Silkenat nominated to be ABA president-elect

Delegates adopt range of policies at association’s 2012 Midyear Meeting

When the ABA House of Delegates gathered in New Orleans Feb. 6 during the association’s Midyear Meeting, the delegates adopted new policies on a wide range of issues that impact the legal profession.

Other highlights of the Midyear Meeting included an appearance by Attorney General Eric H. Holder Jr. at the ABA Summit on Indigent Defense Improvement, where he announced two new Justice Department grant programs for researching indigent defense issues and helping jurisdictions improve their public defender and assigned counsel systems. Also featured during the meeting was a “Conversation with Justice Antonin Scalia,” during which he shared his experiences and perspectives from 25 years on the Supreme Court.

During the meeting the association also nominated James R. Silkenat, of New York, to be ABA president-elect. If elected at the Annual Meeting this August, Silkenat will serve one year as president-elect before assuming the ABA presidency in August 2013 for a one-year term (see article, page 5).

In addition, the Board of Governors approved the continuation of the current legislative and governmental priorities for the Second Session of the 112th Congress (see page 7).

The following is a summary of the recommendations approved by the delegates during their meeting.

Courts/Judiciary

Magistrate Judges. Supports the provisions of Title 28, U.S.C. § 636 (c)(1), which grants U.S. magistrate judges, upon the consent of the parties, the power to conduct any and all proceedings in a jury or non-jury civil matter in federal court and to order the entry of judgment in the case, as being consistent with and not violative of Article III of the U.S. Constitution.

Model Time Standards. Amends the Model Time Standards for State Courts, dated February 2012, to establish one single set of standards for the timely disposition of cases by bringing them into alignment with those adopted by the Conference of Chief Justices and the Conference of State Court Administrators.


Criminal Justice

Access to Records. Adopts the black letter ABA Criminal Justice Standards

see “Midyear Meeting,” page 4
### Independence of the Legal Profession

The Securities and Exchange Commission issued final whistleblower rules that recognize the importance of protecting the attorney-client privilege and the confidential lawyer-client relationship. The Department of Housing and Urban Development issued a final rule exempting lawyers from the Secure and Fair Enforcement for Mortgage Licensing Act of 2008. 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.

<table>
<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independence of the Legal Profession</td>
<td>S. 1483 was referred to the Homeland Security and Governmental Affairs Committee on 8/2/11.</td>
<td></td>
<td>Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections. See page 8.</td>
<td></td>
</tr>
<tr>
<td>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.</td>
<td>House passed H.R. 2 on 1/19/11. Judiciary Committee held a hearing on H.R. 5 on 1/20/11 and approved the bill on 2/16/11.</td>
<td>Senate rejected health care repeal amendment to S. 223 on 2/2/11. S. 218 was referred to the Judiciary Committee on 1/27/11.</td>
<td>President signed P.L. 111-148 (H.R. 3590) on 3/23/10 and P.L. 111-152 (H.R. 4872) on 3/30/10.</td>
<td>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 &quot;health courts&quot; that take away jury trials.</td>
</tr>
<tr>
<td>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 court for civil trials. S. 1945 and H.R. 3572 would authorize televising of Supreme Court open proceedings.</td>
<td>H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11. H.R. 3572 was referred to the Judiciary Cmte. on 12/6/11.</td>
<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. S. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11. Judiciary Cmte. held a hearing on S. 1945 on 12/6/11 and approved the bill on 2/9/12.</td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.</td>
<td></td>
</tr>
</tbody>
</table>
Senate Judiciary Committee approves VAWA bill

The Senate Judiciary Committee, in a party line 10-8 vote Feb. 2, approved an amended version S. 1925, a bill to reauthorize the Violence Against Women Act to continue to provide services to victims of domestic violence, dating violence, sexual assault and stalking.

The legislation, sponsored by committee Chairman Patrick J. Leahy (D-Vt.) and Sen. Michael Crapo (R-Idaho), would consolidate 13 programs, reduce authorization levels by nearly 20 percent, and add accountability measures to ensure that federal funds are used efficiently and effectively in acknowledgment of difficult economic times.

