Opposes pending legislation as “counterproductive”

ABA president conveys association efforts to combat money laundering

ABA President Paulette Brown expressed the association’s concerns last month over proposed legislation that would subject many lawyers to the anti-money laundering (AML) and suspicious activity reporting (SAR) requirements of the Bank Secrecy Act and thus undermine the attorney-client privilege, the confidential lawyer-client relationship, and state court regulation of lawyers.

Brown also outlined the many positive steps the ABA and the legal profession are taking to fight money laundering in ways that avoid these negative consequences.

“The ABA has for years worked diligently with the legal community, federal and international law enforcement authorities, and states to advance reforms to combat money laundering and terrorist financing,” Brown wrote in a letter for the record of a May 24 hearing convened by the House Financial Services Committee’s Task Force to Investigate Terrorism Financing. She emphasized that the ABA supports reasonable and necessary domestic and international efforts to combat these illicit activities and commended the sponsors of pending legislation, H.R. 4450 and S. 2489, for their efforts.

She said, however, that the ABA opposes the legislation, known as the Incorporation Transparency and Law Enforcement Assistance Act, as “unjustified” and “counterproductive.”

Brown explained that under the legislation, law firms that help clients form corporations of limited liability companies (LLCs) would be considered “formation agents” and hence “financial institutions” under the Bank Secrecy Act. As a result, these law firms would be subject to the strict AML and SAR requirements of the act except when they use “paid formation agents.” However, this limited exemption is flawed, she said, because it requires lawyers to outsource important practice-of-law activities to non-lawyers who are often not legally authorized to perform these legal services.

Other provisions would impose burdensome, costly and unworkable new regulatory burdens on legitimate businesses and states by requiring all states to obtain beneficial ownership information about corporations and LLCs from those creating these entities, keep the information current, and make it available to law enforcement authorities. Under the provisions, many lawyers helping these clients would be deemed to be “formation agents” and subject to the reporting requirements, despite the partial lawyer exemption contained in the legislation.

Collecting beneficial ownership information would require state regulators to adopt significant and expensive hardware and software changes, and would

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<td><strong>Criminal Justice.</strong></td>
<td>S. 2123</td>
<td>Held a hearing on civil asset forfeiture on 2/11/15.</td>
<td>Held a hearing on civil asset forfeiture on 4/15/15.</td>
<td>Supports federal sentencing reform to address explosive growth in prison population and costs. Supports JJDPA and Second Chance Act reauthorization. Supports funding for federal and state indigent defense programs. Supports certain civil asset forfeiture reforms. See pages 3 and 5.</td>
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<td><strong>Immigration.</strong></td>
<td>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. The government has appealed the decision to the Supreme Court.</td>
<td>Judiciary Committee held hearings on immigration issues on 4/14/15, 4/29/15, and 10/7/15.</td>
<td>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.</td>
<td>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.</td>
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ABA urges Congress to strengthen child welfare system programs

The ABA is urging Congress to strengthen federal programs that provide services and support to families in the child welfare system and expressed support this month for H.R. 5456, bipartisan legislation passed by the House June 21.

In a June 20 letter to the leadership of the House Ways and Means Committee and its Subcommittee on Human Resources, ABA Governmental Affairs Director Thomas M. Susman said that the ABA supports reform of the federal child welfare financing structure to end fiscal incentives to place children in foster care. He also said that the ABA supports the legislation’s focus on ensuring that children entering foster care are placed in the least restrictive, most appropriate family-life setting.

Susman wrote that H.R. 5456, the Family First Prevention Services Act, takes “crucial steps” toward achieving these goals by allowing use of federal child welfare funds under Title IV-E of the Social Security Act to be used for preventive services. These funds will enable more children to remain in their homes or with kin caregivers while receiving needed support and services. Currently, funds under Title IV-E are available only after a child enters foster care.

