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American Bar Association

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All Americans have a responsibility for maintaining a system of justice that protects and enforces their rights. Funding for and improvements in the justice system are needed to ensure equal access by all. In this period of limited resources and rising demand, policy and funding decisions must strike a balance between the competing demands inherent in the criminal and civil justice systems.

The American Bar Association supports the following legislative and executive branch actions and initiatives to improve the delivery of justice in America.

IMPROVE ACCESS TO JUSTICE

The Preamble to the U.S. Constitution states that the first enumerated function of government is to "establish justice." Equal justice under law cannot be fulfilled unless there is full access to our justice system. The simple truth is that large segments of our population -- including the poor, those of moderate means, and, increasingly, older people and those with disabilities -- do not have equal access.

This issue is among the ABA's highest priorities. The very concept of the rule of law is at risk if there is not equal access to the justice system. We must protect those who are least able to bear the burdens of delay and escalating costs while addressing procedural and substantive civil justice reforms. Access to justice should not depend on economic status, station in life, health, or age. Without legal assistance, however, resolving simple legal needs becomes impossible and makes the justice system effectively unavailable to poor and even middle-class working families.

1. <u>Legal Services Corporation</u>. *Congress and the Administration should improve access to justice for the nation's poor by adequately funding the Legal Services Corporation (LSC).*

The American Bar Association has supported legal services to the poor since 1920. In 1964, Supreme Court Justice Lewis F. Powell, while serving as ABA President, called for a major expansion of the nation's legal services for the poor, leading to the creation of the Legal Services Corporation (LSC).

A bipartisan Congress and the Nixon Administration in 1974 worked together to create the LSC to provide access to the justice system for low-income persons through civil legal services. LSC-funded programs provide basic legal services for low-income persons in every congressional district. LSC disburses 95 percent of its annual federal appropriation to 137 local legal aid programs. Boards consisting of leaders in the local business and legal communities oversee these programs.

Fifty million Americans qualify for federally funded legal assistance. Many of them have significant legal needs and may suddenly become poor because of natural disaster, loss of a job, the break-up of a family, housing loss or uninsured medical care. Legal aid programs make a real difference in the lives of millions of low-income American families by helping them resolve everyday matters, including family law, housing and consumer issues, and by helping them obtain benefits such as Social Security and veterans' pensions. Soldiers and their families most often need help with estate planning, consumer and landlord/tenant problems, and family law.

While the need for civil legal services has increased, LSC funding and our ability to ensure access to the justice system continue to fall far short. The 2005 study by LSC, "Documenting the Justice Gap in America," reported that one in every two individuals who qualify for and actually seek assistance from LSC-funded programs is denied help because of inadequate resources. Similar state studies in recent years

consistently report that despite the combined efforts of LSC-funded programs, state, local and private funding and pro bono efforts, the majority of low-income Americans are unable to obtain legal assistance that is often critical to their safety and independence.

Every day, new situations arise that continue to stretch the ability of our country to ensure that low-income persons can resolve their legal problems fairly through the justice system. Today, natural disasters, consumer fraud matters and the mortgage foreclosure crisis are at the forefront.

A significant funding increase is a vital step forward in closing this "justice gap" in America. LSC's FY 2008 appropriation of $350.5 million represents the highest level of funding since the Corporation's funding was slashed in 1996 from $415 million to $278 million. Both the House and Senate Appropriations Committees have recommended $390 million for FY 2009, a $40 million increase over current funding. Restoring LSC's funding to the FY 1996 level of $415 million would require $576 million in today's dollars.

2. Group Legal Services Benefit Plans. ***Congress should enact legislation to give permanent preferred tax status to employer-provided group legal services plans.***

While the need to provide legal services at no cost for the poor is critical, our civil justice system is also increasingly inaccessible to those of modest or moderate means. Providing access for people who are not wealthy but who are not at or near the poverty line is essential to a healthy justice system.

The ABA has long supported group legal services plans as a way to increase access to the justice system for low- and middle-income workers and their families. These plans allow covered individuals to address legal issues before they become significant problems, reducing demands on already overburdened court systems and instilling confidence in our justice system.

Section 120 of the Internal Revenue Code, enacted in 1976, encouraged employers to provide group legal services benefits for employees and their families by excluding from gross income the cost of this benefit. The plans' tax-favored status was sunset in 1992, resulting in a tax increase to employers and employees, as well as increased administrative costs for employers. Many employers discontinued their group legal benefit plans, causing their employees and retirees to lose access to affordable preventative legal services.

