ABA supports bill to authorize additional Article III judgeships

Emphasizing that “insufficient resources are diminishing the ability of our federal courts to serve the people and deliver timely justice,” the ABA expressed support this month for S. 1385, a bill to increase the number of authorized Article III judgeships by 10 percent as recommended by the Judicial Conference of the United States.

“Our judicial system is predicated upon the principles that each case deserves to be evaluated on its merits, that justice will be dispensed even-handedly, and that justice delayed is justice denied,” Michael H. Reed, chair of the ABA Standing Committee on Federal Judicial Improvements, told the Senate Judiciary Subcommittee on Bankruptcy and the Courts during a Sept. 10 hearing. “The combination of too few judges and insufficient funding is creating a resource crisis for the federal judiciary,” he said.

S. 1385, the Federal Judgeship Act of 2013, would authorize 70 permanent and 21 temporary judgeships at the district and appellate court levels and would convert eight existing temporary district judgeships into permanent positions. Reed pointed out that the last comprehensive judgeship bill, which created 85 new judgeships, was enacted in 1990. Since then, Congress has added 34 district court judgeships through a piecemeal approach and allowed half a dozen temporary judgeships to expire. As a result, over the past 23 years district courts have experienced a 39 percent increase in filings but only a 4 percent increase in judgeships, and the number of appellate court judges has not changed despite a 34 percent increase in filings.

The increase in the federal judicial caseloads has been fueled in large part by congressional expansion of federal court jurisdiction and national drug and immigration policies that call for and fund enhanced law enforcement efforts, Reed said.

Acknowledging the unlikelihood of passage of S. 1385 in the near future, Reed recommended other steps Congress could take immediately to help the judiciary:

•establish new judgeships in the five district courts singled out by the Judicial Conference for immediate relief: District of Arizona, District of Delaware, Eastern District of California, Western District of Texas, and Eastern District of Texas;

•convert the eight existing temporary judgeships into permanent judgeships or extend them as temporary judgeships for 10 years;

•assure that the judiciary has sufficient resources to handle new responsibilities that result from new legislation;

•make the filling of judicial vacancies a priority, with particular attention to judicial emergencies, and work toward reducing the long-standing 10 percent vacancy rate;

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### LEGISLATIVE BOXSCORE

<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><strong>Gun Violence.</strong> 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.</td>
<td>H.R. 437 was referred to the Judiciary Committee on 1/29/13; H.R. 452, on 2/4/13.</td>
<td>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.</td>
<td></td>
<td>Supports steps to prevent gun violence by strengthening the nation’s gun laws.</td>
</tr>
</tbody>
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Labor Department clarifies role of unpaid law student interns

Following a request from the ABA for clarification on work that may be performed by unpaid law student interns, the U.S. Department of Labor (DOL) responded Sept. 12 that law students may work as unpaid interns on pro bono matters at for-profit law firms.

In a letter to ABA Immediate Past President Laurel G. Bellows, Labor Department Solicitor M. Patricia Smith stated that the Fair Labor Standards Act (FLSA) generally does not permit individuals to volunteer their services to for-profit businesses such as law firms. She said that the FLSA does, however, permit individuals to participate in unpaid internships or training programs conducted by for-profit entities if certain criteria are met.

"Under certain circumstances, law school students who perform unpaid internships with for-profit law firms for the student’s own educational benefit may not be considered employees entitled to wages under the FLSA," Smith said, explaining that the determination of whether an internship meets the exclusion depends upon all of the facts and circumstances of each student’s case.

She listed six criteria that must be met:

• the internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
• the internship experience is for the benefit of the intern;
• the intern does not displace regular employers, but works under close supervision of existing staff;
• the employer providing the training derives no immediate advantage from the activities of the intern;
• the intern is not necessarily entitled to a job at the conclusion of the internship; and
• the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

Smith also clarified that recent law school graduates who have not yet passed any state bar may not volunteer for private law firms to perform pro bono work without pay.

