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## *Says service members deserve equal treatment*

# ABA president urges enactment of Equal Justice for Our Military Act

ABA President H. Thomas Wells Jr. expressed the association's support last month for the Equal Justice for Our Military Act of 2009 to provide due process and equal treatment under law to military service members.

In a statement submitted to the House Judiciary Subcommittee on Courts and Competition Policy, Wells said that HR 569, patterned after ABA policy adopted in 2006, would expand the Supreme Court's appellate jurisdiction over military cases under 28 U.S.C §1259. The bill would permit all court-martialed service members who face dismissal, punitive discharge or confinement for a year or more to petition the Supreme Court for discretionary review through writ of certiorari, regardless of any action taken by the U.S. Court of Appeals for the Armed Forces (CAAF), the highest appellate court in the military justice system.

Current law prohibits most court-martialed service members from petitioning the Supreme Court for review of their convictions but the government routinely has the opportunity to petition the court in any case where the charges are severe enough to make a punitive discharge possible. A convicted service member may petition the Supreme Court for review only in cases where the CAAF has either conducted a review of the court-martial or has granted the service member's petition for extraordinary relief. If the CAAF does not grant the service member's petition, which is not granted by CAAF in 80 percent or more of the cases in which a petition is filed, the accused is precluded from ever obtaining review by a federal court.

"Our military service members regularly place their lives on the line in defense of freedoms that we frequently take for granted. The very least they deserve is to be accorded the same due process rights in uniform to which they would be entitled out of uniform," Wells said in his statement. "To do otherwise demeans their service and denigrates the democratic ideals for which they risk their lives."

Dwight H. Sullivan, civilian senior appellate defense counsel in the Air Force Appellate Defense Division, testified in support of HR 569, stating that increased appellate rights for service members would not undermine the military legal system already in place, but rather provide the military with the same rights to Su-

see "Equal justice," page 4

# LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Independence of the Legal Profession.</b> A “Red Flags Rule” proposed by the Federal Trade Commission (FTC) and set to go into effect 8/1/09 would include attorneys in its definition of “creditor” and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft. No legislation has been introduced to reverse the privilege-waiver and employee rights provisions in the Justice Department’s policy 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.</p>				<p><b>Opposes the application of the FTC’s “Red Flags Rule” to lawyers. 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. See page 3.</b></p>
<p><b>Health Care Law.</b> The president held a Forum on Health Reform at the White House on 3/5/09. Numerous bills have been introduced and hearings held on various aspects of the health care system. S. S. 1347 and H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p>	<p>Judiciary subcommittee held a hearing on H.R. 1478 on 3/25/09, and approved the bill on 5/19/09.</p>	<p>S. 1347 was referred to Judiciary Committee on 6/24/09.</p>		<p><b>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. Supports S. 1347 and H.R. 1478.</b></p>
<p><b>Judicial Independence.</b> P.L. 111-8 (H.R. 1105) waived Section 140 to allow federal judges to receive a 2.8 percent cost-of-living increase for fiscal year 2009. S. 220 and H.R. 486 would create an inspector general for the judicial branch to investigate claims of misconduct against federal judges.</p>	<p>H.R. 486 was referred to the Judiciary Committee on 2/9/09.</p>	<p>S. 220 was referred to the Judiciary Committee on 1/13/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p><b>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.</b></p>
<p><b>Legal Services Corporation.</b> P.L. 111-8 (H.R. 1105), omnibus fiscal year 2009 appropriations legislation, includes \$390 million for LSC. The House included \$440 million for LSC in H.R. 2847, fiscal year 2010 funding legislation. The Senate Appropriations Committee approved \$400 million for LSC. S. 718 would reauthorize the LSC and lift some restrictions.</p>	<p>House passed H.R. 1105 on 2/25/09. Appropriations subc. held a hearing on 4/1/09. House passed H.R. 2847 on 6/18/09.</p>	<p>Senate passed H.R. 1105 on 3/10/09. Appropriations Cmte. approved draft funding bill on 6/25/09. S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p><b>Supports an independent, well-funded LSC. See page 8.</b></p>

# ABA Board adopts “Red Flags Rule” policy

## *Maintains that rule not intended to apply to lawyers*

The ABA Board of Governors approved a policy resolution June 13 urging the Federal Trade Commission (FTC) and Congress to clarify that a “Red Flags Rule” proposed by the commission to combat identity theft is not applicable to lawyers while they are providing legal services to clients.

