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## *Board approves 2010 legislative priorities*

# Midyear Meeting produces major new association policies

The ABA House of Delegates considered issues of importance to the legal profession last month when it adopted more than 30 policy resolutions on a wide range of topics.

During their two-day Midyear Meeting session Feb. 8 and 9 in Orlando, the delegates focused on improving the immigration adjudication system with five separate policy recommendations based on a comprehensive study recently released by the ABA (see article, page 3) and gave their stamp of approval to eight criminal justice resolutions covering positions on criminal trials, alternatives to incarceration, increased legal assistance, and contact between incarcerated parents and their children.

Another major resolution approved by the delegates expressed support for the Paycheck Fairness Act, passed by the House and pending in the Senate, to strengthen and update the Equal Pay Act to eliminate gender-based wage discrimination. In addition, the delegates called for reauthorization and full funding for the Violence Against Women Act, which for the past 15 years has provided significant funding to support projects combating intimate partner violence and providing assistance to victims and their families.

Also during the meeting, the House of Delegates nominating committee selected Wm. T. (Bill) Robinson III, of Kentucky, as president-elect nominee of the association. If elected at the Annual Meeting in August, he will serve one year as president-elect before assuming the ABA presidency in August 2011 for a one-year term (see article, page 5).

The Midyear Meeting featured a variety of programs and events, including a summit on indigent defense and programs on diversity on the bench, hot topics in election law and bioethics law, youth at risk, and HIV/AIDS.

In addition, the Board of Governors adopted a list of legislative and governmental priorities for the association for this session of Congress (see page 8-9).

The following is a summary of legislative policy recommendations approved by the delegates.

see "Midyear Meeting," page 4

# LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Independence of the Legal Profession.</b> On 7/29/09, the Federal Trade Commission (FTC) announced a 90-day delay until 11/1/09 for a “Red Flags Rule” that would include attorneys in the definition of “creditor” and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft. The ABA filed a lawsuit against the FTC on 8/27/09 and a motion for partial summary judgment on 9/23/09 to block the Rule’s application to lawyers. On 10/30/09, the court ruled that the FTC has exceeded its authority, and the FTC announced 2/26/10 that it would appeal the decision. The FTC delayed implementation of the rule for all entities until 6/1/10.</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 11.</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, including H.R. 3200, H.R. 3962, S. 1679, S. 1796, and H.R. 3590 as amended by the Senate. 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. House passed H.R. 3962 on 11/7/09.</p>	<p>Health, Education, Labor and Pensions approved draft health care legislation (introduced as S. 1679) on 7/15/09. Finance Committee concluded markup of draft (introduced as S. 1796 ) on 10/2/09. Senate passed H.R. 3590 on 12/24/09.</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> No cost-of-living adjustment was provided for federal judges for fiscal year 2010. S. 220 and H.R. 486 would create an inspector general for the judicial branch. S. 1653 and H.R. 3362 would authorize new federal judgeships.</p>	<p>H.R. 486 was referred to the Judiciary Cmte. on 2/9/09. H.R. 3362 was referred to the Judiciary Cmte. on 9/29/09.</p>	<p>S. 220 was referred to the Judiciary Committee on 1/13/09. Judiciary subc. held a hearing on S. 1653 on 9/30/09.</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. 111-117 (H.R. 3288) includes \$420 million for the LSC in fiscal year 2010 and lifts a restriction on collection of statutorily authorized attorneys’ fees by LSC lawyers. S. 718 and 3467 would reauthorize the LSC and lift several restrictions.</p>	<p>House passed H.R. 2847 on 6/18/09. Judiciary subc. held an LSC reauthorization hearing on 10/27/09.</p>	<p>Senate passed H.R. 2847 on 11/5/09. S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09.</p>	<p>President signed P.L. 111-117 (H.R. 3288) on 12/16/09.</p>	<p><b>Supports an independent, well-funded LSC.</b></p>

# ABA issues immigration adjudication report

The ABA has been briefing members of Congress and congressional staff on the findings and recommendations for reform included in a report released last month on the immigration adjudication system.

The report, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, was researched and prepared by the law firm of Arnold & Porter LLP on a pro bono basis at the request of the ABA Commission on Immigration.