The authorization level for the Legal Assistance for Victims (LAV) program, currently funded at $41 million, would drop from $65 million to $57 million, but the bill also includes provisions to strengthen the training requirements of those providing legal assistance to victims and allow grantees to recruit, train and mentor pro bono attorneys and law students to assist victims under the act.

Other provisions would ensure access to services through a uniform non-discrimination provision that for the first time would provide inclusive language to ensure that victims seeking assistance cannot be denied services based on gender identity or sexual orientation, as well as race, color, religion, national origin, sex or disability. The bill also includes provisions to strengthen tribal criminal jurisdiction over individuals who assault Native American spouses and dating partners in Indian country.

“VAWA is a critical tool in the arsenal to address domestic and sexual violence,” ABA President Wm T. (Bill) Robinson III wrote to the committee Jan. 31. Robinson, who expressed ABA support for S. 1925, noted recent studies indicating decreases in the number of men and women killed or injured by intimate partners since VAWA was enacted. He also pointed out that studies indicate that incidents of domestic and sexual violence tend to go down when victims have legal representation and when they obtain protection orders.

He emphasized, however, that domestic violence remains a pressing problem in the United States, citing a Centers for Disease Control and Prevention study released in December revealing that one in five women and one in 71 men have been raped at some time in their lives.

Other statistics show that one in six women and one in 19 men have experienced stalking victimization. In addition, one in four women and one in seven men have experienced severe physical violence by an intimate partner at some point in their lifetimes, according to the statistics.

The committee’s partisan vote is in stark contrast to two previous unanimous and voice vote committee approvals of VAWA reauthorization legislation.

Prior to the vote, Leahy attempted to address concerns raised by Republicans by negotiating the substitute amendment that was passed by the committee.

The eight members voting against the bill based their opposition on provisions related to the U Visa program, which gives illegal immigrants who are victims of violent crimes an opportunity to attain legal status if they help or are likely to help law enforcement and government officials. In addition, Sen. Charles E. Grassley (R-Iowa) opposed adding the terms “gender identity” and “sexual orientation” to the bill, calling the inclusion of those terms unnecessary to ensure that services are provided equally to everyone.

The legislation now moves to the full Senate for consideration.

President requests $402 million for LSC

President Obama requested $402 million for the Legal Services Corporation in the proposed fiscal year 2013 budget he sent to Congress Feb. 13.

The president’s request would increase LSC funding by $54 million from the current appropriation of $348 million, which was a significant reduction over the past two years from the program’s fiscal year 2010 level of $420 million.

The LSC provides direct legal services to approximately one million constituents struggling to get by on incomes below or near the poverty line and is the single largest provider of civil legal aid in the nation. The program distributes 95 percent of its federal appropriation to 135 programs that support 900 legal aid offices across the country. Reductions in funding from the federal government and other sources are resulting in staff layoffs at LSC-funded programs that may total more than 1,000 by the end of the year, according to an LSC survey.

Expressing the ABA’s strong support for the LSC late last year, ABA President Wm. T. (Bill) Robinson III vowed that the ABA will work diligently with Congress to seek restoration of the LSC funding that has been lost in recent years.

“Congress must weigh the need to shrink our nation’s burgeoning budget deficit against the fundamental needs of low-income citizens in the justice system.”
on Law Enforcement Access to Third Party Records, dated February 2012, regarding law enforcement investigatory access to, and storage and disclosure of, records maintained by institutional third parties such as banks, hospitals and Internet service providers. The new standards provide a framework to assist legislators, courts and administrative agencies in making decisions regarding the protection of such records that balance the needs of law enforcement and the interests of privacy, freedom of expression, and social participation.

Forensic Science. Urges governments at various levels to adopt pretrial discovery procedures requiring laboratories to produce, for use in criminal trials, comprehensive and comprehensible laboratory and forensic science reports that meet specified criteria.

Expert Testimony. Urges judges and lawyers to consider specified factors in determining in which expert testimony should be presented to a jury and in instructing the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings.

