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### President Klein see a “defining season” for lawyers

## House of Delegates approves policies on array of issues important to the rule of law

The ABA House of Delegates, convening Feb. 6 in Miami during the association’s Midyear Meeting, adopted new policies on a number of pressing issues of importance to the legal profession.

ABA President Linda A. Klein, addressing the delegates, called this a “defining season” for lawyers and their commitment to the rule of law, due process and access to justice.

“There has been a lot of talk about protecting our borders,” she said. “Let me tell you what the most important border is: It’s our Constitution and the rule of law it embodies. We as lawyers are called upon to protect it.” She emphasized the importance of avoiding sweeping bans based on religion or national origin and that lawyers must insist on the right to due process and legal representation for immigrants.

Klein also highlighted that, for a nation based on the rule of law, nothing is more important than a fair and impartial judiciary. Also on the ABA’s list of important issues are support for the Legal Services Corporation and criminal justice reform, she said.

Policy resolutions adopted by the delegates include opposing an executive order issued in January to restrict entry into the United States from seven specific countries, and urging attention to legal procedures and legal rights in crafting future executive orders regarding border security, immigration enforcement, and terrorism. Other new policies include support for action to improve the civil justice system, prevent sexual and gender-based violence, protect those with disabilities from discrimination, and provide legal assistance to veterans.

Panel discussions focused on a wide variety of topics, including the judicial nomination and confirmation process, the death penalty, public service loan forgiveness programs, the gender pay gap, immigration, environmental issues, and legal innovation.

In addition, the ABA Board of Governors approved the association’s Legislative and Governmental Priorities for the 115<sup>th</sup> Congress (see page 8).

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

### Civil Rights

**Blood donation.** Urges the Food and Drug Administration (FDA) to update its current policy requiring deferment of blood donations from men who have sex with men to a deferral policy based on an assessment of the risk posed by an individual based on potential recent exposures rather than on the individual’s sexual orientation. Urges the FDA to develop and imple-

see “Midyear Meeting,” page 3

## LEGISLATIVE BOXSCORE

LEGISLATIVE ISSUE	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Criminal Justice.</b> S. 328 and H.R. 968 would confer jurisdiction on the U.S. district courts to provide declaratory and injunctive relief against systemic violation of the right of counsel. S. 330 and H.R. 969 would establish a federal Defender Office for Supreme Court Advocacy to ensure right to counsel.</p>	<p>H.R. 968 and H.R. 969 were referred to the House Judiciary Cmte. on 2/7/17.</p>	<p>S. 328 and S. 330 were referred to the Senate Judiciary Cmte. on 2/7/17.</p>		<p><b>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 page 10.</b></p>
<p><b>Federal Courts.</b> P.L. 114-113 (H.R. 2029), consolidated fiscal year 2016 appropriations legislation, included \$6.78 billion for the federal judiciary. P.L. 114-254 (H.R. 2028), continuing fiscal year 2017 appropriations legislation, extends current funding through 4/28/17. H.R. 720 and S. 237 would amend federal rules to require mandatory imposition of sanctions for lawyers who file non-meritorious lawsuits. H.R. 985 would amend federal rules regarding class action certification.</p>	<p>Judiciary Cmte. approved H.R. 985 on 2/15/17. Judiciary Cmte. approved H.R. 720 on 2/2/17.</p>	<p>S. 237 was referred to the Senate Judiciary Cmte. on 1/30/17.</p>	<p>President signed P.L. 114-113 (H.R. 2029) on 12/18/15. President signed P.L. 114-254 (H.R. 2028) on 12/10/16.</p>	<p><b>Supports adequate judicial resources and opposes efforts to infringe on separation of powers or undermine the judiciary. See pages 6 and 10.</b></p>
<p><b>Immigration.</b> The president issued executive orders on 1/25/17 and 1/27/17 on border security, immigration enforcement, and visa and refugee programs. A federal appeals court judge temporarily blocked the order nationwide that suspended entry from seven majority-Muslim countries.</p>				<p><b>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. See page 11.</b></p>
<p><b>Legal Services Corporation (LSC).</b> P.L. 114-113 (H.R. 2029), consolidated fiscal year 2016 appropriations legislation, included \$385 million for LSC. P.L. 114-254 (H.R. 2028), continuing fiscal year 2017 appropriations legislation, extends current LSC funding through 4/28/17.</p>			<p>President signed P.L. 114-113 (H.R. 2029) on 12/18/15. President signed 114-254 (H.R. 2028) on 12/10/16.</p>	<p><b>Supports an independent, well-funded LSC.</b></p>

