ABA President Paulette Brown emphasized in statements to congressional appropriators last month that the Legal Services Corporation (LSC) is in serious need of increased support and should be funded at $475 million for fiscal year 2017.

The $475 million amount, which was included in President Obama’s proposed budget, would increase the program’s funding by $90 million and would continue to support 134 independent nonprofit legal aid programs with nearly 800 offices across all congressional districts in the country.

Brown thanked the House and Senate Subcommittees on Commerce, Justice, Science and Related Agencies for beginning to restore LSC’s budget over the last three years with small increases. Nevertheless, she pointed out that the corporation’s current budget, calculated in 2016 dollars, is still 15.7 percent lower that it was in 2010 while the number of low-income people qualifying for legal assistance has increased by 25 percent over the past decade.

She also explained that robust federal funding for the LSC is desperately needed because other funding sources have diminished since the country’s economic downturn. For example, revenue from Interest on Lawyers’ Trust Accounts (IOLTA) has decreased approximately 80 percent in the past nine years, resulting in a 68 percent decline in grants provided by IOLTAs to legal aid programs.

Those qualified for legal services under the program are at or below 125 percent of federal poverty levels, which are $11,880 for an individual and $24,300 for a family of four. The most recent Census Bureau data show that more than 95.2 million Americans (one in three) qualified for civil legal aid at some point in 2014. Studies show, however, that 50 percent to 80 percent of all eligible people seeking legal aid services are turned away due to lack of resources.

Brown described the numerous areas in which LSC-funded programs help clients, including assistance with health concerns, consumer and financial matters, family law, access to education, individual rights, income maintenance, juvenile law, tribal law, employment, disability issues, and housing. Those seeking help include veterans returning from war, older Americans, natural-disaster victims, clients in rural areas, and women, who constitute nearly 70 percent of those helped by legal aid offices.

LSC’s fiscal year 2017 budget request emphasizes the Pro Bono Innovation Fund (PBIF), launched in fiscal year 2014 to support collaborative projects to develop replicable innovations in pro bono legal services. Also, with its Technology Initiative Grants (TIG) program, LSC has increased the effi-
<table>
<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal Services Corporation (LSC)</strong></td>
<td>Appropriations Cmte. approved fiscal year 2017 funding of $395 million for LSC on 4/21/16.</td>
<td></td>
<td>Supports an independent, well-funded LSC. See front page.</td>
<td></td>
</tr>
</tbody>
</table>
The Department of Labor (DOL) issued a final rule March 24 that is opposed by the ABA because it would require many management-side labor lawyers to divulge confidential client information to the federal government.

The final rule – which goes into effect April 25 and will apply to arrangements, agreements and payments made on or after July 1 – substantially narrows the department’s longstanding “advice” exemption to the “persuader activities” reporting rule under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959.

The current persuader rule requires employers and their labor consultants, including lawyers, to file extensive periodic disclosures with the department when they are involved in persuading employees on union formation or membership issues. Lawyers historically have been exempt from the rule’s reporting requirements when they merely provide advice or other legal services directly to their employer clients on these unionization issues but have no direct contact with the employees.

The new rule will require lawyers who provide legal advice to employer clients and engage in any persuader activities to file periodic disclosure reports even if they had no direct contact with the employees. These reports will require disclosure of a substantial amount of confidential information, including the existence of the client-lawyer relationship and the identity of the client, the general nature of the legal representation and a description of the legal tasks performed. Also required will be disclosure of a great deal of confidential financial information about clients that is unrelated to persuader activities that the act is intended to monitor.

In particular, lawyers deemed to be engaging in any direct or indirect persuader activities will be required to report all receipts from and disbursements on behalf of every employer client for whom the lawyers performed any “labor relations advice or services,” not just those employer clients for whom persuader activities were performed.

Announcing the new rule, Labor Secretary Thomas E. Perez maintained that “full disclosure of persuader agreements gives workers the information they need to make informed decisions about how they pursue their rights to organize and bargain collectively.”

