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Highlights include rally and concert for LSC

Wide range of policies adopted by delegates during association’s 2017 Annual Meeting

The ABA House of Delegates approved more than 30 new policies during its two-day session Aug. 14-15 at the association’s Annual Meeting, which also featured a rally in support of the Legal Services Corporation (LSC), a new “CLE in the City” series held at law firms and law schools throughout the city, and hundreds of panels, lectures and roundtable discussions on current legal issues.

The LSC rally featured performances from top Broadway performers and speeches from ABA leaders, legal aid providers and clients who have benefited from the corporation, which is the largest single funder of civil legal programs in the United States. The rally called attention to the millions of low-income Americans who need legal assistance but receive little or no help and the importance of adequate funding for the corporation.

The wide range of issues covered during special programs at the meeting included immigration, attorney-client confidentiality, implicit bias in the legal profession, cyber risk management, veterans treatment courts, and judicial independence. In addition, the association celebrated the 50th anniversary of Justice Thurgood Marshall’s appointment to the U.S. Supreme Court and his legacy.

Other highlights of the meeting included the passing of the gavel to Miami lawyer Hilarie Bass, whose presidential initiatives include a longitudinal study to examine why women are leaving law practice in huge numbers (see article, page 5). Bass succeeds Linda A. Klein of Atlanta, Georgia. Robert M. Carlson, of Montana, was elected president-elect and will serve one year in that position before assuming the presidency in August 2018.

The following is a summary of the new policies adopted by the House of Delegates during the meeting.

Civil Rights

Housing Discrimination. Urges governments to enact legislation prohibiting discrimination in housing based on lawful sources of income, including federal vouchers, Supplemental Security Income payments, and retirement benefits.

Student Journalists. Urges all legislative bodies to enact statutes and school districts to adopt policies that rigorously protect the ability of student journalists at the secondary and postsecondary levels to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal. This is provided that such statutes also allow for reasonable restrictions on the time, place and manner of student expression, and neither authorize nor protect expression see “Annual Meeting,” page 3
### LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>LEGISLATIVE ISSUE</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
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<tbody>
<tr>
<td><strong>Criminal Justice.</strong> S. 330 and H.R. 969 would establish a federal Defender Office for Supreme Court Advocacy to ensure right to counsel. H.R. 1809 and S. 860 would revise and reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDPA). H.R. 2480, H.R. 2473, S. 1311 and S. 1312 are aimed at combating human trafficking. H.R. 510 and S. 139 would establish a system for the use of Rapid DNA.</td>
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- S. 330 was referred to the Judiciary Cttee. on 2/7/17. S. 860 was referred to the Judiciary Cttee. on 4/5/17. Judiciary Cttee. approved S. 1311 and S. 1312 on 6/29/17. Senate passed H.R. 510 on 8/1/17. 
- President signed P.L. 115-50 (H.R. 510) on 8/18/17.

| **Immigration.** The president issued executive orders on 1/25/17, and 1/27/17 followed by a revised executive order 3/6/17 on border security, immigration enforcement, and visa and refugee programs. Federal judges temporarily blocked the orders nationwide that suspended entry from majority-Muslim countries, but Supreme Court allowed refugee ban to go forward with certain exceptions. |

- Approps. Cttee. approved $300 million for LSC on 7/13/17.
- Senate Approps. subc. approved $385 million for LSC on 7/25/17.
- President signed P.L. 115-31 (H.R. 244) on 5/5/17.
- Supports improvements in the immigration court and adjudication system. Opposes mandatory detention and supports alternatives to detention. Supports access to counsel and due process safeguards.

| **Legal Services Corporation (LSC).** President’s FY 2018 budget issued on 5/23/17 included no funding for LSC, which is currently funded at $385 million under P.L. 115-31 (H.R. 244). |

- Approps. Cttee. approved $300 million for LSC on 7/13/17.
- Senate Approps. subc. approved $385 million for LSC on 7/25/17.
- President signed P.L. 115-31 (H.R. 244) on 5/5/17.
- Supports an independent, well-funded LSC.

| **Tort Reform.** H.R. 1215 would preempt state medical liability laws to impose caps on non-economic damages and place limits on contingency fees. H.R. 985 would limit the ability of victims to file class action lawsuits. H.R. 720 would require mandatory monetary sanctions against lawyers who file non-meritorious lawsuits. |

by students that is defamatory or invasive of privacy, obscene or otherwise unlawful, or reasonably anticipated to incite students to act unlawfully.

