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## *Confirmation hearing scheduled to start July 13*

### **ABA Standing Committee begins evaluation of Supreme Court nominee**

The 15-member ABA Standing Committee on the Federal Judiciary has begun its peer review evaluation of Supreme Court nominee Sonia Sotomayor, a judge on the Second Circuit Court of Appeals who is President Obama's choice to succeed retiring Associate Justice David H. Souter.

Judge Sotomayor, who has held her Second Circuit seat for 11 years, was first appointed to the federal bench in 1992 when President George H.W. Bush selected her for a seat on the U.S. District Court for the Southern District of New York. President Clinton appointed her to the circuit court in 1998.

Born in the South Bronx to immigrant parents from Puerto Rico and raised in a housing project, she is a graduate of Princeton University and Yale Law School. She was an assistant district attorney in Manhattan before entering private practice at the law firm of Pavia and Harcourt in 1984.

President Obama, in nominating Judge Sotomayor May 26, said she "would bring more experience on the bench, and more varied experience on the bench, than anyone currently serving on the U.S. Supreme Court had when they were appointed."

If confirmed, she would be the first Hispanic to serve on the U.S. Supreme Court. At the news conference announcing her nomination, she said, "I chose to be a lawyer, and ultimately a judge, because I find endless challenge in the complexities of the law. I firmly believe in the rule of law as the foundation for all of our basic rights."

In a statement on the nomination, ABA President H. Thomas Wells Jr. highlighted the role of the ABA Standing Committee in evaluating the nominee.

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# LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Independence of the Legal Profession.</b> 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. The Justice Department issued new privilege waiver guidelines 8/28/08. The Securities and Exchange Commission announced a new guidance on 10/14/08. P.L. 110-322 (S. 2450) adopted new Rule of Evidence 502 regarding inadvertent disclosure of privileged materials.</p>			<p>President signed P.L. 110-322 (S. 2450) on 9/19/08.</p>	<p><b>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.</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. 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.</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.</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 Appropriations Committee included \$440 million for LSC in fiscal year 2010 funding draft legislation. 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. Appropriations Cmte. approved draft legislation on 6/9/09.</p>	<p>Senate passed H.R. 1105 on 3/10/09. 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 3.</b></p>

## ABA backs uniting families legislation

The ABA expressed support June 3 for S. 424, a bill introduced by Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) that would provide same-sex permanent partners of U.S. citizens and lawful permanent residents with access to immigration status on an equivalent basis to married different-sex couples.

“Central to this nation’s long history of immigration law and policy is ensuring that Americans and their loved ones are able to stay



**Christopher Nugent**

together in the United States. The current failure to recognize same-sex permanent partnerships for immigration purposes is cruel and unnecessary,” according to Christopher Nugent, co-chair of the Rights of Immigrants Committee of the ABA Section of Individual Rights and Responsibilities.

Nugent, testifying before the Senate Judiciary Committee, explained that U.S. policy allows foreign spouses and fiancé(e)s to immigrate and live with their U.S. partners, but the policy keeps thousands of lesbian and gay binational couples and their children apart, drives them abroad, or forces them to live in fear of being separated.

He noted that data from the 2000 Census reported 35,820 same-sex binational couples living together in the United States.

The ABA has adopted numerous policy recommendations relating to the administration of the legal immigration system as well as numerous positions opposing discrimination based upon sexual orientation. Policy adopted in February by the House of Delegates supports the enactment of legislation “to enable a U.S. citizen or lawful permanent resident who shares a committed intimate relationship with another adult individual of the same sex; is not married to or in any other legally recognized partnership with anyone other than that individual; and is unable to enter into a marriage with that other individual that is cognizable under the Immigration and Nationality Act to sponsor that individual for permanent residence in the United States.”

Nugent said that the proposed

Uniting American Families Act, S. 424, accomplishes the ABA policy goal while retaining and strengthening important protections against potential fraud and abuse. He also emphasized that current U.S. policy in this area is in direct contradiction with many of the United States’ closest allies, including Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, New Zealand, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, and the United Kingdom.

Julian Bond, chairman of the NAACP National Board of Directors, also testified in support of the legislation, explaining that the “NAACP strongly believes that the definition of ‘family’ is not restrictive and can and should also include non-traditional family units.”

Those opposed to the bill included Jessica Vaughan, director of policy studies for the Center for

*See “Immigration,” page 4*

### House committee okays \$50 million increase for LSC

The LSC would receive \$440 million in fiscal year 2010 in a funding bill approved June 9 by the House Appropriations Committee.

The \$440 million is \$5 million more than requested by President Obama and \$50 million more than the corporation’s current funding of \$390 million. In addition to increasing funding, the legislation would lift the current restriction on the ability of LSC-funded attorneys to recover statutorily authorized attorney fees. The funding and other provisions are the same as those approved June 4 by the House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies.

