ABA House of Delegates approves wide range of new association policies

The 589-member ABA House of Delegates, gathering Aug. 8-9 during the association’s Annual Meeting in San Francisco, approved an array of new policies on topics including transparency in the federal regulatory process diversity in the legal profession, legal ethics, and non-discrimination in the selection of juries.

In addition to the House of Delegates action, the meeting featured numerous panel discussions and CLE showcase programs, the awarding of the ABA Medal to ABA Past President Dennis W. Archer, and a plenary session featuring FBI Director James Comey, who talked about the balance between national security and law enforcement (See article, page 5).

Also highlighting the meeting was the passing of the gavel from 2015-16 ABA President Paulette Brown to incoming ABA President Linda A. Klein of Atlanta (see page 5). Miami attorney Hilarie Bass will serve as president-elect for the coming year before assuming the presidency in August 2017. In addition, Deborah Enix-Ross, of New York, began her two-year term as chair of the House of Delegates.

Here is a summary of major new policies adopted by the delegates.

**Administrative Law**

Regulations. Supports legislation to require federal agencies to provide an online source where material that has been incorporated by reference into proposed or final regulations can be accessed without charge.

**Discrimination**

Jury Service. Amends Principles 2(B) and 6(C) of the ABA Principles for Juries and Jury Trials to include marital status, gender identity and gender expression to the list of factors that may not be used to deny jury service, and to recommend that the court educate jurors on implicit bias and how to avoid such bias in the decision making process.

**Courts/Judiciary**

Diversity. Urges the president of the United States and appropriate parties to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for U.S. circuit, district, bankruptcy and magistrate judges, and other qualified employees in the judicial branch, and to employ strategies to expand the diversity of the pool of qualified applicants, nominees and appointees, as well as the use of diverse merit selection panels.

**Access to Civil Justice.** Urges jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty, after reasonable efforts are made to fully compensate all members of the class.
## LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
</tr>
</thead>
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| **Immigration.** The president announced 11/20/14 that he would take executive action to provide temporary deportation protection for up to five million undocumented immigrants. A federal district court in Texas issued a temporary injunction blocking implementation. An appeals court panel denied the administration’s request for a stay. A 4-4 decision by the Supreme Court on 6/23/16 leaves the appeals court ruling in place. | Judiciary Committee held hearings on immigration issues on 4/14/15, 4/29/15, and 10/7/15. | Judiciary Committee held hearings on immigration issues on 3/3/15, 3/17/15, 3/19/15 and 7/21/15. Judiciary Committee held a hearing on unaccompanied immigrant children on 2/24/16. | Supports comprehensive immigration reform that promotes legal immigration based on family reunification and employment skills and a path to legal status for much of the undocumented population currently residing in the United States. Opposes detention except where individual presents a threat to national security or public safety. |

Criminal Justice

**Mental Health.** Adopts the black letter of the ABA Standards for Criminal Justice: Mental Health Standards to reflect dramatic developments in the areas of legal ethics, criminal law and mental health since the previous standards were adopted 30 years ago.

**Miranda Rights.** Urges federal, state, local and territorial law enforcement authorities to provide a culturally substantive and accurate translation of the Miranda warning in Spanish.

**Probation.** Urges state, local, territorial and tribal legislatures to end the current system of privatized probation by abolishing "offender funded" systems of probation supervised by private, for-profit companies.

**School-to-Prison Pipeline.** Urges all federal, state, territorial and local legislative bodies and government agencies to eliminate the school-to-prison pipeline, in which students of color, students with disabilities, LGBTQ (lesbian, gay, bisexual, transgender and queer) students, homeless students, and other marginalized youth constituencies are disproportionately impacted by systemic inequities in education and overdiscipline resulting in disparate school drop-out or "push-out" rates and interactions with the juvenile justice or prison systems.

