ABA sees no need to jettison advisory guidelines

Sentencing Commission weighs changes in sentencing system

ABA witness James E. Felman, testifying Feb. 16 before the U.S. Sentencing Commission, maintained that the current system of advisory guidelines is the best means available of achieving the original goals of the 1994 Sentencing Reform Act (SRA) – the elimination of both unwarranted disparity and unwarranted uniformity in sentencing.

The Sentencing Commission hearing focused on the impact of the 2005 Supreme Court decision in U.S. v. Booker, 543 U.S. 220 (2005), in which the court ruled that key elements of the SRA were unconstitutional, effectively rendering the federal sentencing guidelines advisory rather than mandatory. The commission maintains that some adjustments to the current system should be considered by Congress.

Felman, the ABA’s liaison to the commission and a co-chair of the ABA Criminal Justice Section Committee on Sentencing, emphasized that use of advisory guidelines has not resulted in decreased sentence lengths as supporters of mandatory guidelines had feared.

“While average sentence lengths have not materially decreased as a result of the guidelines’ advisory nature,” Felman said, “what has changed is that courts have been able to be smarter about who goes to jail for how long because of their ability to more meaningfully consider the aggravating and mitigating aspects of the offense and the individual history and characteristics of the defendants.”

Felman noted that there is more work to be done to improve the advisory guidelines, including the gathering and publishing of additional data and acting on the data received. He said the guidelines must be revised over time in light of empirical research and sentencing data.

Felman also testified that the most pressing problem confronting the Sentencing Commission is not disparity of sentences but severity. He expressed ABA concern about the over-reliance on incarceration in American criminal justice policy, explaining that roughly one quarter of all persons imprisoned in the entire world are imprisoned in the United States and that the incarceration explosion over the last 40 years is unmatched by any other society in any historical era.

In response to the commission’s request for comments on whether Congress should increase the use of mandatory minimum statutes, Felman reiterated the ABA’s view that sentencing by mandatory minimums is the “antithesis of ra-
# LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<tbody>
<tr>
<td><strong>Independence of the Legal Profession.</strong> 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.</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 7.</td>
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<td><strong>Health Care Law.</strong> 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>
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<td><strong>Judicial Independence.</strong> 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></td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 7.</td>
</tr>
</tbody>
</table>
ABA supports uniform treatment of privileged materials by banking agencies, new CFPB

ABA President Wm. T. (Bill) Robinson III last month urged prompt enactment of S. 2099 and H.R. 4014, bills that the association maintains 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).

By explicitly applying the same privilege standards to information submitted to the CFPB that currently apply to any submissions to a federal banking agency, the legislation “would help ensure a more integrated, consistent and coordinated approach to the regulation of financial services providers,” Robinson wrote in his Feb. 21 letters to House leaders, the House Financial Services Committee, and the Senate Committee on Banking, Housing and Urban Affairs.

He said that the legislation, which would amend the Federal Deposit Insurance Act, would advance three of the key financial regulatory reform principles adopted in 2009 by the ABA that were previously developed by the association’s Task Force on Financial Markets Regulatory Reform:

- the regulation and supervision of financial intermediaries, products and services should be integrated and comprehensive to the extent appropriate to protect investors and consumers of financial products;
- functionally similar products and services should be subject to the same or essentially equivalent regulation; and
- federal, state and territorial examination, regulation, supervision and enforcement with regard to the financial services industry should operate in a complementary and coordinated manner.

The legislation also adds the CFPB to the list of agencies that may share privileged information with other agencies specified in the statute without causing a waiver. Absent the legislation, Robinson said, privileged information within a draft CFPB report could lose its privileged status when shared with the prudential regulators, while privileged information in the draft report of a prudential regulator would remain privileged even after being received by the CFPB.

The ABA strongly supports the preservation of the attorney-client privilege, Robinson emphasized, calling it a “bedrock legal principle” that enables clients to communicate with their lawyers in confidence, promotes compliance with the law, and facilitates self-investigation to the benefit of society at large.

