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Association adopts new mission and goals

New York hosts Annual Meeting; numerous new policies adopted

More than 10,000 ABA participants gathered in New York City Aug. 7-12 for the ABA Annual Meeting, where the House of Delegates approved numerous new policies, including a mission statement and goals crafted by the association's Long Range Planning Committee.

Following a passionate debate, the delegates adopted the following new mission statement: to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession. The resolution consolidated the association's previous 11 goals into four "equal" goals with objectives under them: serve our members, improve our profession, eliminate bias and enhance diversity, and advance the rule of law.

The delegates also approved legislative and governmental polices that included support for: the creation of bipartisan commissions at the state level to evaluate the qualifications of potential nominees to the federal courts; legislation to ban racial or ethnic profiling; legislation to protect victims of gender-based violence; funding for tribal justice systems; and broader U.S. interaction with the International Criminal Court.

U.S. Attorney General Michael Mukasey, appearing before the delegates Aug. 12, acknowledged that some Department of Justice (DOJ) supervisors, who have since left the DOJ, failed to observe professional standards and violated civil service laws by inserting politics into the hiring process for career employees and summer law interns. He said that he has addressed the problems and that "professionalism is alive and well at the Department of Justice," but indicated that he does not expect that charges will be filed against the former employees.

Incoming ABA President H. Thomas Wells Jr. and President-Elect Carolyn Lamm both emphasized that they will work to increase diversity in the association's membership. Wells indicated that in addition to enhancing legal diversity, he will focus on preserving judicial independence, ensuring access to justice, and promoting the rule of law (see article, page 5).

The following is a summary of the House of Delegates action on legislative and governmental issues.

Administrative Law

Land Use Planning. Adopts the *Model Statute on Local Land Use Planning Procedures*, dated August 2008, which addresses local land use procedures, incorporates the accumulated legal experience of the last 80 years, and provides a uniform and fair method of treating land use applications and urges its enactment by states, territories and local legislative bodies.

See "Annual Meeting," page 4



LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Independence of the Legal Profession. S. 186, S. 3217 and H.R. 3013 would reverse the privilege-waiver and employee rights provisions in the Justice Department's McNulty Memorandum and other similar federal agency policies that instruct federal law enforcement officials to consider these factors in determining whether corporations and others should receive credit for cooperation – hence leniency – in government investigations. S. 2450 would adopt proposed Rule of Evidence 502 regarding inadvertent disclosure of privileged materials.</p>	<p>Judiciary subc. held a hearing on the McNulty Memorandum on 3/8/07. Judiciary Committee approved H.R. 3013 on 8/1/07. House passed H.R. 3013 on 11/13/07.</p>	<p>S. 186 and S. 3217 were referred to the Senate Judiciary Committee on 1/4/07 and 6/26/08, respectively. Judiciary Committee held a hearing on S. 186 on 9/18/07. Judiciary Committee approved S. 2450 on 1/31/08. Senate passed S. 2450 on 2/27/08.</p>		<p>Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.</p>
<p>Health Care Law. S. 243 would impose a cap on non-economic damages in medical malpractice lawsuits and also cap punitive damages, eliminate joint liability on non-economic damages, and impose a federal statute of limitations in those cases. S. 244, narrower legislation, would limit liability in medical liability cases in the field of obstetrics and gynecology. H.R. 2549 would provide certainty in the Medicare set-aside process for workers' compensation settlements. S. 2662 and H.R. 5480, Medicare funding warning legislation, include medical liability provisions.</p>	<p>H.R. 2549 was referred to the Ways and Means and Energy and Commerce Committees on 5/24/07. H.R. 5480 was referred to the Ways and Means Committee on 2/25/08.</p>	<p>S. 243 was referred to the Health, Education, Labor and Pensions Committee on 1/10/07. Senate rejected attaching the language of S. 244 as an amendment to farm legislation 12/13/07. S. 2662 was referred to the Finance Committee on 2/25/08.</p>		<p>Urges the legal and medical professions to cooperate in seeking a solution to medical liability problems and maintains that federal involvement in the area is inappropriate. In particular, the ABA opposes caps on pain and suffering awards, supports retaining current tort rules on malicious prosecution, collateral sources and contingent fees, and believes that the use of structured settlements should be encouraged. It supports certain changes at the state level in the areas of punitive damages, jury verdicts and joint and several liability.</p>
<p>Judicial Independence. S. 461 and H.R. 785 would create an inspector general for the judicial branch to investigate claims of misconduct against federal judges. S. 352 and H.R. 2128 would provide for media coverage of federal court proceedings. S. 1638 and H.R. 3753 would increase federal judicial pay.</p>	<p>Judiciary subc. held a hearing on judicial salaries on 4/19/07, and approved H.R. 3753 on 12/12/07. Judiciary Committee held a hearing on H.R. 2128 on 9/27/07.</p>	<p>Judiciary Committee approved S. 1638 on 1/31/08. Judiciary Committee held a hearing on cameras in the courtroom on 2/14/07 and approved S. 352 on 3/13/08.</p>		<p>Opposes initiatives that infringe upon the separation of powers between Congress and the courts. Supports increased judicial pay. Opposes any legislation to change constitutional law by limiting federal court jurisdiction in specific areas.</p>
<p>Legal Services Corporation. P.L. 110-161 (H.R. 2764) includes \$350.49 million for the LSC in fiscal year 2008. President Bush requested \$311 million in his proposed fiscal year 2009 budget.</p>	<p>Appropriations Committee approved \$390 million for LSC on 6/25/08.</p>	<p>Judiciary Cmte. held an LSC hearing on 5/22/08. Apps. Cmte. approved \$390 million for LSC on 6/19/08.</p>	<p>President signed P.L. 110-161 (H.R. 2764) on 12/26/07.</p>	<p>Supports an independent, well-funded LSC.</p>

