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## *Participants focus on access to justice issues*

### **ABA Day in Washington draws bar leaders to Capitol Hill for meetings**

Several hundred ABA, state, local and specialty bar leaders from across the country assembled on Capitol Hill April 21-23 to participate in "ABA Day in Washington," a chance to meet face-to-face with their senators and representatives to lobby on issues of importance to the legal profession.

The event, coordinated by the ABA Governmental Affairs Office, was cosponsored by the National Association of Bar Executives, the National Conference of Bar Presidents, the ABA Young Lawyers Division, and the ABA Section Officers Conference.

As participants fanned out across the Hill, their lobbying efforts focused on access to justice, including four major topics of importance to the organized bar.

**FY 2010 Legal Services Corporation (LSC) Funding.** LSC, the largest provider of civil legal aid for the poor in the nation, has been woefully underfunded for more than 20 years, and the ABA is supporting a significant funding increase for the corporation to \$435 million in fiscal year 2010. The issue is becoming more urgent as the need for civil legal services escalates in light of new circumstances, such as consumer fraud and the mortgage foreclosure crisis, that are disproportionately affecting low-income families.

**Legal Services Benefits Act.** Group legal services plans efficiently deliver preventive legal services and provide access to the justice system for low- and moderate-income Americans. The pre-tax status for such benefits has expired, and the association is urging enactment of bipartisan legislation (S. 825/H.R. 1423) to restore and make favorable tax treatment of the plans permanent.

**Guaranteed Legal Assistance for Low-Income Military Families.** As the typical legal needs of servicemembers become more complex and urgent than ever, the association is asking senators and representatives to introduce and enact legislation to guarantee the delivery of legal assistance to low-income military personnel and to their dependents as a matter of battle-readiness and morale.

**Legal Orientation Program for Immigration Detainees.** The ABA supports legislative proposals to help increase access to counsel and legal information for immigration detainees. Such efforts include providing at least \$6.5 million in fiscal year 2010 for the Legal Orientation Program administered by the Justice

*see "ABA Day," page 9*

# 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>			President signed P.L. 110-322 (S. 2450) on 9/19/08.	<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>	Judiciary Subcommittee held a hearing on H.R. 1478 on 3/25/09.			<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>	H.R. 486 was referred to the Judiciary Committee on 2/9/09.	S. 220 was referred to the Judiciary Committee on 1/13/09.	President signed P.L. 111-8 (H.R. 1105) on 3/11/09.	<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 president proposed \$435 million for LSC in fiscal year 2010. S. 718 would reauthorize the LSC and lift some restrictions.</p>	House passed H.R. 1105 on 2/25/09. Appropriations subc. held a hearing on 4/1/09.	Senate passed H.R. 1105 on 3/10/09. S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09.	President signed P.L. 111-8 (H.R. 1105) on 3/11/09.	<p><b>Supports an independent, well-funded LSC.</b></p>

# Hearing focuses on cocaine sentencing

Witnesses appearing April 29 before a Senate Judiciary subcommittee urged Congress to enact legislation to address the disparity in sentencing for crack and powder cocaine offenses that the ABA maintains is “unjustifiable and plainly unjust.”

Under the current sentencing structure, a conviction for selling five grams of crack cocaine garners the same five-year mandatory minimum sentence as a conviction for selling 500 grams of powder cocaine, a disparity that has come to be called the “100-to-1 ratio.”

Lanny A. Breuer, assistant attorney general for the Criminal Division of the Department of Justice, testified in support of the “complete elimination” of disparities between crack cocaine and powder cocaine prison sentences. He explained to the Senate Subcommittee on Crime and Drugs that the 100-to-1 ratio unfairly relies on the assumption that crack carries with it a greater degree of violence and weapon possession, as well as a greater addictiveness than powder cocaine.

Breuer said that drug-related violence must be addressed and penalized on a case-by-case basis rather than through an overarching sentencing formula. He also called for the elimination of the mandatory minimum sentence for simple possession of crack cocaine.

ABA Governmental Affairs Director Thomas M. Susman, in a statement submitted to the subcommittee for the hearing, agreed, saying that in 1995, the ABA House of Delegates overwhelmingly approved a resolution requiring crack and powder cocaine offenses to be sentenced on the same basis, while giving due but separate consideration to aggravating factors such as weapon use, violence, or injury to another person.

