ABA President James R. Silkenat told members of Congress this month that “funding cuts mandated by sequestration pose the greatest challenge to the fair administration of justice and the timely resolution of disputes.”

Silkenat emphasized that, after a year of working with the courts under sequestration, lawyers now know firsthand that the timely administration of justice has been severely strained by these funding cuts. He warned that the courts could be subject to even more severe across-the-board cuts if the House and Senate do not agree on a budget that meets discretionary spending caps mandated by the Budget Control Act of 2011 or enact an alternative bipartisan deficit reduction plan.

Silkenat was appearing at a forum convened Oct. 8 by members of the House Judiciary Committee that was held during a standoff on fiscal year 2014 negotiations that led to a government shutdown from Oct. 1 through Oct. 16. The forum addressed the effects on access to justice of the shutdown and sequestration. The fiscal year 2013 sequestration mandated by the Budget Control Act required across-the-board funding cuts throughout the government, including a $350 million decrease in the federal judiciary’s funding from March through September of this year.

As a result of sequestration, courts continued to downsize and furlough staff in clerks’ offices and in probation and pretrial services offices, resulting in a loss of over 2,700 staff members as of the end of September. The judiciary estimates that if funding is not increased for the rest of fiscal year 2014, staffing will have to be reduced by an estimated 1,000 additional employees.

The Defender Services Program, which provides counsel to indigent criminal defendants, has been especially impacted by the cuts. That program’s $52 million decrease resulted in an 8 percent reduction in staff and 19,700 furlough days in federal defender offices across the country, as well as suspension of pay to Criminal Justice Act (CJA) panel attorneys for the last two weeks of the fiscal year.

If funding for defender services is not increased above its pre-sequestration fiscal year 2013 level, payments to CJA attorneys will be reduced by $15/hour, and payments for work performed during the last four weeks of fiscal year 2014 will have to be deferred until the following fiscal year.

The government shutdown ended with legislation providing $51 million in additional funding for the judiciary. Half of that amount will be used to pay CJA attorneys for cases handled in fiscal year 2013.

According to Silkenat, members of the House and Senate Appropriations Committees “got it right” earlier this year when both committees approved

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## LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
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<th>FINAL</th>
<th>ABA POSITION</th>
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| **Gun Violence.** S. 150 and H.R. 437 would limit the future sale and transfer of assault weapons and ammunition devices that hold more than 10 bullets. S. 54 and H.R. 452 seek to combat the practices of straw purchasing and illegal trafficking of firearms. S. 374 would strengthen background checks. S. 649, a comprehensive bill, includes numerous gun violence prevention provisions. | H.R. 437 was referred to the Judiciary Committee on 1/29/13; H.R. 452, on 2/4/13. | Judiciary Committee held hearings and approved S. 54 on 3/7/13; S, 53, on 3/11/13; and S. 374, on 3/12/13. Judiciary subc. held a hearing on 2/12/13. Senate began consideration of S. 649 on 4/8/13. | | Supports steps to prevent gun violence by strengthening the nation’s gun laws. |


ABA provides legal perspective on advance care planning

A federal workgroup turned to the ABA last month for the legal perspective on advance care planning (ACP) during a Sept. 23 virtual hearing.

“The ABA has strongly promoted the value of ACP and the use of advance health care directives by all adults since the mid-1980s,” Charles P. Sabatino, director of the ABA Commission on Law and Aging, told the Certification and Adoption Workgroup of the Health Information Technology Committee. The committee will be making recommendations to the National Coordinator for Health Information Technology in the Department of Health and Human Services regarding adoption of certified electronic health records.

Sabatino based his testimony on the experiences the ABA commission has had over the past 25 years tracking state developments in health decisions laws.

Tools that play a role in ACP include advance directives and medical notes written or dictated by a physician that reflect a discussion with a patient regarding goals of care, treatment preference and related decisions. Advance directives are legally recognized documents that appoint a health care agent or proxy or provide instructions or guidance about critical medical decisions relating to life support and palliative care. In at least 15 states, medical notes that are properly witnessed constitute a formal advance directive.

Another form of documenting is a protocol commonly called Physician Orders for Life Sustaining Treatment (POLST), a clinical process in use or development in a majority of states that is designed to facilitate communication between health care professionals and patients with advanced illnesses. The result is a set of visible, portable medical orders that is applicable in all settings and across care transitions, is reviewable, and respects the patient’s goals for care in regard to the use of cardiopulmonary resuscitation, breathing machines and other interventions.