The legislation also includes reauthorization of the Stephanie Tubbs Jones Child Welfare Program and the Promoting Safe and Stable Families Act (PSSF) under Title IV-B of the Social Security Act, which support programs that help stabilize families by providing immediate preventive services while children remain at home and by funding reunification services so that children can be safely returned home in a timely manner.

In addition, the bill would eliminate a 15-month time limit on providing reunification services under PSSF so that federally supported reunification efforts can continue in appropriate circumstances.

Other provisions in the bill supported by the ABA would:

- extend funding for Court Improvement Program (CIP) grants, which currently provide $30 million in federal funds to help improve state courts’ performance in child abuse and neglect cases;
- • identify model licensing standards for relative foster family homes;
- • provide a 50 percent federal match for evidence-based Kinship Navigator programs that provide critical services and information to support kinship care providers; and
- • expand access to the John H. Chafee Foster Care Independence Program to ensure that youth in foster care have access to quality education and additional resources for transitioning to adulthood.

The association also maintains that the CIP statute should be amended to require a focus on legal representation with additional funding provided to achieve that goal. States could use the money to set up or enhance programs to administer legal services in child welfare cases, including setting and enforcing caseload, compensation, and attorney evaluation standards.

Similar legislation, S. 3065, was introduced in the Senate June 15 and is pending in the Senate Finance Committee.

Section of Civil Rights and Social Justice celebrates 50th anniversary

The Section of Civil Rights and Social Justice (CRSJ) (formerly the Section of Individual Rights and Responsibilities) celebrated its 50th anniversary in April with a special event at American University’s Washington College of Law.

The celebration, attended by ABA leaders and many of the section’s past chairs and staff members, featured keynote remarks by ABA President Paulette Brown and Slate senior editor Dahlia Lithwick and the presentation of the inaugural Civil Rights Hero Award to six civil rights leaders, including U.S Labor Secretary Thomas Perez and children’s right advocate Marian Wright Edelman.

Among those attending were (from left) ABA Executive Director Jack Rives and CRSJ Chair Lauren Stiller Rikleen, Director Tanya N. Terrell, and Chair-Elect Kirke Kickingbird.
Ad hoc committee completes hearings on CJA Program

ABA president highlights ABA’s Ten Principles

The Judicial Conference’s Ad Hoc Committee to Review the Criminal Justice Act (CJA) Program wrapped up more than 100 hours of public testimony in seven cities earlier this month and will spend the next several months drafting recommendations for a report that is expected to be issued in April 2017.

The CJA, enacted in 1964, created a broad system for appointing and compensating attorneys to represent indigent individuals in federal cases and was amended in 1970 to create federal defender offices as a counterpart to U.S. attorney offices. Today, there are 81 federal defender organizations in the United States with more than 3,100 lawyers, investigators, paralegals and support personnel who provide defense services for 91 of the 94 federal judicial districts.

The wide array of issues covered during the hearings included administration of the defender system by judges, the adequacy of attorney compensation, billing and voucher review, diversity efforts, and the quality of CJA representation.

ABA President Paulette Brown, in a May 11 statement to the ad hoc committee, said that while the CJA has established a system to better serve our country’s indigent defendants and to compensate attorneys who offer their services to indigent clients, there is still work to be done.

ABA expresses concerns over proposal to eliminate ALJs from some cases

The ABA expressed concerns this month about a new proposal by the Social Security Administration (SSA) Office of Disability Adjudication and Review to shift certain categories of cases from administrative law judge (ALJ) hearings to proceedings presided over by administrative appeals judges (AAJs) and attorney examiners within the agency’s Appeals Council.

ABA Governmental Affairs Director Thomas M. Susman, in a June 1 letter to the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, commended the subcommittee for holding a May 12 hearing on the concerns about due process as the SSA attempts to address a backlog of pending cases.