The House Financial Services Committee approved H.R. 4014 by voice vote on Feb. 16. There has been no action on the Senate bill, which is pending in the Senate Banking, Housing and Urban Affairs Committee.

ABA urges better disability accommodations for administering law school admission tests

ABA President Wm. T. (Bill) Robinson III expressed support March 1 for efforts to ensure that individuals with disabilities are provided appropriate accommodations when taking law school admission tests.

In letters to U.S. Attorney General Eric H. Holder Jr. and Reps. George Miller (D-Calif.) and Pete Stark (D-Calif.), Robinson emphasized that “it is imperative that students with disabilities have fair and equal access to law school admission tests and the legal profession.”

The ABA adopted policy on the issue in February following release of a Government Accountability Office (GAO) report commissioned by Miller and Stark.

The report revealed that individuals with disabilities face barriers applying for test-taking accommodations and that some students with disabilities had to forgo taking exams with accommodation due to outright denials or extensive delays in the approval process. Barriers highlighted in the report include difficulty understanding all the needed paperwork, considerable costs for individuals to obtain re-evaluations required by testing companies, the duration of time for approval, and the subjectiveness of testing companies in granting accommodations.

The report also noted that the Justice Department has clarified regulations on testing accommodations that are designed to make the process less burdensome and timelier for students in accordance with the Americans with Disabilities Act (ADA), but that the department lacks a strategic approach to enforcement.

see “Law school,” page 5
Indian court decision allows “fly-in fly-out” for foreign lawyers

ABA emphasizes importance of such activities

The Indian Madras High Court ruled Feb. 21 that foreign lawyers may participate in international arbitration proceedings in India and advise clients on foreign law on a “fly-in fly-out” basis.

The court, ruling in a case involving many of the largest law firms in the United States, rejected a petition by an individual Indian lawyer who accused 31 foreign law firms and a legal process outsourcing company of illegally practicing law in violation of India’s Advocate’s Act. In the decision, the court stated that many Indian companies take part in transactions that require advice on foreign laws that Indian lawyers may not be able to address.

In a letter last fall to the Bar Council of India, ABA President Wm. T. (Bill) Robinson III emphasized the importance of “fly-in fly-out” activities.

“Allowing such activities is critical not only for the mutual benefit of legal practitioners in both countries, but also for fostering the vital and already close relationship between India and the U.S. and to promote the robust growth of trade and investments between our two countries,” he wrote.

The ruling does not affect the current ban prohibiting foreign law firms from opening offices in India, advising on Indian law, or appearing in Indian courts. The Bar Council of India indicated, however, that it may appeal the decision to the Supreme Court of India, maintaining that it is in conflict with a 2009 Bombay High Court decision.

The Madras decision comes as the United States is negotiating a Bilateral Investment Treaty with India.

In a letter last summer to Secretary of State Hillary Clinton, then ABA President Stephen N. Zack noted the importance of India as the fourteenth largest trading partner of the United States and emphasized that a critical element in increasing the size of that trade and investment and the relationship between the two nations is the provision of legal services in their support.

The ABA Model Rule of Licensing and Practice by Foreign Legal Consultants, as adopted by 32 U.S. jurisdictions, allows overseas licensed lawyers, including those from India, upon acceptance of a registration with the local bar or court, to establish offices in the United States and provide legal services to businesses in this country.

In his letter, Zack urged Clinton to advocate that the government of India establish a similar rule allowing non-Indian lawyers to provide advice to their clients in India on laws of their home jurisdictions.
ABA concerned about videoconferencing in immigration courts; urges allowing requests for in-person hearings

The ABA last month commended the Administrative Conference of the United States (ACUS) for undertaking a study of immigration adjudication, noting that both the ACUS draft report released in January and a detailed report issued by the ABA in 2010 focus on ensuring fairness and promoting efficiency in the adjudication system.

In a Feb. 17 letter to ACUS, ABA Governmental Affairs Director Thomas M. Susman said that the association agrees with a number of the ACUS draft recommendations but has concerns about the use of video teleconferencing (VTC) in immigration adjudication hearings.