Susman explained that the ABA has never wavered from its 1995

position, and urged Congress to “act quickly to finally correct the gross unfairness that has been the legacy of the 100-to-1 ratio.” He stated that “enactment of cocaine sentencing reform will take a major step toward refocusing federal policy in the right direction, particularly on federal prosecutorial and corrections resources on ‘serious and major’ offenders instead of the current misguided and expensive prosecution and imprisonment of offenders who are users or who sell user quantities of crack under current law.”

Susman cited a 2006 report by the U.S. Sentencing Commission revealing that approximately 62 percent of federal crack cocaine convictions involve low-level drug activity such as simple possession and street sales of user-level quantities of crack. He also noted a 2007 Sentencing Commission report that

pointed out that while 82 percent of those sentenced under federal crack cocaine laws were African American, 66 percent of crack cocaine users are Caucasian or Hispanic. Susman made clear that “the ABA has agreed with the Sentencing Commission’s careful analysis that the 100-to-1 quantity ratio is unwarranted and results in penalties that sweep too broadly, apply too frequently to lower-level offenders, overstate the seriousness of the offenses, and produce a large racial disparity in sentencing.”

The ABA also sent a letter April 27 to all senators and representatives urging co-sponsorship and support for legislation that would eliminate the crack-powder sentencing disparity and encourage federal law enforcement policy to target higher level drug operators rather than users and low-level offenders. ■

## President proclaims Law Day 2009

Highlighting President Lincoln’s legacy and vision of “a more perfect union,” President Obama proclaimed May 1 as Law Day USA and encouraged Americans to reflect on this legacy through activities acknowledging the importance of the nation’s legal and judicial systems.

The president pointed out that this year is the bicentennial of the birth of Lincoln, who he said was “one of the greatest presidents and one of the greatest lawyers in our nation’s history.”

President Eisenhower issued the first Law Day proclamation in 1958 after then ABA President Charles S. Rhyne established Law Day as a day to celebrate the rule of law. While the official date is May 1, the celebration has grown to encompass weeks of events conducted by schools, bar associations, courts and other organizations throughout the country.

To celebrate Law Day this year, the annual Leon Jaworski Public Program held April 30 at the Newseum in Washington, DC, featured a panel of noted scholars discussing “Lincoln as Lawyer, Lincoln as Orator.” ABA President H. Thomas Wells Jr. presided over the event, which was hosted by the ABA Division for Public Education.



## “ABA Day in Washington” - April 21-23, 2009

Sen. Orrin G. Hatch (R-Utah) received the following visitors (from left): Larry Stahl, past president, American Prepaid Legal Services Institute (API); then API President Joan Beranbaum; Tori Wible, staff counsel, ABA Standing Committee on Group and Prepaid Legal Services and API; Rew Goodenow, past president, Nevada State Bar Association; Utah State Bar President Nathan Adler; ABA President H. Thomas Wells Jr.; Sen. Hatch; ABA President-Elect Carolyn B. Lamm; William Hubbard, chair, ABA House of Delegates; and Robert Saunooke, ABA Judicial Division.



Sen. Amy Klobuchar (D-Minn.) (center) met with (from left): the Honorable Cara Lee Neville, chair, ABA Justice Center Coordinating Council; Minnesota State Bar Association (MSBA) President Michael J. Ford; MSBA President-elect Leo I. Brisbois; and Nancy Mischel, MSBA legal affairs director.



White House Counsel  
Gregory Craig



Sen. Blanche Lincoln (D-Ark.) accepts her ABA Congressional Award for efforts to improve the justice system from ABA President H. Thomas Wells Jr. as Arkansas Bar Association Past President Harry T. Moore and Arkansas Bar Association President Rosalind M. Mouser look on.



Sen. Tom Harkin (D-Iowa) (right) is greeted by ABA President H. Thomas Wells Jr.



California participants meeting with Rep. Jackie Speier (D-Calif.) (second from left) were: Robert Weeks, ABA House of Delegates, Santa Clara Bar Association; Ruthe Ashley, chair, ABA President's Advisory Council on Diversity in the Legal Profession; California Bar Association President Holly Fujie; Alpha Buie, member, ABA Council on Racial and Ethnic Justice; Pauline Weaver, ABA House of Delegates; Nancy de Ita, president, San Mateo County Bar Association; John McDonnell, ABA House of Delegates; and Linda Kim, associate director, Public Interest Clearinghouse, San Francisco.