Courts/Judiciary

Ninth Circuit. Reaffirms opposition to restructuring the U.S. Court of Appeals for the Ninth Circuit, and supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations to handle caseloads efficiently while maintaining coherent, consistent laws in their respective jurisdictions.

Courtroom Experience. Urges courts to implement plans that welcome opportunities for new lawyers to gain meaningful courtroom experience, and urges law firms and clients to take advantage of those plans.

Bias. Urges all courts to develop plans of action to make de-biasing training an important part of initial judicial training and continuing judicial education, and urges local and state bar associations to work with courts to offer de-biasing training to judicial officers free of cost and at the convenience of the courts.

Criminal Justice

Mandatory Minimums. Opposes the imposition of mandatory minimum sentences, and urges Congress and state and territorial legislatures to repeal laws requiring minimum sentences and to refrain from enacting laws punishable by mandatory sentences.

Right to Counsel. Urges Congress to enact legislation enabling the U.S. Department of Justice to initiate and pursue civil actions to obtain equitable relief for systemic violations of the constitutional right to the effective assistance of counsel, both directly and through private litigants deputized to file such actions. Urges Congress to enact legislation recognizing the right of private litigants in their individual capacity or as members of a class action to obtain equitable relief in federal court for systemic violations of their right to effective assistance of counsel.

Dual Jurisdiction Youth. Adopts the ABA Criminal Justice Standards Relating to Dual Jurisdiction Youth addressing the unique situations for juveniles caught in two court systems at the same time and providing guidance regarding best practices in these situations.


Bonds. Urges governments to adopt policies and procedures that, among other things, favor release of defendants upon their own recognizance or unsecured bonds, permit cash bonds or secured bonds only upon a determination by the court that such financial conditions and no other conditions will assure appearance in court, and provide that pretrial detention should never occur due solely to an inability to pay. Supports permitting a court to order a defendant to be held without bail where public safety warrants pretrial detention and no condition of pretrial release suffice; and rejects the use of “bail schedules” based only on the nature of the pending charge.

Juvenile Bail/Bond. Urges governmental entities to cease use of bail/bond in the juvenile justice system and to utilize objective criteria that do not have a discriminatory or disparate impact and that utilize the least restrictive condition of release. 112D

Solitary Confinement. Urges legislative bodies and government agencies to enact laws and adopt policies prohibiting the use of solitary confinement.

A panel of experts discussed whether confidential and privileged client information is safe from searches at the border. Those participating were (from left): Robert T. Givens, Givens & Johnston PLLC, Houston, Texas; Maureen T. Kelly, Northrop Grumman, Falls Church, Virginia; Bruce A. Green, Fordham University School of Law; and for federal district Judge Shira A. Scheindlin, Brooklyn, New York.
tary confinement against children and youth under the age of 18.

**Expunging Convictions.** Urges governments to enact laws allowing individuals to petition to expunge all criminal justice records pertaining to charges or arrests that did not result in a conviction.

**Homelessness.** Urges governments to enact laws allowing for the expungement of convictions, or other statutory ordinances or violations where a court enters a finding of guilty, for life-sustaining or nuisance crimes performed in public spaces that are associated with homelessness.

**Disability Law**

**Guardianship.** Urges legislatures to amend their guardianship statutes to require that supported decision-making – in which people make their own decisions with trusted individuals they choose rather than rely on a stranger – be identified and fully considered by the courts as a less restrictive alternative before guardianship is imposed.

**Dispute Resolution**

**Ombuds Programs.** Encourages greater use and development of ombuds programs that comply with generally recognized standards of practice as an effective means of preventing, managing, and resolving individual and systemic conflicts and disputes.

**Education**

**Access to Education.** Urges governments to adopt and implement laws, policies and other effective measures to provide every child with equal access to elementary and secondary public schools funded at levels adequate to ensure a high-quality education.

**Civics Education.** Urges governments to develop and implement age-appropriate curricula designed to instill in all students a sense of the personal responsibility to cast informed votes and to teach them how to educate themselves regarding the candidates and issues in elections.

**Youth at Risk.** Endorses the Blueprint for Change: Education Success for Children in Foster Care (2007) and the Blueprint for Change: Education Success for Youth in the Juvenile Justice System (2016); urges attorneys, judges and bar associations to improve legal advocacy in juvenile court and education matters; and calls for legislators and policymakers to create policies and practices that ensure educational rights.