Jury Voir Dire. Urges judges and lawyers to consider specific factors in formulating jury voir dire in criminal cases where forensic science evidence is contested, including potential jurors’ understanding of general scientific principles, principles relevant to forensic science, and preconceptions or bias with respect to forensic scientific principles.

Public Housing. Urges the federal government to encourage public housing authorities and other owners of federally subsidized rental housing to reevaluate their current rules regarding admission, termination and additions to households to ensure that those rules do not unfairly punish persons with criminal records.

Therapeutic Courts. Supports legislation, policies and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, regardless of the custody or detention status of the individual. Opposes interpretations of, and amendments to, the Immigration and Nationality Act that would classify participation in a divertory program as a “conviction” for immigration purposes.

Jury Instructions. Urges courts to adopt jury instructions that are understandable to jurors untrained in the law and to provide such instructions to jurors in written form for the penalty phase of capital cases.

Disability Rights

Law School Admissions. Urges all entities that administer a law school admission test to provide appropriate accommodations for test takers with disabilities.

Service Animals. Urges all federal, state, territorial and local legislative bodies to repeal or amend all laws or policies inconsistent with the regulations implementing the Americans with Disabilities Act (ADA) and to implement policies to ensure that persons with disabilities utilizing service animals are provided access to services, programs and activities of public entities and public accommodations in compliance with the regulations implementing the ADA.

Domestic Violence

Rape Definition. Urges the Federal Bureau of Investigation to start collecting data immediately using the expanded definition of rape in the Uniform Crime Reporting Summary Reporting Program, which now includes, regardless of gender or presence of force, all forms of non-consensual penetration of a vagina or anus and all forms of non-consensual penetration by a sexual organ of any orifice.

Intellectual Property Law

Patent Infringement. Supports in principle the long-established precedent that patent infringement must be proven by a preponderance of the evidence, and the fact that a project or process accused of infringement is itself separately patented does not alter the burden of proof but may be relevant to the issue of infringement under the doctrine of equivalents.

International Law

Foreign Data Protection. Urges courts, where possible, to consider and respect the data protection and privacy laws of any applicable foreign sovereign and the interest of any person who is subject to or benefits from such laws with regard to data sought in discovery in civil litigation.


see “Midyear Meeting,” page 5
February 2011

ABA Washington Letter

Page 5

Midyear Meeting

continued from page 4


Legal Education

Law School Standards. Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making amendment, dated February 2012, to the following portions of the ABA Standards and Rules of Procedure for Approval of Law Schools: Standard 510, Student Loan Programs; Rule 3, Accreditation Committee Consideration; Rule 5, Jurisdiction of the Accreditation Committee; and Rule 22, Teach-Out Plan and Agreement and Law School Closure.

Student Complaints. Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making non-substantive clarifications to Standard 512 (Student Complaints) of the ABA Standards and Rules of Procedure for Approval of Law Schools.

Distance Education and Organizational Structure. Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in making non-substantive clarification to Standard 306 (Distance Education) and Rule 20 (Major Change in the Organizational Structure of a Provisionally or Fully Approved Law School) of the ABA Standards and Rules of Procedure for Approval of Law Schools.

Legal Profession

Independence of the Profession. Urges the highest courts or legislative bodies charged with the administration of justice, admission to the bar, and regulation of the legal profession to respect the organized bar’s ability and right to function independently and express its views freely. Further urges that these bodies allow the organized bar to provide specialized advice and opinion on all matters of public policy germane to the bar’s charter.

Fee Arbitration. Amends the Model Rules for Fee Arbitration, originally adopted by the House of Delegates in 1995, to increase productivity, efficiency and fairness of fee arbitration programs, which intend to provide clients and lawyers with the opportunity for fair, fast and inexpensive resolution of disputes involving fees and costs.

Lawyers Sanctions. Reaffirms the black letter of the ABA Standards for Imposing Lawyer Sanctions, as adopted in February 1986 and amended in February 1992, and

James R. Silkenat nominated to become ABA president-elect

New York City lawyer James R. Silkenat, a partner in the national law firm of Sullivan & Worcester, was nominated Feb. 6 at the ABA Midyear Meeting to become president-elect of the association.