## \*\*\*Midyear Meeting\*\*\*Midyear Meeting\*\*\*Midyear Meeting\*\*\*

*continued from front page*

ment validated tools for assessing individual risk to ensure the safety of the blood supply.

### Courts/Judiciary

#### **Supreme Court Appointments.**

Urges the U.S. Supreme Court to consider racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for appointments of amicus curiae, special masters, and other counsel.

**Bankruptcy Judges.** Urges Congress to amend Title 28 of the U.S. Code to authorize the appointment of additional bankruptcy judges sufficient to meet the demands within each district.

**Civil Justice.** Urges all state courts to develop and implement a plan to improve the delivery of civil justice guided by the recommendations of *Call to Action: Achieving Civil Justice for All*, as endorsed by the Conference of Chief Justices. Also urges all bar associations to promote the recommendations.

### Criminal Justice

**Hair Analysis.** Urges the U.S. Department of Justice to continue its accuracy and quality assurance efforts in the area of microscopic hair analysis. Urges prosecutors to undertake a timely review of all cases in which they have received notice of possible error, and to consider waivers of statute of limitations if needed to serve justice.

**Conviction Integrity.** Urges each prosecutor's office to adopt and implement internal conviction-integrity policies when an office supports a defendant's motion to vacate a conviction based on the office's doubts about the defendant's guilt of the crime or about the lawfulness of the conviction.

**Miranda Warnings.** Urges law enforcement authorities to develop

## Montana lawyer Robert M. Carlson is ABA president-elect nominee

Montana lawyer Robert M. Carlson, nominated Feb. 5 as president-elect to become ABA president in August 2018, emphasized in his speech to the association's House of Delegates that the ABA is more important than ever.

Carlson, who practices law in a small firm, said that the ABA has a proven track record of making a difference for practicing lawyers in their everyday work as well as advocating for access to justice, criminal justice reform and independence of the judiciary.

Carlson, a former chair of the House of Delegates, has been a member of that body since 1999, during which he has been chair of the Drafting Committee and served on the Rules and Calendar Committee and the Select Committee of the House. He also was a member of the Board of Governors. In addition, he is a former chair of the Standing Committee on Meetings and Travel and served on the Standing Committee on Bar Activities and Services and the Commission on Racial and Ethnic Diversity in the Profession. He is a former state chair of the American Bar Foundation.

In the area of governmental affairs, Carlson was the chair of the ABA Day in Washington Planning Committee from 2014-2016.

In Montana, he was president of the State Bar of Montana and served on the Montana Supreme Court Commission on Character and Fitness.

He earned his undergraduate and law degrees from the University of Montana.



**Robert M. Carlson**

and use, prior to custodial interrogation of suspects, translations of *Miranda* warnings in as many languages and dialects as necessary to accurately and fully inform individuals of their *Miranda* rights.

### Disability Law

**Parents with Disabilities.** Urges governments to enact legislation

and implement policy providing that custody, visitation and access shall not be denied or restricted, nor shall a child be removed or parental rights terminated, based on a parent's disability, absent a showing that the disability is causally

*see "Midyear Meeting," page 4*

## \*\*\*Midyear Meeting\*\*\*Midyear Meeting\*\*\*Midyear Meeting\*\*\*

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related to a harm or an imminent risk of harm to the children.



Experts discussing recent immigration executive orders during the Midyear Meeting were (from left): Hon. Dana Leigh Marks, president, National Association of Immigration Judges; Wendy Wayne, director, Immigration Impact Unit, Committee for Public Counsel Services; Esther Olavarria, former senior counselor, Department of Homeland Security; and ABA Commission on Immigration Chair Mary Meg McCarthy, moderator.