In his statement, Sabatino pointed out that the appointment of a health care agent or proxy improves the decision-making process because it clarifies who should be directly involved in the decisions at the time they need to be made and allows the decision-maker to weigh all the facts and options in real time. He emphasized, however, that merely having an appointed agent does not necessarily mean that the agent is well-informed about the patient’s goals and wishes or engaged effectively in decision-making on behalf of the patient.

“The process that does clearly make a difference,” he said, “is the level of advance care planning communication that takes place during a course of treatment.”

Discussing the issues that an electronic environment raises for advance directives, Sabatino stressed the importance of keeping advance care plans up to date and to ensuring that a plan is continued from one venue to another. The timeliness of POLST forms is even more important when a patient’s condition changes during a serious progressive illness, he said.

Asked about legal concerns, Sabatino noted that a legal issue of informed consent arises because an advance directive is typically done well in advance of a particular medical decision and cannot be expected to meet the standard of informed consent. The obligations of authorized surrogate decision-makers and health care providers in most states is generally defined as following a standard of substituted judgment—deciding what the individual would have decided to the extent that can be determined and what is in the best interest of the patient.

He explained that there is no accepted or proposed floor established in state practice with respect to advance directives, but some broad benchmarks are emerging for states to be endorsed by the National POLST Task Force. This includes that the program is established statewide and there is widespread POLST accessibility, use and portability.

Sabatino provided the workgroup with the text of the 10 ABA policies adopted by the House of Delegates that address patient self-determination in health care. He pointed out that the two most recent policies urge widespread support of protocols such as POLST and support for strengthening the Patient Self Determination Act, which was originally enacted in 1990 to require health care institutions to provide information about advance health care directives to adult patients.

Shutdown ends

The 16-day government shutdown ended Oct. 17 when President Obama signed P.L. 113-46 (H.R. 2775), legislation that continues most of the federal government at fiscal year 2013 sequestration levels through Jan. 15, 2014, and lifts the nation’s debt ceiling through Feb. 7, 2014.

The final deal came after House Republicans dropped their efforts to combine a continuing appropriations measure with provisions to defund the Affordable Care Act, the law to provide wider availability of health care. The only health care provision in the agreement requires stricter eligibility verification procedures for those applying for tax credits and cost-sharing reductions.

P.L. 113-46 also sets up a conference for the House and Senate to see “Shutdown,” page 4
fiscal year 2014 bills that would increase funding for the federal judiciary by 5.5 percent and 7.5 percent, respectively, over fiscal year 2013 sequestration levels. Although neither bill reached the full House or Senate for a vote, Silkenat emphasized that the committee members “sent a clear message” to their colleagues that the judiciary needs to be treated as a funding priority.

The ABA president has asked all members of the association to become involved in the ongoing effort to secure adequate resources for the federal judiciary by contacting their individual members of Congress.

“Lawyers, in particular, have the knowledge and responsibility to explain why a fully operational federal judiciary is a core component of our government and essential to the preservation of our personal liberties and constitutional government based on the rule of law,” he wrote in his first communication as ABA president.

In related action, the Judicial Conference of the United States, the national policymaking body for the federal courts, took the unusual step of writing to the president of the United States.

“Over the years, with the support of Congress and the White House, the judiciary has been able to forge and maintain one of the most respected justice systems in the world,” the conference wrote. “We are greatly concerned, however, that our constitutional duties, public safety, and the quality of our nation’s justice system will be profoundly compromised if sufficient funding is not provided to the judiciary in FY 2014.”

ABA President James R. Silkenat (left) appeared on a panel on federal judicial funding with (from left): Hon. W. Royal Furgeson Jr., retired federal district judge and dean of UNT Dallas College of Law; A.J. Kramer, federal public defender, District of Columbia; Robert Kengle, co-director, Voting Rights Project, Lawyers’ Committee for Civil Rights Under Law; Don Saunders, vice president of civil legal services, National Legal Aid and Defenders Association; Nan Aron, president, Alliance for Justice; Scott Lilly, senior fellow, Center for American Progress; and Diane Moyer, board member, National Alliance to End Sexual Violence, and legal director, Pennsylvania Coalition Against Rape.

Also receiving additional funding was the Social Security Administration for conducting disability reviews and the Department of Veterans Affairs for speeding up its disability claims process.

The day the shutdown began, ABA President James R. Silkenat called it a “historic failure that imperils justice in our country” and urged members of Congress to “end the scorched earth tactics and send a budget to the president.”