When DOL first proposed the change to the advice exemption in 2011, then ABA President Wm. T. (Bill) Robinson III urged the department not to impose “an unjustified and intrusive burden on lawyers, law firms and their clients.” He emphasized in a comment letter to the department that the ABA is not taking sides on a union-versus-management dispute but is defending the confidential client-lawyer relationship. Eighteen state, local and specialty bar associations joined the ABA in opposition to the proposal.

More than 70 House members also expressed their opposition to the new rule in a March 23 letter to Reps. Tom Cole (R-Okla.) and Rosa DeLauro (D-Ct.), the chair and ranking member of the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies. The members urged the committee to attach riders to upcoming fiscal year 2017 appropriations legislation that would prohibit the Labor Department from spending money to implement the new rule. “In addition to requiring a tremendous new amount of reporting that is of dubious value, the rule threatens attorney-client privilege and confidences and will likely make it more difficult for employers to find and retain expert advice and assistance,” they wrote.

Others opposed to the final rule include the U.S. Chamber of Commerce, the Associated Builders and Contractors, and various large management-side law firms. Lawsuits seeking to block implementation of the rule have been filed in U.S. district courts in Arkansas, Minnesota, and Texas.
President Obama signed legislation April 19 to reauthorize and update the Older Americans Act of 1965 after Republicans and Democrats worked together to craft a bipartisan bill that will continue to provide a range of vital home- and community-based services to the nation’s rapidly increasing and changing senior population.

The ABA, a strong advocate for the nation’s seniors for decades, applauded the three-year OAA reauthorization, specifically the legislation’s increased focus on combating elder abuse, provisions to ensure independence and avoidance of conflicts for long-term care ombudsmen, and the inclusion of legal services in the definition of the term “adult protective services.”

“The reauthorization of the Older Americans Act continues vital programs and services designed to help Americans live with the dignity and respect they deserve as they mature in age,” ABA President Paulette Brown said following enactment of the legislation. “Getting this reauthorization through Congress wasn’t easy, but it demonstrates the commitment this country has to ensure that our older population can live longer, healthier lives without fear of exploitation and abuse.”

The new law, PL 114-144 (S. 192), includes provisions to combat physical and financial abuse of older Americans. According to the National Center on Elder Abuse, more than 6 million older Americans are victims of elder abuse each year, and victims of elder financial abuse lose approximately $2.9 billion a year.

The provisions provide for improved coordination of activities between state and local aging offices; promotion of proven strategies for responding to elder abuse, neglect and exploitation in long-term care facilities; a requirement that states submit data to the federal government concerning elder abuse; and availability of training through the Administration on Aging for state area agencies on aging and for service providers to educate them about elder abuse prevention and screening.

In addition, the Long-Term Care Ombudsman Program, which investigates and resolves resident complaints in nursing home facilities and other adult care homes, will be strengthened in several ways, and ombudsmen will be required to participate in training provided by the National Ombudsman Resource Center.

Also key to improving the act are provisions to strengthen the OAA’s core programs by adjusting the formula for grants providing supportive services such as Meals on Wheels and senior center group meals. Provisions encourage the use of locally grown food for the act’s nutrition programs.

Because seniors are remaining independent and working longer, the reauthorization also enhances employment and community service opportunities to seniors by better aligning the OAA’s Senior Community Service Employment Program with services available through the Workforce Innovation and Opportunity Act and other workforce development systems.

ABA objects to ankle monitors in release of parents from immigration detention

The ABA recently objected to the extensive use of electronic ankle monitors as a condition for release from detention for Central American parents who arrived at the border to enter the United States with their children.

“The ABA supports the use of humane alternatives to detention,” ABA President Paulette Brown wrote March 18 to Homeland Security Secretary Jeh Johnson. She said the ABA believes, however, that “electronic monitoring is a form of restriction on liberty similar to detention, rather than a meaningful alternative to detention.” Ankle monitoring, she said, should only be used in limited circumstances where there has been an individualized determination establishing a genuine flight risk based on objective factors or a criminal history.

It is widely recognized that Central American parents and children are fleeing extraordinary levels of violence in their home countries and are seeking protection in the form of asylum and withholding of removal. There is strong evidence that this population presents valid claims to asylum, Brown said, but, instead of a humanitarian response, DHS has relied on an enforcement-based approach of family detention and overly restrictive custody determination and release procedures.