In those cases, law schools would not have the same ability to act as intermediaries between graduates and the law firms that they do with current students and would not be able to monitor the internship’s compliance with the criteria.

Bellows sought clarification from Smith in May, explaining that ABA Accreditation Standard 301 (b) requires law schools to offer substantial opportunities for student participation in pro bono activities. The primary purpose of these programs, Bellows said, is to advance and expand the education for the students and to provide desperately needed legal assistance to the underserved.

In her letter, Bellows emphasized that the ABA supports the department’s efforts to obtain fair wages for those clearly falling under the FLSA, but she maintained that the FLSA language was unclear about its application to pro bono internships with private law firms or business law departments.

The ABA agrees that exploitation of law students and other interns is unacceptable, but the FLSA uncertainty inhibited law firms from offering students the opportunity to work on pro bono matters in a real life setting, she wrote.

ABA President James R. Silkenat said the DOL clarification “will assist law students seeking to gain legal experience and increase their volunteerism.” He also emphasized that the decision will ensure that law firms can continue to help the many people in need of legal assistance through pro bono efforts.”

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Reportershield bill clears Senate panel

A bill that has been years in the making to protect journalists from unwarranted intrusion by the government and maintain free flow of information to the public was approved Sept. 12 by a 13-5 vote in the Senate Judiciary Committee.

S. 987, known as the Free Flow of Information Act, would protect journalists and their employers from having to reveal information, including source identity, that a reporter obtains under the promise of confidentiality, and would establish a legal framework for determining the limited circumstances under which disclosure may be compelled by a court. Various versions of the legislation have been introduced every Congress since 2005, but the push for the legislation this year was prompted by recent national security leaks from the government to news organizations.

Three Republicans on the committee – Sens. Orrin G. Hatch (R-Utah); Charles Grassley (R-Iowa) and Lindsey Graham (R-S.C.) – joined the Democrats in reporting the bill, which was introduced by Sen. Chuck Schumer (D-N.Y.) in May.

A major factor in approval of the bill was an amendment, offered by Sen. Dianne Feinstein (D-Calif.), that would define a journalist covered under the law as an individual who has worked for a specified length of time for or been affiliated with an organization that “disseminates news or information.” The definition also includes individuals with a substan-

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Bill would provide needed relief to overburdened courts

continued from front page

• protect the federal judiciary from future deficit reduction and increase funding for fiscal year 2014 to $6.67 billion, the amount recommended by the Senate Appropriations Committee; and
• hold hearings to explore structures that would facilitate cooperation and discussion of the issues between the judicial and executive branches.

Those appearing on the panel with Reed included Judge Timothy M. Tymkovich, chair of the Judicial Conference Committee on Judicial Resources, which developed the recommendations included in S. 1385 from the most recent survey of the judgeship needs of the courts conducted in March 2013.

He explained that before a judgeship recommendation is transmitted to Congress, it undergoes careful consideration and review at six levels within the judiciary.

“The conference attempts to balance the need to control growth and the need to seek resources that are appropriate to the judiciary’s caseload,” Tymkovich testified. “In an effort to implement that policy, we have requested far fewer judgeships than the caseload increases and other factors would suggest are now required.”

Also testifying was Judge Sue Robinson, a judge on the U.S. District Court of the District of Delaware who addressed her court’s need for a new judgeship based on the huge increase in patent case filings.

Jay Alan Sekulow, chief counsel of the American Center for Law and Justice, testified that his group supports the creation of new judgeships when there is a clear and demonstrable need, but he expressed concerns that S. 1385, if enacted before the next presidential election, invokes an undue amount of partisan influence into the makeup of the federal judiciary.

Subcommittee Chairman Chris Coons (D-Del.), who introduced S. 1385 with Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) in July, emphasized during the hearing that “we must not take the judiciary for granted” and that the bill would provide “much-needed relief to our overburdened courts.”