The “Red Flags Rule,” mandated by the 2003 Fair and Accurate Credit Transactions Act (FACTA) and now set to go into effect Aug. 1, requires that “creditors” and “financial institutions” implement programs to detect, identify and respond to activities that could indicate identity theft. The FTC is interpreting a broad definition of “creditor” that includes businesses that provide services and bill for the services at a later date to include attorneys, doctors and other professionals.

The ABA learned in April – one week before the rule was set to go into effect in May – that the FTC intended to include lawyers as “creditors,” and ABA President H. Thomas Wells Jr. immediately requested a postponement. The FTC responded by delaying the effective date for three months.

Because of the urgency of the issue, a working group of ABA entities was assembled to assess the rule and its potential impact on lawyers. The working group presented a recommendation and report in June to the Board of Governors, which has the power to act on policy recommendations between meetings of the association’s House of Delegates if the matter cannot feasibly await consideration. Board action was necessary because of the rule’s Aug. 1 enforcement date.

In the report to the ABA Board, the working group explained that “lawyers are not engaged in the

type of commercial activity that Congress was attempting to regulate with FACTA and should not be considered ‘creditors’ under the Red Flags Rule.”

The report emphasizes that lawyers do not extend credit in the manner envisioned by FACTA, nor was FACTA intended to cover lawyers. Failure to apply the Red Flags Rule to lawyers would not increase the risk of identify theft, and FTC staff could not identify any incidents of identity theft arising from the law practice context. The likelihood of identity theft arising from a client-lawyer relationship for purposes of the Red Flags Rule is remote in extreme; the type of identify theft addressed by the rule would be present only if an individual pretended to be someone else, either to fraudulently initiate a client-lawyer relationship or to obtain legal services on the pretext that the person is another individual who is already a client of a lawyer. There-

fore, the person would not only have to assume another person’s identity, but also his or her legal needs.

Developing an identify theft prevention program under the rule is a resource-intensive task even for a low-risk entity like a law firm, and the burden of lawyer compliance with the Red Flags Rule far outweighs any perceived benefit a client might receive.

This is not the first time that the ABA has resisted ungrounded FTC regulatory efforts. In June 2001, the ABA Board approved similar policy urging an exception for lawyers under the Gramm-Leach-Bliley Act. The U.S. Court of Appeals for the District of Columbia Circuit subsequently ruled that the FTC exceeded its statutory authority when it attempted to regulate lawyers engaged in the practice of law as “financial institutions” required to issue privacy notices under the act. ■

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## ABA urges hearings on Military Commissions Act

The ABA urged the Senate and House Armed Services Committees and the Senate and House Judiciary Committees last month to hold hearings on any proposals that would revise the Military Commissions Act of 2006 (MCA) or authorize new detention authority or procedures.

“Congress must engage in a thoughtful, deliberative process to examine the MCA’s implementation and to make certain that the military commission system is revised to ensure that it adheres to established principles of due process,” ABA Governmental Affairs Director Thomas M. Susman wrote June 23 to the chairs and ranking members of the committees.

Congress enacted the MCA to authorize military commissions to try individuals designated as “enemy combatants” as part of the nation’s anti-terrorism efforts. In 2008, the Supreme Court struck down part of the law by ruling that “enemy combatant” detainees held at Guantanamo Bay have the right to habeas corpus to challenge their detention in federal court.