Group legal services plans efficiently and inexpensively provide basic legal services to covered workers and their families. Generally, group legal plan benefits include assistance with the purchase and maintenance of a home (including the review of mortgage documents), preparation of a will and guardianship documents, adoption proceedings, probate services and resolution of family law matters, including collection of child support and protective orders in domestic violence cases.

Legislation to restore the preferred tax status of group legal plans has diverse, bipartisan support. This legislation has been included in several tax packages in the 110th Congress, but has yet to be enacted.

3. Legal Assistance to Military Personnel and Their Dependents. ***Congress should enact legislation guaranteeing legal assistance as a matter of right for low-income military personnel and their dependents.***

Since 1940, the American Bar Association has had a strong commitment to supporting the legal needs of America's military service members and their dependents. Events leading up to America's entry into World War II brought a new complexity of legal challenges, including implementation of the "Soldiers' and Sailors' Civil Relief Act of 1940" to ensure that the rights of service members and their families were not prejudiced when they answered the call of duty. Legal assistance for enforcement of these and other rights is integral to battle-readiness and troop morale. The ABA has led efforts to

organize the bar to provide legal assistance to service members.

There is a continuing need for these legal protections and for legal assistance even at the end of hostilities. In recent years, the complexity of issues has increased, including increases in separation/divorce, remarriage and relevant custody issues; consumer fraud; bankruptcies; and estate work for surviving families in light of significant increases in the survivor death benefit. Many of these matters present unique challenges for service members who may relocate frequently and to whom special federal statutory regulations apply. This requires lawyers with expertise beyond that of the traditional civilian practitioner.

Despite a steady increase in the number of military personnel and their families who qualify for legal assistance, particularly since the onset of conflicts in Iraq and Afghanistan, available resources for providing these services have decreased. At no time should the nation's soldiers and sailors and their dependents be unable to secure appropriate legal assistance, such as obtaining a will and other basic documentation to settle their affairs, while the Nation asks them to be prepared to make the ultimate sacrifice for their country. While some members of the military are more likely to secure appropriate legal counsel on their own, low-income service members (pay grade E-6 and below) are at a special disadvantage and should always have such assistance available, regardless of their ability to pay for these services.

Congress should amend 10 U.S.C. § 1044 to require that low-income military service members and their dependents be guaranteed legal assistance.

ATTORNEY-CLIENT PRIVILEGE

Congress should enact legislation reversing various federal agency policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights or that otherwise weaken the confidential attorney-client relationship.

In recent years, many federal agencies have adopted policies that erode the attorney-client privilege, the work product doctrine, and employee legal rights in the corporate context. Each of these policies -- including the Justice Department's 2006 "McNulty Memorandum," the Securities and Exchange Commission's 2001 "Seaboard Report," and similar policies adopted by many other agencies -- pressure companies and other organizations to waive their attorney-client privilege and work product protections as a condition for receiving full cooperation credit during investigations. A number of those policies also contain separate provisions that weaken employees' Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination by pressuring companies not to pay their employees' legal fees during investigations, to fire the employees for not waiving their rights, and to take other punitive actions against them before any guilt has been established.

In August 2008, the Justice Department replaced the McNulty Memorandum with new corporate charging guidelines that bar prosecutors from pressuring companies to waive their attorney-client privilege, work product, or employee legal rights in return for cooperation credit. The SEC also issued a new Enforcement Manual in October 2008 that includes provisions dealing with waiver of the privilege. Unlike the new DOJ policy, however, Section 4.3 of the SEC Manual merely provides additional guidance for agency staff and does not constitute a formal change in the SEC's waiver policy outlined in the 2001 Seaboard Report. Although Section 4.3 of the Manual states that SEC staff should not directly ask companies to waive the attorney-client privilege or work product protections, it permits the staff to demand waiver if approved

by a supervisor. The Manual also pressures companies "voluntarily" to waive the privilege -- and to take punitive actions against employees who decline to waive their legal rights -- in return for full cooperation credit. Therefore, the new Manual cannot be viewed as a substantial departure from past SEC policies and practices that have led to widespread government-coerced waiver.

