ABA supports uniform standards for disclosing evidence in federal cases

Citing “wildly different policies” for disclosure of evidence in U.S. attorney offices around the country, ABA President Wm. T. (Bill) Robinson III commended Sen. Lisa Murkowski (R-Alaska) last month for her leadership in introducing S. 2197, a bipartisan bill to help establish uniformity in evidence disclosure standards.

“There is no reason why the Justice Department should have 96 different policies rather than one uniform policy,” Robinson wrote to Murkowski March 15. “A clearly defined and codified disclosure standard would help eliminate the pitfalls of the current system,” he emphasized.

In his letter, Robinson said that the disclosure of exculpatory information by the prosecution is vital to notions of due process as guaranteed by the First Amendment and effective assistance of counsel as guaranteed by the Sixth Amendment. He explained that the Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1963), stated the constitutional basis of the duty of prosecutors to disclose evidence to the defense. The decision in Giglio v. United States, 405 U.S. 150, 154 (1972), made clear that the prosecutor’s duty to disclosure is not limited to exculpatory evidence and covers evidence affecting credibility. The court held in United States v. Agurs, 427 U.S. 97 (1976), that the prosecution’s constitutional duty to disclose is not limited to situations where the defendant made a specific request for the relevant evidence.

The ABA, which has approved several resolutions calling for various steps to improve the disclosure process in recent years, adopted policy last year urging enactment of federal legislation to implement Brady disclosure.

During a March 15 press conference unveiling the bill, ABA Past President Carolyn Lamm applauded the introduction of the legislation, which the ABA maintains would be “an important step toward achieving consistency and improving fairness in the federal civil justice system and will serve the cause of achieving justice in countless individual cases.”

S. 2197 would require federal prosecutors to make early disclosure of evidence that is favorable to a defendant and may demonstrate his or her innocence, regardless of whether the evidence is deemed material to the case by the prosecutors. The legislation also would make clear that failure to abide by Brady obligations is a serious breach of the government’s responsibilities and would give judges a broad range of remedies, including postponing or adjourning the proceedings, excluding or limiting testimony or evidence, ordering a
**Independence of the Legal Profession.** S. 1483 would subject many lawyers to anti-money laundering and suspicious activity reporting requirements under the Bank Secrecy Act when they help clients establish companies. H.R. 4014 would amend the Federal Deposit Insurance Act to clarify that when banks or other supervised entities submit privileged information to the Consumer Financial Protection Bureau during examination or other regulatory processes, the privilege would not be waived as to third parties.

Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections. See page 7.

**Health Care Law.** P.L. 111-148 (H.R. 3590), the Patient Protection and Affordable Care Act, and P.L. 111-152 (H.R. 4872), the Health Care and Education Reconciliation Act, overhaul the nation’s health care system. H.R. 2 would repeal health care reform law. An amendment proposed to S. 223, transportation legislation, would have repealed the law. H.R. 5 and S. 218 would preempt state medical liability laws.

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. See page 8.

**Judicial Independence.** No cost-of-living adjustment was provided for federal judges in 2010, 2011 or 2012. S. 348 and H.R. 727 would establish an inspector general for the federal judiciary. S. 755 and H.R. 1416 would help state courts collect overdue court-ordered financial obligations through interception of federal tax refunds. S. 410 would authorize cameras in federal district and appellate courts for civil trials. S. 1945 and H.R. 3572 would authorize televising of Supreme Court open proceedings.

Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.

**Legal Services Corporation.** P.L. 112-55 (H.R. 2112), fiscal year 2012 appropriations legislation, includes $348 million for the LSC. The president requested $402 million for the LSC in his fiscal year 2013 budget.

Supports an independent, well-funded LSC.
ABA cites concerns about new mandatory minimums

ABA President Wm. T. (Bill) Robinson III acknowledged Sen. Rand Paul (R-Ky.) for his stand against enactment of new federal mandatory minimum sentences and urged other senators to oppose bills that would impose such sentences and federalize crimes that could be handled easily by states.