Rep. Robert B. Aderholt (R-Ala.) spends some time with Alabama Law Foundation Executive Director Tracy Daniel; William Broome, Alabama State Bar; and Edward Hosp, chair, Alabama Access to Justice Commission.



West Virginia State Bar President Dwane Tinsley (left) and Rep. Alan Mollohan (D-W.Va.)

Rep. Mel Watt (D-N.C.), a recipient of an ABA Congressional Award, celebrates his award with (seated from left): Stephanie Moore, House Education and Labor Committee; North Carolina Bar Association (NCBA) President Charles L. Becton; Rep. Watt; Kim Crouch, NCBA governmental affairs director; (standing from left) Alyssa Gowans, Office of Rep. Watt; Allan B. Head, NCBA executive director; Leah Johnson, assistant executive director, South Carolina Bar; Lanneau Lambert, immediate past president, South Carolina Bar; and Fred Suggs, president-elect, South Carolina Bar.



## Increased funding urged for Law Library of Congress

*Law Library collection has grown to more than 2.65 million volumes*

The ABA urged a House Appropriations panel May 5 to support full funding for the Library of Congress and Law Library of Congress in fiscal year 2010, including a \$4 million increase for the Law Library so that it can continue to operate as a world class institution.

ABA Governmental Affairs Director Thomas M. Susman, testifying before the House Appropriations Subcommittee on the Legislative Branch, emphasized that the increase in funding would allow the Law Library to perform a necessary update of the Global Legal Information Network (GLIN), support new responsibility for maintaining the THOMAS legislative database, cover the consequences of inflation and rescissions on contracted services that are central to Law Library functions, and compensate for decreased buying power for library acquisitions.

Susman explained that the Library of Congress, founded in 1800, houses more than 138 million items



in 90 collections that include books, periodicals, film and audio recordings in more than 420 languages. The Law Library, authorized by Congress in 1832 as part of the Library of Congress, has grown from modest beginnings to more than 2.65 million legal volumes and periodicals.

The Law Library serves the branches of state and federal governments, the legal profession, universities and law schools, corporate law departments, and the general public, Susman noted. The Law Library's massive collection and auspicious initiatives such as GLIN also are used by American corporations engaged in international commerce and by lawyers supporting American enterprise abroad and

foreign investment in the United States. As a result, the Law Library is recognized as the "ultimate source of international trade law and an anchor for the rule of law worldwide."

Susman testified that the ABA and its Standing Committee on the Law Library of Congress appreciate Congress' historical support for the Library of Congress and the Law Library, but expressed concern that the collections have been subject to reduced budgets insufficient to meet their core needs.

In addition to funding to ensure that the collections are up to date, the ABA supports enactment of improvement and modernization legislation such as that introduced last Congress by Rep. Zoe Lofgren (D-Calif.).

The legislation would have created a private-public foundation to support the Law Library that would be funded by the private bar and industry. The association also is exploring opportunities for the legal community to provide assistance to the Law Library through volunteer efforts. ■

### Judicial Vacancies/Confirmations — 111th Congress (as of 5/12/09)

<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)	15	3	0
US District Courts (678 judgeships)	55	0	0
Court of International Trade (9 judgeships)	0	0	0
<b>Totals</b>	<b>70</b>	<b>3</b>	<b>0</b>

## ABA opposes changes to protective order rule

The ABA expressed strong opposition last month to H.R. 537 and H.R. 1508, the proposed “Sunshine in Litigation Act,” which would circumvent the Rules Enabling Act to make a change in court rules that the association believes is unnecessary.

The bills would amend Federal Rule of Civil Procedure 26(c) to limit a court’s ability to enter an order in a civil case that would: restrict disclosure of information obtained through discovery; approve a settlement agreement restricting the disclosure of such information; or restrict access to court records in civil cases unless the court makes certain findings that the order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the privacy interest asserted.

In letters to the Senate and House Judiciary Committees April 13, ABA Governmental Affairs Director Thomas M. Susman called the bills an “unwise retreat from the balanced and inclusive process established in the Rules Enabling Act.” The process is based on the essential central role of the judiciary in initiating and formulating judicial rulemaking, the use of procedures permitting full public participation, including the legal profession, and congressional review before rules are adopted.

