President-elect Donald J. Trump launches transition process

Republican President-elect Donald J. Trump began the transition process this month following his Nov. 8 election victory, laying out a plan for his first 100 days in office, choosing several individuals to serve in his cabinet, and reinforcing some of his positions on various issues of interest to the ABA.

Trump, who defeated Democrat Hillary Clinton when he exceeded the 270 electoral votes needed to win the election, is expected to receive as many as 306 electoral votes when the 538 members of the Electoral College convene Dec. 19. While Trump won the popular vote in states he needed to win the required electoral votes, Clinton won the overall popular vote by more than 2.5 million votes.

In a Nov. 21 video, Trump, who has vowed to cancel numerous executive orders issued by President Obama, said his transition team is determining what executive actions he can take as soon as he is inaugurated on Jan. 20. In addition, he said he would take the first step toward withdrawing from the Trans-Pacific Partnership trade agreement, address restrictions on the production of American energy, and direct the Department of Labor to investigate visa violations.

Other plans for immediate action include instituting a five-year ban prohibiting White House and congressional officials from becoming lobbyists after leaving government service, and a lifetime ban on White House officials lobbying on behalf of foreign governments when they leave their positions. Another promise is that he will institute a new requirement that for every new federal regulation, two existing regulations must be eliminated.

The ABA is watching closely to see how the president-elect’s positions evolve on several issues of concern to the association.

Trump is expected to move quickly to nominate individuals to fill the Supreme Court vacancy and the more than 90 vacancies in the federal district and appellate courts. It is unclear what the role in the Trump administration will be for the ABA Standing Committee on the Federal Judiciary, which currently evaluates the professional qualifications of potential nominees for the lower federal courts prior to their nominations. The ABA committee evaluates Supreme Court nominees after they have been nominated.
## LEGISLATIVE BOXSCORE

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<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<td><strong>Immigration.</strong> 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.</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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New DOL persuader rule opposed by the ABA is blocked permanently by federal judge

A district court in Texas has permanently blocked implementation of the final persuader rule that was issued by the Department of Labor (DOL) earlier this year.

The ABA has expressed strong opposition to the new rule, which would have required many management-side labor lawyers to divulge confidential client information to federal government.

Judge Sam Cummings of the U.S. District Court for the Northern District of Texas, who granted a preliminary injunction June 27 to prevent the rule from going into effect in July, issued the permanent nationwide injunction on Nov. 16. Ruling in National Federation of Independent Business v. Perez, the judge determined that the Obama administration exceeded its authority in issuing the rule.

The longstanding persuader rule contained in Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) requires employers and their labor consultants, including lawyers, to file extensive periodic disclosures with the department when they engage in certain activities or enter into agreements or arrangements to persuade employees on union formation or membership issues. However, Section 203 (c) of the act has long been interpreted to exempt lawyers 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 would have required lawyers who provide both legal advice to employer clients and engage in any persuader activities to file periodic disclosure reports even if they have no direct contact with the employees. These reports would have required disclosure of a substantial amount of confidential information, including the existence of the lawyer-client relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. The reports could have also compelled disclosure of a great deal of confidential financial information about clients that is unrelated to persuader activities that the LMRDA is intended to monitor.

Prior to issuing the preliminary injunction in June, the Texas district court heard from eight witnesses, including ABA Past President Wm. T. (Bill) Robinson III, who testified as an expert witness regarding a number of serious flaws in the final DOL rule. In its preliminary order, the court quoted extensively from the ABA’s original 2011 comment letter to DOL and the ABA’s statement for the record of an April 27 hearing on the rule held by the House Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions.

In issuing both the preliminary and permanent injunctions, the court concluded that the new rule was unlawful and would cause the plaintiffs to suffer irreparable harm in various ways, including reducing access to legal advice and representation and creating conflicts with Texas’ and other states’ attorney ethical rules. Although the Obama administration appealed the court’s earlier ruling to the Fifth Circuit Court of Appeals, the appellate court has not yet ruled on that appeal.

There also continues to be strong opposition to the new rule in Congress, where several resolutions opposing the rule were introduced in the House and Senate and more than 70 House members urged that an amendment be attached to fiscal year 2017 appropriations legislation prohibiting DOL from spending money to implement the rule.

Sessions selected to be attorney general

One of President-elect Trump’s first Cabinet announcements was the Nov. 18 selection of conservative Sen. Jeff Sessions (R-Ala.) to be the next attorney general of the United States.