The first-of-its-kind comprehensive study examined the units within major government entities involved in the removal process, legal representation for non-citizens, and the need for system restructuring. Entities covered in the report are the Department of Homeland, which houses U.S. Citizenship and Immigration Services, Customs and Border Protection, and Immigration and Customs Enforcement; the Department of Justice, which includes immigration judges and courts and the Board of Immigration Appeals; and the federal circuit courts. The report is intended to be a tool for policymakers considering legislative and administrative changes to the immigration system.

The 60 recommendations in the report address a system found by the researchers to be choked by an exploding caseload and an exponential increase in outside pressures. The recommendations focus on restructuring the court system, representation of noncitizens before the court, court resources, and professionalism of judges and other court officials. The study calls for the right to representation in adversarial removal proceedings, the hiring of approximately 100 addi-

tional immigration judges, more written decisions, and limitations on videoconference hearings.

“The ABA commissioned this study as our country considers how to overhaul our broken immigration

released, the ABA House of Delegates considered five proposals that contained a majority of the report’s recommendations and adopted them as ABA policy during the Midyear Meeting. Those new poli-



**The ABA Commission on Immigration unveiled a report Feb. 2 on improving the immigration adjudication system. Those participating on a panel were (from left): Commission Chair Karen T. Grisez; Lawrence Schneider, a senior partner at Arnold & Porter LLP; Michael Lee, a senior counsel at Arnold & Porter LLP; and Andrew I. Schoenholtz, a member of the commission and a visiting professor at Georgetown Law School.**

tion system,” ABA President Carolyn B. Lamm said during a Feb. 2 news conference unveiling the report. “This thoughtful analysis of the adjudication system’s problems will help frame the debate as our nation’s leaders move forward. The ABA is especially hopeful that the report’s findings regarding representation and system restructuring will lead to reforms for which all Americans can be proud.”

Others participating in the news conference were Karen T. Grisez, chair of the ABA Commission on Immigration; Larry Schneider and Michael Lee of Arnold & Porter; and Andrew Schoenholtz, a Georgetown University law professor and member of the ABA commission.

A week after the report was

cies include: creation of an Article I court to adjudicate immigration cases; new policies and procedures in the Department of Homeland Security for immigration removal; increased resources and more judges for immigration courts; more resources for the Board of Immigration Appeals; and restoration of federal judicial review of immigration decisions (see Mid-year Meeting article, front page). ■

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★ **ABA Day** ★

★ **in Washington** ★

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★ **April 20-22, 2010** ★

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## Midyear Meeting \*\* Midyear Meeting

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### Civil Rights

**Pay Equity.** Urges Congress to enact legislation that would provide more effective remedies, procedures and protections to those subjected to pay discrimination, including discrimination on the basis of gender, and would help overcome the barriers to the elimination of such pay discrimination that continue to exist.

### Courts/Judiciary

**Judicial Pay.** Urges Congress to amend the current method by which federal judges are given cost-of living adjustments (COLAs) to their salaries to provide that federal judges are entitled to annual, automatic COLAs equal to the overall average percentage increase in pay received by federal employees under the General Schedule as provided in the Federal Employees Pay Comparability Act.



The Feb. 6 Summit on Indigent Defense Improvements featured bar and judicial leaders from Florida and Texas offering ways to improve indigent defense systems. The Honorable Barbara Hervey, judge on the Texas Court of Appeals and chair of the Texas Criminal Justice Integrity Unit, speaks from the podium. Looking on are (from left): Michael Ware, director, Dallas county District Attorney Conviction Integrity Division; Jeff Blackburn, chair, State Bar of Texas Committee on Legal Services to Poor in Criminal Matters; The honorable Carlos Martinez, Miami Public Defender; and moderator Frank Neuner, former Louisiana Bar president.

### Criminal Justice

**Juvenile Collateral Consequences.** Urges federal, state, territorial and local governments to increase the opportunities for youth involved with the juvenile or criminal justice system and to prevent the continuing discrimination against those who have been involved with adjudications and convictions.

**Miranda Warning.** Urges federal, state, territorial and local legislative bodies and governmental agencies

to support the development of simplified Miranda warning language for use with juvenile arrestees to facilitate their understanding of the same rights and information that is provided to similarly situated adults.