The current version of Rule 26(c) rule gives judges appropriate authority to determine when to enter a protective order and what its provisions should be in light of particular facts and circumstances of each case.

The ABA maintains that there is no deficiency in the current rule that requires a change. Susman pointed out in the April 13 letters that the Judicial Conference Committee on Rules and Practice reported last year that studies show “no evidence that protective orders create any significant problem of concealing information about public hazards.” The letters also stated that only a small fraction of civil cases involve issues that implicate public health and safety, and imposing a broad rule to every civil case would be burdensome to the courts and litigants.

In addition, the legislation’s requirement that judges entering an order approving a sealed settlement agreement must make the particularized findings of fact necessary for discovery protective orders is also unnecessary, according to the ABA.

“The current version of Rule 26(c) is and has been an appropriate, effective mechanism to protect the rights of both litigants and the public without overburdening the administration of justice in the federal

courts. Any amendment should be addressed through the existing Rules Enabling Act,” Susman concluded. ■

### FTC delays “Red Flags Rule” for three months

At the request of the ABA, the Federal Trade Commission (FTC) delayed the May 1, 2009, enforcement date until Aug. 1, 2009, of a “Red Flags Rule” intended to prevent identity theft.

The postponement gives the ABA time to assess the rule and determine its impact on lawyers and law firms.

The rule is required under the Fair and Accurate Credit Transactions Act of 2003 (FACTA), which directs financial regulatory agencies to promulgate rules requiring “creditors” and “financial institutions” to implement programs to detect, identify, and respond to activities that could indicate identity theft. A broad definition of “creditor” that includes businesses that provide services and bill for the services at a later date is being interpreted by the FTC to include attorneys, doctors, and other professionals.

The ABA learned that the FTC intended to include lawyers as “creditors” only one week before the rule’s effective date of May 1, 2009.

In an April 24 letter to FTC Chairman Jonathan D. Leibowitz, ABA President H. Thomas Wells Jr. requested the postponement for three to six months.

“Some believe that the conclusion that the rule must be applied to lawyers providing legal services cannot be justified by either the law (based on at least one federal circuit’s conclusion that lawyers are not “creditors” under the Equal Credit Opportunity Act) or the facts (the absence of a single example of identity theft related to or arising out of provision of legal services),” Wells wrote. He noted that FTC staff have indicated that the compliance requirements of low-risk creditors (likely to include lawyers and law firms) would be minimal.

While the ABA has not adopted policy on the rule, Wells indicated that a delayed effective date would give the ABA and state and local bar association members time to assess the impact and implications of the rule. In addition, the FTC will be releasing a template to help entities that have a low risk of identity theft, such as businesses that know their customers personally, to comply with the law.

## Washington News Briefs

**SUPREME COURT:** President Obama has begun the process of filling a Supreme Court vacancy after Associate Justice David Souter, appointed in 1980 by President George H.W. Bush, announced May 1 that he plans to retire in June when the court wraps up its current term. The president, responding to Souter's decision, called the justice a "fair-minded and independent" judge who came to the bench with no particular ideology and never sought to promote a political agenda. He said Souter consistently defied labels and rejected absolutes to focus instead on one task – reaching a just result in each case that was before him. Souter approached judging as he approaches life, the president said, with a "feverish work ethic and a good sense of humor, with integrity, equanimity and compassion – the hallmark of not just being a good judge, but of being a good person." Obama said he will consult with members of both parties to seek a nominee to replace Souter who is "dedicated to the rule of law, who honors constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role." The 15-member ABA Standing Committee on the Federal Judiciary, chaired by Dallas lawyer Kim Askew, will evaluate the professional qualifications of the nominee and submit its rating to the administration and the Senate.

**RESALE PRICE MAINTENANCE:** The ABA expressed opposition May 5 to federal legislation such as S. 148 that would undermine a 2007 Supreme Court decision that is consistent with ABA policy concerning resale price maintenance agreements between sellers and buyers. The 5-4 decision in *Leegin Creative Leather Products 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 ABA maintains 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. In a letter to the House Judiciary Subcommittee on Courts and Competition Policy for the record of an April 28 hearing, James A. Wilson, chair of the ABA Section of Antitrust Law, explained the basis for the ABA's view that a rule of reason approach is appropriate for analyzing these types of arguments.