Paul is opposing mandatory minimum provisions in the following legislation: S. 409, the Combatting Dangerous Synthetic Stimulants Act; S. 605, the Dangerous Synthetic Drug Control Act; and S. 839, the Combating Designer Drugs Act. All three bills are awaiting Senate votes following approval in July by the Senate Judiciary Committee.

“The ABA has been concerned for some time about the federalization of crime,” Robinson wrote in a March 13 letter to Paul. He noted that the federal courts have become forums for new classes of cases, many of which would otherwise be tried only in state court, and convictions place additional burdens on the federal prison system.

Congress has enacted new federal criminal laws at an unprecedented rate, both in sheer numbers of subjects addressed and in the scope of new legislated federal jurisdiction. This has resulted in a massive growth in the size of the overall federal criminal justice system and increased costs for the executive and judicial branches.

The ABA opposes the pending Senate bills because they would expand Schedule I of the Controlled Substances Act to cover additional synthetic substances.

Schedule I drugs or substances are those with a high potential for abuse and have no currently accepted medical use in the United States. Under the act, an individual convicted of an offense involving any quantity of a Schedule I controlled substance is subject to up to 20 years in prison, and a mandatory minimum sentence of 20 years is required in cases where death or serious bodily injury resulted from the use of the substance.

“This approach not only inappropriately applies a one-size-fits-all approach, it eliminates the ability of judges to exercise discretion to impose an appropriate sentence taking into account individual circumstances,” Robinson said.

He concluded that “while states are enacting significant sentencing and corrections reforms to reduce unnecessary and excessive incarceration of low-level offenders, Congress is considering proceeding with the business-as-usual ‘big-government’ approach to federal criminal justice that is characterized by ever swelling rolls of federal crimes with expanded federal jurisdiction and additional mandatory minimum sentences.”

Bills seek end to racial profiling

The ABA expressed support April 10 for the proposed End Racial Profiling Act, which the association maintains represents a comprehensive federal commitment to heal the rift caused by racial profiling and restore public confidence in the criminal justice system.

“Recent events demonstrate that racial profiling remains a divisive issue that strikes at the very foundation of our democracy,” ABA Governmental Affairs Director Thomas M. Susman wrote to Sen. Benjamin Cardin (D-Md.) and Rep. John Conyers Jr. (D-Mich.), the sponsors of S. 1670 and H.R. 2618, respectively.

“When law-abiding citizens are treated differently by those who enforce the law simply because of their race, ethnicity, religion, or national origin, they are denied the basic respect and equal treatment that is the right of every American,” Susman wrote. He added that the practice of using race as a criterion of law enforcement undermines the progress that has been made toward racial equality since passage of sweeping civil rights legislation decades ago.

In addition to prohibiting racial profiling by federal, state or local law enforcement agencies, S. 1670 and H.R. 2618 would grant the United States or an individual injured by racial profiling the right to obtain declaratory or injunctive relief. The bill also would mandate that racial profiling issues be part of federal law enforcement training and that data be collected on all routine or spontaneous investigatory activities. In addition, the Justice Department would be authorized to provide grants for the development and implementation of best police practices and require the attorney general to provide periodic reports to assess the nature of any ongoing discriminatory profiling practices.

“Using racial profiling makes it less likely that certain affected communities will voluntarily cooperate with law enforcement and community policing efforts,” Cardin said when he introduced S. 1670. “Minorities living and working in these communities also may feel discouraged from travelling freely, and it corrodes the public trust in government.”
House panel looks at new immigration detention standards

Maximizing access to counsel and legal resources is among the priorities of new detention standards issued in February by U.S. Immigration and Customs Enforcement (ICE).

The standards, explained by an ICE official during a March 28 hearing before the House Judiciary Subcommittee on Immigration Policy and Enforcement, will be implemented at ICE facilities during 2012 on a rolling basis and eventually extended to other facilities, including county jails, that house ICE detainees.

In addition to legal access, the standards seek to improve medical and mental health care services, reinforce protections against sexual abuse and assault, expand access to religious services and opportunities, improve communication assistance services for detainees with limited English proficiency or disabilities, and enhance procedures for reviewing and responding to detainee grievances.