### Disaster Response

**Disaster Resilience.** Urges governments at all levels to adopt standards, guidance, best practices, programs, and regulatory systems that make communities more resilient to loss and damage from foreseeable hazards.

### Families/Children

**Sexual Abuse.** Urges state, territorial, tribal and local legislative bodies and governmental agencies to review their laws on preventing the luring, enticing, or intimidating of minors for sexual acts to ensure that such laws explicitly address Internet and other electronic means of communication.

### Health Law

**Medicare Coverage.** Urges amendment to Section 1862(a)(1) of the Social Security Act and adoption of regulations that broaden the scope of Medicare coverage to include aspects of “precision medicine” – interventions that could mitigate medical issues that are genetically indicated but not yet apparent.

### Human Rights

**Atrocities.** Urges governments and relevant organizations to implement the recommendations set forth

in the May 2016 policy brief, *Allies Against Atrocities: The Imperative for Transatlantic Cooperation to Prevent and Stop Mass Killings*.



“Called to Serve, Addressing the Legal Needs of Veterans” featured (from left): Patricia E. Roberts, director, William & Mary Law School’s Veterans Benefits Clinic; Sara Sommarstrom, Vetlaw director, Minnesota Assistance Council for Veterans; and moderator Antonia K. Fasanelli, executive director, Homeless Persons Representation Project Inc. in Maryland.

### Immigration

**Refugee Legal Protection.** Reaffirms support for the establishment of laws, policies and practices that ensure access to legal protection for refugees, asylum seekers,

torture victims, and others deserving of humanitarian refuge. Urges Congress to adopt legislation mandating that refugees receive an appropriate individual assessment in a timely fashion to determine their eligibility and that neither national origin nor religion be the basis for barring an otherwise eligible individual in making a determination.

### Immigration Executive Orders.

Urges the president to withdraw Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States, issued Jan. 27, 2017) and to follow legal procedures and other legal rights in the promulgation of future executive orders regarding border security, immigration enforcement, and terrorism.

### Immigrant Children.

Urges Congress to preserve and develop laws, regulations, policies and procedures that protect or increase due process and other safeguards for immigrant and asylum-seeking

children, especially those who have entered the United States without a parent or legal guardian.

**Intended Parents.** Urges the

*see “Midyear Meeting,” page 5*

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U.S. State Department to interpret the Immigration and Nationality Act to recognize children born to intended parents, even if those legally recognized parents do not have a biological relationship to the child, as long as one of the intended parents is a U.S. citizen who is legally recognized as the child's parent by the country of birth or the intended parent's state of domicile and the relevant resident or physical presence requirements are met.

### Intellectual Property Law

**Trademarks.** Supports the adoption of the nominative fair use doctrine as an affirmative defense to claims of trademark infringement and unfair competition.

### International Law

**Arms Trade.** Urges the United States to ratify and implement the 2013 Arms Trade Treaty to prevent and eradicate the illicit trade in conventional arms and prevent their diversion.

**Sexual and Gender-based Violence.** Urges the United Nations, the United States and other governments and relevant parties to develop and implement methodologies to measure and track the prevalence of sexual and gender-based violence. Endorses international efforts to improve donor coordination, transparency, and accountability with respect to assistance to victims of sexual and gender-based violence, and recommends that international non-governmental organizations, donors and multilateral agencies work with governments to develop appropriate methodologies to create publicly accessible national databases of information for coordinating, tracking and evaluating assistance.

### Legal Education

**Drug Convictions.** Urges Congress to repeal a restriction in the



A panel on Environmental Justice featured (from left): James Murley, chief resiliency officer, Miami-Dade County; Catherine Millas Kaiman, Environmental Justice Clinic, University of Miami School of Law; Kalyani Robbins, Florida International University School of Law; Keith Rizzardi, St. Thomas University; Cris Costello, Sierra Club; and moderator Emily Bergeron, University of Kentucky and ABA Environmental Justice Committee.