ABA urges political parties to focus on justice system

The ABA urged the platform committees of the Democratic and Republican parties, as they were preparing for their conventions last month, to assign a high priority to addressing problems and challenges faced by the nation's justice system.

In letters to the committees Aug. 6, then ABA President William H. Neukom explained that "equal justice under law can be assured only if all citizens have full access to fair and impartial courts to resolve disputes peacefully and enforce rights fairly and expeditiously." He urged the platform committees to take specific actions to advance three goals designed to protect and strengthen the nation's justice system.

Neukom called upon the committees to preserve a fair and impartial judiciary by supporting an immediate and substantial pay increase for federal judges, which is needed "to attract and retain a highly qualified, experienced judiciary on which our fair and impartial courts rely." Neukom highlighted the words of Supreme Court Associate Justice Anthony Kennedy, who warned in March 2007 that "members of the federal judiciary consider the problem of inadequate compensation so acute that it has become a threat to judicial independence. Your judiciary, the nation's judiciary, will be diminished in its stature and its capacity if there is continued neglect of compensation needs."

In order to improve access to justice for low-income Americans, Neukom urged the committees to support government policies and congressional action that provide adequate funding for the Legal Services Corporation, which funds local legal aid programs through competitive grants.

He pointed out that every day new situations arise that continue to



stretch the ability of the country to ensure that low-income persons can fairly resolve their legal problems through the justice system. Today, natural disasters, consumer fraud matters and the mortgage foreclosure crisis are at the forefront, he said.

The final goal highlighted by Neukom is maintaining the confidential relationship between individual and corporate clients and their counsels. He urged the committees to support government policies that preserve the attorney-client privilege, explaining that the privilege has been eroded over the past several years by a number of government policies governing investi-

gations that also threaten the work product doctrine and employee legal rights in the corporate context.

He pointed out that other policies also undermine the confidential attorney-client relationship by weakening employees' Sixth Amendment right to counsel, Fifth Amendment right against self-incrimination, and other fundamental legal rights by pressuring companies to not pay their employees' legal fees during investigations, to fire the employees for refusing to waive their rights, and to take other punitive actions against them before any guilt has been established.