**Alternative Sanctions.** Urges federal, state, territorial and local governments to undertake a comprehensive review of the misdemeanor provisions of their criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal penalties.

**Disclosure.** Urges federal, state, territorial and local courts to adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a criminal trial involving felony or serious misdemeanor charges, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards and federal and state constitutions.

**Incarcerated Parents.** Urges federal, state, territorial and local governments to ensure that judicial, administrative, legislative and executive authorities expand, as appropriate in light of security and safety concerns, initiatives that facilitate contact and communication between parents in correctional facilities and their children in the free community.

**Parental Rights.** Urges bar associations and law schools to consider and expand, as appropriate, initiatives to assist criminal defendants and prisoners in avoiding undue consequences of arrest and conviction on their custodial and parental rights, and urges Congress to eliminate restrictions that prohibit recipients of Legal Services Corporation funds from providing legal assistance on family law issues to prisoners.

**Political Interests.** Urges the president and the attorney general and the leaders of state, territorial and local legal offices to assure that lawyers in the Department of Justice and their offices do not make decisions concerning investigations or proceedings based upon partisan political interests and do not perceive that they will be rewarded for, or punished for not, making a decision based upon partisan political interests.

**Prisoner Treatment.** Adopts the black letter of the *ABA Criminal Justice Standards on the Treatment of Prisoners*, dated February 2010, to supplant the *ABA Criminal Justice Standards on the Legal Status of Prisoners*. Also supplants Standards 7-1-2 and Standards 7-10.9 of the *ABA Criminal Justice Mental Health Standards*.

**Student Loan Repayment.** Urges Congress to ensure that funding for the John R. Justice Prosecutors

*see "Midyear Meeting," page 5*

## Midyear Meeting \*\* Midyear Meeting

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and Defenders Incentive Act of 2008 is expanded beyond its original authorization of \$25 million to cover actual national need and urges Congress to lift the proposed expiration date of the act.

### **Family Law**

**Child Welfare.** Urges federal, state, tribal, local and territorial governments to enact child welfare financing laws and implement policies to reform the child welfare financing structure to end current fiscal incentives to place children in foster care.

### **Violence Against Women.**

Urges Congress to reauthorize and fully fund the Violence Against Women Act and similar legislation that promotes access to justice and safety for victims of domestic violence, dating violence, sexual assault, and stalking within the United States.

### **Homelessness**

**Homeless Veterans.** Supports the development of comprehensive, systemic approaches to address the special needs of veterans within civil and criminal court contexts, including but not limited to proceedings involving veterans service-related injuries, disorders, mental health and substance abuse needs through programs that connect veterans to appropriate housing, treatment and services through partnerships with the local Veterans Affairs Medical Centers, community-based services and housing providers; urges state, local and territorial courts to facilitate the development of Veterans Treatment Courts following specified principles.

### **Runaway and Homeless Youth.**

Urges Congress to increase funding for programs under the Runaway

*see "Midyear Meeting," page 6*

## Robinson selected to be president-elect nominee

Wm. T. (Bill) Robinson III, of Kentucky, is the new president-elect nominee for the association.

Selected during the Midyear Meeting last month, Robinson is expected to become president-elect this August and assume the ABA presidency for a one-year term at the August 2011 Annual Meeting.

Robinson, a former ABA treasurer and past president of the Kentucky Bar Association, is the Member-in-Charge of the northern Kentucky offices of Frost Brown Todd LLC, a regional law firm of more than 400 lawyers with offices in Kentucky, Ohio, Tennessee, West Virginia and Indiana. An active ABA member



**Wm. T. (Bill) Robinson III**

for the past 35 years, he is currently a member of the ABA House of Delegates and serving on the Board of Governors Strategic Planning Committee. Robinson also is chair of the ABA Standing Committee on Governmental Affairs and is on the ABA Day Planning Committee.

Robinson will strive for continuity in leadership and plans to continue the work initiated by ABA President Carolyn B. Lamm and President-elect Stephen N. Zack that focuses on the impact of the economic crisis on the legal profession, ethics, and diversity in the profession.

"This association will benefit from continuity in our ABA leadership, supporting good initiatives and building them over time. This continuity in leadership will result in the cost-effective use of our talent and resources," he said.

