ABA President Wm. T. (Bill) Robinson III urged the Senate Foreign Relations Committee this month to forward the Law of the Sea Convention to the full Senate for its advice and consent for ratification of the treaty.

“This treaty represents a unique moment in the development of the rule of law,” Robinson said in a June 14 statement to the committee. “Acceding to the convention,” he said, “is unquestionably in the economic, national security and foreign policy interests of the United States, as is reasserting the leadership role of the United States in advancing and shaping the rule of law in the oceans as it evolves over time.”

He emphasized that it is past time for the United States, as the world’s leading maritime and naval power, to become a party to the convention, which was drafted in 1982. Although the United States was instrumental in negotiating the Law of the Sea Convention, it was not until 1994 that President Clinton signed an amended version that satisfied U.S. concerns related to deep seabed mining and submitted the treaty to the Senate for its advice and consent to ratification. Since then, the Senate Foreign Relations Committee approved the treaty twice, but it has never received a full Senate vote.

The convention contains provisions regarding transit passage and other navigational freedoms, protection of the marine environment, maritime jurisdiction and boundaries, and resource management rights.

“I am convinced beyond any doubt that joining the other 160 nations that are party to the treaty will protect America’s economic interests and our strategic security interests,” said Senate Foreign Relations Committee Chairman John Kerry (D-Mass.), who launched a series of hearings on the treaty in May by inviting a high-level panel that included Secretary of State Hillary Clinton, Defense Secretary Leon Panetta and Joint Chiefs of Staff Chairman Gen. Martin Dempsey to express strong support for the convention’s ratification. They all maintained that joining the convention would provide legal certainty to U.S. maritime operations and allow the United States to exercise global security leadership. The United States is the only permanent member of the U.N. Security Council and the only Arctic nation that is not a party to the convention.

Robinson emphasized the widespread backing for the treaty by current and former government officials as well as representatives of all of the principal affected stakeholders – the military, the energy industry, the telecommunications industry, the shipping industry, fisheries, and environmental organiza-
<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 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.</td>
<td>House passed H.R. 4014 on 3/26/12.</td>
<td>S. 1483 was referred to the Homeland Security and Governmental Affairs Committee on 8/2/11.</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 5.</td>
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<tr>
<td>Health Care Law.</td>
<td>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. House passed H.R. 5 on 3/22/12.</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>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.</td>
<td>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 and H.R. 2802 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>
</tr>
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DOJ issues new standards addressing prison rape

Attorney General Eric H. Holder Jr. announced the adoption May 17 of new standards to prevent, detect and respond to prison rape.

The standards are required under the Prison Rape Elimination Act of 2003 (PREA), which established the National Prison Rape Elimination Commission (NPCRC) to conduct a comprehensive study of prison rape in the United States and recommend national standards.

In a May 21 letter to Holder, Robinson applauded the attorney general “for [his] leadership on this important human rights issue.” He emphasized that the ABA has long been a proponent for better standards for inmates and filed comments on the NPCRC recommendations when they were announced in 2009. The final prison rape standards, which go into effect July 23, incorporate changes recommended by the ABA and are consistent with the ABA’s Criminal Justice Standards for the Treatment of Prisoners, Robinson wrote.

Robinson commended the Justice Department (DOJ) for making the following improvements based on the ABA comments during the review process:

- Strengthening the standard on audits to ensure compliance with PREA by requiring that auditing bodies be independent of agencies under review and that every facility be audited at least every three years;
- Implementing a phased-in ban on cross-gender pat searches of adult women prisoners, absent exigent circumstances;
- Removing a significant barrier to victims’ access to the courts by prohibiting time limits on the filing of grievances regarding prison rape and sexual abuse;
- Requiring facilities to consider the particular vulnerability of transgender and intersex prisoners and make housing decision determinations for these prisoners on a case-by-case basis; and
- Requiring facilities to maintain “sight and sound separation” and to refrain from placing youthful inmates in isolation to comply with this requirement.