The political parties were scheduled to finalize their platforms during the Democratic Convention Aug. 25-28 in Denver, Colorado, and the Republican Convention Sept. 1-4 in St. Paul, Minnesota. ■

Senate trafficking bill would protect unaccompanied immigrant children

Legislation approved July 31 by the Senate Judiciary Committee addresses two issues of deep concern to the ABA: protecting victims of international human trafficking and ensuring humane and appropriate treatment of unaccompanied immigrant children who are in U.S. immigration custody.

According to the State Department, approximately 800,000 individuals are trafficked each year, and FBI statistics show that trafficking brings in \$9.5 billion to organized crime annually.

S. 3061, which would reauthorize the Trafficking Victims Protection Act of 2000, would strengthen the Interagency Task Force to Monitor and Combat Trafficking and direct the Secretary of State to establish an office to coordinate anti-trafficking efforts among government agencies and private entities and to set forth protections for immigrants who may be the victims of trafficking or whose testimony against traffickers may be required.

The bill also would enhance tools for prosecuting human trafficking, and includes provisions increasing penalties for the crime.

ABA policy adopted in 2007 urges all levels of government to pass legislation and appropriate funding to strengthen protection and assistance for victims of trafficking within the United States or abroad through emergency assistance and the prompt appointment of

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Interstate Compact Agencies. Urges Congress, states and territories to prescribe the administrative procedures to be employed by congressionally approved interstate compact agencies, provide for judicial review of such agencies' actions, and specify the standards of judicial review.

Business Law

Gatekeeper Regulation. Addresses certain proposed legislation and international policy initiatives intended to impose obligations on company formation agents, including lawyers, to undertake extensive due diligence and determine "beneficial owners" when assisting in the formation of non-publicly traded businesses entities and trusts; and urges Congress to refrain from enacting legislation that would regulate lawyers in the formation of business entities.

Children/Families

Child Welfare. Urges Congress to change laws, including amendment of Titles IV-E and IV-B of the

Social Security Act, to broaden federal review of the disproportionate representation of racial and ethnic minority children in the child welfare system, and require and fund states to track, report, analyze, and take and report on corrective action.

Gender-based Violence. Urges federal, state, local, territorial and tribal governments to adopt legislation and appropriate funding to strengthen protection and assistance for victims of gender-based violence within the United States and abroad; and urges Congress to enact and fund the International Violence Against Women Act or similar legislation.

Courts/Judiciary

Federal Judicial Nominations. Urges pre-nomination consultation between the president and senators. Encourages senators in each state and delegates in each territory to jointly establish bipartisan commissions to evaluate the qualifications of prospective candidates for nomination to the U.S. district courts and to recommend possible nominees

whom the senators or delegates might suggest for the president's consideration; and urges use of bipartisan commissions to evaluate qualifications of prospective candidates to federal courts of appeals.

State Courts Assessment. Urges states and territorial judiciaries, in cooperation with state, local and specialty bar associations, to undertake assessments of their judicial systems, using as an assessment tool the *State Court Assessment Project*, developed by the Standing Committee on Judicial Independence.

Jury Trials. Replaces the Judicial Division's *Standards Relating to Juror Use and Management*, developed in 1983, with the *ABA Principles for Juries and Jury Trials*, which were adopted in February 2005 by the House of Delegates.

Criminal Justice

Sentencing. Recommends that Rule 32 of the Federal Rules of Criminal Procedure be amended to require the availability of information received from parties and non-parties to ensure that both the government and the defense have an opportunity to review information to be considered by the sentencing court in determining appropriate punishment.

Correctional Facilities. Urges federal, state, tribal, local and territorial governments to develop comprehensive plans to ensure that the public is informed about conditions in correctional and detention facilities for adults and juveniles and that there is greater accountability to the public in the operation of those facilities; and adopts the *Key Requirements for the Effective Monitoring of Correctional and Detention Facilities*, dated August 2008.