Reporter shield

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The ability and willingness of the press to uncover information to which the American people

see “Reporter shield,” page 5
ABA supports independent agency regulatory analysis bill

The ABA expressed strong support Sept. 16 for S. 1173, a bill that seeks to expand presidential involvement in the rulemaking activities of independent regulatory agencies.

S. 1173 – sponsored by Sens. Rob Portman (R-Ohio), Mark Warner (D-Va.) and Susan Collins (R-Maine) – would affirm the president’s authority to issue an executive order to require independent regulatory agencies to comply, to the extent permitted by law, with regulatory analysis requirements currently applicable to executive agencies when adopting new regulations.

“The core objective of S. 1173 falls squarely within longstanding ABA policy that the Constitution’s choice of a unitary executive justifies presidential involvement in rulemaking activities of federal agencies,” ABA Governmental Affairs Director Thomas M. Susman wrote to Senate Homeland Security and Governmental Affairs Committee Chairman Thomas R. Carper (D-Del.) and Ranking Member Tom Coburn (R-Okl.).

Susman explained that ABA policy, first adopted in 1986 and reiterated in 1990, supports greater presidential coordination, review and oversight of the regulatory process for both executive and independent agencies because the president:

- is in the best position to centralize and coordinate the regulatory process, particularly with the proliferation of administrative agencies that often have overlapping responsibilities;
- is electorally accountable, unlike administrative officials, to the people and is the only official in government with a true national constituency; and
- has the unique ability, by virtue of the president’s accountability and capacity for interagency coordination and centralization, to energize and direct regulatory policy in a way that would be impossible if that policy were to be set exclusively by administrative agency officials.

“From the standpoint of sound policy in the federal rulemaking process, we believe that there is no meaningful difference between the ‘independent’ agencies and those agencies to which the current executive order (E.O. 12866) applies,” Susman said. E.O. 12866, issued by President Clinton in 1993, requires agencies, among other things, to assess the cost of proposed regulations and submit those that are economically significant to the President for review.

Susman noted that the report underlying the ABA’s 1990 policy acknowledged the perspective that presidential oversight might hamper some functions of independent agencies in certain circumstances, but he said that provisions in S. 1173 appear to be designed to accommodate these concerns. Although the ABA takes no position on specific provisions of this type, he said, the association urges Congress to pay particular attention to ensuring that implementation of the legislation would not impair the ability of independent agencies to perform their statutory functions.

continued from page 4

Reporter shield

ple would not otherwise have access is a hallmark of our democracy,” Susman wrote. “Maintaining the free flow of information may not always be a popular position, especially during trying times,” he explained, “but it is essential in a democracy.”

The ABA’s policy, adopted in 2005, urges “Congress to enact a federal shield law for journalists to protect the public’s need for information and to promote the fair administration of justice.” The ABA also maintains that before a party subpoenas a journalist to compel disclosure, the party should prove that the information is crucial to the matter at hand, that the party has attempted to retrieve the information from all practical alternative sources, and that the need for the information the party is seeking outweighs the public interest in protecting the free flow of information.

The Obama administration has expressed support for reporter shield legislation, and Schumer indicated that he hopes the bill will be on the Senate floor this fall for consideration.

“We’re closer than we’ve ever been before to passing a strong and tough media shield bill,” Schumer said after committee approval of the measure. “This legislation ensures that the tough investigative journalism that holds government accountable will be able to thrive.”

There has been no action on HR. 1962, similar bipartisan legislation introduced in the House by Rep. Ted Poe (R-Texas). Poe’s bill, which has more than 40 cosponsors, contains a broader definition of journalist.
ABA says sanctions bill could increase court costs

The ABA opposes legislation approved Sept. 11 by the House Judiciary Committee that would amend Rule 11 of the Federal Rules of Civil Procedure to reinstate a mandatory sanctions provision.

H.R. 2655, which cleared the committee by a 17-10 vote, would change Rule 11 to require, rather than permit, the imposition of monetary sanctions against lawyers for filing non-meritorious claims. The bill, known as the Lawsuit Abuse Reduction Act, also would rescind a current provisions that allows parties and their attorneys to avoid Rule 11 sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served.