The primary focus of Robinson's law practice has been civil litigation, and he has substantial experience in commercial litigation, class actions, product liability defense, environmental litigation, and medical malpractice defense. He has received numerous awards for his work in the law and in his community.

Robinson is a graduate of Thomas More College and the College of Law at the University of Kentucky, where he is in the Alumni Hall of Fame.

## Midyear Meeting \*\* Midyear Meeting

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and Homeless Youth Act and other laws in order to more effectively intervene and end homelessness for youth ages 12 through 24; urges Congress and state, local and territorial governments to improve statutory definitions, as well as data collection and reporting systems; and urges the federal government to assist communities in establishing plans to end youth homelessness and to increase coordination among federal agencies to address the crisis of homeless youth.

### Immigration

**Removal Adjudication.** Urges the Department of Homeland Security to implement specific policies and procedures within the immigration removal adjudication system and urges Congress to amend the Immigration and Nationality Act regarding the removal of non-citizens convicted of certain crimes, including amending the definition of “aggravated felony” and restoring certain authority of immigration judges handling removal cases.

**Immigration Courts.** Supports numerous measures to improve immigration courts and create a more professional, independent and accountable immigration judiciary, including increasing the number of judges by at least 100 and increasing the number of law clerks and support personnel, increasing the number of assistant chief immigration judges, providing additional training for immigration judges, establishing a new office in the Executive Office of Immigration Review

to house the disciplinary function for immigration judges, and requiring more formal reasoned clearly written decisions.

**Board of Immigration Appeals.** Supports improving the efficiency, transparency and fairness of administrative review by the Board of Immigration Appeals through increasing the resources available to the board, including additional staff attorneys and board members.

**Federal Judicial Review.** Supports the restoration of federal judicial review of immigration decisions and urges Congress to enact legislation to ensure that non-citizens are treated fairly in the adjudication process and urges promulgation of regulations requiring that a final order of removal include notice of the right of appeal, the applicable circuit court, and the deadline for filing an appeal.

**Immigration Court.** Supports creation, following specified guidelines, of an Article I court with both trial and appellate divisions, to adjudicate immigration cases or, as an alternative to an Article I court, the creation of an independent agency for both trial and appellate functions that has an Office of Immigration Hearings at the trial levels and a Board of Immigration Review for administrative appeals.

### International Law

**Rotterdam Rules.** Urges the Senate to ratify the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Seas

*see “Midyear Meeting,” page 7*

### Judicial Vacancies/Confirmations — 111th Congress (as of 3/11/10)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	1
US Courts of Appeals (179 judgeships)	19	11	6
US District Courts (678 judgeships)	84	25	11
Court of International Trade (9 judgeships)	0	0	0
<b>Totals</b>	103	36	18

## Midyear Meeting \*\* Midyear Meeting

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(also known as the Rotterdam Rules) to provide greater harmony, efficiency, uniformity and predictability for those involved in marine shipping.

**Consular Relations.** Urges the United States and state, local and territorial governments to work to ensure that the fundamental protections of Article 36 of the Vienna Convention on Consular Relations are extended fully to foreign nationals within U.S. borders and U.S. citizens in foreign countries.

**Disabilities.** Urges the United States to ratify and implement the United Nations Convention on the Rights of Persons with Disabilities to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and promote respect for their inherent dignity.



A panel discussing diversity on the bench included (from left): the Honorable Philip R. Martinez, Western District of Texas; Jennifer Peresie, Washington, D.C.; the Honorable Carol E. Jackson, Eastern District of Missouri; the Honorable Berle Schiller, Eastern District of Pennsylvania; Professor Pat K. Chew, University of Pittsburgh School of Law; and the Honorable Delissa A. Ridgway, U.S. Court of International Trade.

**Treaty Implementation.** Urges that legislation be enacted to provide procedures for implementing, on an expedited basis, commitments in existing treaties where the president reports to Congress that binding measures are necessary to avoid the imminent risk of breach by the United States.

### Intellectual Property

**First Sale Doctrine.** Urges courts to interpret the statutory first sale doctrine in Section 109(a) of the U.S. Copyright Act and the copyright owner's importation rights in Section 602(a) to exclude application of the doctrine to the importation of goods not manufactured in the United States that embody a copyrighted work.