**Gun Violence**

**Restraining Orders.** Urges governments to enact statutes, rules or regulations authorizing courts to issue gun violence restraining orders, including ex parte orders, that include certain specified provisions.

**Immigration**

**Counsel.** Supports the appointment of counsel at federal government expense to represent all indigent persons in removal proceedings before the Executive Office for Immigration Review (in immigration courts and before the Board of Immigration Appeals), and if necessary to advise such individuals of their right to appeal to the federal circuit courts of appeals.

**Enforcement.** Urges Congress to amend Section 287 of the Immigration and Nationality Act to expand and codify Department of Homeland Security guidelines regarding immigration enforcement actions to include courthouses as “sensitive locations” in which immigration enforcement actions may only be taken upon a showing of exigent circumstances and with prior approval of a designated supervisory official.

**Intellectual Property**

**Trademark Infringement.** Supports an interpretation of Section 35 (a) of the Lanham Act that proof of willfulness is not required, but may be taken into account as among the equitable considerations, for a prevailing plaintiff to recover a defendant’s profits in actions involving...

*Annual Meeting*
ing trade infringement, unfair competition, or cyber-piracy under the statute.

Previously Issued Patents. Supports, in a post-issuance proceeding at the U.S. Patent and Trademark Office in which a previously issued patent is challenged by a petitioner, applying the statutory requirement that the petitioner asserting the unpatentability of a patent “shall have the burden of proving unpatentability by a preponderance of the evidence” on both the challenged claims and any amendment of the claims proposed by the patent owner during the proceeding. This is provided that the patent owner has the initial burden of production (burden of going forward) on the patentability of any proposed amended claims.

International Law

Lead Paint. Urges national governments worldwide to adopt laws to phase out the manufacture, import and sale of lead paint; supports efforts to promote the phase-out of lead paint by no later than 2020; and urges the legal profession and other organizations to support adoption of laws to phase out and eliminate lead paint through pro bono support, educational initiatives and other appropriate measures.

Global Criminal Justice. Urges the U.S. Department of State to preserve the Office of Global Criminal Justice and role of the war crimes ambassador, including funding and staffing to continue the work of the office and the United States’ commitment to international criminal justice and the prevention and prosecution of atrocity crimes.

Legal Education/Bar Admission

Bar Admission. Supports the principle that bar admission should not be denied based solely on im-

**Annual Meeting**

New ABA President Hilarie Bass: Lawyers must lead the way to protect democracy

New ABA President Hilarie Bass, co-president of the Miami law firm of Greenberg Traurig, emphasized in her remarks to the ABA House of Delegates Aug. 14 that lawyers must lead the effort to protect democracy.

Bass, who assumed the ABA presidency for a one-year term at the end of the association’s Annual Meeting, told the delegates that her participation in the ABA has helped her to live up to the ideals of fighting for justice and creating social change.

“Never before has there been a more urgent need for the American Bar Association to stand for the democratic principles on which our country is based,” she said, calling on ABA members to “help lead the way for future generations of lawyers to engage, to commit, to provide and to ensure that our American democracy becomes stronger.”

Bass described the initiatives she plans to pursue during the coming year. Already launched is ABA Legal Fact Check, a resource to inform the public about what the law says about issues surrounding current events. She explained that whenever a politician or member of the media makes a statement about the law that is false or inaccurate, ABA Legal Fact Check will post the correct facts within hours on the ABA website and distribute those facts through a press release.

Another major initiative is a study, which will begin with a summit at Harvard Law School in November, to examine why women are leaving law practice in huge numbers. Also on her agenda is the Homeless Youth Legal Network, a project to help provide pro bono legal assistance to homeless youth as well as training and technical assistance to lawyers and other service providers. Her focus on legal education includes appointment of a Commission on the Future of Legal Education to study issues faced by law schools.

Bass, an ABA member for more than 30 years who has held many positions within the association, served as chair of the ABA Section of Litigation, where she created a Task Force on Implicit Bias in the Justice System. She also chaired the Committee on Rules and Calendar and served on the Board of Governors, the House of Delegates, and the Nominating Committee.

A corporate lawyer, she was inducted into the American College of Trial Lawyers and has been recognized for her pro bono work on behalf of two foster children that led to the elimination of Florida’s unconstitutional ban on gay adoption.

Bass earned her law degree from the University of Miami School of Law, where she is a member of the Board of Trustees.
Senate passes bills to protect the elderly from fraud, abuse

The Senate turned its focus to helping seniors this month with the passage of two bipartisan bills aimed at protecting the elderly from abuse and fraud.