“The political brinksmanship that brought our government to a standstill reflects the same intransigence and unwillingness to compromise that imposed sequestration on our national government and hardships on many who contract with, work for, or receive non-entitlement benefits from the federal government,” he said.

shutdown ends

continued from page 3

craft a fiscal year 2014 budget resolution and lays out a deadline of Dec. 13 for Congress to develop a framework for all 12 fiscal year 2014 appropriations bills. Furloughed federal employees will receive retroactive pay, but the federal pay freeze will continue until Jan. 15, 2014. Congress will be prohibited from receiving a pay increase for fiscal year 2014 under the law.

While keeping most of the government at current reduced fiscal year 2013 levels, the agreement did provide an additional $51 million for the federal judiciary, which includes $25 million for court operations and $26 million for court-appointed public defenders.
ABA recommends way to address prison costs and safety

The ABA urged a House Judiciary subcommittee to move legislation to address out-of-control prison costs and prison overcrowding and to press the Bureau of Prisons (BOP) to fully utilize existing programs to release eligible prisoners into their communities.

“The ABA believes that the same level of scrutiny that is applied with regard to federal spending in other areas must be applied to spending on prisons, corrections, and criminal justice policies,” ABA Governmental Affairs Director Thomas M. Susman said in a statement submitted for the record of a hearing on prison issues convened Sept. 19 by the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security and Investigations. “We must ask whether these crime and corrections policies are cost-effective and evidence-based, and whether they are more or less effective in reducing crime and serving public safety than other alternatives,” he wrote.

Susman pointed out that the federal prison population has exploded since 1980, when the system housed 24,000 people at an annual cost of $333 million. There are now 217,000 people in prison at an annual cost of over $6 billion—an increase of 760 percent in population and 1,700 percent in spending. The most significant source of this exponential growth is the increased incarcerations of nonviolent drug offenders whose actions, Susman said, would be better addressed through alternatives that will hold them equally accountable at a substantially lower cost.

He highlighted successful bipartisan state-level reforms that have led to the first overall declines in state prison populations since 1980. Such reforms include: requiring probation rather than jail time for drug possession offenders with less than a gram of drugs (Texas); expanding eligibility for community sentencing and increasing the use of parole for nonviolent offenders (Oklahoma); and removing mandatory minimums for first-time offenders (South Carolina).

Susman said that BOP should expand the use of its Residential Drug Abuse Treatment Program, which enrolled only 19 percent of those who qualified for a 12-month sentencing reduction program from 2009 to 2011. BOP also should use its full authority provided by new guidelines to identify and bring to the court’s attention all cases that meet the criteria for compassionate release, a practice that for many years was limited to cases where the prisoner had a terminal illness with a life expectancy of one year or less or had a profoundly debilitating medical condition.

BOP also should ensure, as Congress has directed, that persons in federal prisons have an opportunity to spend up to 12 months in reentry facilities so they will successfully reenter the community after their release, he said. This may include a full year in a residential reentry center or halfway house, or in-home confinement for up to six months of that one-year total.

Susman also urged action on the following two legislative proposals: the Public Safety Enhancement Act of 2013, which would expand recidivism-reduction programs in federal prisons and authorize early release of prisoners who committed certain non-violent offenses and have participated in such programs; and the Justice Safety Valve Act of 2013, to authorize federal courts to impose sentences below statutory mandatory minimums for certain nonviolent offenses.

“Restoring federal judicial discretion in certain, low-level nonviolent drug cases by eliminating mandatory minimum sentences would not ignore culpability, but would ensure that defendants receive punishments that are proportional to the offenses they committed and would dis-incentivize states’ shifting of such cases to the federal justice system,” he said.

During the Sept. 19 hearing, BOP Director Charles E. Samuels Jr. testified that two provisions in the Justice Department’s new “Smart on Crime” initiative should have a direct, positive impact on BOP’s population while still deterring crime and protecting the public. The changes will provide, upon order of the sentencing judge, for the release of some non-violent offenders and urge prosecutors in appropriate circumstances involving non-violent offenses to consider alternatives to incarceration, such as drug courts, other specialty courts, or other diversion programs.

“The ‘Smart on Crime’ initiative is only the beginning of an ongoing effort to modernize the criminal justice system,” he said.