If elected at the upcoming Annual Meeting in August, Silkenat will assume the ABA presidency in August 2013 after serving one year as president-elect.

Silkenat has held many leadership positions within the ABA. In addition to serving in the House of Delegates since 1990 as a state delegate from New York, he chaired the Section of International Law, the ABA Section Officers Conference and the ABA Standing Committees on Membership, and Constitution and Bylaws. He is a member of the ABA Commission on Racial and Ethnic Diversity in the Profession and the ABA Leadership Coalition on Solo and Small Firm Lawyers. He also is a former member of the ABA Board of Governors and its Executive Committee as well as a former chair of the Fellows of the American Bar Foundation.

In his legal practice he helps coordinate the firm’s international business practice and concentrates on project and infrastructure finance, banking and securities law, mergers and acquisitions, and corporate law.

He plans to focus on several initiatives during his presidency, including promoting diversity in the legal profession, working more closely with corporate counsel, examining election law reform issues, and improving bar services for solo and small firm practitioners.

A native of Kansas, Silkenat received a B.A. from Drury College, his J.D. from the University of Chicago School of Law, and a Master of Laws in international law from New York University School of Law.

James R. Silkenat

Midyear Meeting

continued from page 4
rescinds adoption of the Commentary as part of its corpus. Going forward, the substance of the commentary will be periodically updated and published separately as “Annotations.”

Military Spouses. Urges state and territorial bar admission authorities to adopt rules, regulations and procedures that accommodate the unique needs of military spouse attorneys, who move frequently in support of the nation’s defense.

Legal Services

Delivery of Legal Services. Supports and encourages the continued efforts of solo, small firm and general practice lawyers to increase access to justice by providing legal services to those in need.

State and Local Government Law

Immunity. Supports the principle that “private” lawyers representing governmental entities are entitled to claim the same qualified immunity provided “government” lawyers from 42 U.S.C. Section 1983 claims when they are acting “under color of state law.”

Uniform State Laws

Title for Vessels. Approves the Uniform Certificate of Title for Vessels Act, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2011, relating to titles for boats and other vessels used principally on the waters of the states.

Electronic Legal Material. Approves the Uniform Electronic Legal Materials Act, promulgated by NCCUSL in 2011, addressing the need to manage electronic legal information in a manner that guarantees the trustworthiness of and continuing access to important state legal material.

During the Midyear Meeting in New Orleans, panelists Harriet Pearson, vice president, security counsel and chief privacy officer, IBM Corporation; Vincent I. Polley, president, KnowConnect, PLCC; and Stewart Baker, partner, Steptoe & Johnson, explored cybersecurity issues during an interactive discussion Feb. 4 entitled “Whither Cyberspace: Security, Privacy Rights, the Law and the Private Sector.” The Standing Committee on Law and National Security sponsored the event, which was moderated by standing committee Chair Harvey Richikof.

Judicial Vacancies/Confirmations — 112th Congress* (as of 2/17/12)

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
</tr>
</thead>
<tbody>
<tr>
<td>US Supreme Court (9 judgeships)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>US Courts of Appeals (179 judgeships)</td>
<td>16</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>US District Courts (678 judgeships)</td>
<td>68</td>
<td>30</td>
<td>58</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>86</td>
<td>39</td>
<td>68</td>
</tr>
</tbody>
</table>

*Includes territorial judgeships
ABA Legislative and Governmental Priorities for 2012

**Access to Legal Services:** Supports increased funding for civil legal services through the Legal Services Corporation (LSC), Violence Against Women Act (VAWA) programs, and other federal programs that provide legal services for the poor. Supports reauthorization of LSC and VAWA. Urges increased federal support for quality state public defense systems. Supports strengthening legal protections and access to legal assistance for active-duty military, their families, veterans, and low-income military personnel. Urges the development of innovative and effective ways to ensure that veterans collect their due benefits and receive appropriate services to help them achieve self-sufficiency.

