Legal Services Funding (LSC) Update

Initial news is good, but spending negotiations on the Hill are slow

While an August 2nd bipartisan budget deal between the Senate, House, and Administration promised smooth sailing for appropriations bills, the spending efforts now find themselves in the doldrums.

Congress did not pass its 12 traditional spending bills before the September 30th fiscal year deadline. Consequently, both chambers approved a continuing resolution (CR) that was signed into law on September 27th to avoid a government shutdown on October 1st. The continuing resolution funds programs, including the Legal Services Corporation (LSC), at FY2019 levels through November 21st—a week before Thanksgiving—to give Congress more time to pass the remaining appropriations bills for FY2020.

So far, in September, the United States Senate Committee on Appropriations unanimously voted (31-0) to pass the FY2020 Commerce, Justice, Science, and Related Agencies (CJS) Appropriations Act, S. 2584. The Senate bill would appropriate $425,500,000 for LSC—a $10.5 million increase over the current, continuing FY2019 funding of $415 million. The White House’s Statement of Administration Policy expressed disappointment that the LSC funding was included after the Administration had called for elimination of LSC.

The Senate committee passed its bill more than three months after the full United States House of Representatives passed its version of the CJS Appropriations Act, H.R. 3055, in June by a vote of 227-194. At that time, the House appropriated $550,000,000 for the Legal Services Corporation – a $135 million increase over current funding levels.

Now Congress is back from a two-week October recess and working on the appropriations process, but negotiations are not going well. Senate Majority Leader Mitch McConnell (R-KY) has accused Democratic colleagues of reneging on the bipartisan budget deal and the Democrats contend that the budget deal should not ban consideration of policy amendments previously considered by the Congress with a history of bipartisan support. Senate Appropriations Chairman Richard Shelby (R-AL) recently reported that spending negotiations remain in a “prolonged slump,” an indicator of a possible government shutdown or another CR.

At this point, the House needs to reconsider its CJS appropriations bill in light of the August budget deal that called for a reduction of $15 billion in non-defense discretionary funding vis-à-vis the House-passed bills. That reduction will affect total spending in the FY2020 CJS
appropriations bill and could cause a reduction in the $550 million House spending proposal for LSC.

It is likely that the final FY2020 appropriation for LSC will be somewhere between the Senate number of $425,500,00 and the House number of $550,000,000. Either way, LSC is likely to receive more funding than it did in FY2019, but the unmet legal need is still huge, and we continue to advocate for as much funding as possible.

On October 8th, American Bar Association President Judy Perry Martinez sent a letter to Senate CJS Appropriations Committee Chair Jerry Moran (R-KS) and Ranking Member Jeanne Shaheen (D-NH) urging them “to make LSC a top priority in reconciling the differences with the House bill and to move as close to the House funding level as possible.”

In the coming weeks and months, both chambers will continue to conference their two vastly different amounts to achieve a final FY2020 appropriation for LSC.

Add your voice to the ABA’s advocacy efforts to increase funding for the Legal Services Corporation by clicking here. Follow us on Twitter @ABAGrassroots to watch for further developments.
Mandatory Life for Juvenile Offenders

Does Youth Matter?

The United States Supreme Court has held that mandatory sentences of life without parole (LWOP) for juvenile offenders are unconstitutional. However, are these sentences prohibited because they are too severe for juveniles or because they are mandatory and don’t consider the youth or mental capacity of the offender? The Supreme Court is now considering this question in Mathena v. Malvo.

The Supreme Court has already held that certain sentences are too severe for juveniles. In Roper v. Simmons, 543 U.S. 551 (2005), the Court prohibited capital punishment for persons who were under 18 at the time of their offense. In Graham v. Florida, 130 S. Ct. 2011 (2010), it held that sentences of LWOP for juveniles who were not convicted of a homicide are unconstitutional.

The Supreme Court has also held in Miller v. Alabama, 567 U.S. 460 (2012), that mandatory LWOP sentences are unconstitutional for juveniles under the 8th Amendment prohibition against cruel and unusual punishment. In Montgomery v. Louisiana, 136 S. Ct. 718 (2016), the Court applied Miller retroactively.

Now enter Lee Boyd Malvo – the 17-year old convicted of terrorizing the Washington DC area with adult John Muhammed where they randomly shot and killed 10 people and hurt several others. Muhammed received a death sentence and was executed ten years ago. Malvo received life sentences without the possibility of parole and appealed his sentences as unconstitutional.

