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LSAC will pay $7.73 million in penalties and damages
Settlement reached that will change LSAT accommodation system

The Department of Justice (DOJ) announced May 20 that it has reached a settlement with the Law School Admission Council (LSAC) that requires systemic reforms to LSAC’s treatment of individuals with disabilities who request accommodations for taking the Law School Admission Test (LSAT) and will compensate victims of past discrimination.

Under a proposed consent agreement in a case originally brought in the U.S. District Court for the Northern District of California on behalf of test takers in California, LSAC will pay $7.73 million in penalties and damages to over 6,000 individuals who applied for testing accommodations over the past five years. An additional $1 million will cover attorneys’ fees and administrative costs. The agreement also will end LSAC’s practice of “flagging” the scores of individuals with disabilities who required testing accommodations.

“A legal system cannot truly deliver justice if intentional or unintentional barriers prohibit the full participation of lawyers, judicial personnel and members of the public with disabilities,” ABA President James R. Silkenat said in a statement issued immediately following the announcement. “The ABA has therefore long advocated for laws and policies to provide a range of accommodations in our legal institutions,” he said.

Silkenat emphasized the proposed consent decree, if agreed to by the court, will “help ensure that our legal system is open to all by requiring several valuable reforms of the accommodations policies involving the LSAT.

The ABA adopted policy in February 2012 following release of a Government Accountability Office report revealing that individuals with disabilities faced barriers applying for testing accommodations, and some students with disabilities had to forgo taking exams with accommodations due to outright denials or extensive delays in the approval process. The report confirmed what the ABA Commission on Disability Rights had been hearing from individuals with disabilities about the process. The California Department of Fair Employment and Housing filed suit in 2012 against LSAC, and DOJ joined the suit later that year alleging violation of the Americans with Disabilities Act.

The association also supported a California law signed in January 2013 by Gov. Jerry Brown requiring entities that administer law school admission tests to provide accommodations for test takers with disabilities to best ensure that test results reflect the skills of the test takers and not their disabilities. The LSAC sued the state, however, challenging the constitutionality of the law, and a Superior Court judge in in Sacramento granted a preliminary injunction against enforcement of the new law pending trial. On 1/14/14, the California Third District Court of Appeal overturned the injunction, and the law went into effect.
### LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
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House passes bill to prevent trafficking of foster children

The House took a significant step May 20 when it passed H.R. 4058, a bipartisan bill supported by the ABA to address the problem of sex trafficking and foster youth.

The Preventing Trafficking and Improving Opportunities for Youth in Foster Care Act, passed by voice vote, includes provisions to require states to:

- determine whether youth in foster care and other youth being served by the state child welfare agencies have been victims of sex trafficking and determine appropriate services for victims;
- document instances of sex trafficking and report the cases to law enforcement and the National Center for Missing and Exploited Children as well as the U.S. Department of Health and Human Services;
- provide foster parents with more authority to make day-to-day decisions regarding their foster child’s participation in age-appropriate activities;
- ensure that states do more to quickly move children out of foster care and into permanent, loving families; and
- ensure that youth in foster care are better prepared for a successful adulthood by allowing those age 14 and older to assist in developing their plans for transitioning out of foster care.

During floor debate, bill sponsor Dave Reichert (R-Wash.) emphasized that six out of every 10 children involved in human trafficking are foster children. “I am confident that this legislation will ensure that all states take real steps to better understand the problem and keep kids safe while in foster care,” he said. Noting the ABA’s support for the legislation, Reichert said the bill incorporates a range of ideas gleaned from more than 150 pages of public comments received on a discussion draft circulated late last year.

Rep. Karen Bass (D-Calif.), the chair of the Congressional Caucus on Foster Youth and an original cosponsor of H.R. 4058, explained that few child welfare employees have been adequately trained and prepared to identify or respond to child victims of trafficking, and the legislation would require states to provide training for case workers to coordinate services to victims.

In comments submitted in January, the ABA focused on strengthening the provisions to add safe and stable housing to child welfare agencies’ responsibilities for trafficking victims and to ensure that child welfare agencies are also responsible for undocumented, unaccompanied children and youth who may be receiving services under the Trafficking Victims Protection Act.