Racial and Ethnic Profiling. Urges federal, state, local and territorial
see "Annual Meeting," page 5



An Annual Meeting program featured discussion on the implications of the Supreme Court's decision in *Boumediene v. Bush* on criminal and terrorism-related cases. The decision defined the scope of congressional authority to limit the right to habeas corpus. Those appearing on the panel were (from left): Paul Wolfson, Washington, D.C.; Sidney Rosditcher, New York; Deborah Pearlstein, Princeton University; and moderator Neal R. Sonnett.

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torial governments to enact effective legislation, policies and procedures to law enforcement's use of racial or ethnic characteristics not justified by specific facts suggesting that the individual may be engaged in criminal behavior.

Cross-racial Identification. Urges federal, state, local and territorial jurisdictions to recognize that in particular cases cross-racial identification may increase the risk of erroneous convictions; and urges jurisdictions to seek to assure that, in cases in which the trial judge finds a sufficient risk of misidentification based on cross-racial factors, expert testimony that satisfies the applicable rules of evidence is admissible, adequate funding is available to enable both the government and indigent defendants to obtain such testimony, and trial judges have available model jury instructions that inform juries of all of the factors that may enhance or detract from the reliability of an eyewitness identification, one of which may be the cross-racial nature of the identification.

Election Law

Election Administration. Amends the *Election Administration Guidelines and Commentary*, dated August 2008, regarding a code of conduct for volunteers participating in voter registration drives and addressing the handling of provisional ballots by poll workers.

Poll Workers. Urges law firms and other legal employers to allow time spent by lawyers as official poll workers to qualify as community service or voluntary public service hours, and for non-lawyer staff to be allowed paid leave to serve as official poll workers.

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Incoming ABA President Wells will emphasize four core values

ABA President H. Thomas Wells Jr., who began his one-year term Aug. 12, said he will focus his presidency on four core values – preserving judicial independence, enhancing legal diversity, ensuring access to justice, and promoting the rule of law.

"In the South, we say lawyers are 'called to the bar,' and this call to the bar unites us on our common core values, which enables us to make a difference as a profession," Wells said in his acceptance speech before the ABA House of Delegates. Wells is a founding partner and shareholder at the law firm on Maynard Cooper & Gale P.C. in Birmingham, Alabama.

Wells said that as ABA president he will work to help improve the nomination and confirmation process for federal judges, to ensure equal access to legal representation, promote the hiring of more minority lawyers, and emphasize the importance of attorney ethics.



H. Thomas Wells Jr.

He indicated that he strongly backs ABA policy just approved by the ABA House of Delegates that, among other things, calls for senators to establish bipartisan commissions in their states to evaluate the qualifications of prospective nominees to the federal district courts. He also announced that retired Supreme Court Associate Justice Sandra Day O'Connor has agreed to chair a Fair and Impartial State Courts Summit sponsored by the ABA and scheduled for May 2009 in Charlotte, North Carolina. The summit will address problems with state judicial campaigns that threaten the independence of the state judiciaries.

Wells also unveiled two new association initiatives during the Annual Meeting. The first, coordinated by the ABA Standing Committee on Election Law, is a website for the public providing information about voting rights across the country (www.abavoteinfo.org). The second, cosponsored by the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP) and the Section of Litigation, will match cases that are referred by the military to LAMP with civilian lawyers who volunteer to represent members of the military and their families in civil matters.

Wells, who received both his undergraduate degree and law degree from the University of Alabama, has served in the ABA House of Delegates since 1991 and was chair of that policy-making body from 2002 to 2004. He is a former chair of the Litigation Section, has been a member of the ABA Commission on the American Jury and the Commission of the Future of the Legal Profession; and is a co-chair of the ABA Special Committee on Disaster Response.

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Health Law

Decision-making Protocols. Urges federal, state, tribal and territorial legislative bodies, governmental agencies, and health care providers to establish and support decision-making protocols to ensure that the wishes, including those expressed in any prior advance directive, of those who have advanced chronic progressive illnesses are appropriately translated into visible and portable medical orders, such as “Physicians Orders for Life-Sustaining Treatment” (POLST), that address higher probability medical contingencies, including hospitalization, cardiopulmonary resuscitation, artificial nutrition and hydration, antibiotics, and ventilation.