The ABA, which has assisted in the development of detention standards for many years, has established a Detention Standards Implementation Initiative in its Commission on Immigration. The association, which is preparing comments on the new standards, supports regulations for detention standards to ensure consistent implementation. The ABA also opposes mandatory detention and supports increasing programs to provide alternatives to detention for those in the civil immigration system.

Kevin Landy, assistant director of the ICE Office of Detention Policy and Planning in the Department of Homeland Security (DHS), testified that reforming the ICE detention system is a top priority for the agency. Recent changes include creating his office in ICE, launching an online detainee locator system available in multiple languages, and establishing an Office of Detention Oversight to conduct targeted inspections at detention facilities where complaints or deficiencies have been reported. He said that, in addition to implementing reforms and new standards, ICE is opening new civil detention facilities that for the first time incorporate civil detention principles and the needs and characteristics of ICE’s diverse detainee population.

ABA supports evidence disclosure legislation

continued from front page

new trial, or dismissing the case with or without prejudice.

Murkowski’s bill – cosponsored by Sens. Daniel K. Inouye (D-Hawaii), Kay Bailey Hutchison (R-Texas), Mark Begich (D-Alaska), and Daniel Akaka (D-Hawaii) – was introduced the same day Special Counsel Henry Schuelke released a report revealing a wide variety of discovery failures during the 2008 trial of Sen. Ted Stevens (R-Alaska). Stevens was convicted of accepting excessive gifts, but the Department of Justice vacated the conviction in 2009 after evidence of prosecutorial misconduct was discovered.

The Senate Judiciary Committee focused on the Schuelke report during a March 28 hearing as part of its oversight responsibilities. The House Judiciary Committee is expected to hold a broader hearing on the issue in mid-April.

Sen. Lisa Murkowski (R-Alaska), at podium, unveils the proposed Fairness in Evidence Disclosure Act at a news briefing March 15. Also participating in the briefing were, from left: ABA Past President Carolyn B. Lamm; Washington lawyer Robert M. Cary, who represented Sen. Ted Stevens (R-Alaska); and Michael Macleod-Ball of the American Civil Liberties Union.
ABA President Wm. T. (Bill) Robinson III urged Congress March 30 to maintain funding in fiscal year 2013 for agencies and programs that support rule of law activities such as those implemented by the association’s Rule of Law Initiative (ABA ROLI).

“Targeted foreign assistance to establish and enhance legal systems and institutions grounded in the rule of law is a critical component of U.S. foreign policy in the developing world, post-conflict counties and countries in transition,” Robinson wrote in a statement submitted to the House Appropriations Subcommittee on State, Foreign Operations and Related Programs. He added that such assistance is vital in ensuring the protection and promotion of U.S. national security and economic interests.

Robinson explained that establishing legal structures and institutions based on the rule of law is a necessary prerequisite to creating durable democratic societies and successful market-based economies. U.S. businesses, he noted, are hesitant to invest in countries that lack sufficient legal protections and independent courts to fairly resolve business disputes.

ABA ROLI, which provides legal technical assistance to nations around the world, has promoted the rule of law in more than 80 countries since it was established in 1990. The program currently has nearly 700 staff, pro bono volunteers and other personnel in offices in Washington, D.C., and approximately 50 countries in every region of the world. ABA ROLI projects focus on strengthening the rule of law and promoting good governance in countries closely allied with the United States such as Jordan, Liberia, Mexico and the Philippines as well as countries where the relationships are more complex, including China, Ethiopia, Russia and Tajikistan.

“Through these programs, the ABA has a framework in place to respond to requests for assistance from every region of the world and can provide expertise in virtually every area of law, including, but not limited to, such areas as women’s rights, anti-human trafficking and anti-corruption, judicial reform, prosecutorial and defense bar reform, commercial law development, and access to justice and human rights,” Robinson wrote.