Sessions, who was elected to the Senate in 1996 and is a longtime member of the Senate Judiciary Committee, earned his law degree from the University of Alabama. He began his career as an attorney in private practice before serving as assistant U.S. attorney from 1975-77 and then as the U.S. attorney for the Southern District of Alabama from 1981-1993. He then served as Alabama’s attorney general from 1995-97 before being elected to the Senate. In 1986, his nomination to a seat on the U.S. District Court for the Southern District of Alabama was derailed in the Senate by charges of insensitivity in racial matters as a prosecutor.

Sessions has been a vocal opponent of comprehensive immigration reform proposals and the bipartisan Sentencing Reform and Corrections Act backed this Congress by the ABA. Numerous civil rights organizations have spoken out against his nomination, but Sessions, who was the...
Republicans maintain majorities for 115th Congress

Republicans — who will be in control of the White House, Senate and House for the first time in 10 years — began organizing for the 115th Congress this month with narrower Senate and House majorities than in the current Congress.

Still awaiting the results of Dec. 10 runoff elections in Louisiana for two House seats and one Senate seat, the 115th Congress currently stands at 239 Republicans and 194 Democrats in the House and 51 Republicans, 46 Democrats and two independents in the Senate. The upcoming Congress will be the most diverse in history with 39 Hispanics, 49 African-Americans and 15 Asian-Americans.

House Republicans re-elected Paul D. Ryan (R-Wis.) as speaker of the House. Ryan assumed the speakership in 2015 following the resignation of Rep. John Boehner (R-Ohio). Joining Ryan on the House Republican leadership team are Majority Leader Kevin McCarthy (R-Calif.) and Majority Whip Steve Scalise (R-La.). House Minority Leader Nancy Pelosi (D-Calif.) was chosen by the Democrats to retain her position, along with Minority Whip Steny Hoyer (D-Md.).

Senate Republicans chose to keep Senate Majority Leader Mitch McConnell (R-Ky.) and Majority Whip John Cornyn (R-Texas) in their leadership positions. Sen. Charles Schumer (D-N.Y.) will replace retiring Senate Minority Leader Harry Reid (D-Nev.) as the Senate minority leader, and Sen. Richard Durbin (D-Ill.) will retain his position as minority whip.

The Senate Judiciary Committee, which will continue to be chaired by Sen. Charles E. Grassley (R-Iowa), will have a new ranking member, Sen. Dianne Feinstein (D-Calif.). Feinstein, the first woman to hold that position, steps into the seat that Sen. Patrick J. Leahy (D-Vt.) vacated to assume the position of ranking member on the Senate Appropriations Committee.

“This committee, which touches the lives of so many Americans, will face many tough issues in the coming years, and I’ll do my level best to represent all Americans,” Feinstein said, pointing out that one of the first orders of business will be the consideration of a new attorney general and a new Supreme Court justice.

“We have a lot of work to do. The Judiciary Committee has shown that it can lead the way toward bipartisan solutions on some of the most controversial issues like immigration reform and sex trafficking. I’m hopeful that we’ll keep that tradition alive,” she said.

ABA urges CFPB to modify proposed rule on confidential information disclosure to protect attorney-client privilege

ABA President Linda A Klein recently urged the Consumer Financial Protection Bureau (CFPB) to modify a proposed rule on disclosure of records and information that the association believes may threaten the attorney-client privilege.

In comments submitted Oct. 24 to the CFPB, Klein expressed the ABA’s strong support for preserving the attorney-client privilege and the work product doctrine. She also expressed serious concerns over provisions in the proposed rule that would allow the CFPB to share the privileged information it receives from supervised or regulated entities with many types of foreign, state and other agencies that are not covered by statutory privilege waiver provisions established by 12 U.S.C. §§ 1828(x) and 1821(t).

Those statutory provisions allow the CFPB and other listed bank regulatory agencies to receive privileged information from entities without waiving the privilege as to third parties, even if the information is later shared with other federal agencies.

Klein also voiced concerns about other related provisions that would do the following: allow the CFPB to share an entity’s privileged supervisory information with any other agency, not just those agencies with supervisory jurisdiction over the entity; allow the CFPB inspector general to disclose privileged information “as needed” in accordance with the Inspector General Act; and relax the CFPB’s duty to notify an entity in advance when its privileged information is provided to Congress.

In her comments, Klein also pointed out that other provisions that were designed to protect the privileged status of information may not be effective in preventing waiver of the privilege vis-à-vis third parties when the information is shared with non-federal agencies not covered by 12 U.S.C. §1821(t).

She said that the ABA “recognizes and appreciates the CFPB’s effort to strike the proper balance between the need to protect confidential and privileged information and the need to fulfill the Bureau’s important supervisory and regulations objective,” but recommends that the rule be modified. The ABA-proposed change would clarify that, at most, the CFPB will only share privileged materials it receives from supervised and regulated entities with other federal agencies that are specifically referenced in Section 1821(t), not with other foreign and state agencies that could result in a waiver of the privilege.