Patient Safety. Urges federal, state and territorial legislative bodies to adopt legislation establishing pilot programs that enable and encourage medical personnel to report hospital events which, if repeated, could threaten patient safety.

Expedited Partner Therapy (EPT). Urges states, territories and tribes to support the removal of legal barriers to the appropriate use by health care providers of EPT, applied as specified in protocols promulgated by the U.S. Centers for Disease Control and Prevention (CDC), in the treatment of sexually transmitted diseases identified in the evidence-based recommenda-

tions of the CDC and the policy statements of the American Medical Association.

Telemedicine. Urges states and territories to provide for mutual telemedicine licensure recognition, whereby a physician with a current, valid and unencumbered license in any jurisdiction could file a single application that would permit the physician to practice telemedicine in some or all other jurisdictions, subject to continuing compliance with those jurisdictions’ licensure fees, discipline and other applicable laws and regulations and adherence to professional standards of medical care.

Housing/Homelessness

Housing Court. Urges all jurisdictions to adopt rules, guidelines and best practices in reviewing stipulations for the settlement of cases and for use in other proceedings, such as the *Best Practices for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court*, dated August 2008.

Indian Law

Tribal Justice. Urges Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems.

International Law

Electronic Communications. Urges the U.S. government to ratify the United Nations Convention on the Use of Electronic Communications in International
see “Annual Meeting,” page 8

Judicial Vacancies/Confirmations — 110th Congress (as of 9/1/08)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	0
US Courts of Appeals (179 judgeships)	10	8	10
US District Courts (678 judgeships)	32	29	48
Court of International Trade (9 judgeships)	0	0	0
Totals	42	37	58

ABA backs federal shield law for journalists

Cites effectiveness of such laws in the states and District of Columbia

The ABA is urging Congress to enact bipartisan legislation to establish uniform rules to determine when journalists can be compelled by a federal judge to reveal their confidential sources.

“This bipartisan compromise bill is the product of several years of deliberation and negotiation, during which it was painstakingly analyzed and refined to as-

sure that it strikes the right balance between preserving the free flow of information to the public through a free and active press and protecting the public’s right to effective law enforcement and the fair administration of justice,” ABA Governmental Affairs Thomas M. Susman wrote to all senators in July.

He pointed out that 49 states and the District of Columbia already recognize an absolute or qualified privilege for journalists to protect their sources from unwarranted legal repercussions. “These state laws are working and are not interfering with criminal investigations or the daily work of government,” he said.

Despite bipartisan support, the Senate failed by a 51-43 vote on July 31 to garner the 60 votes necessary to bring the bill to a floor vote. Objections came from the Bush administration and Minority Whip Sen. Jon Kyl (R-Ariz.), who raised concerns about the definition of journalists and bloggers under the proposal. Attorney General Michael Mukasey, appearing before a House Judiciary Committee in early July said both S. 2035 and H.R. 2102, the House bill that overwhelmingly passed the House last October, would jeopardize the executive branch’s ability to protect classified information.

In more recent correspondence to Senate leaders Aug. 22, Mukasey and Michael McConnell, director of national intelligence, reiterated the administration’s opposition to S. 2035, indicating that changes made to the legislation by sponsor Sen. Arlen Specter (R-Pa.) did not allay their concerns that the legislation would undermine their ability to protect intelligence sources.

On another front, Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) and Ranking Member Specter have asked FBI Director Robert S. Mueller III to explain the findings of a 2007 Department of Justice report revealing that the FBI had requested access, without subpoenas, to telephone records in 2004 from reporters working overseas for the *Washington Post* and *New York Times*.

The senators indicated that this information underscored the need for S. 2035 because the bill would require the government to show a federal judge a specific need for information from reporters or telephone companies, and reporters would be given a chance to respond.

It is unclear whether the Senate will attempt to consider the legislation before the 110th Congress adjourns, but the ABA maintained in its letter to the Senate that “there is no compelling reason to postpone floor consideration longer.” ■

Human trafficking

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guardians ad litem for child victims of trafficking.