Samuels also highlighted administration support for legislation to expand inmate Good Conduct Time to provide inmates up to the full 54 days per year stated in current law and to provide inmates with an incentive to earn sentence credits annually for successfully participating in programs that are effective at reducing recidivism.
ABA expresses support for indigent defense commission

ABA President James R. Silkenat, describing the nation’s indigent defense system as “in crisis,” expressed the ABA’s support this month for the creation of a National Commission on Indigent Defense.

“The ABA has been pleased and is grateful for the ongoing dialogue between the Department of Justice and the indigent defense community, as well as for the steps the Department has taken to address the ongoing crisis in indigent defense systems,” Silkenat wrote in an Oct. 15 letter to Attorney General Eric H. Holder Jr. “We believe that the creation of a commission…will help the criminal justice system do more than simply commemorate the passing of time” since the landmark 1963 ruling in Gideon v. Wainwright, Silkenat added. The Gideon ruling, which held that the federal and state courts are constitutionally required under the Sixth and Fourteenth amendments to provide counsel to indigent defendants, reached its 50th anniversary this year.

He also emphasized the importance of upholding the constitutional obligations as a country to provide legal counsel to those unable to access or afford it. “We as a nation of laws have not kept the promise of Gideon, that the right of counsel is fundamental and essential to a fair trial,” Silkenat said.

He noted that in February 2013 the ABA House of Delegates adopted policy to encourage Congress to create a federally-funded, independent Center for Indigent Defense Services. The purpose of such a center, according to the policy, would be to aid in providing “effective assistance of counsel for the defense of the indigent accused in criminal, juvenile and civil commitment proceedings,” at the state, local, tribal and territorial levels.

“The proposed commission may be but an interim step toward the establishment of a national center for indigent defense,” Silkenat said. “However, the journey toward equal justice for all must begin somewhere.”

He offered some advice regarding the mission and function of the proposed commission, emphasizing that the commission should work quickly and efficiently under a strict deadline, have a clearly defined mission, and look at all defender systems. He said that the commission should not retrace the steps of numerous blue-ribbon panels that have sufficiently documented the persistent problem in fulfilling the constitutional indigent defense mandate but should “focus on solutions and set goals for achieving them.”

“The ABA stands ready to assist, and to bring to the table extensive experience and expertise in the area of indigent defense,” Silkenat said.

Judicial Vacancies/Confirmations — 113th Congress* (as of 10/30/13)

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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<td><strong>Totals</strong></td>
<td><strong>93</strong></td>
<td><strong>51</strong></td>
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*Includes territorial judgeships
OLDER AMERICANS ACT: The ABA expressed support Oct. 23 for key provisions in S. 1562, legislation to reauthorize the Older Americans Act (OAA). The bill was sponsored by Senate Special Committee on Aging Chairman Bernard Sanders (I-Vt.) with original cosponsors Tom Harkin (D-Iowa), who chairs the Senate Health, Education, Labor, and Pensions (HELP) Committee, and the committee’s ranking member, Lamar Alexander (R-Tenn.). The association supports reauthorization of the OAA, which was originally enacted in 1965 to provide federal funding and create an infrastructure for the delivery of critical social services to help seniors maintain their independence. “For more than 30 years, the ABA has been a strong advocate on issues that help Americans age with dignity, security and quality of life,” ABA Governmental Affairs Director Thomas M. Susman wrote to the HELP Committee, which was scheduled to mark up the bill this month. “We view reauthorization as an important opportunity for Congress to reaffirm and refine our country’s commitment to a safe, secure and dignified life for all older Americans,” he said. The ABA specifically supports the defining of “adult protective services” in the bill to include legal services. That support, he said, is based on an ABA 2002 policy encouraging widespread efforts to address the impact of abuse, neglect and exploitation of older adults and a 2010 policy supporting OAA reauthorization with provisions recognizing the importance of legal assistance under the act. The association supports reauthorization of the OAA, which was originally enacted in 1965 to provide federal funding and create an infrastructure for the delivery of critical social services to help seniors maintain their independence. “For more than 30 years, the ABA has been a strong advocate on issues that help Americans age with dignity, security and quality of life,” ABA Governmental Affairs Director Thomas M. Susman wrote to the HELP Committee, which was scheduled to mark up the bill this month. “We view reauthorization as an important opportunity for Congress to reaffirm and refine our country’s commitment to a safe, secure and dignified life for all older Americans,” he said. The ABA specifically supports the defining of “adult protective services” in the bill to include legal services. That support, he said, is based on an ABA 2002 policy encouraging widespread efforts to address the impact of abuse, neglect and exploitation of older adults and a 2010 policy supporting OAA reauthorization with provisions recognizing the importance of legal assistance under the act. The association supports provisions focusing on the independence and avoidance of conflicts for long-term care ombudsmen. “Although the legislation does not contain all elements we would like to see, such as encouraging development of coordinated legal service delivery systems and strengthening legal service developers, we recognize it as a critical step forward in ensuring that the rights of older Americans are supported and protected under federal law,” Susman wrote.