In a June 3 letter to the subcommittee, ABA President H. Thomas Wells Jr. reiterated the association’s support for increasing LSC funding as well as lifting, in addition to the attorney fee restriction, the restriction that prevents recipients of LSC funding from freely utilizing state, local private and other non-LSC funds to provide needed legal assistance to poor clients, and the restriction on the bringing of class actions by LSC-funded programs.

Wells pointed out to the subcommittee that in April the presidents of every state bar, the District of Columbia, the Virgin Islands and Puerto Rico and the four major bars of color wrote to the panel to urge LSC funding of at least \$435 million to help meet the urgent and expanding need for civil legal services.

He also said that the ABA believes that “the recession, which has both squeezed the federal budget and increased the number of Americans in need

*see “LSC,” page 8*

## ABA opposes bill to overturn *Leegin* decision

James A. Wilson, chair of the ABA Section of Antitrust Law, told a key Senate subcommittee May 19 that the ABA opposes legislation that would effectively overturn a 2007 Supreme Court decision regarding resale price maintenance agreements between manufacturers and their retailers.

The decision, *Leegin Creative*

decision is consistent with several of the Supreme Court's decisions over recent decades. "The ABA supports the Supreme Court's decision that the time has come to extend the rule of reason approach of these earlier decisions to minimum resale price maintenance because the same motives that manufacturers possess for entering into non-

dealers.

Sen. Herb Kohl (D-Wis.), who chaired the hearing held by the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, has introduced S. 148, the Discount Pricing Consumer Protection Act). Kohl maintained that since the *Leegin* decision, manufacturers already have begun to set minimum retail prices, resulting in higher prices for consumers, and that enactment of S. 148 is essential to once again make the setting of minimum retail prices illegal.

Witnesses expressing support for the legislation during the hearing included FTC Commissioner Pamela Jones Harbour, who spoke on her own behalf, Tod Cohen of eBay Inc., and Stacy John Haigney of Burlington Coat Factory. Harbour, who said she believed that resale price maintenance guarantees that consumers will pay higher prices, announced that the FTC recently initiated a series of workshops to explore the economic and legal realities of resale price maintenance. ■



Sen. Herb Kohl (D-Wis.) (left), chairman, Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, greets James A. Wilson, who testified on behalf of the ABA at a May 19 hearing on resale price maintenance.

*Leather Products Inc. v. PSKS Inc.*, 127 S. Ct. 2705 (2007), overruled a 96-year-old precedent that vertical agreements between a supplier and its distributor or retailer on the minimum resale prices for the supplier's products are per se violations of Section 1 of the Sherman Act. The decision is in line with the ABA position that agreements between a buyer and seller setting the price at which the buyer may resell goods or services should not be illegal per se but should be evaluated under the antitrust rule of reason. Under the rule of reason, minimum resale price maintenance would be unlawful only if, on balance, its anticompetitive effects can be proven to outweigh its procompetitive effects in a relevant market.

Wilson noted that the *Leegin*

price vertical restraint agreements can also explain their motivation for wanting to enter into minimum resale price maintenance agreements," he said.

He explained that manufacturers view dealer margins as their cost of distribution and have no economic incentive to overcompensate dealers; if they want to raise prices, they need only raise their own wholesale prices to the dealers without limiting the prices at which the dealers may resell. Wilson also said that the ABA does not believe that applying a rule of reason analysis to minimum resale price maintenance agreements will facilitate coordination or outright collusion among manufacturers and other sellers to fix the wholesale prices at which they sell their products to

## Immigration

*continued from page 3*

Immigration Studies, who said the bill would wreak havoc on the legal immigration system because immigration law and all other areas of federal law are subject to the definition of marriage as between a man and a woman.

Roy Beck, of Numbers USA Education and Research Foundation, opposed the legislation because he said it "represents another piecemeal congressional act that would increase the number of green cards each year with no regard for the resulting increase in population pressure and costs throughout our society." ■

## ABA presents mock SSA disability appeals hearing



**Wm. T. Robinson III**

Wm. T. Robinson III, chair of the ABA Standing Committee on Governmental Affairs (above), welcomed those attending a mock Social Security disability hearing on Capitol Hill May 27 to provide congressional and federal agency staff with a chance to observe what occurs at

these hearings.

The mock hearing, sponsored by the standing committee and 12 other ABA entities and staffed by the ABA Governmental Affairs Office, explained the steps leading up to a disability hearing and the role of the parties involved, including the administrative law judge (ALJ), the claimant, the claimant's lawyers and expert witnesses.

David V. Foster, Social Security Administration deputy commissioner for disability adjudication and review, addressed the group and explained that the SSA is dedicated to streamlining the process and addressing the backlog of cases.