### Legal Education

**Student Loans.** Urges the enactment of legislation

amending the Higher Education Opportunity Act of 2008 to correct deficiencies in government-sponsored student loan debt relief for lawyers, including providing that all judge advocates are eligible for Perkins Loan forgiveness allowed for public service.

**Economic Crisis.** Urges Congress, the Executive Branch and/or commercial lenders to develop and implement programs to assist students and recent graduates, including law students and recent law school graduates, experiencing financial hardship due to deterred or lack of employment (and consequently lack of income) during a period of economic crisis such as the one the country currently is experiencing.

### Legal Profession

**Rankings.** Resolves that the ABA examine any effort to publish national, state, territorial and local rankings of law firms and law schools.

### Tort and Insurance Law

**Disaster Animals.** Adopts the *Model Act Governing Standards for the Care and Disposition of Disaster Animals*, dated February 2010, to provide certainty of ownership for animals that have been separated from their owners as a result of a major disaster.

**Universal Health Coverage.** Opposes the adoption of legislation by Congress that would merge medical payment components of workers compensation and medical payment components of automobile insurance with health insurance, a concept commonly referred to as Universal 24-Hour Health Coverage.

### Uniform State Laws

The delegates approved the following uniform state laws as appropriate acts for states to adopt: the Uniform Real Property Transfer on Death Act, which enables an owner of real property to pass the property to a beneficiary upon the owner's death simply, directly and without probate; the Uniform Collateral Consequences of Conviction Act, an effort to improve public and individual understanding of the collateral consequence of conviction, such as denial of government services, that prevent a person from reintegrating into society; and the Uniform Statutory Trust Entity Act, which brings clarity and uniformity to laws regarding statutory trusts. ■

## 2010 Legislative and Governmental Priorities

Adopted by the ABA Board of Governors in February 2010

See more details on the Governmental Affairs Office website at <http://www.abanet.org/poladv>

### Access to Legal Services

The ABA supports adequate funding for civil legal services through the Legal Services Corporation, Violence Against Women Act programs, and any federal agency program that increases access to legal services for the low-income. The ABA supports reauthorization of the Legal Services Corporation and the Violence Against Women Act. The ABA urges the federal, state and local governments to take immediate steps to ensure the provision of sufficient funding for indigent defense services. The ABA supports legal assistance as a matter of right for low-income military personnel and their dependents. The ABA supports the reinstatement of the tax-preferred status of group legal services benefits.

### Anti-Terrorism and Preservation of Civil Liberties

The ABA urges that Guantanamo detainees who are charged with criminal law violations be prosecuted in Article III courts. If the Attorney General certifies that a detainee cannot be prosecuted in such courts, prosecution should occur in other regularly constituted courts, consistent with due process, the laws of war, the Geneva Conventions and the Uniform Code of Military Justice. Detainees no longer considered to be enemy combatants should be released or resettled, and any remaining individuals detained as enemy combatants should be granted prompt habeas corpus hearings with full due process rights and access to counsel. The ABA opposes torture or other cruel, inhuman or degrading treatment of detainees in U.S. custody. The ABA urges Congress to adopt legislation that outlines procedures governing federal civil cases implicating the state secrets privilege.

### Criminal Justice System Improvements and Protection of Rights

The ABA urges that Congress and the President seek to maintain a balance between support for stronger governmental power to protect public safety and for protecting the integrity of our justice system and maintaining our nation's individual liberties. The ABA urges Congress to strengthen federal habeas corpus review of state criminal convictions and expand federal resources to assure that capital defendants receive adequate representation at trial and on appeal. The ABA

opposes the enactment of mandatory minimum sentences, supports elimination of federal sentencing disparities for drug offenses, and supports expanded reliance on alternatives to incarceration. The ABA supports enactment of legislation to ameliorate the punitive effects of collateral sanctions from convictions affecting jobs, housing, voting and privacy. The ABA supports reauthorization and strengthening of the Juvenile Justice and Delinquency Prevention Act. The ABA supports federal legislation to assess and address racial and ethnic disparities in the criminal justice system, including the use of racial and ethnic profiling. The ABA supports comprehensive legislation to improve the response of federal, state and local governments and of the criminal justice system to address elder abuse, neglect and exploitation and urges federal, state, local, tribal and territorial governments and their prosecutors to vigorously prosecute cases of elder abuse, neglect, and financial exploitation.