Higher Education Act that denies eligibility for federal educational aid to students convicted of drug offenses, remove the question about drug convictions from the Free Application for Federal Student Aid, and provide notification of the change to students who had earlier been deemed ineligible.

**Standards.** 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 in the areas concerning self study, curriculum, academic program and academic calendar, admissions, and appeals panels.

**Continuing Legal Education.** Adopts the *Model Rule for Minimum Continuing Legal Education and Comments* adopted in February 2017 to replace the previous model rule and comment adopted in 1988.

### Veterans

**Legal Assistance.** Urges lawmakers and the legal profession to work together to identify longstanding legal barriers for veterans in accessing housing, education, employment, treatment, other services,

or benefits. Urges, where appropriate, the inclusion of veterans' caregivers as eligible clients.

### Uniform State Laws

The delegates approved the following uniform state laws promulgated by the National Conference of Commissioners on Uniform State Laws: Uniform Family Law Arbitration Act; Uniform Wage Garnishment Act; Uniform Employee and Student Online Privacy Protection Act; Revised Uniform Unclaimed Property Act; Uniform Unsworn Domestic Declarations Act; and Uniform Unsworn Declarations Act. ■

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## Class action reform bill clears House Judiciary Committee

The House Judiciary Committee approved class action reform legislation Feb. 15 by an 18-11 party-line vote without holding a hearing to examine the myriad provisions and complex considerations involved in changing the Federal Rules of Civil Procedure.

The ABA, in a [Feb. 14 letter](#) to the committee, had urged the committee to delay markup to hold a hearing on the bill, H.R. 985, which is more comprehensive than class action reform legislation that passed the House during the last Congress. The ABA opposed the previous legislation because it would have unnecessarily circumvented the Rules Enabling Act process developed by Congress to amend the federal rules, and made it more difficult for large numbers of injured parties to efficiently seek redress in court. In the letter, ABA Governmental Affairs Director Thomas M. Susman also pointed out that the Judicial Conference of the United States is considering changes to Rule 23, which governs class action certification, and recommended that Congress allow that process to continue.

H.R. 985 would amend Rule 23, which was adopted in 1966 and has been amended several times using the Rules Enabling Act. Currently, plaintiffs must meet rigorous threshold standards to proceed with a class action case, and the ABA maintains that current screening practices are working. The legislation, how-

ever, would mandate that no federal court shall certify any proposed class seeking monetary relief for personal injury or economic loss unless the party affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative(s).

“This requirement places a nearly insurmountable burden for people who have suffered personal injury or economic loss at the hands of large institutions with vast resources, effectively barring them from bringing class actions,” Susman wrote.

He explained that class actions have been an efficient means of resolving disputes and that many of the legitimate complaints about lawsuit abuses through class-action litigation have been addressed through the evolution of class-action standards by the courts and through consideration by the Judicial Conference.

H.R. 985 also contains several provisions to modify procedures governing multidistrict litigation proceedings.

Committee Chairman Bob Goodlatte (R-Va.) applauded approval of H.R. 985, maintaining that the action of the committee “addresses the abuses within our class action litigation system and keeps baseless class action suits away from innocent parties, while still keeping the doors to justice open for parties with real and legitimate claims.” ■

### Judicial Vacancies/Confirmations—115th Congress\* (as of 2/28/17)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	1	1	0
US Courts of Appeals (179 judgeships)	19	0	0
US District Courts (678 judgeships)	92	0	0
Court of International Trade (9 judgeships)	2	0	0
<b>Totals</b>	<b>114</b>	<b>1</b>	<b>0</b>

\*Includes territorial judgeships

## WASHINGTON NEWS BRIEFS

**CYBERSECURITY:** Cybersecurity will receive increased attention in the Senate Armed Services Committee this Congress with the creation of a new subcommittee. The Subcommittee on Cybersecurity, established by committee Chairman John McCain (R-Ariz.), will focus on cyber policies and capabilities and oversight of certain cyber-related budget accounts and several Department of Defense (DoD) offices, commands, and agencies. Sen. Mike Rounds (R-S.D.), who will head the committee with Ranking Member Bill Nelson (D-Fla.), said the panel's first task will be to work with DoD to create guidelines for cyberattack response. The panel also is expected to establish a more direct line of communication between the military and the civilian side of the cybersecurity discussion. Other senators appointed to the subcommittee are Sens. Deb Fischer (R-Neb.), Sonny Perdue (R-Ga.), Lindsey Graham (R-S.C.), Ben Sasse (R-Neb.) Claire McCaskill (D-Mo.); Kirsten Gillibrand (D-N.Y.), and Richard Blumenthal (D-Ct.).