**Election Law**

**Counting Votes.** Urges state and territorial election administrators and officials to ensure that statewide and territorial-wide ballot counting guidance is in place as soon as practicable. This includes clear criteria for determining what constitutes a valid vote when a hand count is required of paper and optical scan ballots.

**Intellectual Property Law**

**Likelihood of Confusion.** Supports the treatment in federal trademark law of the likelihood-of-confusion standard for infringement as a question of fact in line with the Supreme Court 2015 decision in *Hana Fin Inc. v. Hana Bank*, which ruled that the jury, rather than a court, determines how an ordinary person or community would make an assessment to resolve fact-intensive questions.

**Trademark Registration.** Supports an interpretation of the federal Lanham Act concerning three propositions of trademark law: a determination that a mark is ineligible for registration on the U.S. Patent and Trademark Office’s Principal Register does not necessarily render that mark invalid and unprotected; such a determination does not restrict the mark owner’s right to use the mark in commerce; and the owner of a mark registered on the Principal Register enjoys certain substantive and procedural advantages in litigation to protect its mark that are not available to the owners of unregistered marks.

**Patent Venue.** Supports statutory construction of the special patent venue statute, 28 U.S.C. §1400(b), that does not look to the separate general venue statute, 28 U.S.C. §1391(c), to ascertain the meaning of the term "resides," and puts an end to improper forum shopping in patent cases by limiting venue for a corporate defendant to either where it resides or where it has committed acts of infringement and has a regular and established place of business.

**International Law**

**Turkey.** Opposes any state’s detention of individuals without charge or access to counsel and calls on the government of the Republic of Turkey to immediately release each detained judge, lawyer, prosecutor, journalist and any other individual unless there is evidence establishing reasonable grounds to believe the individual.

*A panel of immigration experts explored the policies of the United States and other countries as they face challenges posed by mass refugee migrations. Those appearing on the panel were (from left): T. Alexander Aleinikoff, Columbia Law School; Elisa C. Massimino, Human Rights First; Wolfgang Ewer, immediate past president, German Bar Association; Katharina Obser, Human Rights First; Holly S. Cooper, University of California-Davis; and moderator Nina Perales, MALDEF.*
has committed a crime. Calls upon the government of the Republic of Turkey to provide a fair hearing before an impartial tribunal applying established legal principles before suspending or dismissing any lawyer or judge from the bar or a tribunal, and to commit to protect human rights, respect freedom of speech and of the press, and ensure that any measures taken that derogate from such obligations be only those that are strictly necessary given exigencies of the situation.

Legal Education

Approval of Law Schools. Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in amending the ABA Standards and Rules of Procedure for Approval of Law Schools, including elimination of the interpretation that prohibited the granting of credit to a student for participation in a field placement for which the student received compensation. The amended standards include: Standard 304 (Simulation Courses, Law Clinics and Field Placements); Standard 305 (Other Academic Study); Standard 307(a) (Studies, Activities and Field Placements Outside the United States); and Interpretation 311-1 (Academic Program and Academic Calendar).

Legal Profession

Lawyer Referral Services (LRS). Reaffirms support of lawyer referral services sponsored by state, local, territorial and tribal bar associations, and encourages those services to adhere to the standards of the ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services.

Confidential Communications. Urges federal, state, territorial and tribal courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for confidential communications between LRS clients and lawyer referral services that would be similar to the privilege that currently exists for confidential communications between attorneys and their clients.

Discrimination. Amends Rule 8.4 and comment of the ABA Model Rules of Professional Conduct to provide that it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

Diversity. Urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys, and urges clients to assist in the facilitation of opportunities for diverse attorneys and direct a greater percentage of legal services they purchase, both currently and in the future, to diverse attorneys.

Legal Services

Online Resources. Urges courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities that make forms for legal services available to individuals through the Internet to provide clear and conspicuous information on how people can access a lawyer or a lawyer referral service to provide assistance with their legal matters to prevent errors or omissions.