The current system, which gives judges the option to sanction parties, replaced a mandatory sanctions provision that had been in place from 1983 to 1993.

“During the decade that the 1983 version of the rule requiring mandatory sanctions was in effect, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time,” ABA Governmental Affairs Director Thomas M. Susman explained in a July 24 letter to the committee.

Susman said there is no evidence that the proposed changes to Rule 11 would deter the filing of non-meritorious lawsuits. “In fact, past experience strongly suggests that the proposed changes would encourage new litigation over sanctions motions and would thus increase, not reduce, court costs and delays,” he wrote.

It is important to point out, Susman said, that avoidance of Rule 11 sanctions does not preclude imposition of other sanctions, and he emphasized that Rule 11 is part of a “complex, coordinated and sometimes overlapping system” that governs court administration. “A judge may invoke other rules of procedure, statutes, or its own inherent authority to prevent frivolous or non-meritorious lawsuits from going forward and to impose sanctions when appropriate,” he explained.

Susman also emphasized that any changes in the Federal Rules of Civil Procedure should be considered through the Rules Enabling Act process established by Congress rather than the legislative process.

Under the Rule Enabling Act, the Judicial Conference of the United States drafts proposed rules and amendments, makes them available for public comment, and submits them to the U.S. Supreme Court after Judicial Conference approval. The Supreme Court transmits the proposals to Congress, which retains the final authority to reject, modify or defer any rule or amendment before it takes effect.

During the Sept. 11 committee markup of the bill, Rep. John Conyers Jr. (D-Mich.) cited the ABA’s letter opposing the legislation, saying that the bill would “create a cure far worse than the problem” it is intended to solve.

The committee rejected, by a 9-15 vote, an amendment offered by Conyers to exempt civil and constitutional rights cases from the legislation.

Judicial Vacancies/Confirmations — 113th Congress* (as of 9/26/13)

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<th>Court</th>
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<tr>
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<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>Totals</td>
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<td>55</td>
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*Includes territorial judgeships
MANDATORY MINIMUMS: The Senate Judiciary Committee launched hearings Sept. 18 to reevaluate the effectiveness of federal mandatory minimum sentences. “Our reliance on a one-size-fits-all approach to sentencing has been a great mistake. Mandatory minimums are costly, unfair and do not make our country safer,” committee Chairman Patrick J. Leahy (D-Vt.) said in his opening statement. He noted that the number of mandatory minimum penalties in the federal code nearly doubled from 1991 to 2011, and the country now spends approximately $6.4 billion a year—one-quarter of the Department of Justice’s budget—on federal prisons. This spending, he said, means fewer federal prosecutors and FBI agents, less funding for investigations, less support for state and local law enforcement, and fewer resources for crime prevention programs, reentry programs and victim services. Earlier this year Leahy joined with Sen. Rand Paul (R-Ky.) to introduce S. 619, the Justice Safety Valve Act of 2013, which would extend the current safety valve, which allows certain low-level drug offenders to avoid mandatory minimum penalties, to all federal crimes subject to mandatory minimums. According to Paul, who testified at the hearing, only about 23 percent of all drug offenders qualify under the limited safety valve in current law. “Today, I’m here to ask you to create a comprehensive sentencing safety valve for all federal mandatory minimums, which have been a major culprit in our unbalanced and often unjust drug laws, he said.” The ABA, which has longstanding policy opposing mandatory minimums, supports S. 619 and S. 1410, the Smarter Sentencing Act, a bill sponsored by Sens. Dick Durbin (D-Ill.) and Mike Lee (R-Utah) that is aimed at reducing lengthy sentences for non-violent offenders.