President Obama, after initially suspending active military commission proceedings at Guantanamo Bay when he took office in January 2009, announced in May that his administration will be changing the rules to restore the commissions “as a legitimate forum for prosecution while bringing them in line with the rule of law.” He also said that he will work with Con-

*see “Military,” page 5*

## SSA backlog spurs call for more funding

The ABA urged Senate and House Appropriations subcommittees last month to provide no less than \$11.603 billion for the Social Security Administration (SSA) in fiscal year 2010 – the amount requested by President Obama.

That amount, according to the ABA, would permit the agency to continue its efforts to address the crippling backlog of Social Security disability claims. In letters the Senate and House Appropriations Sub-

committees on Labor, Health and Human Services, Education and Related Agencies, the association pointed out that inadequate SSA funding has led to a backlog of approximately 755,000 hearings pending before the agency and an average processing time for a hearing decision of 516 days.

ABA Governmental Affairs Director Thomas M. Susman emphasized the ABA's longstanding interest in the SSA's disability benefits

decision-making process and cited a wide range of recommendations that have been developed by the ABA Section of Administrative Law and Practice, Judicial Division, and Commission on Law and Aging. The goals of the recommendations are to:

- improve the quality of decision-making;
- increase fairness and efficiency for claimants;
- help alleviate the backlog;
- encourage clarity in communication with claimants;
- promote due process protections; and
- seek the application of appropriate, consistent legal standards at all stages of the adjudication process.

“Congressional approval of the president's fiscal year 2010 budget request for SSA would constitute a large step forward in reducing the backlog and improving services to the public,” Susman wrote. A sustained level of administrative funding also will enable the agency to “build the infrastructure necessary to manage the significant workload challenges presented by serving the aging baby boomers filing disability and retirement claims,” he concluded. ■

### Equal justice bill supported by ABA

*continued from page 4*

preme Court review as U.S. civilian citizens.

“CAAF's status as an Article 1 court has not greatly limited its powers,” Sullivan stated. “Even if the Supreme Court's review was broadened, CAAF would still hold great authority, but in cases of constitutional issues, it is appropriate for the Supreme Court to step in.”

Wells disagreed with a 2008 Congressional Budget Office (CBO) statement estimating that the cost of enactment of the legislation would be about \$1 million a year “based on information provided by the Department of Defense (DoD) and the American Bar Association.” Wells countered that “the CBO cost estimate is erroneously predicated on an assumption that several hundred cases will be filed, when in fact the number of petitions that will be prompted by enactment of this legislation is likely to be minimal, based on an extrapolation of past patterns.”

The ABA “cannot say that there will be no costs associated with expanding service members' right to seek Supreme Court access,” Wells stated. “But we can say with confidence that the costs will be small, and they are justified given the result: namely, that men and women who wear the uniform of the United States and who are charged with serious crimes will have the same right to access to the only court mandated by the United States Constitution as defendants in every civilian court in the nation. This is equal justice and those who choose to serve their country deserve it.”

Also testifying before the subcommittee were Rep. Susan Davis (D-Calif.), sponsor of HR 569 and chair of the House Armed Services Subcommittee on Military Personnel; and John D. Altenburg, Jr., retired Major General for the U.S. Army and former Deputy Judge Advocate General. Altenburg opposed the bill, maintaining that “service members are already afforded greater appellate rights by the UCMJ than are civilians in U.S. justice systems.”

The legislation is pending in the Senate as S. 357, sponsored by Sen. Dianne Feinstein (D-Calif.).

### ABA Annual Meeting

July 30—August 4, 2009

Chicago, Illinois



## Military commissions

*continued from page 3*

gress on additional reforms that will “permit commissions to prosecute terrorists effectively and be an avenue, along with federal prosecutions in Article III courts, for administering justice.”

In his letter to the committees, Susman highlighted relevant ABA policies adopted in 2002 and 2009.

Since February 2002, the ABA has urged that military commissions comply with the rules of the Uniform Code of Military Justice to provide detainees the rights afforded in courts-martial and to comply fully with international treaty obligations.

In February 2009, the ABA House of Delegates adopted a policy urging “the U.S. government to ensure that all individuals who have been or are expected to be charged with violations of criminal law should be prosecuted in Article III federal courts, unless the attorney general certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice.”