In particular, Wilson noted that most of the significant economic literature regards minimum resale price maintenance as more likely to be used by manufacturers to achieve efficiencies in distribution of their products than to enable dealers to maintain significant margins. He added that empirical studies of minimum resale price maintenance have not established that the practice is invariably anticompetitive and that manufacturers and suppliers have developed practices of achieving effective minimum resale price maintenance without actually entering into any agreements on resale pricing. He further noted that the per se prohibition on minimum resale price maintenance in force for several decades has had the effect of enhancing the market power of very large scale retailers that carry a wide variety of products. The smaller retailers cannot match the low prices that these large retailers charge.

**YOUTH PROMISE ACT:** The ABA urged representatives and senators this month to cosponsor and support the Youth Prison Reduction through Opportunities, Mentoring, Support and Education (Youth PROMISE) Act. The bipartisan legislation – introduced as S. 435 by Sens. Robert Casey (D-Pa.) and Olympia Snowe (R-Maine) and as H.R. 1064 by Reps. Robert C. "Bobby" Scott (D-Va.) and Michael Castle (R-Del.) – would fund evidence-based gang prevention and positive youth development programs and bring together communities facing the greatest gang, delinquency and crime challenges through a local council. The council would include representatives from law enforcement, community-based organizations, schools, faith organizations, health and social services, and mental health providers and would develop and implement a comprehensive local plan to support young people and make the communities safer. The legislation, among other things, also provides for the hiring and training of Youth Oriented Policing officers to prevent and address juvenile delinquency and street gang activity in a manner that is responsive to the research on juveniles and adolescent brain development. In May 4 letters to House and Senate members, ABA Governmental Affairs Director Thomas M. Susman said the association supports the legislation because it "will effectively address youth violence and help thousands of youth to stay away from gangs and the criminal justice system and to become productive members of our communities."

## ABA Day provides opportunity to lobby Congress

*continued from front page*

Department's Executive Office for Immigration Review. The program contracts with nonprofit legal services organizations to provide immigration detainees with group legal rights presentations, individual screening and, in appropriate cases, referral to pro bono counsel.

"This year more than ever before it is crucial for Congress to hear

directly from bar leaders as constituents," according to Laurel G. Bellows, chair of the 2009 ABA Day Planning Committee. The new Obama administration and the 111th Congress are considering legislation and policies of great significance to the nation and the justice system, she emphasized, and ABA Day offered an opportunity to establish relationships with the

more than 60 new members of the House and Senate and their staffs.

In preparation for their visits, participants attended a continuing legal education program on "Lobbying the Nation's Capital" led by ABA Governmental Affairs Director Thomas M. Susman, legislative training and briefings, and keynote addresses by White House Counsel Gregory Craig and Sen. Tom Harkin (D-Iowa). During a dinner April 22, the ABA recognized the following members of Congress for their specific efforts to improve the American justice system: Sens. Edward M. Kennedy (D-Mass.) and Blanche L. Lincoln (D-Ark.), Reps. Spencer T. Bachus (R-Ala.) and Melvin "Mel" Watt (D-N.C.).

The following night, ABA President H. Thomas Wells Jr. presented Grassroots Advocacy Awards to the Alabama Law Foundation; the Chicago Bar Association/Chicago Bar Foundation; Richard T. Cassidy, of Burlington, Vermont; and Mark G. Sessions, of San Antonio, Texas.

The ABA Board of Governors established the awards in 2006, authorizing the Standing Committee on Governmental Affairs to present certificates of appreciation to: state, local, territorial and/or specialty bar associations and access to justice commissions or their equivalent; and individual ABA members who were instrumental in successfully advocating or advancing ABA/organized bar legislative priorities. ■

### ACUS future is topic of roundtable



The House Judiciary Committee gathered experts last month to discuss the future of the Administrative Conference of the United States (ACUS), which received a \$1.5 million appropriation this year for the first time since 1995, when the agency was terminated because of budget concerns. First established in 1968, ACUS enjoyed bipartisan support for 25 years as it advised the federal government on reforms to administrative procedural law. Those participating in the roundtable included (from left); ABA Governmental Affairs Director Thomas M. Susman; Georgetown University law professor David Vladeck; Michael Fitzpatrick, associate director, Office of Information and Regulatory Affairs at the Office of Management and Budget; Jeffrey S. Lubbers, American University Washington College of Law fellow and former ACUS research director; and moderator Sally Katzen, former director of the OMB Office of Information and Regulatory Affairs.

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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