The ABA opposes using VTC in immigration hearings, except in procedural matters in which the noncitizen has given consent. The association also maintains that the Executive Office of Immigration Review (EOIR) should work with Immigration and Customs Enforcement to ensure that every new detention facility includes a courtroom and that detainees who are in removal proceedings are housed in facilities with courtrooms or provided transportation to an immigration court for non-procedural matters.

The ACUS draft report recommends further study to determine the effect of VTC on immigration adjudication.

“We have serious concerns with the Executive Office of Immigration Review’s increased use of videoconferencing in immigration hearings, in spite of a lack of information regarding its possible effect on case outcomes,” Susman said, noting that the ABA’s concerns are compounded by the serious challenges confronting the immigration adjudication system, including persistent lack of adequate representation.

According to the ABA, VTC makes it difficult, if not impossible, for attorneys to consult confidentially with their clients. In some detention facilities, counsel is required to attend the hearing with the judge and may only communicate with clients through video technology during the hearing.

In addition, VTC may make it difficult for respondents to understand interpreters and may discourage them from asking questions. Susman also pointed out that many detainees do not understand the roles of individuals in the courtroom, and sometimes are not certain which individual is the judge.

VTC also makes it harder for parties, attorneys, and the immigration judge to communicate and connect emotionally, Susman said, which compounds difficulties faced by vulnerable individuals such as juveniles and individuals diagnosed with severe mental illnesses.

He urged the conference to recommend that noncitizens in the immigration adjudication system be allowed to request in-person hearings, but he said the draft report also should encourage EOIR to establish clear standards for immigration judges and other personnel using video technology.

In other areas of the draft report, the ABA does not agree with a recommendation calling for an evaluation of whether fees may be appropriate for defensive asylum filings. The ABA opposes charging fees for applications for humanitarian forms of immigration relief and associated benefits.

Susman wrote that the association appreciates the report’s call for assistance from EOIR and the Department of Homeland Security for transcription into additional languages of the forthcoming ABA Know Your Rights video, which provides information to detainees on immigration law and the immigration court process.

To further examine the use of VCT in immigration adjudication hearings, ACUS has scheduled a meeting focusing on the issue this month.

Law school admission continued from page 3

In his letters, Robinson pointed out that the GAO report confirms concerns that the ABA Commission on Disability Rights has been hearing from individuals with disabilities about the process. The ABA policy recommends steps to ensure that test administrators comply with the ADA and existing DOJ regulatory standards.

These include ensuring that the application process, the scoring of the test and the reporting of test scores are consistent for all applicants and do not differentiate on the basis that an applicant received an accommodation for a disability.

The policy also urges that entities make policies, guidelines and administrative procedures used for granting accommodations readily accessible to those with disabilities; give notice to applicants within a reasonable period of time whether or not requested accommodations have been granted; and provide a fair process for timely reconsideration of the denial of requested accommodations.
The Fourth Circuit Judicial Council suspended the March 1 effective date for implementation of new special procedures for requesting attorney compensation requests in death penalty cases to permit the council to consider concerns expressed by individuals and groups, including the ABA.

ABA President Wm. T. (Bill) Robinson III had urged the council to withdraw the proposed procedures in comments submitted Jan. 30 because he said the procedures are inconsistent with the delivery of high-quality legal representation for capital defendants and death-sentenced prisoners in the Fourth Circuit.

Robinson acknowledged that the Special Death Penalty Compensation Procedures are intended to maximize the use of limited funding for the largest number of indigent defendants, but said that the ABA was submitting comments because of its concern that any short-term financial savings that may be achieved will be negated by long-term consequences that are inconsistent with the goals of the justice system.

He explained that while the ABA’s policies, which do not endorse or support the death penalty, address the fair administration of the death penalty, including that every person facing a possible death sentence has the assistance of competent and skilled attorneys at every stage of the proceedings against them. Over the past 25 years the ABA Death Penalty Representation Project has worked to improve the quality and availability of counsel in death penalty cases by recruiting volunteer counsel from civil law firms to handle capital cases, and training judges and lawyers about the resources and skills necessary for an effective capital defense. The project also promulgated the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, widely accepted as the national standards in this area.