Robinson also noted that the new standards will apply to all federal confinement facilities, including those operated by departments and agencies other than DOJ.

Evidence disclosure examined at hearing

Senate Judiciary Committee Chairman Patrick J. Leahy (D-VT) called a hearing June 6 to examine S. 2197, the Fairness in Disclosure of Evidence Act of 2012, ABA-supported legislation that would codify a clear uniform standard for disclosure of evidence by federal prosecutors that may be favorable to a defendant in a criminal prosecution.

This legislation originated in large part in response to prosecutorial misconduct found in the 2008 trial of the late Sen. Ted Stevens (R-Alaska). Stevens was convicted of accepting excessive gifts, but the Department of Justice (DOJ) vacated the conviction in 2009 due to the prosecution’s failure to properly disclose evidence.

The bill would create a nationwide standard to implement longstanding Supreme Court decisions on the duty to disclose. The 1963 Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1963) enunciated the constitutional basis of the duty of prosecutors to disclose evidence to the defense, and Giglio v. United States, 405 U.S. 150, 154 (1972), clarified that a prosecutor’s duty to disclose is not limited to exculpatory evidence and covers evidence affecting credibility. A third case, United States v. Agurs, 427 U.S. 97 (1976), held that the prosecution’s constitutional duty to disclosure is not limited to situations where the defendant made a specific request for the relevant evidence.

The ABA has long advocated for a codified standard of disclosure under Brady and its progeny and recently praised Sen. Lisa Murkowski (R-Alaska) for introducing S. 2197. Murkowski, testifying at the hearing, said that “the disturbingly high incidence” of prosecutorial misconduct found in the possession of the prosecution team or would become known to the prosecutor through the exercise of due diligence, without delay after arraignment. The bill would provide a fair mechanism by which prosecutors could seek a protective order in a case in which there is a reasonable basis to believe that disclosure would endanger a witness.

ABA Governmental Affairs Director Thomas M. Susman in a June 5 letter said that “the disturbingly high incidence” of prosecutorial misconduct as well as the countless stories left undiscovered and untold provide “clear evidence that federal prosecutors are failing to discharge their constitutional obligation under Brady, whether as a result of intentional tacti-
Push is on this month to reauthorize VAWA

As the push intensifies this month for passage of legislation to reauthorize the Violence Against Women Act (VAWA), June 26 has been designated as a National Day of Action on the issue.

The Senate-passed version of the legislation, S. 1925, is supported by the ABA. The bill, in addition to extending existing programs, would add uniform nondiscrimination provisions that would for the first time 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 would strengthen tribal criminal jurisdiction over individuals who assault Native American spouses and dating partners in Indian country. Another provision would make available previously issued but unused visas to illegal immigrants who are victims of domestic abuse and sexual violence.

The association opposes H.R. 4970, the House-passed version of the legislation, calling the bill “a retreat from the battle against domestic and sexual violence.” In a May 14 letter to all members of the House prior to floor debate on H.R. 4970, ABA President Wm. T. (Bill) Robinson III said the bill fails to incorporate critical improvements to address the needs of underserved populations, such as victims who are members of faith communities and those who are denied services because of their sexual orientation or gender identity.

H.R. 4970 also would undermine protections available to vulnerable immigrant victims of violence by creating obstacles for immigrant victims seeking to report crimes and increasing the danger to victims by eliminating important confidentiality provisions, Robinson wrote.

Progress toward a conference committee on the two versions of the legislation was stalled earlier this month over the effect of provisions related to the availability of additional U visas. Some members of the House maintain that this provision constitutes a revenue-raising bill that is required to originate in the House. Sens. Patrick J. Leahy (D-Vt.) and Lisa Murkowski (R-Alaska) urged House Speaker John Boehner (R-Ohio) June 12 to affirm the House’s commitment to combating domestic violence by having an up-or-down vote on the Senate bill.