See more Annual Meeting coverage on page 5
Veterans, voting and education top new ABA president’s priorities

New ABA President Linda A. Klein, senior managing partner at Baker Donelson in Atlanta, will focus on legal services for veterans, the importance of voting, and crucial education issues during her one-year term as the association’s president.

The ABA Veterans Legal Services Initiative, led by a 20-member commission, is establishing a website providing legal resources to meet the specific needs of veterans and their families. In addition, the initiative will promote medical-legal partnerships for resolving problems and will rejuvenate a project providing pro bono legal help to help reduce the backlog of veterans’ benefits claims.

“As we lay the groundwork for this effort, I hope we can create a legacy that will help millions of veterans who so bravely served our nation,” Klein said.

Her voting initiative includes a website with state-by-state information about voter laws and encourages lawyers to be advocates for voting and to work at the polls on election day.

Klein also has set up a Childhood Education Commission to develop recommendations for providing high-quality education for children from low-income families, children of color, children with disabilities, children whose primary language is not English, children in foster care, and homeless children.

Another initiative that emerged from a listening tour she took around the country during the past year is ABA Blueprint, a one-stop shop website with resources to help lawyers, especially solo practitioners and those in small law firms, better meet the needs of their clients.

“Working with your bars, the ABA will enhance our resources that help our members—especially solo practitioners and those in small firms, that’s 76 percent of all U.S. lawyers—with marketing, managing their practices and getting out ahead of what’s new in technology,” Klein said.

Klein, who was chair of the ABA House of Delegates (HOD) from 2010 to 2012, also is a former chair of the Section of Tort Trial and Insurance Practice, the HOD Committee on Rules and Calendar, the Coalition for Justice, and ABA Day in Washington.

The first woman president of the State Bar of Georgia, Klein has received numerous awards and has been listed in the Best Lawyers in America, Who’s Who in America, and Chambers USA.

She received her law degree from Washington and Lee University in Virginia and her B.A. from Union College in New York.

Comey announces upcoming conversation on national security and privacy issues

FBI Director James Comey, speaking Aug. 12 at the ABA Annual Meeting, focused his remarks on the balance between national security and privacy and announced plans for a national conversation on the issues next year.

Comey expressed concern over the increasing inability of law enforcement to execute lawful search warrants and court orders to intercept electronic communications because the electronic devices cannot be unlocked, even by the manufacturers, or the communications are encrypted and cannot be read.

“This is a shadow that’s falling across our work,” he said, explaining that this shadow — this inability to execute on court orders — is expected to worsen as encryption becomes a bigger facet of daily life.

Comey explained that the bargain at the heart of ordered liberty
FBI director sees role for lawyers in upcoming conversation

continued from page 5

in the United States is that “your stuff is private – unless, with appropriate authority and appropriate predication, the government needs to look at it.” However, the proliferation of default encryption devices is changing this bargain by making “large swaths of our life off-limits to judicial authority, where a judge’s orders are ineffective.”

He stated that he believes that neither the FBI nor technology companies should tell the American people how to live; instead, the FBI’s job is to sound the alarm and explain how the bureau’s work is being impacted in the hope of fostering a national conversation about these competing values and what can be done.

Thanking lawyers for participating in the conversation, he said that lawyers especially “understand the importance of a robust adversarial conversation to reconcile difficult values.”

Comey noted the anxiety in the United States connected to the threat of terrorism and urged the American people not to give in to the terrorists. “Live in the state of awareness but not disabling fear,” he said.

Addressing cybercrime, Comey said major issues are determining who is responsible and imposing costs on the perpetrators. He said that this “requires tremendous cooperation from our partners around the world.”

Comey also said that transparency drove his decision to make a public statement about the FBI’s recommendation not to bring criminal charges against Hillary Clinton for her use of a personal email system during her tenure as secretary of state. Noting the “extraordinary interest in the matter from the American people,” Comey said he wanted to explain that the FBI had properly conducted the investigation.