In addition to passing H.R. 4058 on May 20, the House passed four other bills related to human trafficking: H.R. 3630, the Justice for Victims of Trafficking Act of 2014; H.R. 3610, the Stop Exploitation Through Trafficking Act of 2014; H.R. 4225, the Stop Advertising Victims of Exploitation Act of 2014, and H.R. 4573, the International Megan’s Law to Prevent Demand for Child Sex Trafficking.

ABA supports retroactive application of drug sentencing guidelines

James E. Felman, the ABA’s liaison to the U.S. Sentencing Commission and chair-elect of the ABA Criminal Justice Section, testified at a June 10 commission hearing that the 2014 amendments to the drug sentencing guidelines should be applied retroactively.

Calling retroactivity a “moral imperative,” Felman told commission members that this is their opportunity to do what they can for those already imprisoned whose sentences are now widely understood to be potentially excessive.

The 2014 amendments to the drug guidelines, which were passed unanimously by the commission, reduce the disproportionate role that the single factor of the drug quantity has played in sentences tied to mandatory minimums for drug offenses.

“We strongly support the new two-level reduction across the drug quantity table will have the effect of modestly reducing guideline penalties for drug trafficking offenses while keeping the guidelines consistent with the current statutory minimum penalties,” Felman said. “It would still provide for significant punishment for drug offenses while more appropriately taking account individual culpability, deterrence and the overall seriousness of the offense,” he explained.

Felman pointed out that the commission estimates that the average extent of reduction in sentence for those eligible for retroactive application would be 18.4 percent, which would provide “tremendous relief” to an already overburdened federal prison system. “It is unfair for thousands of prisoners to continue serving unduly severe sentences that would be nearly see “Drug sentencing,” page 8
ABA offers expertise for DOJ analysis of state death penalty protocols

ABA President James R. Silkenat has offered the ABA’s assistance to U.S. Attorney General Eric H. Holder Jr. as the Justice Department undertakes, at President Obama’s request, an analysis of the current use of state death penalty and protocols and policies.

The analysis follows the mishandled execution of Clayton Lockett, who died April 29 of a heart attack after a failed lethal injection in Oklahoma.

ABA welcomes Supreme Court decision in Hall v. Florida

ABA President James R. Silkenat last month welcomed the May 27 Supreme Court decision in Hall v. Florida, 572 U.S. ___ 2014, which held as unconstitutional Florida’s rigid 70-point IQ cutoff for determining whether an individual has intellectual disabilities that prohibit imposition of the death penalty.

Florida law required that defendants show an IQ test score of 70 or below before being permitted to submit additional evidence of intellectual disability. The court, in its 5-4 ruling, found that while professionals have long agreed that IQ tests scores should be read as a range, Florida’s use of the test score as a fixed number created “an unacceptable risk that persons with intellectual disabilities would be executed.”

Silkenat noted in a statement that the court’s 5-4 decision agreed with many of the arguments made by the ABA in an amicus curiae brief submitted in the case. In its brief the ABA, which takes no position on the death penalty per se, asserted that before any defendant claiming intellectual disability is eligible for the death penalty, the defendant should be entitled to establish, pursuant to a constitutionally appropriate test, that both his or her level of intellectual functioning and conceptual, social and practical adaptive skills fall within the definitions used by recognized mental disability organizations. The brief pointed out that many states allow courts to consider the standard margin of error or specific facts about the administration and scoring of IQ tests and that other states recognize that the process requires a multi-faceted analysis.

The court’s opinion reversed a ruling by the Florida Supreme Court rejecting an appeal from death row inmate Freddie Hall, who had been denied by the lower court the ability to present additional evidence of disability because his IQ score was 71, one point above the 70-point threshold set by Florida statute.

“Intellectual disability is a condition, not a number,” Justice Anthony Kennedy wrote in the majority see “Intellectual disability,” page 8

In May 15 letters to President Obama and Holder, Silkenat said the ABA shares the concerns expressed by Obama at a May 2 press conference, where the president noted the troubling facts of the Lockett case as well as pervasive problems with the administration of the death penalty that include racial bias, wrongful convictions, and lack of proportionality in who receives a death sentence.

Silkenat emphasized that the ABA, through extensive work in this area of law, has “encouraged every jurisdiction that imposes capital punishment to implement policies and procedures that ensure that death penalty cases are administered fairly, impartially and in accordance with due process.”