### Health Care Law

The ABA opposes federal legislation to preempt state medical liability laws and legislation to require patients injured by malpractice to utilize "health courts" that deny injured patients a right to a trial by jury or full compensation for injuries caused by medical negligence. The ABA supports proposed "Patients' Bill of Rights" legislation which would amend ERISA so that it no longer would preempt various state health care liability laws. The ABA supports legislation to provide for certainty, predictability, and efficiency to the Medicare set-aside process in Workers' Compensation cases. The ABA supports increasing access to health care for all Americans. The ABA has positions on various provisions in health care reform proposals being considered by the 111<sup>th</sup> Congress.

### Immigration

The ABA supports legal immigration based on family reunification and employment skills, due process safeguards in immigration and asylum adjudications, and judicial review of such decisions. The ABA also supports increasing access to counsel for those in immigration proceedings, including, when necessary, government-appointed counsel for unaccompanied children and mentally ill and disabled persons. The ABA opposes detention of those in removal proceedings except in extraordinary circumstances and supports

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## 2010 Legislative and Governmental Priorities

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the use of alternatives to detention. The ABA supports strengthening the ICE National Detention Standards and promulgating the Standards into legally enforceable regulations.

### **Independence of the Judiciary**

The ABA supports legislative efforts to strengthen the federal judiciary, including judicial pay reform (with focus on enactment of legislation to modify the method by which judges receive cost-of-living adjustments) and the prompt filling of judicial vacancies. The ABA opposes initiatives that undermine the judicial process, including legislation that strips the courts of jurisdiction to hear cases involving constitutional rights or infringes upon the separation of powers between Congress and the courts. The ABA urges the use of bipartisan advisory judicial nominating commissions and prenomination consultation between the President and the Senate. The ABA opposes enactment of federal legislation that circumvents the Rules Enabling Act such as the proposed "Sunshine in Litigation Act" and "Lawsuit Abuse Reduction Act." The ABA urges Congress to fund the Social Security Administration at a level that will enable it to address the serious backlog of disability claims and otherwise carry out its mandated responsibilities.

### **Independence of the Legal Profession**

The ABA believes that primary regulation and oversight of the legal profession should continue to be vested in the court of highest appellate authority of the state in which the attorney is licensed and opposes federal legislation or rules that would undermine traditional state court regulation of lawyers, interfere with the confidential attorney-client relationship, or otherwise impose excessive new federal regulations on lawyers engaged in the practice of law. The ABA has vigorously opposed a growing number of such Congressional and Executive Branch proposals in recent years, including federal agency privilege waiver policies; provisions in BAPCPA that impose new liability and regulations on bankruptcy debtor attorneys; the FTC's attempts to regulate lawyers through its Red Flags Rule; the expanded lawyer regulation provisions in the proposed Consumer Financial Protection Agency Act; and legislation subjecting lawyers to key provisions of the Bank Secrecy Act, including suspicious activity reporting requirements.

### **Legal Remedies to Eliminate Discrimination**

The ABA endorses legal remedies and voluntary actions to eliminate or prevent discrimination that take into account as a factor race, national origin, or gender. The ABA supports preservation of and full funding for the Thurgood Marshall Legal Educational Opportunity Program to help disadvantaged students obtain a legal education. The ABA supports enactment of those provisions in the proposed "Civil Rights Tax Relief Act of 2003" that were not included in P.L. 108-357. The ABA supports providing federal voting rights to residents of the District of Columbia. The ABA supports the Paycheck Fairness Act (111<sup>th</sup> Congress) or other legislation that would strengthen pay discrimination protection under the Equal Pay Act. The ABA supports the Employment Non-Discrimination Act or other legislation prohibiting discrimination on the basis of real or perceived gender identity and expression in the areas of employment, housing, and public accommodations.

### **Promoting the International Rule of Law**

The ABA supports adequate funding for domestic and international agencies that promote the rule of law, including the prompt payment of U.S. assessments to the United Nations for its regular and peacekeeping expenses. The ABA supports ratification of certain international treaties, including the Convention on the Law of the Sea (LOS), the Rome Statute for an International Criminal Court, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the American Convention on Human Rights and the Convention on the Rights of the Child.