Comey’s speech was followed by a panel discussion moderated by Harvey Rishikof of the ABA Standing Committee on Law and National Security. The panel featured Marc Rotenberg, Electronic Privacy Information Center, and Gilman Louie, Alsop Louie Partners.
WASHINGTON NEWS BRIEFS

MENTAL HEALTH: Mental health legislation passed by the House last month does not include provisions opposed by the ABA that would have prevented programs under the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) from engaging in certain advocacy and litigation on behalf of individuals with serious mental illness. The provisions, which were opposed by the ABA when they were part of the original version of the bill, H.R. 2646, would have mandated that protection and advocacy activities under PAIMI be exclusively focused on abuse and neglect. The ABA maintains that this would block Protection and Advocacy Agencies (P&As) from serving some of the most vulnerable citizens. Currently, PAIMI requires that P&As in every state and territory protect and advocate for the rights of individual with mental illness and investigate incident of abuse and neglect of these individuals in all public and private facilities and in community settings. The agencies also have the authority to provide legal representation and other advocacy services to persons with severe mental disabilities. Under the legislation, essential information and referral services would be restricted along with other critical legal services to thousands of individuals regarding issues such as inappropriate or excessive medication, lack of appropriate mental health treatment, financial exploitation, the need for transportation to or from residential care facilities, admission to residential care facilities, discharge planning, housing and employment discrimination, and denial of visitors. During consideration of the legislation last fall by the House Energy and Commerce Subcommittee on Health, ABA Governmental Affairs Director Thomas M. Susman wrote to the subcommittee that information and referral services were provided in 2015 to 32,798 individuals and that more than 80,000 individuals, family members, mental health planners and social services professionals benefited from training provided through PAIMI grants.

PRISON MICROWAVES: The ABA urged the Bureau of Prisons (BOP) Aug. 18 to retain microwaves in the inmate unit areas of federal prisons. In a letter to BOP Acting Director Thomas R. Kane, ABA Governmental Affairs Director Thomas M. Susman wrote that reports indicate that BOP is no longer maintaining microwaves when they are removed for repair or when replacement is needed. Because of this, inmates are left without a way to heat water for tea, instant coffee or soup and have no ability to heat up food bought at the commissary. In addition, the ABA understands that the cost to BOP for the microwaves is minimal since prisoner trust funds traditionally have been used to pay for and maintain the microwaves. “This issue affects not only Jewish inmates who need these microwaves to heat up kosher food, but also inmates of all faiths who use the microwaves for special dietary needs,” Susman wrote. Support for maintenance of microwaves is included in the ABA Criminal Justice Standards on the Treatment of Prisoners, which includes standards for providing prisoners with adequate nutrition with appropriate accommodations and with food consistent with their religious beliefs.
ABA calls for more transparency in the regulatory process

The ABA expressed support this month for key reforms in Title II of H.R. 712, House-passed legislation designed to increase transparency in the federal regulatory process.

In an Aug. 1 letter to Senate leaders, ABA Governmental Affairs Director Thomas M. Susman wrote that the Title II provisions in the legislation, the “All Economic Regulations Are Transparent Act” (ALERT Act), are consistent with ABA policy adopted by the association’s House of Delegates in February and should be enacted.

The bill would amend and strengthen the Unified Regulatory Agenda, which enables regulated parties, consumers, workers and other interested persons to understand and prepare for new rules that are planned or under development by approximately 60 federal departments, agencies and commissions.

In the past, the ABA Section of Administrative Law and Regulatory Practice has expressed concerns when the federal government was not meeting its obligation to publish the semi-annual United Regulatory Agenda in a timely manner. The new ABA policy calls upon Congress to ensure that the United Regulatory Agenda is updated continuously and otherwise enhanced.