“We are concerned that unnecessary political and procedural posturing is breaking the bipartisan consensus on an issue that should rise above such considerations, and is creating an unconscionable delay that further threatens victims of violence,” they wrote.

Boehner’s office declined the request but said the House is ready to go to conference to resolve the differences between the two version of the legislation.
ABA urges self-funding for SEC and CFTC

The ABA urged Congress last month to address the need for increased reliable sources of revenue for the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) to enable the agencies to carry out their expanded regulatory responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Jumpstart Our Business Startups (JOBS) Act and several other new laws.

“The increasingly rapid pace of change in financial markets in recent years, accompanied by frequently shifting public attitudes, growing marketplace complexity and expanding cross-border capital flows, has posed a serious challenge to the regulators’ ability to perform their functions consistent with the objective of maintaining a stable and dynamic financial system,” Giovanni P. Prezioso and William F. Kroener III, the co-chairs of the ABA Task Force on Financial Markets Regulatory Reform, wrote May 17 to the chairs and ranking members of the House Committee on Financial Services and the Senate Banking, Housing and Urban Affairs Committee.

In their letter, Prezioso and Kroener noted that despite repeated calls for increased and independent sources of funding for the agencies, Congress has not authorized the agencies to become self-funded through the use of industry-paid fees. They added that it is increasingly clear that the agencies’ current funding levels are inadequate to meet the growing challenge of overseeing modern financial markets, including the need to complete their many newly congressionally assigned tasks under the Dodd-Frank Act and other legislation.

Self-funding of the SEC and the CFTC, rather than the current congressional appropriations process, is the most effective means of ensuring the agencies’ ability to achieve the critical regulatory missions assigned to them by Congress, according to the ABA letter.

Prezioso and Kroener said that when the Dodd-Frank Act was under consideration, SEC Chairman Mary Schapiro and many others encouraged Congress to authorize self-funding to help eliminate the chronic underfunding of the SEC and to enable the agency to make multi-year commitments to build technology and infrastructure. In addition, the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and other financial regulators have been self-financed for years, and, as with those agencies, the money for SEC self-funding could come from transaction and registration fees already provided for by Congress. Compara-

Senate committee cites work of ABA Military Pro Bono Project

The Senate Armed Services Committee acknowledged the work of the ABA Military Pro Bono Project last month when it released its committee report on the 2013 National Defense Authorization Act.

The report, S. Rept. 112-173, stated that the committee is grateful for the support provided to military members by the ABA project, which is directed by the ABA Standing Committee on Legal Assistance for Military Personnel.

The project, founded in 2008, connects junior enlisted, active-duty military personnel and their families to civilian lawyers who provide free representation for civil legal issues beyond the scope of services provided by military legal-assistance offices. More than 1,000 cases have been referred to the project from Judge Advocate General (JAG) officers across the county and around the world. The project also includes Operation Stand-By, through which lawyers may volunteer to provide lawyer-to-lawyer consultations to military attorneys.

According to the committee report, the Military Pro Bono Project “has provided military legal assistance attorneys with a centralized referral point for pro bono counsel and overseen an efficient complement to existing military legal assistance programs.” The report added that JAGs of the Army, Navy, Air Force and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps have formally expressed their appreciation to the project’s network of lawyers.

The report directed the Defense Department to study and recommend by March 2013 “methods through which additional resources and support can be given to the Military Pro Bono Project.”

The defense authorization legislation, approved by the committee May 24 and introduced June 4 as S. 3254, is awaiting a full Senate vote.
ABA reiterates support for Paycheck Fairness Act

The ABA reiterated its support last month for the Paycheck Fairness Act, legislation that would update key provisions of the Equal Pay Act of 1963 to assure that men and women have the tools to assert their legal right to equal pay for equal work.

Despite strong support from the Obama administration, Democratic senators and numerous civil rights groups, proponents failed by a 52-47 vote June 5 to garner the 60 votes needed in the Senate to invoke cloture and proceed to a vote on this year’s bill, S. 3220.