“The ABA has worked actively for over two decades to protect the adjudicative independence of the administrative judiciary and promote increased efficiency and fairness in the system,” Susman said. He explained that longstanding ABA policy calls for due process, on-the-record hearings presided over by ALJs pursuant to the Administrative Procedure Act (APA) and applying standards consistent with the law and published regulations. The ABA 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.

Susman said that allowing the SSA to ignore the use of due process hearings conducted by ALJs is contrary to both the SSA and the APA.

The ABA letter also urged the subcommittee to consider legislation to establish an Administrative Law Judge Conference of the United States as an independent agency to handle ALJ personnel matters, including testing, selection and appointment.

“A fair and impartial administrative judiciary is indispensable to our system of justice,” he emphasized. “Vast numbers of Americans are involved in administrative adjudicative proceedings every day, and the decisions rendered by ALJs in these proceedings often affect their lives in profound ways.”

ABA expresses concerns over proposal to eliminate ALJs from some cases

Brown highlighted the ABA Ten Principles of a Public Defense Delivery System, recalling that former U.S. Attorney General Eric H. Holder Jr. said the principles have “not only given shape to our aspirations, but quite literally set the standard, and developed a framework, for progress.” She focused on three of the principles in her statement.

• Principle 1 (independence). The current system often forces judges to engage in decisions, including funding and payment of defense counsel, that would be better left to an independent agency to ensure that defender systems are immune from political forces often present in the judiciary.

• Principle 8 (parity of resources). Prosecutors and defenders should have parity of resources, including similar salaries, workload and access to trial resources. An attorney’s ability to mount an adequate defense should not be dependent on the defendant’s ability to pay for experts or investigators.

• Principle 6 (training). Defense counsel should be provided with quality continuing education courses, and public defenders and panel attorneys should also have access to high-quality trial advocacy training similar to the training provided to federal prosecutors at the National Advocacy Center operated by the U.S. Department of Justice.

“Effective representation is the foundation on which a fair and equal administration of justice rests,” Brown said. “If a system does not meet the Ten Principles, it is bound to fail its clients,” she added. Brown pointed out that indigent defense systems across the country have long been understaffed, underfunded, and poorly trained, and she expressed hope that “an understanding of the failings of our justice system will help to shape its future.”
Money laundering

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impose onerous burdens on state authorities, legitimate businesses, and the businesses’ lawyers.

“The burdensome and intrusive new reporting requirements in H.R. 4450 are unnecessary because in recent years the federal government, financial institutions, and the legal profession have developed other tools and taken other steps that are far more effective in fighting money laundering and terrorist financing that the bill’s mandates.” Brown said.

She highlighted the “Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing” (Voluntary Guidance), which was developed and adopted by the ABA in August 2010. Since then, the ABA has worked diligently to educate lawyers, judges, state and local bars, and the public about the problem of money laundering and the benefits of following the Voluntary Guidance, which has been endorsed by the Conference of Chief Justices.

In addition, the ABA, the International Bar Association, and the Council of Bars and Law Societies of Europe jointly published the “Lawyer’s Guide to Detecting and Preventing Money Laundering” in 2014, which provides practical tips to help lawyers around the world avoid inadvertently participating in money laundering activities.

Brown also pointed to other data collection rules adopted by the Internal Revenue Service in 2010 and by the Treasury Department’s Financial Crimes Enforcement Network in 2016 that make the proposed legislation unnecessary.

Brown emphasized that the ABA “will continue to support efforts by federal and international law enforcement agencies and the states to fight money laundering and terrorist financing in ways that minimize the impact on the lawyer-client relationship, state regulation of the business formation process and legal profession, and the U.S. economy.”
Merrick Garland receives “Well Qualified” rating from ABA committee

The ABA Standing Committee on the Federal Judiciary released its unanimous rating of “Well Qualified” for Supreme Court nominee Merrick B. Garland on June 21, sending the rating letter and explanatory statement to the Senate Judiciary Committee, the White House, the Department of Justice, and the nominee.