Silkenat called attention to a recent report of the ABA Death Penalty Due Process Review Project, an entity established in 2001 to conduct research and educate the public and decision-makers on the operation of capital jurisdictions’ death penalty laws and processes in order to promote fairness and accuracy in death penalty systems in the United States and abroad.

The report, The State of the Modern Death Penalty in America: Key Findings of State Death Penalty Assessments 2006-2013, summarizes the project’s assessment of death penalty systems in 12 states and includes extensive, fact-based findings regarding each jurisdiction’s current death penalty practices. The detailed individual state assessment reports are available on the project’s website.

The report covers whether each jurisdiction’s practices comport with the ABA’s Protocols on the Administration of Capital Punishment and the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The ABA’s Death Penalty Representation Project, the ABA experts on issues related to the defense effort in death penalty cases, led the effort to develop the representation guidelines, which are the widely accepted national standard for the defense effort in death penalty cases.

“I believe you will find that these reports provide thoughtful and thorough analyses of each state’s successes and inadequacies in the administration of capital punishment,” Silkenat wrote. He added that the assessments “demonstrate why all states that implement the death penalty should undertake their own comprehensive studies of their capital punishment systems.”

In his letter to Holder, Silkenat stressed that the ABA believes that the recent report and the ABA’s other work in this area “can serve as valuable tools for the Department of Justice as you begin determining what investigations into the death penalty you will undertake.”
ABA educates congressional and agency staff with mock SSA disability hearings on Capitol Hill

Staff from various congressional office and federal agencies gathered on Capitol Hill May 20 for a mock Social Security Administration (SSA) disability appeals hearing sponsored by 10 ABA entities and coordinated by the ABA Standing Committee on Governmental Affairs. The free mock hearings, which have been offered since 2004, involve ABA volunteers portraying those who participate in SSA hearings. Jodi B. Levine, a SSA administrative law judge (ALJ) in Oklahoma, has been a part of these events since the beginning and offers some insights below.

How did the ABA mock SSA hearings begin?
The hearings are a result of meetings with congressional committee staff during ABA Day in Washington several years ago. Congressional staff in Washington and in their home districts are asked to assist their constituents and provide their members of Congress with information on legislation and oversight. It dawned on me that many on Capitol Hill never had seen a disability hearing because these hearings are closed. I offered that we could present a basic hearing so that congressional staff (and even congressional members) could see what is involved and have the opportunity to ask basic questions about the disability process. The important point is that we are presenting just the "facts" and not trying or intending to mix this with a sales pitch for any particular viewpoint or legislation.

We now have presented these mock hearings on Capitol Hill six times over the years and have presented them in other venues as well. Several were done in conjunction with ABA Meetings where the public were invited. We also have presented mock hearings in coordination with one of our partners – the association’s AIDS Coordinating Committee – to social workers, case managers and others who work with and represent those living with HIV and AIDS.

What roles are played by ABA volunteers?
Our cast portrays the judge, claimant, attorney, medical expert and vocational expert.

Can you briefly explain the disability appeals process?
Simply, a person files an application with the SSA seeking either/or both Disability Insurance Benefits and Supplemental Security Income. To establish entitlement, a person must establish that he/she is not working due to a severe medical condition (physical or mental) that meets or equals the listed medical conditions in the regulations, and, if not, that he or she is unable to perform past relevant work the individual performed over the past 15 years and is unable to perform any other type of work that exists in the region where he or she lives or around the nation.

What are the most serious problems faced by an ALJ who is considering one of these cases?
Time and limited resources of staff and equipment. There are a large number of cases at the agency, and the agency, the claimants and the public expect and demand that these cases be handled expeditiously. The challenge or tension is that judges must provide due process to claimants, and this takes time. Files contain hundreds and sometimes thousands of pages of complicated medical records that must be read and considered. Decisions must be made independently and impartially. To do this, judges must be independent, impartial and of the highest ethical standard to withstand the pressure merely to move cases along or to cut corners just to close a file. This can be difficult with the enormity of caseloads and the pressure the agency has to move cases, but the claimants, the agency and the American public who employ these judges deserve to have ethical, independent and impartial decision makers.