Klein added that if the CFPB believes that it will be necessary for it to share privileged information with foreign, state, and other governmental bodies in the future, the bureau should support congressional legislation to amend the law to expressly permit such sharing without waiving the privilege.

Annual Review of the Field of National Security Law draws hundreds

District judge blocks nursing home binding arbitration ban

A federal judge has blocked a final rule issued Oct. 4 by the Centers for Medicare & Medicaid Services (CMS) that seeks to prohibit nursing homes from requiring pre-dispute binding arbitration to settle disputes over residents’ care.

The CMS rule, which was scheduled to go into effect Nov. 28, would apply to nursing facilities participating in the Medicare or Medicaid programs and would benefit approximately 1.5 million nursing home residents. The final rule mirrors a recommendation made by the ABA in comments submitted to CMS regarding the proposed rule in September 2015, and the agency quoted extensively from the ABA’s comments to explain the decision to amend its proposed rule to reflect the ABA’s views.

Arbitration is a method of dispute resolution in which a neutral decision-maker is selected by one or both parties to resolve a dispute. In an arbitration agreement, a party agrees to waive the rights to sue and to a trial by jury, to participate in a class action lawsuit, or to receive any type of judicial review apart from the very limited grounds applicable to setting aside arbitration decisions.

The ABA recommended prohibiting pre-dispute agreements for binding arbitration between a facility and its residents while permitting voluntary, post-dispute arbitration agreements as long as certain conditions are met and the residents have provided informed consent.

In response to a suit brought by nursing home groups, including the American Health Care Association, Judge Michael P. Mills, of the U.S. District Court for the Northern District of Mississippi, indicated Nov. 7 that the rule appears to be based on sound public policy, but found that the binding arbitration issue should be addressed by federal legislation rather than CMS rules.

Acknowledging that some nursing home residents do not have the capacity to understand what an arbitration agreement involves, Mills wrote: “The court believes that Congress might reasonably consider this inefficiency, as well as the extreme stress many nursing home residents and their families are under during the admissions process, as sufficient reason to decide that arbitration and the nursing home admissions process do not belong together.”

Judicial Vacancies/Confirmations—114th Congress* (as of 11/30/16)

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<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tr>
<td>US Supreme Court (9 judgeships)</td>
<td>1</td>
<td>1</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
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<tr>
<td>US District Courts (678 judgeships)</td>
<td>83</td>
<td>44</td>
<td>18</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
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<td>2</td>
<td>2</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>99</strong></td>
<td><strong>54</strong></td>
<td><strong>22</strong></td>
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*Includes territorial judgeships
APPROPRIATIONS: House and Senate leaders have decided to push final decisions about fiscal year 2017 appropriations until the 115th Congress and are expected to approve a continuing resolution to fund the government through March or April 2017. The current continuing resolution (P.L. 114-223), which was passed just before the Oct. 1 start of the fiscal year, runs through Dec. 9. Members of the 114th Congress had expected to finalize fiscal year 2017 funding during the lame duck session, but President-elect Donald J. Trump’s transition team requested a delay so that the incoming administration could be involved in appropriations decisions. Numerous members of Congress opposed the idea, preferring to pass an omnibus appropriations legislation to fund government programs through Sept. 30, 2017, and start fresh early next year with the fiscal year 2018 funding process. A continuing resolution, which would keep most programs at current funding levels, would be dangerous for the military, according to Senate Armed Services committee Chairman John McCain (R-Ariz.). Democrats speaking against the move included Senate Appropriations Committee Chairman Barbara Mikulski (D-Md.), who called it “absolutely outrageous.” House Appropriations Committee Chairman Harold Rogers (R-Ky.) indicated that House Republican leaders thought it was “important that the new president have input on the spending plans.”