MONEY LAUNDERING: The ABA recently asked state and local bar presidents throughout the country to alert their members about ABA Formal Ethics Opinion 463, which encourages lawyers to engage in appropriate due diligence to avoid inadvertently participating in or facilitating money laundering or terrorist financing activities. The opinion, adopted by the ABA Standing Committee on Ethics and Professional Responsibility on May 23, explains the benefits of complying with the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing and why the Voluntary Guidance is fully consistent with a lawyer’s ethical obligations of loyalty and confidentiality under the ABA Model Rules of Professional Conduct and the corresponding ethical rules in individual jurisdictions. In a July 31 letter to the bar presidents, Immediate Past President Laurel G. Bellows said that the ABA believes the Voluntary Guidance, which encourages lawyers to take a tailored, “risk-based” approach to client due diligence, is the “most effective means of both combating money laundering and avoiding the adoption of much more burdensome ‘rules-based’ legislation and regulations that could undermine the attorney-client privilege, the confidential lawyer-client relationship and traditional state court regulation and oversight of the legal profession.” She also explained that while rules-based mandates have already been imposed on lawyers in certain non-U.S. jurisdictions, the ABA has consistently taken the position that any similar attempts in the United States to regulate lawyers and law firms as “financial institutions” under the existing anti-money laundering laws will have “deleterious effects on the legal profession, the rule of law and the clients we serve.” Instead, Bellows said, “we believe the legal profession should use existing ethical obligations—and voluntary guidance designed for lawyers—to more effectively address the legitimate concerns of U.S. government officials in combating money laundering activity.”
Legislation focuses on reunification and permanency for children

Legislation introduced this month in both the House and Senate would amend the Adoption Incentives Program to encourage reunification and overall permanency outcomes for children—a goal strongly supported by the ABA.

S. 1511, introduced Sept. 17 by Sen. John D. Rockefeller IV (D-W.Va.), and H.R. 3124, introduced the following day by Rep. Danny K. Davis (D-Ill.), are pending in the Senate Finance Committee and the House Ways and Means Committee, respectively.

The Adoption Incentives Program, created as part of the Adoption and Safe Families Act of 1997 and most recently reauthorized in 2008, provides financial incentives to states for increasing adoptions from foster care.

In an Aug. 28 letter to House Ways and Means Committee Chairman Dave Camp (R-Mich.) and Ranking Member Sander Levin (D-Mich.), ABA Governmental Affairs Director Thomas M. Susman commented on a draft version of the House bill and commended the committee for its “continued commitment…to encourage legal permanency for children in foster care.”

The ABA has policies dating back to 1988 supporting families in the child welfare system, as well as those families at risk of becoming involved in the system. In 2010, the ABA approved further policy urging “reform of the federal child welfare structure to increase the amount and flexibility of funding available for child abuse and neglect prevention, family preservation and support, family reunification, and family permanency supports.” The policy also urges lawmakers to support all forms of permanency, including parental reunifications and adoptions.

The legislation would amend the Adoption Incentives Program to base rewards to states on increased adoption rates rather than using just raw number of adoptions, a step that Susman said is an important improvement given the decline in overall foster care cases. Another improvement is expansion of the program to include payments to states that increase the rate of children reaching permanency through legal guardianship.

Susman recommended some revisions to the legislation, including incentive payments for increased rates of safe and stable family reunifications. He emphasized that foster care should be limited to necessary cases.

“Safe and stable reunification is the primary and most common permanency goal for children in foster care,” he wrote.

Although the most frequent permanency outcome for those children departing foster care is still reunification, Susman explained, reaching permanency through reunification is taking longer for these children. Reaching permanency through adoption, however, has “significantly sped up,” he said.

The ABA also supports measures to require children to reside in foster care for 90 days before reunification if a state is to receive incentive payments. “States should not receive reunification incentive payments for children who do not remain in their homes in safe and stable situations, that is, for at least six months without any repeat substantiated abuse or neglect,” Susman wrote.

He pointed out that in 2011 there were approximately 104,000 foster children waiting to be adopted. “With the help of effective and appropriate services and supports,” Susman explained, “many of these children could find safe and lasting permanency through family reunification.”