In the photo below, Foster (far right) answered questions from the audience. Seated next to Foster and acting the role of the ALJ in the mock hearing is

Jodi B. Levine, ALJ, Oklahoma, past chair, ABA Judicial Division; chair, Federal Legislation Committee, National Conference of Administrative Judiciary; and co-chair, Benefits Committee, Section of Administrative Law and Regulatory Practice.

Others participating in the event and playing roles in the mock SSA disability hearing were (to Levine's left): Peter M. Keltch, ALJ, Oklahoma; Tela L. Gatewood, ALJ, Oklahoma, past chair, National Conference of Administrative Judiciary; Rudolph N. Patterson, private practitioner and member, ABA Commission on Law and Aging, and co-chair, Benefits Committee, ABA Section of Administrative Law and Regulatory Practice; and David Godfrey, senior staff attorney, ABA Commission on Law and Aging.



## ABA committee begins evaluation of Sotomayor

*continued from front page*

“The Standing Committee’s independent peer review will provide the Senate with a thoughtful thorough evaluation of Judge Sotomayor’s professional credentials for serving the nation’s highest court as the Senate fulfills its constitutional role in the confirmation process,” he said.

The ABA committee’s review process includes the following steps:

- Standing Committee members will interview hundreds of lawyers, judges and members of the community who know Judge Sotomayor professionally, asking them to assess the nominee on three key criteria: integrity, professional competence and judicial temperament;
- two panels of legal scholars will examine Judge So-



**Judge Sonia Sotomayor**

tomayor’s legal writings for quality, clarity, knowledge of the law and analytical ability;

- a panel of preeminent lawyers with Supreme Court and appellate experience will examine the nominee’s writings from the perspective of practitioners who are

familiar with appellate practice at the highest level; and

- Standing Committee members will interview Sotomayor regarding her professional qualifications.

The findings will be assembled into a report that is reviewed by each Standing Committee member, who will individually rate the nominee as “well qualified,” “qualified” or “not qualified.” The majority rating is the official rating of the Standing Committee.

Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) announced June 9 that Judge Sotomayor’s confirmation hearing will begin July 13. Leahy and the committee’s ranking Republican, Sen. Jeff Sessions (R-Ala.), have said they are committed to ensuring that the next justice is seated before the Supreme Court’s next term begins Oct. 5. ■

### Judicial Vacancies/Confirmations — 111th Congress (as of 6/10/09)

<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	3	0
US District Courts (678 judgeships)	58	0	0
Court of International Trade (9 judgeships)	0	0	0
<b>Totals</b>	<b>73</b>	<b>4</b>	<b>0</b>

## Washington News Briefs

**GUARDIANSHIP:** The ABA last month supported the goals of H.B. 889, legislation sponsored by Texas state Rep. Elliott Naishtat that outlines elements to be considered by a clinician in assessing adult capacity in a guardianship proceeding. The ABA Commission on Law and Aging, which has played a leadership role in adult guardianship reform for more than 20 years, regularly tracks state guardianship legislation. In a May 8 letter to Naishtat, ABA Governmental Affairs Director Thomas M. Susman explained that ABA policy emphasizes the need for a thorough and refined clinical assessment to provide guidance to judges in determining an individual's capacity and need for a guardian. In 2006, the commission collaborated with the American Psychological Association and the National College of Probate Judges to create *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*. Susman pointed out that the clinical evaluation form in the handbook is the model for the element set in the legislation, and that Tarrant County (Texas) Probate Court #1 Judge Steve M. King has used the form for several years. "Full information on the individual's functional and cognitive abilities, as well as medical condition, in light of the person's values and the risks involved, can assist judges in crafting more specific, limited orders and also may be useful in the development of guardianship plans and in court oversight of the guardian," Susman wrote. The Texas House passed H.B. 889 on May 15. State Sen. Carlos Uresti introduced identical legislation, S.B. 2344, in the Texas Senate.

**JUDICIAL ETHICS:** ABA President H. Thomas Wells Jr. applauded the June 8 Supreme Court ruling that elected judges should withdraw from considering cases when large contributions to the judges' election campaigns by parties to those cases create "a serious risk of actual bias" based on objective and reasonable perceptions. In the 5-4 decision in *Caperton et al. v. A.T. Massey Coal Co. Inc. et al.*, 556 U.S. \_\_\_ (2009), the justices ruled that judges should recuse themselves when the campaign contributions are so large, so important or so closely tied to a pending case that they pose an "unconstitutional threat to a fair trial" and imperil public confidence in the fairness and integrity of the nation's elected judges. In what the Court called an "exceptional case," a jury in West Virginia awarded \$50 million in damages to Hugh Caperton, a mining executive who sued Massey Coal Co. for driving him out of business. Massey appealed the decision. As the case moved toward the West Virginia Supreme Court,