EXCESSIVE BAIL: ABA President Linda A. Klein urged the Maryland Standing Committee on Rules of Practice and Procedure to amend state court rules to reduce the use of excessive bail in pretrial detention, which often leads to continued detention of defendants before trial due to their inability to pay. In a Nov. 15 letter to the standing committee, Klein recommended amending Rule 4-216 so that Maryland pretrial procedures would comply with the ABA Standards for Criminal Justice, the 8th Amendment of the U.S. Constitution stating that “excessive bail shall not be required,” and Article 25 of the Maryland’s Declaration of Rights, which states that “excessive bail ought not to be required.” In her letter, Klein pointed out that for decades the ABA has worked to improve pretrial release in America. The ABA standards – which have been approved by judges, prosecutors and defense attorneys, and cited by courts nationwide – require that courts: (1) give individualized consideration to each defendant; (2) use financial conditions only when no other conditions will ensure appearance in court for trial; and (3) never detain defendants solely due to their inability to pay. Klein said that reports and white papers from numerous groups, including the Abell foundation, the Commission to Reform Maryland’s Pretrial System, and the law firm of Covington & Burling, contain ample evidence that Maryland’s wealth-based detention scheme fails to meet the ABA standards. “The ABA applauds Maryland’s attorney general, public defender, and others for recommending changes to Maryland’s Rule 4-216 that would help bring the state into compliance with these standards and with the United States and Maryland Constitutions,” Klein wrote. The standing committee approved the proposed amendments on Nov. 18 and submitted its report to the Maryland Court of Appeals. The comment period ends Dec. 22, after which the court is like to consider the change at its next open meeting.

ATTORNEY GENERAL JANET RENO: ABA President Linda A. Klein issued a statement Nov. 7 mourning the passing of Janet Reno, a longtime member of the ABA who was the first woman to be appointed U.S. attorney general. Reno, the longest-tenured attorney general of the 20th Century, served from 1993 to 2001 under President Bill Clinton. Klein noted that Reno was a valued contributor to the ABA, serving on several task forces, including the ABA Commission on Standards and Juvenile Justice, the Special Committee on Criminal Justice in a Free Society, and the Task Force on Minorities and the Justice System. She was honored with a special award at the Margaret Brent dinner in 1993 and received the D’Alemberte Raven Award for outstanding service in dispute resolution in 1997 and the Thurgood Marshall Award from the Section of Individual Rights and Responsibilities in 2009. “Ms. Reno always fought for the rights of children in the legal system, pushing for juvenile justice reform and advocating for programs to assist troubled youths, directing them away from crime rather than incarceration them,” Klein said, adding that Reno “believed that lawyers should work beyond the adversarial system and work for the social good.”

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Trump transition proceeds following Republican victory

continued from front page

One of the other top areas is immigration. Executive orders that could be repealed by Trump include President Obama’s Deferred Action for Childhood Arrivals (DACA) program and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). The DAPA program is currently blocked by an appeals court decision that remains in place after the U.S. Supreme Court failed to decide a challenge to the program by a 4-4 vote.

The administration plans to focus initially on deporting illegal immigrants who have committed crimes and establishing mandatory minimum sentences for those who illegally reenter the United States after previous deportation. Other steps include vetting applicants to “ensure they support America’s values, institutions and people,” and temporarily suspending immigration from “regions that export terrorism and where safe vetting cannot presently be ensured.”

The ABA has been a strong supporter of the DACA and DAPA programs and has pushed for comprehensive immigration reform that provides new channels for future workers, a path to legal status for much of the undocumented population, as well as enhanced border security. The association also has spoken out against legislative proposals that would delay or halt U.S. resettlement of Syrian, Iraqi or Muslim refugees.

The ABA also is monitoring discussion regarding action the new president might take on criminal justice reform. Trump ran on a “tough on crime” agenda and has indicated that he would create a new violent crime task force and increase spending for law enforcement and federal prosecutors. The ABA supports sentencing and corrections reform legislation pending in this Congress that would narrow the scope of mandatory sentences to focus on the most serious drug offenders and violent criminals, allow judicial discretion in sentencing lower-level violent offenders, expand recidivism-reducing prison programs, and reauthorize the Juvenile Justice and Delinquency Prevention Act.

Decisions regarding Cabinet positions are also being made during the transition. One of the first announcements was the Nov. 18 choice of Sen. Jeff Sessions (R-Ala.) for U.S. attorney general (see article, page 3). Other choices so far are Rep. Mike Pompeo (R-Kan.) for director of the Central Intelligence Agency, retired Gen. Michael Flynn for national security adviser, South Carolina Gov. Nikki Haley to be U.N. ambassador, Betsy DeVos for education secretary, Rep. Tom Price (R-Ga.) for secretary of Health and Human Services, and Elaine Chao for secretary of Transportation.

The first senator to endorse Donald Trump for president, is expected to be confirmed by the Senate.

Senate Judiciary Committee Chairman Charles E. Grassley (R-Iowa) expressed confidence that Sessions would be favorably reported out of the committee. “Senator Sessions is a respected member and former ranking member of the Judiciary Committee who knows the Justice Department as a former U.S. attorney, which would serve him very well in this position,” Grassley said. Sen. Dianne Feinstein (D-Calif.), the incoming ranking member on the committee, emphasized in a statement that the attorney general should be “above the fray,” and she is “committed to a full and fair process.”