**MENTALLY ILL AND THE DEATH PENALTY:** W. Lawrence Fitch, a professor at the University of Maryland Law School and a reporter for the Criminal Justice Standards Project on mental health issues in criminal cases, urged the Criminal Law Subcommittee of the Virginia House Courts of Justice Committee last month to approve H.B. 1522, legislation to close a gap in how the law handles mental illness and the death penalty. The bill would define severe mental illness and provide that a defendant in a capital case who had a severe mental illness at the time of the offense is not eligible for the death penalty. The measure also would establish procedures for determining whether a defendant had a severe mental illness at the time of the offense and provides for the appointment of expert evaluators. In his [Jan. 30 statement](#) submitted to the subcommittee, Fitch explained that competency to stand trial has to do with whether a defendant can go to trial in the first place, and the insanity defense has to do with whether a defendant can be found guilty at all. Neither, however, addresses what penalty a mentally ill defendant should receive once convicted. Noting that H.B. 1522 would fill that gap, he said, "We believe it is important to have the ultimate punishment off the table, but allow life without the possibility of parole, for those defendants who are deemed competent to stand trial and do not satisfy the very narrow insanity defense standards, but whose behavior was severely impacted by their mental illness when they committed their crime." He also cited several issues surrounding cases where mentally ill defendants face serious charges: jurors often think that

mental illness should mean an increase in the defendant's punishment; mentally ill individuals are more likely to be wrongly accused; mentally ill defendants may not be able to make informed choices in waiving certain rights; and a trial may agitate a mentally ill defendant and affect jurors' perception of the individual's level of dangerousness. "Resolving these issues fairly is a complex and evolving challenge for both the mental health and legal professions," he noted. "Because the issues are, as yet, unresolved, and because so much hangs in the balance in capital cases, we believe an exemption from the death penalty must be established with severe mental illnesses." Fitch emphasized that while the ABA does not have a policy that either supports or opposes the death penalty generally, the association adopted policy in 2003 opposing capital punishment for severely mentally ill defendants.

**VOIR DIRE PROCESS:** In a [Jan. 31 letter](#) to the Advisory Committee on Civil Rules, the ABA suggested an amendment to Rule 47(a) of the Federal Rules of Civil Procedure to require that the parties at trial or their counsel be allowed the opportunity to question prospective jurors directly during the voir dire process under the supervision of the court and subject to reasonable time limits. In the letter, ABA Governmental Affairs Director Thomas M. Susman explained that the proposed amendment is included in *Principles for Juries and Jury Trials*, which were developed by the ABA American Jury Project and adopted by the association in 2004. Rule 47(a) currently states that the court "may permit the parties or their attorneys to examine prospective jurors or may itself do so," and while some federal district court judges permit direct questioning by counsel, others often preclude questioning by counsel when they exercise their discretion under the rule to conduct all direct questioning themselves. "It is important to realize," Susman wrote, "that a trial judge likely knows far less about a given case at the time of voir dire than the lawyers who have prepared the case for months or years," and that "busy tough diligent judges cannot be expected at the outset of trial to appreciate all the significant matters on which jurors should be examined for bias." He also emphasized that research shows that potential jurors respond more candidly and are less likely to give merely socially desirable answers to questions from lawyers than from judges. In addition, he pointed out that research indicates that, under court supervision, attorney-conducted voir dire does not take substantially more time than voir dire conducted only by the court.