The Standing Committee, chaired by Karol Corbin Walker, concluded that Garland, currently the chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, is “a preeminent member of the legal profession with outstanding legal ability and exceptional breadth of experience” and that he “meets the very highest standards of integrity, professional competence and judicial temperament.”

In reviewing Garland’s nomination, the Standing Committee conducted investigations into the nominee’s professional qualifications in every federal circuit in the United States, commissioned three reading groups to review the nominee’s legal writings, and invited input from 3,085 individuals, including all federal appellate and district judges and magistrate judges as well as many state judges, lawyers, and community and bar representatives.

According to its explanatory statement, the Standing Committee’s evaluation is based solely on its comprehensive, nonpartisan, non-ideological peer review of the nominee’s integrity, professional competence, and judicial temperament.

“The unanimous consensus of everyone we interviewed was that Judge Garland is superbly competent to serve on the United States Supreme Court,” Walker wrote. This significant point, she said, warrants repeating: all of the experienced, dedicated, and knowledgeable sitting judges, several former solicitor generals from both political parties, legal scholars from top law schools across the country, and lawyers who have worked with or against the nominee in private practice, government or within the judiciary describe the nominee as outstanding in all respects and cite specific evidence in support of that view.

President Obama nominated Garland on March 16 to fill the Supreme Court vacancy resulting from the death of Justice Antonin Scalia. The Senate Republican leadership and the Senate Judiciary Committee immediately reiterated earlier statements, however, that there would be no consideration of any nominee during this election year, maintaining that the nomination should be made by the next president.

“It is now imperative that the Senate fulfills its constitutional responsibilities to consider and act promptly on the Supreme Court nominee,” ABA President Paulette Brown said following release of the ABA rating.

“While the Court continues to function, its 4-4 decisions do not establish precedent and leave open questions on issues that are vital to the lives of everyday people,” Brown said.
ADVANCE CARE PLANNING: Sens. Richard Blumenthal (D-Conn.) and Shelley Capito (R-W.V.) have introduced a bipartisan bill addressing end-of-life issues by providing federal support to educate patients and providers, developing core end-of-life care quality measures, and testing innovations in advance care planning through telemedicine. S. 2961, known as the Compassionate Care Act, also would implement studies on national advance directive policies as well as enhance public and professional education on the subject. In a press release, Blumenthal emphasized that advance care planning conversations are “essential to ensuring that we all receive the care that we want and that is right for us.” He said that the act would improve communication and accordingly “improve end-of-life care for all Americans.” The ABA sent a letter on May 18 commending the senators for their work on the bill, noting that the association has supported enacting advance care planning legislation for over two decades. “Health care providers cannot know and honor patients’ values and wishes unless care planning conversations take place on a recurring basis and providers have the skills needed to engage patients in a meaningful way,” explained ABA Governmental Affairs Director Thomas M. Susman in the letter.

JAPANESE AMERICAN INTERNMENT: ABA President Paulette Brown, in a June 17 letter to Sen. Mazie Hirono (D-Hawaii), expressed support for a resolution introduced by Hirono that recognizes the historical significance of the internment of Japanese Americans during World War II and expresses the sense of the Senate that policies that discriminate against an individual based on race, ethnicity, national origin, or religion would be a repetition of past mistakes. The resolution, S. Res. 373, also expresses support for the goals of the Japanese American community in recognizing a National Day of Remembrance to increase public awareness about the unjust measures taken in 1942 to restrict the freedom of Japanese Americans. Such a day, according to the resolution, would be an opportunity to reflect on the importance of upholding justice and civil liberties of all people of the United States. “It is sobering to recall that during the war every branch of our government – even the judiciary – justified the exclusion, forced removal and incarceration of citizens and permanent resident aliens of Japanese descent as necessary for our national defense,” Brown wrote. She said the justification failed to distinguish Japanese Americans from the Japanese Empire, thereby turning every Japanese American into a potential enemy of the United States. “Your resolution is a reminder that our national experience has taught us that in time of crisis we must vigilantly guard against the dangers of overreaction and undue trespass on individual rights lest we betray our values and lose the very freedoms we are fighting to protect,” Brown emphasized.

