why do they seem to be afraid that the members or worse, perhaps, the Board would elect him back into office – if he ran? Remember, currently, it is the Board that elects all of the officers and most of the directors of the Academy.
- Was this current Board afraid that some future Board (like, for example, the one that comes into being after the Annual meeting on October 26, 2009) might, unless Schobel agreed not to run, draft him and re-elect him despite the fact they had just removed him?
- Or, perhaps, the Board thinks that the members cannot be trusted to not re-elect Schobel unless they got him to agree not to run?

Is it Enforceable?

A look at the Academy Bylaws (**Article I - Membership**) shows that:

*Section 1. **Members.** Individuals having membership in the Academy shall be called “members.”*

Members shall be entitled to attend meetings of the Academy, vote, hold office, serve as elected Directors, make nominations, serve on committees, and generally exercise the rights of full membership.

The Settlement Agreement is a contract. The question is whether or not a contract between Schobel and the Academy Board (the AAA's governing body) can be used to restrict or remove the rights of membership Schobel has by virtue of being an MAAA? These rights of membership are granted by the Academy Bylaws. Clearly, this condition is not in the Settlement Agreement at Schobel's request.

The Bylaws do make some members who have already served in various offices ineligible to run again for a while. For example retiring regular Directors and Vice Presidents must wait a year before running again and the president may serve only one term as President-Elect and President.

If this provision were enforceable, then Schobel would be the only member otherwise eligible who could not run for office. This provision, which is part of the settlement because of the Academy Board, might be contrary to common law or public policy as it looks very much like a *Bill of Attainder*, that is, a narrow, legislative type act by a governing body that singles out an individual and restricts that individual's rights. This might be compared to an employment contract, for example, that has an agreement to work for less than the minimum wage. Such a contract would be, I believe, unenforceable.

More interestingly, however, the Settlement Agreement language which attempts to restrict Schobel's member rights seems to also affect other member's rights. That is, members have a right to *make nominations*. It may be appropriate for Schobel to agree not to “seek” a position or to not “encourage others to propose or nominate him” but the settlement agreement does not (and probably couldn't) restrict a member's right to nominate Schobel or vote for him. The question is: Can the Settlement Agreement require Schobel to not accept a nomination he did not seek or encourage – since he is a member?

The Settlement Agreement does anticipate in its paragraph 14 that a provision of the agreement may be finally determined to be invalid or unenforceable and, if so, that determination would not adversely affect the other provisions.

On the Horizon

Very shortly you should see some proposals and an opportunity for a member initiated Academy Bylaws amendments designed to make the Academy Board more responsive and accountable to Academy members through direct election by the members of all Directors and Officers. This may be the best way for the Academy to repair reputational damage within the profession.