Provisions in the bill protecting unaccompanied immigrant children – strongly supported by the ABA and first introduced seven years ago by Sen. Dianne Feinstein (D-Calif.) – build on a law passed in 2002 that transferred authority over unaccompanied immigrant children from the Immigration and Naturalization Service to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services.

The new protections in S. 3061, Feinstein said, “will give unaccompanied minors access to pro bono legal counsel and someone to look after their best interests. I’ve been working on this legislation for seven years. It is time for it to become law.” The bill would also provide guidance to the Department of Homeland Security, Department of Justice and ORR on how to handle unaccompanied immigrant children, establish procedures to ensure that unaccompanied immigrant alien children from Mexico or Canada who do not have claims of asylum can be safely returned to their countries without delay; and provide ORR with the authority to confer with child welfare professionals to make recommendations concerning the best interest of each child.

The House passed its version of the legislation, H.R. 3887, in December. Both bills would strengthen anti-trafficking efforts, but the House bill does not include the additional protections for unaccompanied immigrant children.



Sen. Dianne Feinstein

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Contracts (E-Contracting Convention), which will provide a basic harmonized global legal framework for e-commerce consistent with existing U.S. e-commerce law and policy.

International Adoption. Supports international adoption as an integral part of a comprehensive child welfare strategy to address the worldwide problem of children without permanent homes; and supports policies that make the process of international adoption more timely, less costly and less burdensome while ensuring that international adoption practices are ethical and legal.

Child Support. Urges the Senate to give its advice and consent to the ratification of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Child Support Convention); and urges Congress to enact the necessary implementing legislation.

International Criminal Court. Urges the U.S. government to expand and broaden interaction with the International Criminal Court (ICC), including cooperation with the ICC's investigations and proceedings; and urges the government to participate in all future sessions of the ICC's governing body, the Assembly of States Parties, and in preparations for the Review Conference to be held in 2010.

International Trade. Supports the contribution that the negotiated liberalization of international trade in goods and services, through government-to-government trade agreements, makes to the spread of the rule of law, both at the state-to-state level and within participants' domestic legal systems.

Legal Education

Bar Exam Preparation. Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in deleting Interpretation 302-7 of the *Standards for Approval of Law Schools* concerning bar examination preparation courses.

Legal Profession

ABA Mission and Goals. Adopts a new mission, goals and objectives for the American Bar Association based on recommendations from the ABA Long Range Planning Committee.

ABA Elections. Amends the *Principles and Guidelines on the Election Process for Officers of the Association*.

In-house Counsel. Adopts the *Model Rule for Registration of In-House Counsel*, dated August 2008, for those jurisdictions that elect to impose registration requirements on lawyers practicing therein under Model Rule 5.5(d).

Litigation

Pretrial Preparation. Adopts the black letter of the *Standards for Final Pretrial Submissions and Orders*, dated August 2008, which

are intended to provide a schedule that moves a case forward to trial, but does not impose unnecessary burdens or require pretrial submissions too early in the parties' final pretrial preparation, and to simplify what items should be prepared as the case is in the final pretrial stage.

Military Law

Feres Doctrine. Urges Congress to examine the "incident to service" exception (*Feres Doctrine*) to the Federal Tort Claims Act created by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950), to provide that only the exceptions specifically provided in the act limit active-duty military members' access to the court when they are victims of tortuous government conduct, and to amend the act to provide that the exception limiting access for conduct that occurs in combatant activities applies "during time of armed conflict" rather than "during time of war."

Science and Technology

Forensic Work. Urges state, local and territorial legislatures and regulatory bodies to refrain from requiring private investigator licenses for persons engaged in computer or digital forensic work, including expert testimony; and supports the development of certification and competency requirements for such forensic activities. ■

**ABA Midyear Meeting
Boston, Massachusetts
February 11-17, 2009**

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association's legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at <http://www.abanet.org/poladv/publications.shtml>. © 2008 American Bar Association. All rights reserved. Please address correspondence to:

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