MEDICARE SET-ASIDES: The ABA Governmental Affairs Office cosponsored a briefing on Capitol Hill June 16 to educate congressional staff and the public on the need for enactment of H.R. 2649 and S. 1514, legislation that would reform the administration of the Medicare secondary payer provisions in cases involving workers’ compensation settlements. Congress passed the Medicare Secondary Payer Act in 1980 as a way to control the expanding costs to the Medicare program by identifying specific conditions under which Medicare is a secondary payer when another source of funds is available for medical treatment. If an individual who is or likely to become a Medicare beneficiary is injured and receives damages covering expenses that will be incurred over time, some of that award must be set aside to cover future medical expenses that would otherwise be covered by Medicare. The legislation would improve the current process that was put in place in 2001 by the Centers for Medicare and Medicaid Services (CMS) by creating certainty for calculating the amounts to be included in set-asides and by providing the following: criteria for optional “qualified” set-aside arrangements; the ability to establish fair guidelines for set-asides in compromise settlement cases; a reasonable time frame for CMS review of set-asides; an appeals process; and an optional direct payment of set-aside amounts to Medicare. At the briefing, ABA Legislative Counsel David Eppstein appeared on a panel that featured representatives of groups that are part of a coalition supporting the legislation. ABA policy adopted in 2005 and reaffirmed in 2011 urges Congress to enact legislation that includes certain principles, including setting clear criteria for when a set-aside may be reviewed by CMS and putting an appeals procedure in place. “This legislation has the support of both plaintiff and defense attorneys. Among the many helpful provisions in the bills is one that clarifies the relationship between state and federal law in this area, something the ABA has been calling for since 2005,” Eppstein said.
Lobbying reference guide available for state and local bars

Free publication produced by ABA Governmental Affairs Office and NABE Government Relations Section

The ABA Governmental Affairs Office and the National Association of Bar Executives Government Relations Section have collaborated to produce All Politics Is Local: A Practical Guide to Effective Advocacy for State and Local Bars. This “nuts and bolts” guide is intended to help bar professionals navigate the legislative terrain and to empower bars to develop and deliver influential and effective messages to lawmakers.

The free downloadable guide, which provides a set of tools for state and local bars to engage in effective public policy advocacy on their home turf, includes lobbying fundamentals such as achieving policy goals, mobilizing a grassroots network, and communicating through the use of social media. In addition, the publication also offers tips for dealing with technical lobbying disclosure laws, political action committees, and the nuances of federal v. state lobbying.

“It is our hope that this Guide offers something for everyone,” ABA Governmental Affairs Director Thomas M. Susman wrote in his introduction to the publication. He explained that the title of the guide is derived from the phrase “all politics is local,” which was popularized by legendary Speaker of the House Thomas P. “Tip” O’Neill (D-Mass.) to emphasize the importance of framing and advocating issues as significant to a legislator’s district, state and local constituency.

“Participation by state and local bars is indispensable to the ABA’s effective advocacy in Washington,” Susman said. “While the ABA is limited in its ability to reciprocate and engage in advocacy at the state level, this guide should help bars develop and implement local advocacy to advance their individual priorities.

“Advocacy is a strong component to the work of the organized bar whether on the state or national level,” commented William K. Weisenberg, senior policy advisor and former government affairs director at the Ohio State Bar Association. “Our members consider advocacy to be a major member benefit as we lobby on behalf of the profession and significant public policy that advances the rule of law and serves the public.” He added that All Politics Is Local is a practical guide serving as a valuable reference for both veteran lobbyists (government affairs specialists) and those just starting their careers.

The guide is available and can be downloaded from the ABA Governmental Affairs Office website at www.ambar.org/allpolitics.