**Criminal Justice System Improvements and Protection of Rights:** Opposes mandatory minimum sentences and supports the broad expansion of alternatives to incarceration, particularly for nonviolent offenses. Supports federal funding for indigent defense representation in criminal cases and urges stronger federal habeas corpus review of state convictions and resources to assure capital defendants have representation at trial and on appeal. Supports legislation to reauthorize the Second Chance Act, reduce the adverse effects of collateral sanctions, and address racial and ethnic disparities in the justice system.

**Eliminating Discrimination and Protecting Civil Liberties:** Endorses legal remedies and voluntary actions to eliminate or prevent discrimination based on race, origin, gender or sexual orientation, and opposes efforts to roll back current anti-discrimination laws. Urges the prosecution of Guantanamo detainees in Article III courts unless the Attorney General certifies that the trials cannot take place before such courts and can be conducted in other courts, and the transfer or release of those who are no longer classified as enemy belligerents. Opposes torture or other cruel, inhuman or degrading treatment of detainees in U.S. custody.

**Health Care Law and Tort Reform:** Opposes federal legislation to preempt state medical liability laws to limit compensation to patients injured by malpractice, or legislation to require patients injured by malpractice to use “health courts” instead of jury trials. Endorses the use of alternatives to litigation for resolution of medical malpractice disputes, but only when such alternatives are entered into on a voluntary basis after a dispute has arisen. Supports federal legislation to provide for clear, predictable, and consistent procedures for Medicare set-aside settlements.

**Immigration:** Supports measures to improve the immigration court system to increase due process safeguards, including access to counsel for those in removal proceedings. Opposes mandatory detention of those in removal proceedings, supports alternatives to detention, and supports strengthening the ICE National Detention Standards and promulgating them into enforceable regulations. Supports comprehensive immigration reform that promotes legal immigration based on family reunification and employment skills and provides for new legal channels for future workers, a path to legal status, and enhanced border security.

**Independence of the Judiciary:** Urges prompt filling of federal judicial vacancies. Supports adequate funding for the federal judiciary and legislation to modify the method by which judges receive cost-of-living adjustments. Opposes legislative initiatives that undermine the judicial process, infringe upon separation of powers, or circumvent the Rules Enabling Act. Urges enactment of legislation that would authorize the Department of the Treasury to intercept federal income tax refunds to help states collect overdue court debts and crime victim restitution.

**Independence of the Legal Profession:** Supports the principle that the primary regulation and oversight of the legal profession should be vested in the court of highest appellate authority of the state in which the attorney is licensed and opposes federal legislation and agency rules that would undermine traditional state court regulation of lawyers, interfere with the confidential attorney-client relationship, or otherwise impose excessive new federal regulation on lawyers engaged in the practice of law.

**Promoting the International Rule of Law:** Supports the creation of and adequate funding for domestic and international agencies and programs that promote the rule of law and the protection of human rights, including the prompt payment of U.S. assessments to the United Nations for its regular and peacekeeping expenses, and enactment of the International Violence Against Women Act. Supports ratification of certain international treaties, including the Convention on the Law of the Sea, the Rome Statute for an International Criminal Court, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of Persons with Disabilities.

For more details, go to the ABA Governmental Affairs Office website.
ABA opposes incorporation transparency legislation

ABA President Wm. T. (Bill) Robinson III expressed the ABA’s concerns recently about S. 1483, incorporation transparency legislation that the association maintains would impose burdensome federal mandates on state incorporation practices and subject many lawyers to the anti-money laundering and suspicious activity reporting requirements of the Bank Secrecy Act when they help clients establish companies.

The bill, according to sponsor Sen. Carl Levin (D-Mich.), is intended to combat terrorism, money laundering, tax evasion and other wrongdoing by U.S. corporations with hidden owners. The measure would require states to obtain a list of the beneficial owners of each corporation or LLC formed under their laws, maintain the information for a period of years after a corporation is terminated, and provide the information to law enforcement upon receipt of a subpoena or summons.