### **Response to Economic Crisis: Flexibility in Repayment of Law Student Loans and Related Emergency Programs**

The ABA supports relief for law students and recent law school graduates during the current economic downturn, both with Congress and with the Executive Branch, to ease the burdens of educational debt. Legislative proposals the ABA is exploring include raising the cap on federal Stafford loans, incorporating bar study loans into the definition of an educational loan, and permitting retroactive borrowing from the federal government to pay back private student loans, as well as allowing TARP funds to be used to assist in student loan repayment or extension.

## Washington News Briefs

**LAW LIBRARY OF CONGRESS:** The ABA is urging Congress to provide increased funding in fiscal year 2011 to the Law Library of Congress for two critical projects: classifying a backlog of nearly 600,000 volumes and converting more than 5.3 million deteriorating legal gazette pages into microfilm. In a statement submitted March 3 to the House Appropriations Subcommittee on the Legislative Branch, M. Elizabeth Medaglia, chair of the ABA Standing Committee on the Law Library of Congress, emphasized that the Law Library, which is funded as part of the overall Library of Congress budget, is an unparalleled collection of legal treatises and publications. "The magnitude of these priceless collections in both size and significance to our nation and to the world cannot be overstated," Medaglia said. "These are our national treasures and the funding required to keep them running at full capacity is a wise investment of taxpayer dollars." She noted that the ABA and the Library of Congress have been discussing various strategies to address the classification backlog, including the prospects of raising private funds or authorizing \$3.5 million to provide the staffing necessary to complete the classification project in just 10 years rather than the 20 it would take at the level of support made available in fiscal year 2009. The new authorization would be included in the proposed William Orton Library Modernization and Improvement Act, which passed the House last July as H.R. 2728. She also said that the Law Library estimates that \$2.2 million would be required to eliminate the backlog of legal gazette pages within three years. In her statement, Medaglia noted the ABA's appreciation for the ongoing commitment beyond core funding that the Librarian of Congress has shown by dedicating end-of-year surplus funds toward critical Law Library projects, but that this has been insufficient to effectively address the needs.

**USA PATRIOT ACT:** President Obama signed legislation Feb. 27 that extends the "library," "lone wolf" and roving wiretaps" anti-terrorism provisions under the USA PATRIOT ACT through Feb. 28, 2011. Enactment of the new law, P.L. 111-141 (H.R. 3961), postpones the need for immediate action on two broader bills, H.R. 3845 and S. 1692. Although both bills were ready for floor action following committee approval, Congress chose a simple extension of the three expiring provisions. The "library" provision allows the government to seek surveillance orders from the Foreign Intelligence Surveillance Court for tangible things, including medical and library records, that it states are related to a terrorism investigation. Under the "lone wolf" pro-

vision, the government may apply to the court to conduct surveillance on suspected terrorists who are not connected to larger terrorist organizations. The third provision extends authorization of court-approved roving wiretaps to terrorism suspects using multiple communications devices. The ABA has urged Congress to thoroughly review executive branch powers under the USA PATRIOT ACT and to conduct regular oversight of the government's use of the Foreign Intelligence Surveillance Act.

**MCCARRAN-FERGUSON:** The House passed legislation Feb. 24 to repeal the health insurance industry's exemption from federal antitrust law under the McCarran-Ferguson Act, but the bill does not include ABA-supported language to include "safe harbors" that would specify certain pro-competitive conduct that is permitted under current federal antitrust laws. The exemption in H.R. 4626, passed by a 406-19 vote, is narrower than an earlier version, H.R. 3596, which was reported out of the House Judiciary Committee and included in the House-passed health reform package, H.R. 3892. The earlier version would have repealed the antitrust exemption for both health care insurers and medical malpractice insurers and included safe harbors such as collecting and distributing historical loss data and performing actuarial services that do not involve a restraint of trade. S. 1681, legislation pending in the Senate Judiciary Committee, is a straight repeal for both health care insurers and medical malpractice insurers without safe harbors. The Senate-passed health care reform package, H.R. 3590, does not include McCarran-Ferguson provisions. During hearings on the issue last fall, Ilene Knable Gotts, chair of the ABA Antitrust Law Section, testified that for the past 20 years, the ABA has maintained that the McCarran-Ferguson Act should be repealed and replaced with legislation permitting certain cooperative activities (safe harbors) between insurers to continue. For all other conduct, the ABA position is that the insurance industry should be subject to the same antitrust rules as other industries. The association also recommends that states retain the authority to regulate the business of insurance. The day before the bill passed, the president announced strong support for repealing the health insurance industry's federal antitrust exemption. He said that "at its core, health reform is all about ensuring that American families and businesses have more choices, benefit from more competition and have greater control over their own health." Repealing the exemption is an important part of that effort, he maintained.