On October 16th, the Supreme Court heard arguments in the case Mathena v. Malvo. A key issue is whether courts must consider the youth or diminished capacity of a juvenile offender when determining a LWOP sentence. It is unclear from the Court’s decisions in the Miller and Montgomery cases whether a LWOP sentence for a juvenile is unconstitutional only when it is mandatory or whether a court or jury must consider the youth of the offender as a factor in determining any LWOP sentence.

The American Bar Association filed an amicus curiae brief in Mathena v. Malvo supporting what the Supreme Court recognized in the Miller case -- that juveniles’ diminished culpability and greater prospects for reform make them different from adults for sentencing purposes, and that juveniles whose crimes reflect transient immaturity, rather than irreparable corruption, should not be subject to life imprisonment without parole.
All eyes are now on the Supreme Court, with the fate of life-without-parole sentences for juvenile offenders on the line. Malvo is not the only inmate potentially affected by the outcome. As his lawyer told the Court, there are more than a dozen other inmates who were also juveniles at the time of their crimes serving LWOP sentences watching this case closely.

In addition to the Supreme Court, Congress has also considered the severity of long sentences involving juvenile offenders in recent years, but without success. Two bills introduced this Congress may change that. The Next Step Act of 2019, S.697/H.R.1893, would allow a court to reduce a prison sentence imposed on a juvenile offender once he or she has served not less than 20 years and is no longer determined to be a danger to any person or the community. A related bill, the Second Look Act, S.2146/H.R.3795, would go further, expanding that review for all persons once they have served at least 10 years of a sentence greater than 10 years.

ABA policy opposes sentences of life without parole for juveniles, opposes transfer of juveniles into the adult system absent waiver by the juvenile court, and opposes all mandatory minimum sentences.
Enforcing Copyright Claims

Can a simple, more affordable option be on the horizon?

Imagine you are a commercial photographer who sells a picture to a client to use at an event, but your client’s competitor at the same event is using it too, without your permission and without paying for it. You clearly own the picture, and you have the right to decide who can use it. But how do you enforce that? Today the answer is to sue your client’s competitor in federal court for copyright infringement. That is an expensive and time-consuming process, and there is no guarantee of success. But hope may be on the horizon for copyright owners if Congress passes legislation to simplify the legal process and make it more affordable.

In this era of political gridlock, one area of bi-partisan agreement is on the need for small creators to have an avenue to pursue their low value claims of copyright infringement. Both chambers of Congress will soon be voting on the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the “CASE Act”) which would create an alternative forum inside the U.S. Copyright Office to pursue these low value claims.

The copyright community has noted the need for such a tribunal, as the high cost of legal counsel, time-consuming nature of discovery, and significant likelihood of loss when proceeding pro se have all made federal copyright infringement litigation effectively unavailable for parties with limited resources. As a result, copyright holders who cannot afford to bring claims essentially must tolerate infringement and are thus deprived of the protections that copyright is meant to afford.

Moreover, copyright defendants are often burdened with significant legal costs and long-lasting suits, even where their use is fair or otherwise lawful. Overall, these risks hinder copyright law from fulfilling its primary function of incentivizing the creation of new, expressive works. If enacted, the CASE Act would establish a Copyright Claims Board (the “Board”) within the United States Copyright Office (the “Office”) to resolve copyright claims up to $15,000 for a single work and up to $30,000 in one proceeding in which two or more claims are asserted.

At the August Annual Meeting, the ABA adopted policy supporting the creation of a program similar to that now proposed by the CASE Act. An alternative small claims forum within the Copyright Office limited to claims seeking up to $30,000 in damages, staffed by lawyers well-versed in copyright and alternative dispute resolution, and open to
ABA Governmental Affairs Office  

consenting parties proceeding with or without legal representation is well worth pursuing because it will result in greater access to justice.

The CASE Act would bring positive change to the copyright system by providing copyright holders with a realistic means to protect their works. Claimants could get relief for a meritorious infringement claim in a small claims procedure, when they could not afford to bring that same action in federal court. The Act would also benefit defendants who may choose to participate in the Copyright Small Claims Program by minimizing the cost and time needed to resolve disputes and ensuring that they are protected from liability for any amount over the cap on recovery in the small claims proceeding.