The Senate Armed Services Committee, responding to the need to examine legal issues surrounding military commission and treatment of detainees, has announced a July 7 hearing that will feature Department of Defense General Counsel Jeh C. Johnson; David S. Kris, assistant attorney general for the National Security Division at the Department of Justice; and Vice Admiral Bruce E. MacDonald, judge advocate general for the U.S. Navy. ■

## ABA hosts Diversity Summit

More than 200 lawyers, judges and academics joined ABA President H. Thomas Wells Jr. June 18-20 at a summit he convened in National Harbor, Maryland, to discuss the next steps that must be taken to achieve greater diversity in the legal profession.

The kickoff keynote speaker, Kareem Dale, special assistant to President Obama, cited a wide range of appointees at the White House and in various government positions as evidence of a renewed commitment to enforcement of rights for all people, regardless of race, ethnicity, religion or other factors.

Rep. G.K. Butterfield (D-N.C.), the dinner speaker June 19, described his childhood in North Carolina when all judges and most prosecutors and jurors were white and courtroom observers sat in sections separated by race. Even though much progress has been made, he said there has never been a female district court or superior court judge in his district. “It is a terrible mistake to make public policy without diverse viewpoints. Viewpoint diversity advances democracy,” he emphasized.

Wells convened the summit to reenergize the legal profession’s diversity efforts, including expansion of outreach to persons with disabilities and persons of varying sexual orientation and gender identities as part of a campaign for a more representative bar. He pledged that the association will compile the ideas generated at the summit into an agenda for enhancing diversity in the legal profession.



**Major participants at “Diversity in the Legal Profession: The Next Steps?” included (from left): Planning Committee Co-Chair The Honorable James A. Wynn Jr., Court of Appeals, Raleigh, North Carolina; ABA President H. Thomas Wells Jr.; Rep. G.K. Butterfield (D-N.C.); and Planning Committee Co-Chair Eduardo Roberto Rodriguez of Rodriguez Colvin Chaney & Saenz LLP, Brownsville, Texas.**

## ABA commends introduction of health bill on advance planning and life-sustaining treatment

The ABA commended the sponsors of legislation addressing important health care issues, including the importance of advance planning and quality treatment of advanced chronic progressive conditions.

In a June 29 letter to Sen. John D. Rockefeller IV (D-W.Va.), ABA Governmental Affairs Director Thomas M. Susman wrote that S. 1150, introduced by Rockefeller, includes several ABA-supported components aimed at providing steps toward ensuring that every adult's health care wishes are known and respected by his or her physician and by other health care providers, both within one's home state and across state lines.

Pointing out that these are needs that have been overlooked by the federal government in its oversight of Medicare and Medicaid, Susman said that the legislation "will spark needed dialogue about real policy solutions to meet the needs of patients with serious and chronic life-limiting conditions."

S. 1150, titled the Advance Planning and Compassionate Care Act of 2009, builds on the goals of the 1990 Patient Self-Determination Act, which was supported by the ABA. The new legislation contains ABA-supported provisions that would establish advance care planning as a basic element of patient care, ensure electronic access to advance directives, strengthen hospice care and translate patients' wishes into visible and portable medical orders as exemplified by Physicians' Or-

ders for Life Sustaining Treatment (POLST). The ABA also supports the bill's provisions to ensure greater availability of high-quality palliative care resources and improved training in palliative care.

Rep. Earl Blumenauer (D-Ore.) introduced identical advance planning legislation, H.R. 2911, in the House as well as H.R. 1898, a bill focusing on POLST. H.R. 1898, the Life Sustaining Treatment Preferences Act of 2009, raises POLST to a recognized treatment modality by providing coverage under Medicare for consultations regarding orders for life-sustaining treatment and by creating a grant program to provide necessary resources to states and local communities to develop POLST programs.