In a May 31 letter to all senators, ABA President Wm. T. (Bill) Robinson III emphasized that the legislation would update current law without altering the basic scheme of the Equal Pay Act or imposing excessive, novel burdens on employers. “Indeed,” he said, “the majority of the proposed changes are borrowed from other civil rights statutes that have proved more effective in eradicating workplace discrimination.”

He explained that the bill would apply equally to men and women who experience sex-based wage discrimination and would provide that an employer is not guilty of wage discrimination if a pay differential is based on seniority, merit, quantity or quality of production, or “any other factor other than sex.”

The bill, he said, would close an existing loophole by clarifying that the “factor other than sex” defense would be valid only when it is based on a bona fide factor (such as education and training) that is job-related, consistent with business necessity and where there is no other alternative practice that would serve the same business purpose without producing the wage differential.

Robinson also emphasized that the bill would not encourage excessive verdicts against employers that will bankrupt businesses and jeopardize the recovery of the economy. He noted that by “helping improve the present and future economic welfare of working women who make up about one half of the work force and who are the primary breadwinners in more than 12 million families, the measure would foster financial security and a strong economy.”

During the last Congress, the Paycheck Fairness Act easily passed the House but failed by just two votes on a procedural vote in the Senate.

Following the June 5 vote, bill sponsor Sen. Barbara Mikulski (D-Md.) said, “Although we lost the vote today, we’re not going to give up the battle. While it is a sad day here in the U.S. Senate, it is an even sadder day each day a woman earns less than a man doing the same job with the same education.” She said it is her hope that “we can bring this bill up again and forge a bipartisan vote.”

Judicial Vacancies/Confirmations — 112th Congress*  
(as of 6/18/12)

<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>12</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>US District Courts (678 judgeships)</td>
<td>61</td>
<td>27</td>
<td>77</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>79</strong></td>
<td><strong>34</strong></td>
<td><strong>91</strong></td>
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*Includes territorial judgeships
**FINANCIAL CRIMES:** The ABA expressed concerns last month over a proposed rule issued by the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) that the association said would require law firms that establish accounts at financial institutions on behalf of their clients to disclose the identity and other beneficial ownership information regarding those clients. Kevin Shepherd, chair of the ABA Task Force on Gatekeeper Regulation and the Profession, emphasized in a May 4 letter to FinCEN that the ABA shares the overarching goal of protecting the U.S. financial system from criminal abuse and to guard against terrorist financing, money laundering and other financial crimes. He said, however, that FinCEN’s advance notice of proposed rulemaking, which would establish new due diligence requirements for financial institutions, “could impose unreasonable and excessive burdens on many law firms with client trust accounts and could undermine both the confidential lawyer-client relationship and traditional state court regulation of lawyers.” Shepherd explained that requiring law firms to disclose clients’ identities and the corporate clients’ beneficial ownership whenever they establish accounts for those clients or deposit client funds into the law firms’ trust accounts is “clearly inconsistent with lawyers’ existing ethical duties outlined in ABA Model Rule 1.6 and the binding state rules of professional conduct that mirror the model rule.” According to the letter, the risk that the client’s identity and other confidential beneficial ownership information regarding corporate clients would be divulged by the lawyer or law firm could discourage a client from retaining a law firm and entrusting funds with lawyers or law firms, thereby interfering in a substantial way with a client’s fundamental right to counsel. Shepherd also emphasized in the letter that instead of federal mandates like the FinCEN proposals, the ABA supports existing attorney guidelines known as the “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing,” which were developed by the ABA and a number of specialty bar associations. The Voluntary Guidance, he said, lays out “prudent, proportional risk-based steps tailored to individual situations rather than adhering to a burdensome and rigid ‘one-size-fits-all’ approach.”