Some groups are concerned that these small claims could chill free speech on the internet and decisions would not be appealable to the federal courts. While some level of judicial review of small claims decisions may be appropriate, subjecting these decisions to extensive, overly-broad judicial review in federal court undermines the very purpose of the bill, destroys the effectiveness of this small claims procedure, and potentially enables respondents to re-litigate their cases in very same federal courts that the claimants could not afford in the first place.

These groups also argue that defendants should not have to “opt-out” of the proceedings, but rather should be allowed to “opt-in.” This “opt-in” approach, however, has no teeth. In its 2013 report that recommended the establishment of a small claims tribunal, the Copyright Office highlighted some significant shortcomings of the “opt-in” approach—shortcomings that have plagued small creators when attempting to protect their works. “The ‘opt-out’ model,” the report states, “offers the significant advantage that parties could pursue claims against uncooperative respondents” who often ignore their cease and desist notifications. An “opt-out” system would help prevent a small claims process for copyright claims from being similarly ignored.

Additionally, using an “opt-in” approach for small claims proceedings would create a framework nearly identical to currently available alternative dispute resolution (ADR) solutions that do not work for small creators any better than expensive and complex federal court processes. If a respondent is required to opt in to a small-claims proceeding, the copyright holder would be agreeing to a mediator or an arbitrator in lieu of going to court. In short, an “opt-in” approach would be a waste of Congress’ time because the approach already exists today through ADR.

The Senate Judiciary Committee considered the CASE Act in July and passed it via voice vote; the House Judiciary Committee similarly followed suit last month. The legislation is now ready to be brought to the floor of both chambers for a full vote. If all goes as planned, the House of Representatives could vote on this bill as soon as October 21st, and the Senate shortly thereafter.
ABA Governmental Affairs Office
The Washington Letter, October 2019 Edition

To encourage your Senators and Representatives in Congress to support this important legislation, please click here.
ABA Fights to Protect Courts’ Authority Over Litigation Attorneys

Urges CFPB to Reject Flawed “Meaningful Attorney Involvement” Concept

In the latest threat to the courts’ inherent authority to regulate and oversee the litigation activities of all attorneys appearing before them, the Consumer Financial Protection Bureau is seeking to codify the controversial “meaningful attorney involvement” concept that would impose special due diligence requirements just on creditor litigation attorneys.

Section 807(3) of the Fair Debt Collection Practices Act prohibits debt collectors from making a “false representation or implication that any individual is an attorney or that any communication is from an attorney.” This straightforward provision was designed to prohibit non-attorney debt collectors from impersonating actual attorneys by falsely claiming that they or their representatives are attorneys—or that their correspondence or court filings are from an attorney—when that is not the case.

Some courts have interpreted the term “from” to mean not just that a communication is from an actual attorney, but also that the attorney directly controlled the process through which the item was sent and that the attorney formed a professional judgment on the validity of the underlying debt. Because of this interpretation, many creditor attorneys are now routinely sued and can be forced to pay substantial damages, attorneys’ fees, and costs unless they can prove “meaningful attorney involvement” in the preparation of the demand letter or the actual lawsuit.

In its recent proposed Debt Collection Practices rule, the CFPB included a “safe harbor for meaningful attorney involvement” to protect creditor attorneys from liability under Section 807(3) if they can prove that they followed certain special due diligence steps before filing a lawsuit or motion with the court. However, those special steps are significantly different from the standard due diligence requirements in Federal Rule of Civil Procedure 11(b) that apply to all litigation attorneys appearing in federal court.

In September 18 comments to the CFPB, ABA President Judy Perry Martinez explained that while the ABA appreciates the Bureau’s efforts to create a safe harbor, we are concerned the proposal would harm many attorneys and law firms and should be withdrawn for several reasons.

First, the proposal would improperly codify the flawed “meaningful attorney involvement” concept, which is not mentioned in the FDCPA or other federal statutes. Because there is no
ABA Governmental Affairs Office

statutory basis for imposing a special meaningful attorney involvement requirement on creditor litigation attorneys, it is up to the courts to regulate and establish professional standards for these attorneys and improper for the CFPB to issue new rules codifying or granting a safe harbor from the flawed concept.

Second, the safe harbor proposal would undermine the courts’ primary and inherent authority to regulate and sanction all attorneys engaged in litigation. Creating special due diligence requirements that *only* creditor litigation attorneys must follow establishes a double standard that is grossly unfair and undermines the courts’ authority to oversee the litigation activities of all attorneys appearing before them in a consistent, evenhanded manner.