"In 2007, the ABA adopted a policy calling for the establishment and support of protocols such as POLST because POLST helps ensure that patients' voices are heard and respected and improves the quality of care," Susman wrote in a June 29 letter to Blumenauer.

POLST, while not an advance directive, builds on advance directives by translating a patient's wishes into medical orders that address here-and-now medical conditions. For patients who do not have advance directives or who retain the capacity to make health care decisions, POLST works equally well through direct communication between physician and patient or between the physician and the patient's authorized surrogate. ■

### Judicial Vacancies/Confirmations — 111th Congress (as of 7/7/09)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	1	0
US Courts of Appeals (179 judgeships)	15	5	0
US District Courts (678 judgeships)	66	2	0
Court of International Trade (9 judgeships)	0	0	0
<b>Totals</b>	<b>81</b>	<b>8</b>	<b>0</b>

## Washington News Briefs

**RECIDIVISM REDUCTION:** The ABA expressed strong support June 11 for the Recidivism Reduction Act, which the association believes would provide vital help to offenders attempting to reenter society and avoid further contact with the criminal justice system. The legislation, H.R. 2829, would ensure prompt access to Supplemental Security Income (SSI), Social Security Disability Income (SSDI) and Medicaid benefits for those released from public correctional facilities. According to the Justice Department, two-thirds of prisoners released from prisons will be rearrested within three years. Recidivism is a particular problem among mentally ill offenders, who make up a disproportionate number of inmates in correctional facilities, and SSI, SSDI and Medicaid often are their main source of income and health care support. In a letter to bill sponsors Reps. André Carson (D-Ind.), Patrick Kennedy (D-R.I.) and Pete Stark (D-Calif.), ABA Governmental Affairs Director Thomas M. Susman emphasized that because of barriers in the law, most offenders do not receive their entitled benefits upon release and often have to wait as long as three months to have them restored. “Without these benefits, offenders are forced to live under the same conditions that precipitated their prior arrest,” Susman wrote, “and many commit another crime and end up back in prison, creating a cycle from which few offenders – especially those with mental illness – have little chance of escaping.” When introducing the bill last month, Carson emphasized that the measure is not about increasing or expanding benefits for ex-offenders, but “simply streamlines our system so that eligible individuals can access their benefits more quickly – which will in turn reduce recidivism and make our communities safer.”

**VOTING RIGHTS:** The ABA last month applauded House Judiciary Committee Chairman John Conyers Jr. (D-Mich.) and Sen. Russ Feingold (D-Wis.) for their leadership in introducing the Democracy Restoration Act of 2009, which would restore voting rights in federal elections to those with felony convictions who have been released and have reentered society. Currently, four million individuals with felony convictions in their past are living in the community, paying taxes and raising families, but they remain disenfranchised for years, often decades, and sometimes for life. In letters to Conyers and Feingold, ABA Governmental Affairs Director Thomas M. Susman said that the United States is one of the few western democratic nations that exclude such large numbers of people from the democratic process and that the current patchwork of laws has

created an unfair federal electoral process that has a disparate impact on African Americans. He explained that felony disenfranchisement laws are rooted in the Jim Crow era, enacted alongside poll taxes and literacy tests to keep African Americans from voting. By 1900, 38 states denied voting rights to people with felony convictions, and rights were not restored unless the individuals received a pardon. Today, 13 percent of African-American men have lost the right to vote and, if current incarceration rates continue, three in 10 of the next generation of African-American men will lose the right to vote at some point in their lifetimes. “In this country, voting is a national symbol of political equality and full citizenship,” Susman wrote. “When citizens are denied this right and responsibility, their standing as full and equal members of our society is called into question. The United States should not be a country where the effects of past mistakes have countless adverse consequences with no opportunity for renewal,” he concluded.