Can you explain why you feel it is so important for congressional staff to understand the process?
If I am expected to review or judge something, I want to understand it. I expected that congressional staff felt the same. I also felt it important for them to...
Congress weighs campaign finance proposals

Hearings continued on Capitol Hill this spring on the impact of the Supreme Court’s April 2 decision abolishing limits on aggregate amounts that an individual may contribute to political candidates and political party committees.

The court’s 5-4 decision in *McCutcheon v. Federal Election Commission*, 572 U.S. ___ (2014) followed another 5-4 decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), that ruled that corporations and unions have the same political speech rights as individuals under the First Amendment and may not be prohibited from contributing their general treasury funds for election-related independent expenditures.

In a May 6 letter for the record of an April 30 hearing held by the Senate Rules and Administration Committee, ABA Governmental Affairs Director Thomas M. Susman said the ABA has long been concerned with campaign finance and election issues and is a strong supporter of transparency in the political process.

ABA policy adopted in 2013 supports efforts to ensure consistent disclosure of political and campaign spending by entities making political expenditures. The policy also urges Congress to require organizations not already required to do so by current law to disclose the amounts spent on electioneering communications and independent expenditures, as well as the sources of such funds.

Susman said the *McCutcheon* and *Citizen United* decisions “dismantled key components of our campaign finance framework, which will result in significant additional money pouring into the system and are bound to increase the public’s concern over undue influence in governmental decision-making.”

He added that it will be critical to ensure that this additional money is not used in a way that circumvents contribution limits still in place and to ensure full and timely disclosure of all federal campaign contributions and expenditures.

Before the *McCutcheon* decision, the aggregate limit on political campaign contributions by an individual was $123,200 over a two-year election cycle.

Committee Chairman Chuck Schumer (D-N.Y.) announced during the April 30 hearing that the Senate will take a vote this year on S.J. Res. 19, a proposed constitutional amendment introduced by Sen. Tom Udall (D-N.M.). Udall, a member of the committee, said that “free and fair elections are a founding principle of our democracy, but the Supreme Court’s rulings have ensured that they are now for sale to the highest bidder.”

In a rare appearance on Capitol Hill, retired Supreme Court Justice John Paul Stevens expressed support for the constitutional amendment, which would state that neither the First Amendment nor any

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Judicial Vacancies/Confirmations—113th Congress* (as of 6/12/14)

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*Includes territorial judgeships
ATTORNEY-CLIENT PRIVILEGE: ABA President James R. Silkenat said in a statement last month that he appreciates and supports many of the steps taken by the National Security Agency (NSA) and other governmental agencies to ensure that procedures are in place to minimize the acquisition, retention and dissemination of information related to U.S. individuals, including any potentially privileged information. He added, however, that more can be done and should be done by the agencies to preserve fundamental attorney client privilege protection and help restore public confidence in the privacy of privileged communications. Silkenat met May 13 with NSA General Counsel Rajesh De to discuss the issue and said he expects that the ABA’s discussions with NSA and other government agencies will continue. Silkenat originally expressed ABA concerns in a Feb. 20 letter to De and then NSA Director General Keith B. Alexander about alleged foreign government surveillance of American attorney communications with foreign clients and the potential harm this might cause to the attorney-client privilege. In a March 10 response, Alexander assured Silkenat that any privileged attorney-client communications will be given “appropriate protection.” He clarified that NSA does not ask any foreign partner to conduct any intelligence activity on its behalf that the agency would not legally be able to do itself, including signals intelligence activities that could implicate potentially privileged communications. During the meeting, Silkenat emphasized that the attorney-client privilege is essential to the fairness of the justice system and the independence of the profession.