S. 81, the Seniors Fraud Prevention Act of 2017, and S. 178, the Elder Abuse Prevention and Prosecution Act, both passed by voice vote on Aug. 2.

S. 81, introduced by Sens. Amy Klobuchar (D-Minn.) and Susan Collins (R-Maine), would help educate seniors about potential scams and improve the response to and monitoring of fraud complaints through establishment of a Bureau of Consumer Protection in the Federal Trade Commission (FTC).

“This bipartisan legislation will improve efforts to combat fraud targeting seniors so we can help ensure all Americans have safety and dignity in their senior years,” Klobuchar said.

Collins also expressed her pleasure with the Senate’s passage of the bill. “I am pleased that the Senate unanimously supported our legislation, which will enhance fraud monitoring, increase consumer education, and strengthen the complaint tracking system to help prevent seniors from being robbed of their hard-earned savings through threatening and manipulative scams,” she explained.

S. 178, sponsored by Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) and Sen. Richard Blumenthal (D-Conn.), would improve the protection of seniors by:

- increasing data collection and information sharing of abuse and fraud cases;
- increasing training of federal prosecutors and investigators;
- establishing an elder justice coordinator position in both the FTC and the Department of Justice; and
- increasing penalties for criminals who target seniors.

“As the population ages, we can expect more and more victims if we don’t act. The Elder Abuse Prevention and Prosecution Act takes meaningful steps to equip law enforcement, seniors and caregivers with additional tools so they can deter these crimes and hold perpetrators accountable,” Grassley explained.

The ABA has a long history as a strong advocate for the nation’s seniors through the work of its Commission on Law and Aging. These efforts, which include numerous projects to prevent elder abuse, seek to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

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**Judicial Vacancies/Confirmations—115th Congress* (as of 8/25/17)**

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<th>Court</th>
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<th>Nominations</th>
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<td>US Supreme Court (9 judgeships)</td>
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<td>US District Courts (678 judgeships)</td>
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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>134</strong></td>
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<td><strong>5</strong></td>
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*Includes territorial judgeships
**WASHINGTON NEWS BRIEFS**

**PRO BONO/DOMESTIC VIOLENCE VICTIMS:** The Senate unanimously passed the Pro Bono Work to Empower and Represent Act of 2017 (POWER Act) this month to combat domestic and sexual violence. S. 717, co-sponsored by Sens. Dan Sullivan (R-Alaska) and Heidi Heitkamp (D-N.D.), would direct U.S. attorneys to hold a minimum of one event annually to promote pro bono legal assistance for domestic violence and sexual assault victims and submit reports on the events to the Department of Justice, which will then compile an annual report to Congress. The bill also includes a provision requiring many U.S. attorney’s offices to work with the Native populations in their judicial districts in planning and holding an event every few years with a focus on addressing domestic violence in Indian Country and among Native populations. Noting that legal representation increases the possibility of successfully obtaining a protective order against an attacker from 32 percent without an attorney to 83 percent with an attorney, the sponsors lauded the Senate for passing the bill. “Passage of the POWER Act by the Senate is a solid avenue to raising awareness that legal assistance is a critical first step in helping victims of domestic violence become survivors,” Sullivan said. Heitkamp further explained, “By encouraging more partnerships in every state to provide pro bono legal services, we can help offer the education, awareness, and legal tools for victims who would otherwise not be able to afford or seek the resources they need to escape, survive, and rebuild their lives.” The ABA supports the expansion of pro bono legal services by all lawyers as a critical priority and adopted policy in 1997 urging that “federal, state, territorial, tribal, local governments and private entities make the establishment of programs addressing domestic violence a priority,” and that the access to legal services for such victims be ensured. The bill will now go to the House, where a companion bill, H.R. 1762, was introduced in March by Reps. Joe Kennedy (D-Mass.) and Don Young (R-Alaska) and is pending in the House Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.