**LAW LIBRARY OF CONGRESS:** H.R. 2728, a bill approved June 10 by the House Administration Committee, would authorize a one-time appropriation of \$3.5 million for the Law Library of Congress and establish a separate federal budget line-item for the Law Library to promote accountability and provide the institution with the funding necessary for maintaining services. Currently the Law Library’s appropriations are encompassed in the Library of Congress budget. The bill – the William Orton Law Library Improvement and Modernization Act – is named in memory of former Rep. William Orton of Utah, who died in April. Orton, who served in Congress from 1991 to 1997, was a long-time member of the ABA Standing Committee on the Law Library of Congress. He testified last June in support of increased funding for the Law Library and for legislation to enhance the Law Library’s services. The bill also would establish the William Orton Program, which would be funded through appropriations and private donations of funds or in-kind contributions to implement special services and programs for the Law Library. The Library of Congress Trust Fund Board and the Librarian of Congress would accept the funds, and the Law Librarian of Congress would recommend how the funds would be disbursed. During appropriations hearings in May, ABA Governmental Affairs Director Thomas M. Susman said that the ABA supports the legislation or similar proposals to “enhance the resources and flexibility of the Law Library to meet the particular challenges it faces.”

## Senate panel recommends \$400 million for LSC

### *Laurie Mikva confirmed to LSC Board of Directors*

The Senate Appropriations Committee June 25 approved \$400 million for the Legal Services Corporation – a \$10 million increase but \$40 million less than the \$440 million passed by the House a week earlier as part of H.R. 2847, its fiscal year 2010 appropriations bill.

The House figure represents a \$50 million increase in funding for the corporation, and the ABA will be continuing its efforts to increase LSC funding for fiscal year 2010 as Congress continues to consider appropriations bills.

During House debate on H.R. 2847, the House soundly defeated, by a 105-323 vote, an amendment offered by Rep. Jeb Hensarling (R-Texas) to eliminate the LSC. Rep. Alan Mollohan (D-W.Va.), chair of the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, argued that Hensarling's amendment "would attempt to effect a balancing of the national debt or a reduction of it on the backs of those who are the absolutely least able to afford it and making an extremely small contribution in the process. Now more than ever, the LSC really needs a healthy federal appropriation."

H.R. 2847 would lift the current provision that prohibits LSC-funded programs from recovering attorneys' fees when recovery is

permitted or required under federal or state law. According to the House report, this action "will level the playing field between legal aid attorneys and their counterparts in the private sector and provide a potentially crucial source of additional revenue to legal aid providers in a year in which state, local and private funding sources are decreasing."

The Senate Appropriations Committee would lift a restriction, except in abortion and prison litigation cases, that prevents recipients of LSC funding from freely utilizing – without being subject to federally imposed restrictions – state, local, private and other non-LSC funds to provide needed legal assistance to poor clients.

In a June 23 letter to the Senate Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, ABA President H. Thomas Wells Jr. emphasized that this restriction prevents these other funders from giving money to LSC-funded programs because the funds often cannot be used as the donor intends.

"The restriction has created great inefficiency in the legal aid system across the nation; entirely new and separate local legal aid program had to be created to accept non-LSC funds in order to facilitate the donors' intent," he wrote.

Wells also reiterated ABA supports for lifting the attorneys' fee restriction as well as the restriction on LSC-funded programs using federal funds to file class actions, which the ABA believes should be available to low-income victims of unscrupulous practices.

In other LSC action, the Senate confirmed Chicago lawyer Laurie Mikva June 19 as a new member to the LSC Board of Directors for a term expiring in July 2010. Wells and Deborah G. Hankinson, chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), sent a letter June 8 to the Senate Health, Education, Labor and Pensions Committee supporting Mikva's nomination following an evaluation of her qualifications.

The association's support of the nomination was based on criteria adopted by the ABA House of Delegates in 1989. The ABA Board of Governors authorized the ABA president to express support or opposition to individuals nominated to the LSC Board.

Mikva worked as a staff attorney at Land of Lincoln Legal Assistance Foundation Inc. from 1993 through 2008. A specialist in areas of family law and domestic violence, she helped establish the Domestic Violence Clinic at the University of Illinois College of Law. ■

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>. © 2009 American Bar Association. All rights reserved. Please address correspondence to:

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