LEGAL SERVICES CORPORATION (LSC): The Senate Appropriations Committee approved a fiscal year 2015 funding bill for Commerce, Justice, Science and Related Agencies (CJS) June 5 that includes $400 million for the LSC. That amount is $50 million more than the funding approved by the House in May and $35 million above the program’s current level of $365 million. The Senate bill also includes $5 million for the Pro Bono Innovation Fund, which supports LSC efforts to involve more private attorneys in the delivery of legal services to the poor. This compares to the House amount of $3 million for the fund. The House passed its LSC appropriations May 30 as part of its CJS bill, H.R. 4660. During floor debate on the measure, the House rejected two LSC amendments. The first amendment, offered by Reps. Steve Cohen (D-Tenn.) and Michael Quigley (D-Ill.) and defeated by a 173-238 vote, would have included an additional $15 million for LSC to bring the House figure to the program’s current funding level. Cohen emphasized that cutting the program will mean that “untold numbers of Americans will go unrepresented in court and unable to pursue justice.” The second amendment, proposed by Rep. Austin Scott (R-Ga.), would have eliminated LSC funding entirely. That amendment failed by a 116-290 vote.

SSA mock hearings

continued from page 5

experience what it is like to be in a hearing where someone is expected to talk about highly personal things in front of strangers; and where someone is expected to judge someone's life and whether that person is in sufficient pain and/or ill health to be unable to function in a work situation. Empathy. The people who are claimants are not numbers and each case is different.

It is important for the staff to understand that a due process hearing means that the claimant has a full opportunity to present his or her case, to have an attorney or representative zealously and ethically represent him or her, and to have a judge who is an impartial independent decision maker, a trier of fact and applier of the law who operates at a high level of ethical conduct. My expectation is that once the staffers see, feel and understand what a hearing is they better can address the problems we – the judges, attorneys, claimants and the agency – face as we strive to provide claimants the due process they deserve even if that person is not eligible and entitled to benefits.

What have you achieved through these events?

We have established that we, the ABA, are a good resource for information. We have built good relationships with those working on Capitol Hill and with leadership and members of the agency. We have established that we want to work with everyone to maintain and improve the integrity of the process. The success we have achieved is due in large part to our cast of volunteers and the great support from the ABA sections and divisions and the Governmental Affairs Office, which have partnered with us. I thank them and know that I, we, owe them a huge debt for providing understanding and information about this important legal event in people's lives.
Constitutional amendment would allow campaign spending limits
continued from page 6

The Senate Judiciary Committee continued the discussion June 3 at a hearing marking the first time in history that the top two Senate leaders appeared together to testify. Majority Leader Harry Reid (D-Nev.) and Minority Leader Mitch McConnell (R-Ky.) took opposing views on the proposed amendment.

Reid supported the proposal, testifying that the “flood of dark money into our nation’s political system poses the greatest threat to our democracy that I have witnessed during my time in public service.” McConnell warned that a constitutional amendment would “empower incumbent politicians in Congress and in the states to write the rules on who gets to speak and who doesn’t.”

provision of the Constitution shall be construed to prohibit Congress or any state from imposing reasonable limits on the amount of money that candidates for public office or their supporters may spend in election campaigns.

“Unlimited campaign expenditures impair the process of democratic self-government,” Stevens said. “They create a risk that successful candidates will pay more attention to the interests of non-voters who provided them with money than to the interests of the others who elected them. That risk is unacceptable,” Stevens emphasized.

Intellectual disability
continued from page 4

The ABA has long taken a special interest in the equitable treatment of individuals with mental disabilities, as well as a concern that the death penalty be enforced with appropriate procedural protections and in a fair and unbiased fashion,” Silkenat said, calling the Supreme Court’s decision “a victory for fairness and equal justice.”

Drug sentencing
continued from page 3

1/5 lower if imposed today,” he said. In addition, recidivism rates of those released early under retroactive application of the 2014 drug guidelines amendments are expected to be low based on earlier experience with retroactive application.

Others testifying at the hearing also supported retroactivity, including representatives of the Department of Justice, federal public Defenders, the American Civil Liberties Union, Families Against Mandatory Minimums, and the Judicial Conference Criminal Law Committee. Representatives of law enforcement organizations expressed opposition or concerns about making the amendment retroactive.

opinion. The court had ruled in 2002 in Adkins v. Virginia, 536 U.S. 304 (2002), that executing intellectually disabled individuals violated the Constitution’s ban on cruel and unusual punishment but left to the states the task of determining who was intellectually disabled.

“The ABA has long taken a special interest in the equitable treatment of individuals with mental disabilities, as well as a concern that the death penalty be enforced with appropriate procedural protections and in a fair and unbiased fashion,” Silkenat said, calling the Supreme Court’s decision “a victory for fairness and equal justice.”

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