Some of the ABA ROLI projects in-clude combating impunity for rape and others forms of sexual and gender-based violence in the Democratic Republic of Congo; improving court efficiency through the first-ever claims court program in the Philippines; helping increase the capacity of the government to introduce forensic evidence to combat massive human rights violations in Nepal; expanding access to justice and combating corruption in Russia; and launching a community-based legal education program to combat force labor and sex trafficking in Tajikistan.

Robinson emphasized that the programmatic work is supported by legal research and assessments that produce findings that host country government leaders and policymakers use to prioritize and focus reform efforts.

He emphasized that funding for rule of law programs must be utilized in partnership with local leaders in an accountable, transparent and sustainable manner and that independent non-governmental organizations such as the ABA are more likely to develop long-term relationships that build capacity and allow for sustainable assistance efforts, thereby leveraging U.S. taxpayer funding.
**Veteran homelessness declining, but challenges remain**

The number of homeless veterans is decreasing as a result of a Department of Veterans Affairs (VA) five-year plan to end homelessness among veterans, and the ABA is continuing its efforts to address the problem.

The five-year plan, unveiled by VA Secretary Eric Shinseki in November 2009, includes efforts to shelter those on the streets as well as prevent veterans from becoming homeless. The VA estimates that between 2010 and 2011, there was a 12 percent decline from 76,329 to 67,495 in the number of veterans who on a single night were living in emergency shelters, transitional housing or an unsheltered place.

During a March 14 hearing before the Senate Veterans Affairs Committee on the plan’s progress, Chairman Patty Murray (D-Wash.) characterized the significant progress as admirable but said that challenges remain.

Two panels comprised of veterans, nonprofit executives, shelters, veterans service organizations and federal government representatives reviewed the relative strengths and vulnerabilities of federal programs designed to help house, employ and meet the health needs of homeless military veterans.

Murray and Sen. John Boozeman (R-Ark.) expressed their deep concern over the lack of safe and secure facilities for veterans, especially women veterans. This problem, highlighted in a recent Government Accountability Office report, was echoed by a hearing panel that included a homeless female veteran who spoke to her frustrations in getting veterans assistance. Among other things, the witness highlighted how a local service provider has helped her transition toward self-sufficiency.

The ABA has numerous policies supporting various approaches to ending homelessness among veterans and is involved in partnerships with the federal government and other organizations. For example, the association has a formal partnership with the VA and the Department of Health and Human Services titled Strategic Initiative #1 under “Opening Doors: The Federal Strategic Plan to Prevent and End Homelessness,” the Obama administration’s interagency plan.

The ABA also continues to advocate for veterans treatment courts, smart sentencing and diversion, and the elimination of barriers to pro bono assistance for veterans. In addition to pushing for enactment of legislation strengthening the Servicemembers Civil Relief Act, the association worked closely with the VA as the agency promulgated a directive allowing pro bono programs access to VA medical centers.

The ABA Governmental Affairs Office currently is working with the association’s Commission on Homelessness and Poverty, as well as veterans service and housing organizations, to develop a Capitol Hill briefing for congressional staff on key programs combating homelessness.

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**Judicial Vacancies/Confirmations — 112th Congress**

(as of 4/11/12)

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*Includes territorial judgeships*
### STOCK ACT:
President Obama signed legislation April 4 to prevent members of Congress and congressional employees from using nonpublic information derived from their official positions for insider trading for their benefit. P.L. 112-105, the Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act), does not include a controversial provision opposed by the ABA Business Law Section and the association’s Task Force on Financial Markets Regulatory Reform that would have had significant unintended adverse consequences for business lawyers. The provision, Section 17 of the Senate-passed version of the legislation, would have amended the Lobbying Disclosure Act of 1995 to cover “political intelligence activities” and thereby regulated any “political intelligence consultants” who engage in these activities. Section 17 would have required a person to register as a “political intelligence consultant” as a result of any “political intelligence contact” with a covered executive or legislative branch official that could have consisted of only a single telephone call, a single email or letter, or attending a single meeting on behalf of a client. In a March 2 letter to House and Senate leaders, ABA Business Law Section Chair Linda J. Rusch expressed opposition to the provision from both her section and the ABA task force, explaining that business lawyers engage on a regular basis in dialogue with government officials regarding matters of importance to their clients and often reach out to government officials to seek clarification and guidance with respect to the application of rules and regulations to particular fact situations. The provisions, Rusch concluded, would have required many business lawyers to register under the Lobbying Disclosure Act, which would impose a significant burden on lawyers and undermine their ethical obligations of client confidentiality and zealous representation.