CHILD TRAFFICKING: The House Ways and Means Subcommittee on Human Resources convened a hearing Oct. 23 focusing on ways to improve the child welfare system to prevent sex trafficking of youth in America’s foster care system. “Even though foster care is meant to protect children who have been abused, research shows that most victims of child sex trafficking come straight from the foster care system. This is unacceptable,” subcommittee Chairman Dave Reichert (R-Wash.) said in announcing the hearing. Those testifying included members of Congress who have introduced legislation to address the issue. Reps. Karen Bass (D-Calif.) and Ron Marino (R-Pa.), co-chairs of the Congressional Caucus on Foster Youth, have cosponsored H.R. 1732, a bill to help establish local plans to combat trafficking as well as ensure nationwide data collection. According to Bass, the bill also would direct the Department of Health and Human Services (HHS) to develop and publish guidelines to help child welfare agencies serve youth who are victims of trafficking and prevent exploitation of youth at risk of becoming victims. Other legislation discussed during the hearing included H.R. 2744, introduced by Reps. Erik Paulsen (R-Minn.) and Louise Slaughter (D-N.Y.), S. 1518, introduced by Sen. Orrin G. Hatch (R-Utah), and companion bills expected to be introduced in the House and Senate shortly by Reps. Ted Poe (R-Texas) and Carolyn Maloney (D-N.Y.) and Sens. John Cornyn (R-Texas) and Ron Wyden (D-Ore.). The ABA, which submitted comments earlier this year to the HHS Administration on Children and Families on a federal plan to address human trafficking in the United States, supports measures to aid states in improving their child welfare systems’ identification of and response to child trafficking victims, including assessing and disseminating successful laws and policies and making technical assistance readily available to those providing services.
Immigration discussion revived on Capitol Hill

Renewed discussion about comprehensive immigration reform emerged this month on Capitol Hill as President Obama said in his Oct. 19 weekly address that the issue is one on which he believes Democrats and Republicans can work together.

The president noted in his address that there is already a broad coalition across America that is behind immigration reform efforts and the Senate passed S. 744, a bill with strong bipartisan support, in June.

In the House, where several separate immigration bills have moved through the Judiciary Committee and Homeland Security Committee, Democrats on Oct. 2 introduced H.R. 15, a comprehensive bill that mirrors most of the provisions in the Senate bill after a bipartisan group of House members failed to craft a measure.

H.R. 15, introduced by Rep. Joe Garcia (D-Fla.) and 182 cosponsors, would provide a path to citizenship for undocumented immigrants currently residing in the United States and incorporate the ABA-supported DREAM Act, which would provide an opportunity for young people brought to this country as children to earn legal status through higher education or service in the military.

H.R. 15 also features provisions supported by the ABA to enhance fairness and efficiency in the immigration adjudication and detention system. These include increasing access in immigration proceedings for the most vulnerable noncitizens such as children and the mentally disabled, increasing resources for the immigration court system, increasing the use of alternatives to detention, and enhancing oversight of detention facilities.

The major difference between the House and Senate bills is in the area of border security. H.R. 15 includes the provisions of H.R. 1417, a bill approved by the House Homeland Security Committee that would require the secretary of Homeland Security to develop a comprehensive strategy to gain and maintain operational control of the country’s international borders. The Senate bill would require an increase in the number of federal border agents and the building of a 700-mile fence along the southern border.

The ABA supports comprehensive immigration reform and applauded Senate passage of S. 744. According to the ABA, the Senate-passed bill, while not perfect, would implement steps toward accomplishing the goals of enhancing border and national security realistically and humanely, addressing the undocumented population and the need for immigrant labor, preserving family unity, and protecting the tradition of due process and judicial review.

Prospects for compromise and passage of comprehensive reform this year are not promising, however, in the aftermath of the stalemate that led to the 16-day government shutdown that ended Oct. 17. Most House Republicans have expressed opposition to the Senate bill, particularly the legalization provisions, and prefer to consider separate measures.

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. © 2013 American Bar Association. All rights reserved. Please address correspondence to:

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