## ABA president speaks out in support of DOJ attorneys

ABA President Carolyn B. Lamm condemned recent criticism of nine lawyers now working for the Department of Justice who represented Guantanamo Bay detainees on a pro bono basis when they were in private practice.

Lamm was responding to newspaper editorials and a video posted earlier this month by Keep America Safe, an organization that states its mission as providing information about critical national security issues. The video questioned the ethics and allegiance of the DOJ lawyers. Some Republican members of Congress also are calling on the DOJ to reveal details about the lawyers' activities with regard to Guantanamo detainees and whether they concern issues on which the lawyers work at DOJ.

"Individuals and organizations conducting a witch hunt in order to name names of DOJ lawyers who earlier represented Guantanamo detainees are showing a profound disregard for the fundamental tenet of our justice system and our Constitution: that anyone who faces loss of liberty has a right to legal counsel," Lamm said in a statement issued March 5 and in a letter to the editor of the *Washington Times*, which published an editorial calling the lawyers "The Gitmo Nine." She explained that lawyers have an ethical obligation to uphold that principle and provide representation to people who otherwise would stand alone against the power and resources of the government – "even those accused of heinous crimes against this nation in the name of causes that provoke our contempt."

Lamm said that the American people understand this obligation and the corollary principle stated in Rule 1.2(b) of the ABA Model Rules of Professional Conduct that: "A lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social, or moral views or activities."

"Impugning the character of lawyers who have sought to protect the fundamental rights of unpopular clients is a divisive and diversionary tactic," she said. "The real issue in this debate, and one that should not be lost in petty distractions, is whether our nation is committed to justice." She emphasized that the lawyers were attempting to assure justice, on a volunteer basis, in the finest tradition of this country's legal profession and doing so under extremely challenging circumstances.

The number of people denouncing those questioning the loyalty of the DOJ lawyers is growing. A statement issued March 8 by the Brookings Institution was signed by 18 lawyers, including policy experts and former Bush administration officials, who emphasized that one of the Justice

Department's strengths is that those who serve there have represented a diverse array of clients.

"As attorneys, former officials, and policy specialists who have worked on detention issues, we consider these attacks both unjust to the individuals in question and destructive of any attempt to build lasting mechanisms for counterterrorism adjudications," the letter said. ■

### FTC to appeal Red Flags ruling

The Federal Trade Commission (FTC) announced Feb. 26 that it will appeal a decision issued by the U.S. District Court for the District of Columbia last fall that concluded the commission had exceeded its authority by applying its "Red Flags Rule" regarding identity theft to practicing lawyers.

The Oct. 30 ruling by District Judge Reggie Walton was the result of a lawsuit filed by the ABA in August 2009 asking the court to bar the FTC from including lawyers under the rule, which will require "financial institutions" and "creditors" to implement programs to detect, identify and respond to activities that signal possible identity theft.

Walton concurred with the ABA complaint, which stated that the FTC had "failed to articulate, among other things, a rational connection between the practice of law and identity theft; an explanation of how the manner in which lawyers bill their clients can be considered an extension of credit under the Fair and Accurate Credit Transactions Act; or any legally supportable basis for application of the Red Flags Rule to lawyers engaged in the practice of law."

Following the Oct. 30 ruling, the FTC postponed the effective date of the rule for all entities to June 1, 2010.

ABA President Carolyn B. Lamm expressed disappointment at the FTC's decision to appeal its loss. She pointed out that the D.C. Circuit Court of Appeals ruled in the ABA's favor and against the FTC in a similar case in 2005. In that case, the court determined that the commission had overstepped its authority by including lawyers as "financial institutions" under the privacy provisions of the 1999 Gramm-Leach-Bliley Act. The ABA, she said, is "anticipating no less a victory in this case."

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