Massey contributed \$3 million to help unseat an incumbent state supreme court justice. The newly elected state supreme court justice cast a vote to overturn the \$50 million verdict after refusing to recuse himself from the case. Caperton appealed that decision to the U.S. Supreme Court. "The pervasive influence of money on judicial election campaigns threatens to create a crisis of confidence in our state court systems," Wells said. He said that the ABA Standing Committee on Judicial Independence, working through its Judicial Disqualification Project, will continue to craft a series of guidelines for courts to assess whether contributions to judges' campaigns implicate the due process right of parties appearing before them. In addition, more than 300 state government officials from around the country attended a summit hosted by Wells last month in Charlotte, North Carolina, to discuss the critical role of fair and impartial state courts.

**IMMIGRATION:** Attorney General Eric Holder vacated an order issued in January during the Bush administration that limited non-citizens' ability to make claims of ineffective assistance of counsel in immigration proceedings before the Board of Immigration Appeals. The attorney general's order restores procedures that were in place prior to the January order to allow immigrants to appeal deportation rulings to the federal courts. In his June 3 announcement, Holder directed the Executive Office of Immigration Review to initiate rulemaking procedures to evaluate the existing framework, solicit public comment, and, if necessary, propose new regulations. "The integrity of immigration proceedings depends in part on the ability to assert claims of ineffective assistance of counsel, and the Department of Justice rulemaking in this area will be fair, it will be transparent, and it will be guided by our commitment to the rule of law," Holder said. ABA President H. Thomas Wells Jr. said the ABA strongly believes that the substantive and procedural rights of applicants for immigration relief should be protected when their cases suffer due to incompetent representation. "This decision by the attorney general will help ensure that immigrants who have been victimized by ineffective assistance of counsel have redress," Wells said.

**ABA Annual Meeting  
July 30-August 4, 2009  
Chicago, Illinois**

## House panel approves repeal of Feres Doctrine

*Bill would allow servicemembers to sue United States for medical malpractice*

The House Judiciary Subcommittee on Commercial and Administrative Law approved legislation May 19 by a 7-6 vote that would allow servicemembers to sue the United States for damages under the Federal Tort Claims Act (FTCA) for non-combat related injuries caused by negligent medical or dental treatment.

H.R. 1478, introduced by Rep. Maurice D. Hinchey (D-N.Y.), would repeal the Feres Doctrine,

which was established by the Supreme Court decision in *Feres v. United States*, 340 U.S. 135 (1950). In that case, the court ruled that members of the armed forces and their families have no right or ability to sue the military for negligent medical care during their service.

The version of the bill approved by the subcommittee would amend the FTCA to allow claims for damages to be brought

against the United States for personal injury or death of a member of the Armed Forces arising out of a negligent or wrongful act or omission in the performance of medical, dental or related health care functions. The bill would prohibit claims arising out of the combatant activities of the armed forces in times of armed conflict.

During markup, subcommittee members approved a substitute amendment that would allow servicemembers to sue for military medical malpractice regardless of whether the alleged malpractice occurred inside or outside of the United States. The amendment also removed language from the original bill that would have required the payment of claims to be reduced by the value of other federal benefits to which the servicemember is entitled.

Testifying at a March 24 subcommittee hearing on the legislation, George Washington University Law Professor Stephen A. Saltzburg expressed the ABA's support for the bill (see April 2009 *Letter*).

"It is time for the current separate and unequal status and treatment of military personnel to be acknowledged as unnecessary, unwarranted, and patently unfair and unjust," Saltzburg said, quoting the report accompanying the policy resolution adopted by the ABA in 2008. ■

### LSC funding may increase substantially

*continued from page 3*

of legal help, warrants a fresh look at ways that will, without cost to the government, significantly increase the amount of money available to provide legal aid to the poor."

He noted that the ABA provides information and resources to strongly encourage and assist private lawyers in providing free legal services to persons of limited means. The ABA's 2008 study, "Supporting Justice II, A Report on the Pro Bono Work of America's Lawyers," which was released in February 2009, shows that 73 percent of respondents, representing a broad range of practice settings that include small and large firms, provide pro bono services to persons of limited means and to organizations providing such services. Many lawyers provide pro bono assistance working through local legal aid programs or through local bar associations.

"The LSC, through its funding of private attorney involvement programs, provides the infrastructure and central coordinating resource that undergirds a major portion of the pro bono efforts of private lawyers nationwide," Wells wrote.

The \$64 billion appropriations legislation approved by the House committee also provides funding for a wide array of programs, including \$114 million for the Second Chance Act, an increase of \$11 million for the Office on Violence Against Women, and a total of \$27.7 billion for law enforcement and other Department of Justice activities. ■

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