Robinson, in a Dec. 16 letter to the Senate Committee on Homeland Security and Governmental Affairs, explained that the ABA supports all reasonable and necessary domestic and international efforts to combat money laundering and terrorist financing and has worked diligently with the rest of the legal community, federal and international law enforcement authorities and the states to advance these reforms. He stressed, however, that federal legislation such as S. 1483 is unjustified and would be counterproductive.

Robinson explained that the ABA particularly opposes the proposed regulatory approach in S. 1483 that would superimpose new federally mandated requirements on existing state company formation practices and regulate many practicing lawyers and law firms as part of a new class of “formation agents” subject to the bill’s beneficial ownership mandates. The association also opposes provisions that would regulate lawyers and law firms as “financial institutions” under the Bank Secrecy Act.

“By subjecting lawyers to new federal anti-money laundering (AML), combating the financing of terrorism (CFT), and suspicious activity reporting (SAR) requirements under the Bank Secrecy Act, the bill would undermine the attorney-client privilege, the confidential client-lawyer relationship and traditional state court regulation of lawyers,” Robinson wrote.

He also pointed out that a limited attorney exemption in the bill is inadequate and would harm clients. Section 4(b)(3) would exempt attorneys and law firms from the definition of “formation agent” for AML and CFT purposes, but only when they agree to use paid formation agents operating in the United States to form corporations or LLCs for their clients. As a result, this would require lawyers to outsource an important practice of law activity to non-lawyers, which may cause the lawyers to violate their ethical duties by aiding non-lawyers in the unauthorized practice of law. In addition, regardless of whether lawyers are exempt from the AML and CFT requirements of Section 4, they would still be deemed to be formation agents under Section 3 of the bill and still subject to the costly and burdensome beneficial ownership reporting requirements in that section.

Robinson said that the association and a number of specialty bar associations, in an effort to fight money laundering and terrorist financing in ways that minimize the impact on the client-lawyer relationship, have developed and are promoting the “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing.” The Voluntary Guidance, he said, allows U.S. lawyers to combat money laundering and terrorist financing by taking prudent, proportional risk-based steps tailored to the individual situation rather than adhering to a burdensome and rigid one-size-fits-all approach.

He also noted the ABA’s efforts to engage with the Financial Action Task Force on Money Laundering (FATF), an intergovernmental body working to update and refine the existing international anti-money laundering and counter terrorist financing standards. Most recently, the ABA filed its fourth comment letter encouraging the FATF to preserve the risk-based approach of the existing standards.

ABA supports addition of countries to Trans-Pacific Partnership

The ABA expressed support last month for inclusion of Japan, Mexico and Canada in the Trans-Pacific Partnership (TPP), which the association said would provide additional opportunities to address issues relating to the ability of U.S. firms to establish offices and to associate freely with foreign lawyers and law firms.

In a Jan. 13 letter to the Office of the U.S. Trade Representative (USTR), ABA Governmental Affairs Director Thomas M. Susman noted that “the ongoing globalization of commercial activity by American individuals and businesses makes it imperative for U.S. lawyers to be able to provide advice and assistance to their clients wherever the clients needs that assistance.” The USTR solicited comments in December regarding the interest that the governments of Japan, Mexico and Canada have expressed about joining the

see “Trans-Pacific,” page 9
Trans-Pacific Partnership

continued from page 8

TPP, a trade and investment partnership among the following nine countries: Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States.

The comment letter emphasized that international trade in legal services is big business, citing the most recent published statistics suggesting that the United States annually exports legal services valued at more than $7 billion and enjoys a trade surplus of more than $3 billion. The figures, according to the letter, probably understate the participation of U.S. lawyers in U.S. trade by excluding the significant legal services provided by in-house counsel at many businesses engaged in cross-border and foreign operations.