## **ABA Legislative and Governmental Priorities 115th Congress (2017-2018)**

### **Access to Legal Services**

- Support increased funding for the Legal Services Corporation
- Support legal protections and assistance for members of the military and veterans

### **Civil Justice System Access**

- Oppose measures that limit access to, or redress by, the civil justice system, including legislation that would amend the Federal Rules of Civil Procedure to curtail class actions (Rule 23) and impose mandatory sanctions (Rule 11)
- Oppose legislation that discourages medical malpractice litigation and limits recovery

### **Criminal Justice System Improvements**

- Support federal sentencing reform
- Support prison system reform
- Support reauthorization of the Juvenile Justice and Delinquency Prevention Act
- Support funding for federal and state indigent defense programs

### **Elimination of Discrimination**

- Support enactment, enforcement, and preservation of laws to eradicate discrimination in public accommodations and the workplace
- Support protection of the voting rights of all citizens

### **Immigration Reform**

- Support access to counsel, including appointed counsel for unaccompanied children, and due process safeguards
- Oppose mandatory detention and support alternatives to detention
- Support improvements to the immigration court and adjudication system

### **Independence of the Judiciary**

- Support prompt filling of judicial vacancies
- Support adequate judicial resources
- Oppose efforts that infringe on separation of powers or undermine the judiciary

### **Independence of the Legal Profession**

- Oppose mandatory accrual accounting for law firms
- Oppose federal government policies that erode the attorney-client privilege and the work product doctrine
- Oppose federal legislation and agency rules that impose excessive new regulations on practicing lawyers or undermine the confidential lawyer-client relationship or state court regulation of the legal profession

### **International Rule of Law**

- Support funding for domestic and international agencies and programs that promote democracy, human rights, and the rule of law
- Support prompt payment of U.S. obligations to the United Nations

### **Legal Education**

- Support preservation of the Public Service Loan Forgiveness Program
- Support affordable student loan options and repayment assistance programs

### **National Security and Civil Liberties**

- Support cybersecurity legislation consistent with enumerated principles and for policies to prevent unauthorized intrusions into lawyers' computer systems and networks
- Oppose reinstatement of interrogation methods by any government agency that do not comply with the U.S. Army Field Manual



## Gorsuch confirmation hearings set for March 20; ABA standing committee begins evaluation of nominee

The Senate Judiciary Committee has scheduled confirmation hearings to begin March 20 on the nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court.

President Trump nominated Gorsuch on Jan. 31 to fill the vacancy left by the death of Justice Antonin Scalia.

Gorsuch, who was appointed as a judge on the U.S. Court of Appeals for the Tenth Circuit by President George W. Bush in 2006, holds a law degree from Harvard Law School and a Doctor of Philosophy in Law from University College in Oxford.

After clerking for DC Circuit Appeals Court Judge David Sentelle and Supreme Court Justices Byron White and Anthony Kennedy, he joined the law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel. After 10 years of private practice from 1995 to 2005, he served as a deputy associate attorney general in the Department of Justice until his judicial appointment.

In a [statement](#) issued immediately following the announcement of Gorsuch's nomination, ABA President Linda A. Klein highlighted the role the ABA Standing Committee on the Federal Judiciary has played in evaluating the professional qualifications of Supreme Court nominees since the Eisenhower administration. Every member of the 15-member committee participates in the evaluation, which involve extensive peer review of the nominee's integrity, professional competence and judicial temperament.

The standing committee focuses solely on a nominee's professional qualifications and does not take in consideration the nomi-



**Neil M. Gorsuch**

nee's philosophy, political affiliation or ideology.

The investigations of Supreme Court nominees are particularly rigorous because of the significance, range and complexity of issues the Supreme Court considers.

After the committee members complete their evaluation, they vote to rate the Supreme Court nominee "Well Qualified,"

"Qualified" or "Not Qualified."

The rating is submitted in writing to the Senate Judiciary Committee, the White House, the U.S. Department of Justice and the nominee, and is posted on the standing committee's website for the public record. The standing committee also submits a detailed written statement to the Senate Judiciary Committee explaining the reasons for its rating, and traditionally is invited to testify as the first public witness at the nominee's confirmation hearing.