“The ABA believes that any restrictions or conditions placed on noncitizens to ensure their appearance in immigration court or for their removal should be the least restrictive, nonpunitive see “Ankle monitors,” page 5
The ABA expressed concerns last month about key provisions relating to damages, proportionate liability and contingent fees in H.R. 4771, a bill being considered by the House Judiciary Committee.

The legislation – the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2016 – would preempt state laws to cap noneconomic damages in medical liability cases at $250,000 and place limits on contingency fees that lawyers can charge. The bill also would preempt existing state laws that provide for joint and several liability in medical liability cases by creating a “fair share rule” under which each party would be liable only for its part of any damages.

The committee began marking up H.R. 4771 on March 22 but did not complete action on the bill. Prior to the markup, ABA Governmental Affairs Director Thomas M. Susman emphasized in a March 21 letter to the committee that the authority to determine medical liability has rested in the states for more than 200 years. “This system, which grants each state the autonomy to regulate the resolution of medical liability actions within its own borders, is a hallmark of our American justice system,” Susman wrote. He pointed out that the states also regulate the insurance industry and, because of the role they have played, the states are the “repositories of experience and expertise in these matters.”

Explaining the ABA’s opposition to provisions that would cap noneconomic damages at $250,000, he said that research has shown that caps diminish access to the courts for low-wage earners such as the elderly, children and women, and that if economic damages are minor and noneconomic damages are capped, attorneys are less likely to represent these potential plaintiffs.

He also explained that courts already possess and exercise their powers of remittitur to set aside excessive jury verdicts.

In the area of proportionate liability, the ABA opposes the bill’s provisions to preempt existing state laws regarding joint and several liability. The association believes, however, that state laws providing for joint and several liability should be modified by the states to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss in a case should be held liable for only their equitable share of the plaintiff’s noneconomic losses.

The ABA also opposes provisions to reduce contingent fees from a plaintiff’s damage award to an attorney, redirect damages to the plaintiff and further reduce contingent fees in cases involving minors and incompetent persons. Such changes, he said, could reduce total awards for patient victims by limiting availability of counsel.

During the March 22 markup, several committee members expressed serious concerns about the legislation. The committee’s ranking member, Rep. John Conyers Jr. (D-Mich.) called the bill “a solution in search of a non-existent problem” and inserted the ABA’s letter into the record as well as the opposition expressed by the National Conference of State Legislatures. He also noted that 30 organizations had sent letters to the committee opposing the legislation.

No more action has been scheduled on the bill, which was also referred to the House Energy and Commerce Committee.

Ankle monitors

continued from page 4

means necessary to further these goals,” Brown said, noting that those wearing monitoring devices are being perceived as criminals in the community and treated accordingly. Ankle monitors also may impede the ability of these families to access counsel and to fully prepare their cases for immigration court, she said.

The ABA said ankle monitors should be used only as a last resort and recommends that DHS expand the use of release on recognizance, reasonable bond and parole and should implement community-based alternative programs that incorporate social services and legal support mechanisms.

Brown said that while the ABA acknowledges that there are objective factors that justify the use of ankle monitors, DHS should implement consistent and clear criteria and standards for their use.

The ABA also opposes the DHS practice of prohibiting detained mothers from being accompanied by counsel at meetings during which alternatives to detention and terms of release are being discussed and determined. Also troubling is the practice of prohibiting counsel from accompanying individuals during their mandatory reporting appointments with DHS after their release.

“Individuals should have the right to have counsel present at all stages of their immigration proceedings and processes, particularly at critical junctures that will determine their custody and release status,” Brown said.
ABA president reiterates opposition to accrual accounting

ABA President Paulette Brown reiterated ABA opposition April 13 to any proposals in Congress that would require many law firms and other personal service businesses to change to the complex accrual method of accounting from the simple cash method they are currently using.

In separate letters to the Senate Finance Committee, the House Ways and Means Committee, and the House Ways and Means Subcommittee on Tax Policy, Brown emphasized that the mandatory accrual accounting proposals from the last Congress and similar proposals now under consideration would cause substantial financial hardship by requiring firms and businesses to pay tax on “phantom” income they have not yet received and may never receive. The House and Senate committees are in the process of developing new tax reform legislation, and the letter to the Subcommittee on Tax Policy was submitted for the record of an April 13 subcommittee hearing on fundamental tax reform proposals.