**IMMIGRATION:** The ABA called a recent proposed rule issued by the U.S. Citizenship and Immigration Services (USCIS) a step in the right direction to lessen the hardships faced by U.S. citizens and their families as they navigate the complicated and often lengthy permanent residence process. The proposed rule would amend USCIS regulations to allow immediate relatives of U.S. citizens who are physically present in the United States to request provisional unlawful presence waivers to enable them to adjust their status in the United States. Those individuals must currently depart from the United States and request waivers of inadmissibility during the overseas immigrant visa process, a requirement that often separates U.S. citizens from their immediate relatives for extended periods of time. The ABA believes that the proposed rule could be further enhanced by broadening its scope to reach eligible family members of lawful permanent residents as well as persons in removal proceedings. In a June 1 letter to the Office of the Secretariat of USCIS, ABA Governmental Affairs Director Thomas M. Susman recommended several steps, including the following: permit individuals in removal proceedings to receive provisional waivers; expand the provisional waiver process to include preference categories of unmarried adult children of U.S. citizens and spouses, and children of lawful permanent residents; and expand the rule to permit lawful permanent residents to serve as qualifying relatives for hardship purposes. Susman also wrote that applicants in the United States who have been scheduled for an immigrant visa interview at a consulate should be eligible to apply for a provisional waiver as well as those who have a Form I-212 waiver for prior removal order. “The ABA has long supported timely family reunification as a fundamental principle of our nation’s immigration policies,” Susman wrote, adding that the ABA believes the stated goals of reducing prolonged family separation and increasing the efficiency of the waiver process for both government and applicants can be met by incorporating the association’s recommendations.
ABA opposes child custody provisions in House DoD bill

ABA President Wm. T. (Bill) Robinson III expressed the ABA’s opposition last month to military child custody provisions in H.R. 4310, defense authorization legislation that passed the House May 18.

Section 564 of the legislation, according to Robinson, would amend Title II of the Servicemembers’ Civil Relief Act (SCRA) to “open the federal courthouse doors to military child custody cases, creating uncertainty and extraordinary expense for military members and the families.” The provision would require a court that issued a temporary custody order based solely on the deployment or anticipated deployment of a servicemember to reinstate, upon return of the servicemember, the custody order that was in effect immediately preceding the temporary order unless it is not in the best interest of the child. The provisions also would prevent a court from using deployment or the possibility of deployment against a servicemember when determining the best interest of the child.

Robinson, writing to Senate Armed Services Committee Chair Carl Levin (D-Mich.) and Ranking Member John McCain (R-Ariz.), explained that each attempt to seek federal jurisdiction in a custody case would delay final resolution by months and potentially create a changing body of law affecting custody laws in every state. He added that parties to these emotionally charged cases can be counted on to exploit any potential loophole, practically ensuring high-conflict litigation in the courts with the least experience or services to handle such cases.

Robinson said that more than 40 states have enacted legal protections for military child custody cases, and he called the federal legislation an “unwarranted intrusion into matters best reserved to the states.” The SCRA currently provides military parents protections in harmony with state laws without federal litigation. The act prevents any permanent change in parental rights until a reasonable time following an absent servicemember’s return, and only the best interests of a child would prevent a child’s return to the military parent.

Next month the Uniform Law Commission will release a comprehensive Deployed Parents Visitation and Custody Act that will be circulated to all of the states for consideration.

In conclusion, Robinson emphasized that ABA policy supports state laws providing that military service alone, including deployment or the threat of deployment may not be used to permanently deny custody to a military parent or to change parental custodial rights. “These custody rights can best be assured by state laws enforced in state courts that are already equipped to provide the protections needed,” he wrote.

Other organizations that support strong legal protections for military servicemembers and oppose Section 564 include the National Governors Association, the National Military Family Association, the Conference of Chief Justices and State Court Administrators, the Adjutants General Association of the United States, the American Academy of Matrimonial Lawyers, the National Council of Juvenile and Family Court Judges, the Uniform Law Commission, and many state bar associations.

Evidence Disclosure

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The monthly Washington Letter reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association’s legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html. © 2012 American Bar Association. All rights reserved. Please address correspondence to:


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