Bipartisan legislation that would reverse these harmful federal agency policies was approved by the House overwhelmingly in 2007, but died in the Senate at the end of the 110th Congress. The "Attorney-Client Privilege Protection Act" would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product and employee legal protections. It would prevent federal agencies from pressuring companies and employees to waive their fundamental legal rights while preserving the ability of prosecutors to obtain the important, nonprivileged factual materials they need to punish wrongdoers and enforce the law. Congress should enact this critical legislation as soon as possible.

HEALTH CARE DECISION-MAKING

Congress should enact a strong Patients Bill of Rights.

Legislation known as the "Patients Bill of Rights" was given much attention in Congress during 1999 - 2001. That legislation would expand patients' protections under the Employee Retirement Income Security Act of 1974 (ERISA) by giving patients the right to have adverse coverage decisions by employer-sponsored health plans reconsidered -- and in some cases reversed -- through a system of internal and external review. "Internal review" involves a reexamination by the health insurer of the initial decision to deny coverage, while "external review" involves a separate arbitration-type procedure conducted by an outside panel of neutral doctors. The legislation would also amend ERISA and give patients the right to seek damages against employer-sponsored HMOs in state courts.

Since ERISA was passed, traditional insurance, where the doctor makes the decision about a patient's care, has given way to managed care. Because managed care plans with an emphasis on cost containment did not exist when Congress passed ERISA, that statute was not written to address those plans. Managed care companies should be held to the same standards of accountability we expect from doctors, nurses, hospitals and other health care professionals if their decisions to deny or delay medically necessary care covered under an insurance policy result in harm to a patient.

As a result of ERISA, enrollees in employer-sponsored health plans are generally unable to pursue legal remedies under state law for injuries resulting from actions or decisions of their health plans. They may seek redress only in federal court under provisions of ERISA, which limit damages to the cost of the plan benefits under dispute and, in certain cases, attorneys' fees and court costs. In recent years, some federal courts have ruled that enrollees can sue their plans in state courts for vicarious liability for the medical negligence of the plan's providers, but disputes over denial or delay of coverage have largely been preempted by ERISA.

In the 107th Congress, "Patients Bill of Rights" legislation passed both houses of Congress and went to a conference committee, but died at the end of that Congress. The legislation has been introduced in subsequent Congresses, but little attention has been given to it. Congress should enact legislation that gives patients a strong system of internal and external review and grants patients injured by a decision of an HMO the right to seek damages in state courts under state laws.

THE SOCIAL SECURITY DISABILITY CLAIMS PROCESS

Congress should appropriate sufficient funds to ensure that the agency does the job that the American people and their elected representatives expect it to do.

The ABA has adopted recommendations to improve the quality of SSA decision-making, increase fairness and efficiency for claimants, help alleviate the backlog, encourage clarity in communications with claimants, promote procedural due process protections, and seek the application of appropriate, consistent legal standards at all stages of the adjudication process. However, the SSA needs sufficient funding to carry out these goals.

Administrative funding for the SSA has been significantly below the level necessary to keep up with the agency's workload. The resulting crisis has harmed individuals that the system was designed to protect. Approximately 750,000 claimants are currently awaiting a hearing on an appealed claim, and many wait years to receive the benefits they deserve. The President's FY 2009 budget for the SSA represents a step toward reducing an extensive backlog and improving services to the public, but it still does not afford prompt and fair adjudication of applications for disability insurance and supplemental security income benefits. Funding for the SSA has been insufficient to maintain an adequate number of administrative law judges and support staff and to continue to reduce a serious backlog in disability cases, and it does not address the inadequate levels of service provided to the public in SSA field offices and customer service centers. Congress should provide the SSA with sufficient funding to continue to reduce the significant backlog of initial claims and appeals of disability cases and to reverse crippling cuts in services to the public. Only by providing a sustained level of administrative funding will Congress enable the agency to perform its mandated services in a timely manner; to promptly and fairly adjudicate applications for disability insurance and supplemental security income benefits; to overcome significant disability claims processing times and backlogs; and to build the infrastructure necessary to manage the significant workload challenges presented by serving the aging baby boomers who are now filing disability and retirement claims.

The above proposals focus on the need for action by Congress and the Executive Branch. However, a focus on the needs of the civil justice system would be incomplete without a discussion of those areas where the American Bar Association believes federal legislation would be unwise or unnecessary. Those include the following:

RULES ENABLING ACT

Congress should not enact legislation that circumvents the Rules Enabling Act.