Brown explained that under current law businesses are permitted to use the simple, straightforward cash method of accounting (in which income is not recognized until cash or other payment is actually received) if they are individuals or pass-through entities or their average annual gross receipts for a three-year period are $5 million or less. In addition, all personal service businesses, including law firms, are exempt from the revenue cap and can use the cash method of accounting regardless of their annual revenues, unless they have inventory. The proposals would raise the gross receipts cap to $10 million while eliminating the existing exemption.

If law firms and other personal service businesses are required to use the more complex accrual method of accounting, she said, they would be forced to calculate and then pay taxes on multiple types of accrued income and would need to keep much more detailed work and billing records and hire additional accounting and support staff.

In addition to requiring law firms and personal service businesses to pay tax on phantom income, the proposals would adversely affect clients by forcing law firms to collect their fees immediately after the legal services are provided. Many clients could find it more difficult to afford legal counsel as law firms would no longer be able to represent as many accident victims, start-up companies, and other clients on an alternative or flexible fee basis. Many law firms also would have to reduce the amount of pro bono legal services they provide to their poorest clients.

Brown also pointed out that the proposals would discourage small business growth by making it more difficult for professional service providers to join with other providers to create or expand a firm, even if it made sense and would benefit their clients, as these actions could trigger the costly accrual accounting requirement.
INMATE CALLING: A new Federal Communications Commission (FCC) rule issued last fall to address the extremely high phone rates charged to prison inmates has been put on hold by a federal appeals court after phone service providers and several states challenged the FCC’s authority and said that the new rates are too low. The rule, announced in October 2015 and scheduled to go into effect this spring, set a cap of 11 cents per minute for all local and long distance calls from state and federal prisons while providing for tiered caps on rates for jails that range from 14 cents per minute for calls in jails with 1,000 or more inmates to 22 cents per minute for jails up to 349 inmates. The rule, if it goes into effect, would reduce the average rate for most calls to no more than $1.65 for 15-minute local and long distance calls from state and federal prisons. Prior to approval of the new rule, rates averaged about $3 for a 15-minute call but sometimes could reach as high as $14 per minute. While the court stayed implementation of the caps and a related rule limiting fees for certain single-call services, the court allowed implementation of caps and restrictions on ancillary fees. The court stay does not affect rates set in 2013 on interstate calling. “Ultimately, we believe the court will uphold the new rates set by the commission,” FCC Chairman Tom Wheeler and Commissioner Mignon Clyburn said in a statement issued following the decision. “We look forward to the day when we stop erecting barriers to communications and have a system where all rates and fees paid by friends and family to stay in touch with their loved ones in jail or prison will be just, fair and reasonable.” The ABA supports the new rule, saying in comments that the FCC’s actions call for jails and state and federal prison facilities to operate closely in line with the ABA Standards for the Treatment of Prisoners. The standards call for open and affordable lines of communications between a prisoner and the prisoner’s family and attorney to help with re-entry planning during incarceration.

Clemency: President Obama announced the granting of clemency petitions March 30 to 61 federal prisoners, bringing his total number of commutations to 248 during his time in office. Twenty-five of those granted clemency in March had the assistance of volunteer lawyers recruited and trained through Clemency Project 2014, an effort involving the ABA and other legal organizations that was established in 2014 when Deputy Attorney General James Cole asked the legal profession to work to expand pro bono assistance to federal prisoners who would likely have received a shorter sentence if they had been sentenced today. Those qualifying for assistance through the project are non-violent, low-level offenders who are required to have served at least 10 years of their sentences, have no significant criminal history, demonstrated good conduct in prison, and have no history of violence prior to or during the current term of imprisonment. Since its inception, the project has recruited and trained nearly 4,000 volunteer lawyers and has completed the screening of nearly 30,000 of the more than 35,000 federal inmates who have requested the project’s assistance. In a March 30 statement, ABA President Paulette Brown said, “The ABA appreciates today’s commutations by President Obama, and we hope to see many more commutations as the petitions submitted by Clemency Project 2014 and its army of volunteer lawyers make their way through the application process to the president’s desk.”