### IMMIGRATION REPRESENTATION:
The ABA expressed support last month for improving access to counsel for individuals in immigration removal proceedings and urged the Executive Office for Immigration Review (EOIR) to strengthen the requirements for individuals seeking accreditation by the Board of Immigration Appeals (BIA) to provide those services. Pointing out that several studies have found that the presence of representation has a significant impact on case outcomes in immigration court, ABA Governmental Affairs Director Thomas M. Susman offered recommendations to EOIR for ensuring that appropriate organizations are recognized and accredited representatives are competent. He said the ABA recommends that the BIA ensure that a competent attorney is available to provide mentoring and supervision to accredited representatives and that BIA-accredited organizations provide free or low-cost services, depending on the financial need of the individual in need of services. The association also recommends that minimum training requirements and continuing legal education be established for accredited representatives, who should accept only cases that are appropriate to their skill levels. In addition, EOIR should conduct outreach, particularly in areas lacking in legal services agencies, to encourage existing organizations to seek BIA accreditation. Susman noted that this is of particular concern for immigrants in remote detention facilities.

### PRIVILEGED INFORMATION:
The House passed legislation by voice vote March 26 that would create a single, consistent standard for the treatment of privileged information submitted to all federal agencies that supervise banks, including the new Consumer Financial Protection Bureau (CFPB). H.R. 4014 would amend the Federal Deposit Insurance Act to clarify that when banks or other supervised entities submit privileged information to the CFPB during examinations or other regulatory processes, the privilege would not be waived as to third parties. The bill also would add the CFPB to the list of agencies that may share privileged information with other agencies specified in the statute without causing a waiver. In correspondence to both the House and Senate in February, ABA President Wm. T. (Bill) Robinson III said enactment of the legislation “would help ensure a more integrated, consistent and coordinated approach to the regulation of financial services providers.” The Senate is expected to pass the bill, which has bipartisan support.
ABA reiterates opposition to medical liability proposals

The ABA last month reiterated its opposition to provisions in Title I of current medical liability legislation that would cap noneconomic damages that a plaintiff in a health care lawsuit could recover.

H.R. 5, which passed the House March 22 by a 223-181 vote, would limit noneconomic damages to $250,000 and cap punitive damages to two times the amount of economic damages or $250,000, whichever is greater. It also would preempt existing state laws on proportionate liability, allow courts to reduce contingent fees, and abolish the collateral source rule.

In a March 19 letter to all members of the House, ABA Governmental Affairs Director Thomas M. Susman reiterated the association’s doubts about potential savings from enactment of the legislation that the Congressional Budget Office (CBO) projected in 2009. He wrote that the ABA Standing Committee on Governmental Affairs reviewed the CBO conclusions and found that the CBO selectively relied on some studies that addressed only one side of the tort reform argument and misconstrued the conclusions of some of the studies cited.

The ABA committee, which conveyed its concerns to the CBO at the time, concluded that “on the whole, the results regarding potential savings through tort reform are ambiguous at best.”

Susman emphasized that the ABA remains committed to maintaining a fair and efficient system of justice where victims of medical malpractice can obtain redress based on state laws. He added that the states, because of the historic role they have played, remain the repositories of experience and expertise in these matters.

“Congress should not substitute its judgment, as it does in Title I of H.R. 5, for the systems that have thoughtfully evolved in each state over time,” he concluded.

Susman also noted that the ABA has no position on Title II of the bill, which would repeal the Medicare Independent Payment Advisory Board (IPAB) created in 2010 by the Patient Protection and Affordable Care Act. The IPAB has the authority to recommend proposals to Congress for reducing Medicare spending.