In the comments, Susman emphasized that Japan, as the second largest destination for U.S. legal services, is a particularly critical market for U.S. lawyers and law firms. He said that Japan has made significant progress in liberalizing its legal services market since 1987, when the country began to open its doors with the passage of the Foreign Lawyers’ Act. In spite of the progress, however, a number of important inhibitions on the ability of U.S. lawyers to practice in Japan remain, including requirements that a foreign lawyer have practiced in his or her “home country” for at least three years before admission to practice in a Japanese office.

The negotiation of Japan’s membership in the TPP would provide a forum for reviewing the remaining obstacles to opportunities for lawyers in both countries to offer their services, and similar opportunities would be presented with the inclusion of Canada and Mexico, Susman said.

He also noted that it is important for USTR, as TPP and other trade negotiations continue to engage in ongoing consultation with state supreme courts and other regulatory bodies because rules regulating practice by non-U.S. lawyers, including consultants, are adopted by each state’s highest court of appellate jurisdiction.

The ABA, Susman said, has long supported state-based judicial regulation of the legal profession in the United States but also has adopted recommendations encouraging state supreme courts to adopt limited licensure rules to allow both U.S. and non-U.S. lawyers to engage in temporary practice in a jurisdiction where they are not licensed.

see “Homelessness,” page 10
ABA expresses opposition to consent decree bill

The ABA reiterated its opposition last month to proposed legislation that the association maintains could be the “death knell” for many types of federal court consent decrees.

The bill, H.R. 3041, would authorize state or local governments and related officials sued in their official capacity or their successors to file motions to modify or vacate existing federal court consent decrees four years after the decree was originally entered or once the highest elected state or local government official authorizing the consent decree leaves office, whichever occurs first. Once a motion is filed, the burden of proof would shift to the party that originally sought the decree – usually a federal agency – to demonstrate that it should remain in effect. If the burden of proof is not met, the court would be required to terminate the consent decree. Even if the burden of proof is met, the court would be required to narrow the consent decree to the maximum extent possible.

In a letter sent to a House Judiciary subcommittee prior to a Feb. 3 hearing on the bill, ABA Governmental Affairs Director Thomas M. Susman emphasized that for many years consent decrees have been very helpful in resolving a wide variety of claims brought by the federal government, including suits to preserve public health and safety, enforce environmental regulations, and protect individuals rights. By entering into consensual agreements, Susman said, the federal government is able to craft solutions with states, localities and private parties that a trial court could not otherwise order.

He further explained that legislation is unnecessary because the Supreme Court decision in Frew v. Hawkins, 540 U.S. 431 (2004), confirmed the federal courts’ existing authority to vacate or modify consent decrees in appropriate circumstances.

In cautioning that H.R. 3041, if enacted, could be the end of federal court consent decrees involving states and localities, Susman said, “By discouraging federal government agencies, state or local governments, companies and private individuals from settling their legal disputes and entering into consent decrees, the legislation would result in increased and unnecessary litigation, reduced flexibility and greater burdens on federal courts and agencies, and further erosion of the independence of the federal judiciary.”

During the hearing before the House Judiciary Subcommittee on Courts, Commercial and Administrative Law, proponents maintained that the legislation is necessary because consent decrees bind not only the elected officials who consented to the decree but also their successors, who often have a difficult time changing policy that has been embedded in the court orders. David Schoenbrod and Ross Sandler, of New York Law School, testified in favor of the bill and argued that it provides a procedure that protects plaintiff’s rights while still deferring appropriately to the choices made by state and local.

John C. Cruden, president of the Environmental Law Institute, spoke against the bill, testifying that adverse consequences would be particularly acute in environmental cases that frequently involve complex activities such as dredging contaminants from rivers, installing sophisticated equipment, or repairing damaged wetlands.

No further action has been scheduled on the bill. Similar legislation failed to pass during the 109th and 110th Congresses when the ABA worked closely with a coalition of more than 80 legal and public policy organizations to defeat the measures.

Homelessness
continued from page 9
“homelessness.”

One witness at the hearing, Deputy Assistant Secretary Mark Johnston of the HUD Office of Special Needs, explained the need for a uniform definition of homelessness since “any child, much less many thousands of children, living on our streets is unacceptable” because “no child should be without a home.”