Third, the proposal would undermine the attorney-client privilege, the work product doctrine, and the confidential attorney-client relationship. To claim the safe harbor, the attorney would have the burden of proving that the attorney drafted or reviewed the pleading or other paper in question and determined that the claims, defenses, and contentions were well-supported by existing law and evidence. But proving these enhanced requirements would force the attorney to disclose confidential communications with the client and a great deal of the attorneys’ work product.

The ABA is urging the CFPB to withdraw the safe harbor proposal and reject the meaningful attorney involvement concept. Protecting the courts’ primary authority to regulate, oversee, and sanction all attorneys engaged in litigation, regardless of the types of cases they file with the court, remains one of our highest priorities.
Advocacy Beyond Borders

Advancing the rule of law knows no boundaries

The Washington Office of the ABA, which houses the association’s Governmental Affairs Office, is less than a block from K Street Northwest – a street that has become synonymous with Washington lobbyists. GAO’s registered lobbyists and staff spend most of our time focusing our advocacy on the U.S. Congress and federal agencies, though we make occasional forays into state-level advocacy on issues ranging from unfair fees and fines imposed on low-income individuals to unanimous juries to legal aid funding.

The ABA also advocates beyond our nation’s borders. Our efforts to improve laws and regulations aimed at opening jurisdictions to U.S. law firms, strengthening the rule of law, and improving the quality of laws through education, law reform, and advocacy work often escape notice, but they are important components of the ABA’s voice globally. Here is but a sampling of those efforts.

The ABA has for decades been tirelessly working to support the ability of U.S. law firms to establish offices overseas and to associate freely with foreign lawyers and law firms. We not only regularly communicate with the Office of the United States Trade Representative and Department of Commerce on legal services-related issues in ongoing trade negotiations, but ABA leaders routinely engage directly with relevant bar leaders and government officials in foreign countries to press for enhanced market access. Countries where we have vigorously pressed our case include India, South Korea, Russia, Hong Kong, China, and the United Kingdom.

Sections often bring their members’ expertise to bear on recommending improvements to foreign laws and regulations. For example, the Antitrust and International Law Sections frequently send joint blanket authority comments to foreign antitrust regulators around the world, offering detailed constructive commentary and recommendations on draft guidelines, agreements, and regulations. Recipients of these recent section communications include the Canadian Competition Bureau, China’s State Administration for Market Regulation, and the Chilean Fiscalia Nacional Economica.

The ABA’s Rule of Law Initiative participates in education and advocacy efforts in many of the countries where it works, with a goal of assisting in the adoption of laws ranging from establishing bar associations to penalizing human trafficking. In Mali, ABA ROLI has been working for almost a decade to combat hereditary slavery, joining with local partners to develop an advocacy strategy to fight for anti-slavery legislation.
A less direct and traditional form of advancing the rule of law abroad is practiced by the Center on Human Rights, which sends trial observers to monitor and report on legal proceedings. After the Center documented significant irregularities in the proceedings for selecting high court judges in Guatemala, that country’s Constitutional Court ordered the selection process to start over from the beginning. In Equatorial Guinea, the UN Human Rights Committee relied in part on the Center's trial observation report in ordering greater adherence to fair trial standards. And over the last six months, trial observations by the Center have contributed to the release of wrongfully detained individuals, including journalists and activists, in Algeria, Guatemala, India, and El Salvador.

Yes, the ABA is still the American Bar Association. And most of our advocacy is focused on the home front. But GAO works with a variety of ABA entities that actively pursue improving laws and regulations and legal processes around the world, for the ABA's goal of advancing the rule of law knows no boundaries.
Climate Change Takes Center Stage

A policy hot topic in DC and at the ABA

As drastic weather and natural disasters continue to dominate today's headlines, reducing greenhouse gas emissions and preparing for the impacts of climate change must take on an even greater urgency than before, according to a policy adopted by the ABA in August. Just last week, we were reminded of the toll brought by changing weather patterns when electric power was purposely cut off to approximately 850,000 homes in California experiencing extreme drought and high winds to mitigate the risk of massive fires starting by downed power lines.

The ABA has a long history of urging the legal community and others to think and act in a more environmentally responsible manner. Starting with policies dating back to 1991, the ABA has long believed that climate change must be addressed in the context of sustainable development. Heeding its own advice, the ABA has sought out environmentally sound buildings for its headquarter offices in Chicago and Washington, DC, which are designated by the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) as Gold- and Silver-certified buildings, respectively.