The proposed procedures would establish fee caps for defense counsel not only in federal capital trials, but for direct appeals for defendants sentenced to death and post-conviction proceedings for federal death row inmates. Robinson emphasized that such caps are specifically prohibited by ABA policy and would make the recruitment of qualified and experienced capital counsel in the Fourth Circuit more difficult.

“Capital cases are the most time-consuming and complicated kinds of criminal cases,” Robinson said, noting that thousands of hours must be spent preparing a capital case for trial or post-conviction proceedings to ensure that they are litigated competently. He also noted that because the federal government has no restrictions on the number of attorney hours or the amount of money it can commit to a capital case, additional disparities would be created between capital defendants who are represented by Federal Defender Offices and those represented by private attorneys appointed under the Criminal Justice Act.

### Judicial Vacancies/Confirmations — 112th Congress* (as of 3/8/12)

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tr>
<td>US Supreme Court (9 judgeships)</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
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<td>US District Courts (678 judgeships)</td>
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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>83</strong></td>
<td><strong>41</strong></td>
<td><strong>71</strong></td>
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*Includes territorial judgeships
CAMERAS IN THE COURTS: The Senate Judiciary Committee approved a bill Feb. 9 that would direct the Supreme Court to allow television coverage of all open sessions unless the court decides by a majority vote that doing so would constitute a violation of the due process rights of one or more of the parties involved in the case pending before the court. S. 1945, approved by a party-line 11-7 vote, was introduced by Sens. Richard Durbin (D-Ill.) and Charles E. Grassley (R-Iowa). During the markup of the bill, Durbin emphasized, “In a democratic society that values transparency and participation, there is just no justification for such a powerful element of government to operate largely outside the view of the American people.” Supreme Court justices, however, have been reluctant to allow televising of their sessions. Since 1996, the Judicial Conference has authorized each court of appeals to determine the circumstances in which cameras may be permitted in their courts in civil cases, and the conference is conducting a three-year pilot project to evaluate the effect of cameras in federal district courts and the public release of digital video recordings of some civil proceedings. The ABA supports further experimentation with cameras in the courts, including the Supreme Court, under guidelines promulgated by the Judicial Conference. S. 1945 has been placed on the Senate calendar. There has been no action on H.R. 3572, the companion bill introduced in the House by Rep. Gerald E. Connolly (D-Va.).

PARENTAL REPRESENTATION: The ABA is supporting a bill introduced last month by Rep. Gwen Moore (D-Wis.) that seeks to improve the quality of representation for parents and guardians in child welfare cases in state courts. H.R. 3873, the Enhancing the Quality of Parental Representation Act of 2012, would strengthen the Court Improvement Program (CIP), originally enacted in 1993 to provide federal funds to state courts and child welfare agencies for programs to improve the quality, depth and timeliness of child welfare court proceedings. The bill would allow state courts to focus on improving legal representation for parents by devoting a modest stream of CIP funding to that critical area. ABA Governmental Affairs Director Thomas M. Susman emphasized in a Feb. 16 letter to Moore that data from organizations that provide representation for parents demonstrate that investing in high-quality counsel results in improved outcomes for children that include increased family reunifications, fewer reunification failures and case re-filings, continuance reductions, improved case participation by parents, and better access to services. Enactment of the bill, he said, would result in more state courts being equipped to evaluate their current systems of providing parent representation and implementing appropriate reforms, establish standards of practice for attorneys representing parents, fund law school clinics to provide high-quality representation, and improve the training and mentoring opportunities available to parents’ attorneys.