**NINTH CIRCUIT:** The ABA reiterated its opposition to splitting the U.S. Court of Appeals for the Ninth Circuit in testimony submitted for a field hearing held Aug. 24 in Phoenix, Arizona, by the Senate Judiciary Subcommittee on Privacy, Technology and the Law. Patricia Lee Refo, a partner in the Phoenix law firm of Snell & Wilmer LLP, pointed out in the statement that a recent reexamination by the ABA of the functioning the Ninth Circuit – the largest in terms of geographic size, populations served, number of authorized judgeships, and total annual caseload – found no compelling empirical evidence of adjudicative or administrative dysfunction that warrants restructuring the Circuit. This led the ABA House of Delegates to adopt new policy this month reaffirming the association’s opposition. The new policy, Refo said, “makes it clear that the ABA believes that the Ninth Circuit’s ongoing efforts to utilize technology and procedural innovations, in large part, have enabled it to handle its caseload efficiently and maintain coherent, consistent law within the Circuit.” She also said that while there are some judges in the Ninth Circuit who support division, neither the Judicial Council of the Ninth Circuit nor the Judicial Conference of the United States has adopted a position favoring realignment. “Rather than revisiting ways to divide the Ninth Circuit, the ABA believes that the best way for Congress to improve the administration of justice in the Ninth Judicial Circuit is to work cooperatively with the administration to promptly fill the 20 existing vacancies on its courts (four of which are on the Court of Appeals) and four announced future vacancies, authorize new and temporary judgeships as needed, and provide concomitant resources when federal jurisdiction is expanded or national policies are implemented that result in significant increases in the work of the federal courts,” Refo maintained. She also recommended that the subcommittee refocus its efforts on assuring that the entire federal judiciary has access to the best technological resources.

**RAPID DNA:** President Trump signed bipartisan legislation Aug. 18 that directs the Federal Bureau of Investigation (FBI) to issue standards and procedures for the use of fully automated processes, known as Rapid DNA, to analyze DNA samples. P.L. 115-50 (H.R. 510), the Rapid DNA Act of 2017, was cleared for the president by the Senate Aug. 1 after identical bills, H.R. 510 and S. 139, moved through Congress with strong support from both Republicans and Democrats. The legislation, which was introduced by Rep. James Sensenbrenner (R-Wis.) in the House, will help reduce the backlog of DNA samples and allow DNA results to be processed in under 90 minutes. “This technology has the potential to revolutionize the way in which arrested individuals are enrolled in the criminal justice system, shorten the time required for their DNA to be linked to unsolved crimes, and expedite the exoneration of innocent suspects by giving law enforcement officials a new system that meets FBI quality assurance standards to compare DNA samples collected at the time of an arrest to profiles in the Combined DNA Index System (CODIS),” according to a news release issued by Sensenbrenner’s offices. Sensenbrenner called Rapid DNA a “promising new technology” that will “save time and taxpayer dollars.” While the ABA has not taken a position specifically on Rapid DNA technology, the association approved policy in 2006 adopting the black letter ABA Criminal Justice Standards on DNA Evidence that include provisions supporting the prompt collection of DNA evidence and testing and interpreting such evidence in a timely manner.
migration status and urges Congress to amend 8 U.S.C. §1621(d) to vest state courts with authorization to permit undocumented aliens to obtain professional licenses to practice law in their jurisdictions.

Legal Ethics

Misappropriation of Funds. Amends the black letter for Rule 7 (Roster of Lawyers) of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE) to minimize instances of lawyer misappropriation of monies held in trust accounts and hold lawyers accountable when appropriate.

Tort Law

Trap-Neuter-Vaccinate-Return. Urges legislative bodies and governmental agencies to interpret existing laws and policies and to adopt laws and policies that allow implementation and administration of trap-neuter-vaccinate-return programs for free-roaming cats (“community”) cats within their jurisdictions in order to promote effective, efficient and humane management of the cats.

Attorney-client Privilege. Supports common-interest doctrine, under which sharing of privileged communications with persons of common interest who have agreed to maintain confidentiality does not waive privilege.

Veterans

Discharge Status. Recommends review and improvement of the processes by which military records are corrected, discharge status petitions are considered, and the character of one’s discharge is reviewed to ensure that veterans receive the full range of benefits to which they are entitled.

Veterans treatment courts were the focus of a panel discussion featuring (from left): Frank D’Aversa, veteran mentor, Suffolk County Veterans Court, Central Islip, New York; Timothy Thayne, Binghamton, New York; John Toomey, Suffolk County Veterans Court, Central Islip, New York; Robert Russell, Buffalo City Court, Buffalo, New York; Gary Horton, NYS Defenders Association, Albany, New York; Marcia Hirsch, Supreme Court, Queens County, Kew Gardens, New York; and moderator Christine Edwards, New York City.