The Title II provisions in the bill would require the head of each agency to submit certain information to the administrator of the Office of Information and Regulatory Affairs (OIRA) on a monthly basis, including, among other things, a summary of any rule that the agency expects to propose or finalize during that year, the objectives of and legal basis for the issuance of the rule, the stage of the rule making, and, if applicable, an approximate schedule for completing action on the rule. OIRA then would be required to make the information publicly available on the Internet within 30 days. Each year, OIRA also would be required to publish online all the information it has received from agencies regarding their rules, along with other information regarding the total number of rules proposed and finalized, or repealed or narrowed, by each agency.

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ABA urges clear direction for implementing ESSA

The ABA, pleased that the recently enacted Every Student Succeeds Act (ESSA) includes foster care support, offered recommendations this month on how the Department of Education regulations can ensure that state plans provide for the act’s effective implementation of transportation, data and reporting, and supportive services.

ESSA, signed by the president in December 2015, reauthorized the Elementary and Secondary Education Act, which provides federal grants to state educational agencies to improve the quality of elementary and secondary education.

ABA comments submitted Aug. 1 to the department emphasized how important it is for school stability that children in foster care receive transportation services. The association recommended that the ESSA regulations clarify that school stability is a joint responsibility of local educational and child welfare agencies, and that the agencies must collaborate continuously.

Language proposed by the ABA would clarify the obligation to provide transportation even if there is disagreement regarding funding of the transportation. The language also provides for resolution of disputes through collaboratively developed state plans and ensures that during any period of dispute resolution there is a clearly identified local agency responsible for providing transportation pending resolution of the dispute.

In the area of data and reporting, the ABA recommended that the definition of “foster care” for ESSA be aligned with the federal child welfare definition and the stability requirements of the Fostering Connections to Success and Increasing Adoptions Act of 2008. The comments noted that some states define “child in foster care” more broadly than the federal definition, and those states should be permitted to apply the broader definition for the purposes of data reporting.

For the purposes of reporting student achievement, the ABA supports the designation of students in foster care as a subgroup because of the unique educational needs of those students and the educational barriers they face. The comments point out that statistics for reporting high school graduation rates should include both students in foster care at the time of graduation and those who have ever experienced foster care while in high school for a more accurate understanding of the educational experience of students in foster care.

In addition, the comments stated that children and youth in foster care should be included in the subgroups of students listed under two proposed regulations regarding support for excellent educators and support for all students.
SSA not planning to move forward with proposed adjudication augmentation program

The Social Security Administration (SSA) Office of Disability Adjudication and Review has decided, for budgetary reasons, not to move forward at this time on an ABA-opposed proposal to hold hearings without administrative law judges (ALJs) in certain categories of cases.

The proposal, which was the subject of a May 12 Senate hearing, would have shifted certain cases from ALJ hearings to proceedings presided over by administrative appeals judges (AAJs) and attorney examiners within the agency’s Appeals Council. While the original proposal will not be implemented at this time, further discussions are expected concerning the future of various aspects of the proposal.

The Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management convened the May hearing amid concerns about due process as the SSA attempts to address a backlog of pending cases. During the hearing, subcommittee Chairman James Lankford (R-Okla.) emphasized that the Administrative Procedure Act (APA) validates due process principles through the guarantee of administrative hearings before independent decision makers who are most often ALJs. “The SSA proposal raises important questions about whether cases heard by non-APA attorneys constitutes a violation of the APA,” he said.

In a June 1 letter for the record of the hearing, ABA Governmental Affairs Director Thomas M. Susman explained that longstanding ABA policy calls for due process, on-the-record hearings presided over by ALJs pursuant to the APA and applying standards consistent with the law and published regulations. The association also supports an informal and non-adversarial hearing before an ALJ that allows the ALJ to function as an independent fact-finder who has a duty to develop the record.

“The ABA has worked actively for more than two decades to protect the adjudicative independence of the administrative judiciary and promote increased efficiency and fairness in the system,” Susman wrote. “A fair and impartial administrative judiciary is indispensable to our system of justice.”

All Politics Is Local

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