In recent years, there has been a trend towards circumventing the Rules Enabling Act process through proposals for legislation to make changes in the Federal Rules of Procedure or Evidence. Congress should recognize that the federal judiciary is the proper body to promulgate the rules of procedure and evidence for the federal courts under its Rules Enabling Act authority.

In the Rules Enabling Act, Congress prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, congressionally specified procedure contemplates that evidentiary and procedural rules will, in the first instance, be considered and drafted by committees of the United States Judicial Conference; will thereafter be subject to thorough public comment and reconsideration; and will then be submitted to the United States Supreme Court for consideration and adoption. Finally, the proposed rules resulting from the inclusion of all of the stakeholders will be transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

The time-proven Rules Enabling Act process proceeds from separation-of-powers concerns and is driven by the practical recognition that rules of evidence and procedure are inherently matters of intimate concern to the judiciary, which must apply them on a daily basis, and that the Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation. When congressional members propose legislation to adopt rule changes without following the Rules Enabling Act, it not only circumvents the purpose of the act but can have potentially negative and unforeseen impacts on the judicial system.

TORT LAW

1. Federalizing State Medical Malpractice and Product Liability Laws. ***Congress should not enact legislation that would preempt the state medical liability laws or enact broad federal product liability legislation.***

With few exceptions, the ABA has long and consistently opposed the enactment of federal legislation that would attempt to create a national body of tort law that would apply in the justice systems of the fifty states and territories. The courts and legislatures of the states and territories are the appropriate bodies to modify tort laws. While the ABA has supported proposals to improve the tort laws at the state level, it opposes proposals that would preempt state medical liability laws, and proposals to enact broad federal product liability legislation. State legislatures and courts are in the best position to address these matters. This approach is in keeping with the common law process and has been the historic hallmark of tort law in the United States. The ABA supports discrete federal product liability legislation where unique circumstances justify such action. Thus, it supports federal legislation concerning the issues of liability and damages with respect to claims arising out of occupational diseases with long latency periods, such as asbestosis, where the number of such claims and the liability for damages threatens the solvency of a significant segment of the business sector and the number of claims has become an excessive burden on the justice system. It also supports federal legislation that allocates product liability risks between the federal government and its contractors.

2. Health Courts. ***Congress should not enact legislation that would create health courts that require injured patients to utilize health care tribunals that deny injured patients the right to a trial by jury.***

As part of an ongoing effort relating to liability of health care providers, proposals have been made to create "health courts." Under a "health court" system, medical negligence litigation cases would be removed from the court system where cases are heard by judges and juries, and instead would be heard by health care tribunals who have expertise in health care, but who are not necessarily judges or lawyers. A "health court" is an administrative tribunal. The proposals currently use a Workers' Compensation model, and damages are subject to standardized schedules or formulas. The ABA opposes the creation of a system that requires injured patients to utilize "health courts" that deny injured patients the right to a trial by jury or full compensation for injuries caused by medical negligence. ABA policy has long endorsed the use of alternatives to litigation for resolution of medical malpractice disputes, but only when those alternatives operate on a voluntary basis and only after a dispute has arisen.

The recommendations discussed above are among a wide range of issues endorsed by the ABA and are by no means exhaustive. We emphasize these issues because of their timeliness and importance to our nation.

For more information, please contact Thomas M. Susman, Director of the ABA's Governmental Affairs Office, at susmant@staff.abanet.org or (202) 662-1765.

For more information on ABA Legislative Priorities, visit www.abanet.org/poladv.

American Bar Association

With more than 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law.

ABA Governmental Affairs Office

The ABA Governmental Affairs Office (GAO) serves as the focal point for the Association's advocacy efforts before Congress, the Executive Branch and other governmental entities on diverse issues of importance to the legal profession on which the ABA House of Delegates has adopted policy. The GAO concentrates its advocacy efforts on the Association's Legislative and Governmental Priorities that are selected annually by the ABA Board of Governors from a list of over 1,000 policy positions adopted by the ABA House of Delegates. When appropriate, the GAO calls upon the Grassroots Action Team for grassroots advocacy assistance. The GAO also works closely with ABA member entities to communicate the views of the Association to numerous governmental entities on a broad range of issues of concern to policy makers and the legal profession. In total, each Congress, the GAO lobbies on approximately 100 different legislative issues.


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