“It Is Only Fair! Legal Services Corporation Concert and Rally,” which drew a large crowd during the Annual Meeting, featured ABA and LSC leaders, legal services advocates and clients, and seven Broadway actors.
ABA opposes proposed rule to authorize mandatory pre-dispute arbitration in nursing home contracts

The ABA urged the Centers for Medicare & Medicaid Services (CMS) this month to withdraw a proposed rule that would authorize the inclusion of mandatory pre-dispute arbitration provisions in long-term care admission contracts, saying the proposed rule “fails to protect residents’ rights and interests.”

The proposal also would permit nursing homes to require residents to agree to such arbitration provisions as a condition of admission to a facility.

The proposed rule would replace a rule that was blocked by a preliminary injunction just before it was scheduled to go into effect in November 2016. That rule, which mirrored ABA policy, sought to prohibit nursing homes participating in the Medicare or Medicaid program from requiring pre-dispute binding arbitration to settle disputes over residents’ care.

In the ruling — which was 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, determined that CMS exceeded its authority in issuing the rule and that the binding arbitration issue should be addressed by Congress through federal legislation rather than by CMS.

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, theoretically in return for a speedy and cost-effective solution, 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 opposes the use of binding forms of alternative dispute resolution involving residents in disputes with long term care facilities unless the parties agree to do so voluntarily and knowingly after a dispute arises.” ABA Governmental Affairs Director Thomas M. Susman wrote in an Aug. 7 comment letter to CMS.

Susman emphasized that nursing home admission is an extremely emotionally and physically challenging event for the prospective residents and their family. “It is virtually impossible for an applicant or family representative to give fully informed, voluntary consent to arbitration provisions relating to facility admission,” he explained in his letter.

He also wrote that it is a “mistaken” view that the recent Supreme Court ruling in Kindred Nursing Center v. Clark interpreted the Federal Arbitration Act (FAA) as prohibiting bans on pre-dispute arbitration in long-term care admissions contracts. The ruling states that arbitration agreements may only be found invalid based on legal rules that would apply to any contract.

“While Kindred clearly prohibits singling out arbitration agreements for disfavored treatment, nothing in the court’s reasoning or under the terms of the FAA requires singling out arbitration agreements for favored treatment. Yet, this is exactly what CMS is doing by its proposed total embrace of mandatory pre-dispute arbitration provisions in admissions contracts,” Susman said.

He reiterated the association’s support for the final rule crafted in 2016 and said the rule, which would permit arbitration agreements only after a dispute arises, treats arbitration on a par with or better than other resident contract rights that are properly regulated by CMS. While the 2016 rule is consistent with the person-centered paradigm at the core of the long-term care regulatory framework, the new proposed rule would give special deference to arbitration agreements and, as a result, ignores and contradicts the entire regulatory purpose and context of Medicare and Medicaid long-term care law and regulation, he said.

In related action, Sens. Al Franken (D-Minn.) and Ron Wyden (D-Ore.) spearheaded an Aug. 7 letter from 31 senators to CMS opposing the proposed rule. Forced arbitration clauses in nursing home agreements “prevent many of our country’s most vulnerable individuals from seeking justice in a court of law and instead funnel all types of legal claims, no matter how egregious, into a privatized dispute resolution system that is often biased toward the nursing home,” the letter said.
ABA reiterates opposition to “Persuader Rule” changes

The ABA expressed support this month for a Department of Labor (DOL) proposal to rescind key changes the department made last year to the “Persuader Rule” that would have required many labor lawyers and law firms representing employers to report confidential client information to the government.

The 2016 changes to the Persuader Rule, which were blocked by a permanent injunction issued by a U.S. district court in Texas last November before they could go into effect, were intended to narrow the department’s longstanding interpretation of the “advice” exemption under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

Section 203 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 2016 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 included 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 also could have 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.

In a Aug. 4 letter to the department, ABA Governmental Affairs Director Thomas M. Susman included a 2011 comment letter submitted by the ABA opposing the department’s then-proposed rule and the ABA’s statement for the record of an April 2016 hearing that the House Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions held regarding the final 2016 rule.

In his letter, Susman also urged the department to narrow the scope of Form LM-21 (Receipts and Disbursements Report) so that when a lawyer engages in persuader activities that are not subject to the advice or attorney-client communications exemptions under Sections 203(c) and 204 of the LMRDA, disclosure would be required only for receipts and disbursements that relate directly to the employer clients for whom persuader activities were performed, not for the lawyer’s other employer clients.

Susman emphasized that the ABA was not taking sides on a union–versus management dispute, but has the sole objective of “defending the confidential client-lawyer relationship by reversing a rule that imposes unjustified and intrusive burdens on lawyers, law firms and their clients.”