The ABA's new climate change policy urges governments at all levels to reduce U.S. greenhouse gas (GHG) emissions to "net zero or below as soon as possible, consistent with the latest peer-reviewed science" and to "contribute the U.S. fair share to holding the increase in the global average temperature to the lowest possible increase above pre-industrial levels."

The term "net zero" derives from the United Nations (UN) Framework Convention on Climate Change, which created an international framework to address climate change. The United States ratified the Convention in 1992. Carbon dioxide, the most important climate change pollutant, can be removed from the atmosphere by a variety of natural and other processes that are collectively defined as sinks. The "balance" of emissions and removals by sinks results in net zero emissions.

Building on the climate change progress made by the UN Convention, in 2015, the parties to the Convention signed the Paris Agreement, which called for net zero emissions and set a timeline for its accomplishment. In June 2017, President Trump announced his intention to withdraw the United States from the Paris Agreement, but the earliest that the United States can withdraw is November 4, 2020, one day after the 2020 presidential election.
The ABA resolution urges the U.S. to remain an active party to the climate change convention and to ratify treaties and other agreements to reduce greenhouse gas emissions and adapt to climate change.

It also encourages Congress to enact market-based legal mechanisms to remove barriers to reduce greenhouse gas emissions and urges lawyers to engage in pro bono activities to address climate change.

While there has been a shift in Congress toward greater recognition that climate change is real and a major threat to our economy and national security, there is scant agreement on how to proceed. On January 9, 2019, Speaker Pelosi created the Select Committee on the Climate Crisis with authority to investigate, study, make findings, and develop recommendations on policies, strategies, and innovations to achieve substantial and permanent reductions in pollution and other activities that contribute to the climate crisis. The Select Committee has held a series of investigative hearings, the latest of which occurred in September 2019 and focused on developing and implementing domestic technologies to reduce industrial emissions.

Congress also continues to debate several measures designed to address various aspects of climate change, including S. 2302 (Barrasso, R-WY), the “America’s Transportation Infrastructure Act of 2019,” which was approved unanimously this summer by the Senate Environment and Public Works Committee. This legislation, which has significant bipartisan support, would authorize transportation funding for numerous environmental projects, including electric vehicle charging stations, pedestrian and cyclist-friendly street design, reduction of diesel emissions in ports, and infrastructure that is resilient to floods and heat waves.

The ABA will continue to monitor and analyze climate change proposals, and weigh in as needed to help advance legislation consistent with our policy goals.

Follow us @ABAGrassroots to learn more developments as they occur.
ABA president to reporters: Immigration system is in crisis

ABA President Judy Perry Martinez made the case for an independent immigration court system – free from the control of the Justice Department – to reporters at the National Press Club in Washington, D.C., on Sept. 27.

“The system of immigration is in crisis,” Martinez told reporters. “It is an all-hands-on-deck moment for this country and for our policy-makers in Congress.”

Martinez was one of three featured experts on a panel that also included the Hon. Ashley Tabaddor, president of the National Association of Immigration Judges, and Jeremy McKinney, second vice president of the American Immigration Lawyers Association. All agreed it is crucial to switch to independent immigration courts to ensure judicial independence for the judges and due process for those who appear before the courts. Because immigration courts are currently within the U.S. Department of Justice, immigration judges are answerable to the U.S. attorney general.

Martinez talked about spending a week this summer doing pro bono work with asylum-seekers on the border in Texas. During that visit, she toured a new, temporary immigration court in Brownsville before it opened. At that court, only 1% of people seeking asylum are able to find lawyers and none is allowed to bring pens and paper into the courtrooms.

“I saw something that does not in any way approach justice,” Martinez said.

She talked about working with one particular detainee – a father seeking asylum who was separated from his 2-year-old child for several months. The father recently won release, thanks to the work of pro bono volunteers and staff at the ABA South Texas Pro Bono Asylum Representation Project, or ProBAR. “That one example tells you why it is so critical that we have meaningful access to counsel in these cases,” Martinez said.

She said the ABA supports the right of every child in immigration court to a government-appointed lawyer, and the right of immigration judges to make decisions free of any hint of political influence.

“We support an independent immigration court system, one that is not within the Department of Justice,” Martinez said. “These courts are making life-altering decisions on a daily basis. We have to have their independence.”