In her statement, Klein emphasized that the standing committee's role is insulated and separate from all other ABA activities. "The impartiality and independence of the committee and its procedures are essential to the effectiveness of its work," Klein said, adding that the ABA looked forward to "engaging in the process to ensure that the Senate can make an informed decision about the professional qualifications of this and future Supreme Court nominees." ■

### Sessions becomes U.S. attorney general

Sen. Jeff Sessions (R-Ala.) was sworn in as the U.S. attorney general Feb. 9 following a 52-47 Senate vote confirming his nomination the night before.

The confirmation vote following an intense debate over his views on voting rights, immigration and criminal justice reform.

Sessions, who began his career as an attorney in private practice, was the U.S. attorney for the Southern District of Alabama before becoming the state's attorney general. In 1986, his nomination to 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. He was elected to the Senate in 1996 and was a longtime member of the Senate Judiciary Committee.

## House Judiciary Committee approves Rule 11 legislation

The ABA reiterated its opposition this month to H.R. 720, a bill that would amend Rule 11 of the Federal Rules of Civil Procedure to require monetary sanctions against lawyers who file non-meritorious lawsuits.

Despite the ABA's stand against the legislation and opposition from the Judicial Conference of the United States, the House Judiciary Committee approved the bill, known as the Lawsuit Abuse Reduction Act, by a 17-6 vote along party lines on Feb. 2.

In a [Feb. 1 letter](#) to the committee, ABA Governmental Affairs Director Thomas M. Susman explained that the legislation seeks to amend Rule 11 by "rolling back critical improvements" made to the rule in 1993 and reinstating a mandatory sanction provision that was adopted in 1983 but eliminated 10 years later after experience revealed its unintended, adverse consequences. The legislation also would eliminate the "safe harbor" provision added in 1993 that allows parties and their attorney to avoid Rule 11 sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served.

Susman also pointed out that the legislation would require judges to impose monetary sanctions in an amount sufficient to reimburse the prevailing party for reasonable attorneys' fees and litigation costs attributable to the frivolous claims rather than authorizing judges only to impose sanctions to deter future litigation.

He cited three main reasons the association opposes the legislation: it would circumvent Rules Enabling Act procedures that Congress has established for amending the Federal Rules of Civil Procedure; there is no demonstrated evidence that the existing Rule 11 is inadequate and needs to be amended; and there is substantial risk that the proposed changes would impede the administration of justice by encouraging additional litigation and increasing court costs and delays.

Under the Rules Enabling Act, the Judicial Conference drafts proposed rules and amendments, makes them available for public comment, and submits them to the U.S. Supreme Court after Judicial Conference approval. The Supreme Court transmits the proposals to Congress, which retains the final authority to reject, modify or defer any rule or amendment before it takes effect.

During the markup, committee Chairman Robert W. Goodlatte (R-Va.) maintained that "the lack of mandatory sanctions leads to the regular filing of lawsuits that are baseless." On the other hand, Ranking Member John Conyers Jr. (D-Mich.), who opposed H.R. 720, said the bill would restore the "deeply flawed" version of the rule that was in effect before 1993 and eliminate judicial discretion on sanctions.

Respecting the deep concerns that some members of Congress have about frivolous lawsuits, Susman wrote that the ABA's objective in opposing the enactment of H.R. 720 "is not to stifle discourse over the underlying issues." He said that the best way to provide a full and robust examination of concerns and proposed solutions is to defer to the Rules Enabling Act. "This will assure a comprehensive and evidence-based development of any remedial proposal that involves amending the federal rules," he concluded. ■

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### Legislation seeks to fix problems with public defender system

The ABA expressed strong support last month for the goals of legislation introduced by Sens. Cory Booker (D-N.J.) and Rep. Sean Patrick Maloney (D-N.Y.) that seek to help the nation's public defender system meet the Sixth Amendment's guarantee of right to counsel required by the landmark 1963 Supreme Court decision in *Gideon v. Wainwright*.