California Ethics Rules: The ABA expressed support March 15 for a proposed ethics rule in California that would require the prosecutor in a criminal case to make timely disclosure of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. In connection to sentencing, the prosecutors would be required to disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutors, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. In a March 15 letter to the State Bar of California’s Office of Professional Competence, Planning and Development, ABA Governmental Affairs Director Thomas M. Susman wrote that the proposed rule (to amend Rule 5-110 and 5-220 of the state’s Rules of Professional Conduct) is based on Rule 3.8(d) of the ABA Model Rules of Professional Conduct and reinforced by ABA Formal Opinion 09-454 (2009). He pointed out that virtually all states, with the exception of California, have adopted ethics rules based on the ABA model, but he acknowledged that the ethics rule is in some respects more demanding than constitutional and statutory law because it does not restrict disclosure requirements to only favorable evidence that is “material.” Susman emphasized that an ethics rule based on Rule 3.8(d) such as the one under consideration in California would not conflict with federal or state law, but would supplement existing law. He said the ABA strongly encourages the adoption of the proposed rule.
ABA urges support for democracy-building programs

The ABA urged the House and Senate Subcommittees on State, Foreign Operations and Related Programs last month to continue its support for funding Democracy, Rights and Governance (DRG) programming to advance democracy around the world.

DRG programming is “critical to global efforts to combat terrorism, extremism and insecurity and to promote equitable economic development and well-being,” ABA Governmental Affairs Director Thomas M. Susman wrote in a March 18 letter to the subcommittees. He pointed out that the ABA works through its Rule of Law Initiative and Center for Human Rights to implement U.S. government-supported programs to advance democracy, the rule of law and human rights around the world by contributing the expertise of the association’s more than 400,000 members and $3 million annually in pro bono legal assistance.

He noted the ABA’s participation in the DRG Initiative of InterAction, a large alliance of U.S.-based international nongovernmental organizations focusing on humanitarian relief and sustainable development programs. He said that the ABA joined that group in supporting fiscal year 2017 funding levels of $2.86 billion for Democracy Programs under Title VII and $170 million for the National Endowment for Democracy under Title I.

Susman’s additional recommendations included set-aside language to ensure that DRG funds are spent on the programs as intended and not diverted to other purposes; program prioritization language to ensure funds made available for strengthening government institutions are prioritized for institutions that demonstrate a commitment to democracy and the rule of law; and language recognizing the benefits of grants and cooperative agreements in implementing certain DRG-funded programs.

The ABA letters specifically requested consideration of funding in the following areas: efforts to counter violent extremism; assistance to criminal defense advocates and bar associations; legal assistance to migrants and refugees; and efforts to improve the rule of law in the People’s Republic of China.

“The ABA appreciates the committee’s past support of funding for critical democracy, rights and governance programs,” Susman said as he acknowledged budgetary challenges for allocating funds. “However,” he emphasized, “if the United States fails to invest adequate resources in this area, countries that do not share our commitment to democratic values and free markets will continue to languish and serve as destabilizing forces, to the detriment of U.S. national interests.”

LSC funding

continued from front page

ciency of statewide websites and enhanced case management systems. LSC also this past year followed through on its strategic plan of strong management and accountability for federal funds.

In conclusion, Brown cited the economic benefits that civil legal aid programs provide. For example, preventing foreclosure and domestic violence provides measurable benefits to families and savings for the community. A 2015 Tennessee Bar Association study – one of over a half dozen – shows more than an 11-fold return on investment in legal services.

Looking ahead, appropriations bills are breaking all modern records for speed. The Senate Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies included $395 million for LSC in a fiscal year 2017 draft approved April 19. Two days later, the full committee reported a bill that included the subcommittee amount. House appropriators have not yet considered legislation that would fund LSC, but the appropriations subcommittees are proceeding with fiscal year 2017 funding bills even though the House has not agreed to a budget resolution determining whether the House will comply with the budget deal it agreed to last October or come up with a budget that would further reduce spending.