STOCK ACT: The proposed Stop Trading on Congressional Knowledge of 2012 (STOCK Act) has stalled in Congress over a provision in the Senate version that would have significant unintended adverse consequences for business lawyers. Last month, the Senate and House easily passed separate versions of the legislation, S. 2038, to prevent members of Congress and congressional employees from using for their personal benefit nonpublic information derived from their official positions for insider trading. Section 17 of the Senate bill, however, would amend the Lobbying Disclosure Act of 1995 to bring “political intelligence activities” within the act’s scope and to regulate “political intelligence consultants” who engage in these activities. In a March 2 letter to House and Senate leaders, ABA Business Law Section Chair Linda J. Rusch expressed opposition to Section 17 and noted that the ABA Task Force on Financial Markets Regulatory Reform supports the section’s position. According to Rusch, the term “political intelligence activities” in Section 17 is overly broad and would encompass activities that involve only an indirect relationship to political intelligence gathering and no relationship at all to lobbying. She explained 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 those government officials to seek clarification and guidance with respect to the application of rules and regulations to particular fact situations. Section 17, she said, would require a person to register as a “political intelligence consultant” as a result of any “political intelligence contact,” which could consist of only a single telephone call, a single email or letter, or attending a single meeting on behalf of a client. “Not only would this registration impose a significant burden on business lawyers, it may also materially undermine some of the core principles associated with the professional conduct of lawyers, including lawyers’ ethical obligations to maintain client confidences and represent clients zealously within the bounds of the law,” she wrote. She urged Congress not to include Section 17 in the final version of the bill.

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ABA submits Focus Group’s indigent defense findings

The ABA submitted a report to U.S. Attorney General Eric H. Holder Jr. earlier this year with the five key findings of the National Focus Group on Indigent Defense Reform, which was brought together to identify concrete strategies for reforming and strengthening indigent defense services throughout the United States.

The Bureau of Justice Assistance funded the 18-member Focus Group through a grant to the ABA Standing Committee on Legal Aid and Indigent Defendants with the National Association of Criminal Defense Lawyers as a subgrantee. Participants included representatives from all branches of state government, prosecutors, defenders, and leaders of non-governmental organizations dedicated to improving indigent defense systems.

The Focus Group believes that Justice Department support for adoption of the five core findings would demonstrably improve prospects for indigent defense reform.

The following summarize four key core findings that reflect existing ABA policy:

• Any solution to the indigent defense crisis in America must focus on the front end of the system as much as the back end. Over-reliance on criminal prosecution for petty, non-violent offenses, for which people seldom receive jail sentences, drives defender caseloads to unmanageable extremes. Many jurisdictions have begun to experiment with reclassification of offenses to relieve the pressure, and the Focus Group believes leadership from the Justice Department can help reverse America’s reliance on the criminal justice system as the tool of first choice to influence social behavior that is inherently criminal.

• There is an urgent need for the Justice Department to support programs that assure that counsel is provided at the initial appearance in every situation where a person is criminally charged and their liberty is at stake. The costs to communities for detaining unrepresented persons charged with minor offenses are better invested in providing for the early appearance of counsel, whose representation can facilitate better, quicker and less costly outcomes.

• The Justice Department could exert leadership through policies and ongoing communications to ensure that the defense bar is consulted prior to the adoption of any new law enforcement strategies that will impact case processing or caseloads.

• The Justice Department should fully recognize that public defense requires the active involvement of the private bar as well as public defenders.

The fifth core finding, on which the ABA has not yet adopted policy but is expected to consider at a later date, states that the Justice Department should act or seek the tools necessary to assertively support full realization of the Sixth Amendment right to counsel. Where there is clear evidence of systemic denial of the right to counsel, the department can, through filing of amicus briefs, support systemic litigation that seeks to reform state or local indigent defense systems. The department also could also seek enactment of legislation conferring federal jurisdiction upon the agency to bring actions to remedy systemic violations of the Sixth Amendment.

During the ABA Midyear Meeting in February, Holder applauded the recommendation of the Focus Group.

“Together, this diverse group worked to develop concrete strategies for reforming our nation’s indigent defense systems, and to identify actions that the Justice Department can take to help facilitate this work,” Holder said. “Their findings … will undoubtedly guide reform efforts long into the future. And their recommendations will reinforce the robust commitment that the department has already demonstrated.”