S. 328 and H.R. 968, the Equal Justice Under Law Act, would confer jurisdiction on the U.S. district courts to provide declaratory and injunctive relief against systemic violations of the right to counsel. S. 330 and H.R. 969, the Clarence Gideon Full Access to Justice Act, would establish a federal Defender Office for Supreme Court Advocacy dedicated to delivering independent, uniform and quality defense representation in criminal cases before the U.S. Supreme Court and, in some cases, before the highest courts in the states.

"Our legislation seeks to fill the glaring gaps that have left too many Americans vulnerable and without adequate legal representation from the lowest levels of our judicial system all the way to the Supreme Court," Booker said in announcing the introduction of the bills. "We must better balance the scales of justice so that we can truly be a nation of liberty and justice for all."

In a [Jan. 26 letter](#) to Booker, ABA Governmental Affairs Director Thomas M. Susman noted a report issued by the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID), which conducted four public hearings in 2004 at which 32 experts from 22 large and small states across the country testified. He said the report observed that when lack of funding for indigent defense led to overwhelming workloads, the result was "routine violations of the Sixth Amendment obligation to provide effective assistance of counsel."

*see "Public defenders," page 11*

## President Trump drafting new immigration executive order

After the federal courts blocked the president's Jan. 27 executive order to temporarily suspend entry of "all immigrants and non-immigrants" from seven majority-Muslim countries, the Trump administration has been drafting a new executive order that was expected to be released shortly.

The original executive order, EO 13769, is one of three orders related to immigration regarding border security, immigration enforcement, and visa and refugee programs. In addition to suspending entry into the United States from Iraq, Iran, Sudan, Libya, Yemen, Somalia and Syria for 90 days, EO 13769 would indefinitely bar Syrian refugees from entering the country, suspend the U.S. Ref-

ugee Admission Program for 120 days, and reduce the number of refugees allowed into the United States this year from 110,000 to 50,000.

The order, which went into effect immediately without notice or clear guidance, created confusion at numerous airports around the country and internationally and resulted in lawyers rushing to airports to assist those who were being detained regardless of their immigration status.

In a lawsuit brought by the states of Washington and Minnesota, Ninth Circuit Appeals Judge James Robart temporarily halted the president's executive order nationwide on Feb. 3 until the case could be heard in court. On Feb. 9, a three-judge panel denied an emergency motion from the Justice Department to stay Robart's ruling. The litigation is pending as the administration drafts a new executive order.

The other executive orders, issued on Jan. 25, call for the construction of a wall on the U.S. southern border with Mexico, the end of the "catch and release" policy, and the building of new detention facilities along the border to house those waiting for removal proceedings. In addition, the use of expedited removal is expanded, allowing individuals to be deported

without an opportunity for a hearing before an immigration judge.

In a [statement](#) issued Jan. 31, ABA President Linda A. Klein said the ABA is concerned with significant portions of the executive orders. "Together, they make significant changes to our nation's immigration policies and jeopardize fundamental principles of justice, due process and the rule of law," she said.

Responding to the details of the orders, Klein emphasized that the ABA opposes detention except in extraordinary circumstances, such as a threat to public safety or flight risk, and maintains that removal decisions should be made only by impartial adjudicators, preferably immigration judges, following a formal hearing that with accepted norms of due process.

The ABA House of Delegates took further action Feb. 6, when the delegates approved a policy resolution urging the president to withdraw EO 13769 and the executive branch to ensure that any executive orders concerning border security, immigration enforcement and terrorism respect the bounds of the U.S. Constitution and other international legal obligations and facilitate a transparent, accessible, fair and efficient system of administering U.S. immigration law and policies. ■

### Public defenders

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Susman also pointed out that the importance of controlling workloads to ensure quality representation is highlighted in Principle 5 of the ABA's 2002 *Ten Principles of a Public Defense Delivery System*, the comment for Guideline 5 of the ABA's 2009 *Eight Guidelines of Public Defense Related to Excessive Workloads*, and Formal Opinion 06-441 of the *ABA Model Rules of Professional Conduct*. ■

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association's legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at [http://www.americanbar.org/advocacy/governmental legislative work/publications.html](http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html). ©2017

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