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Inside This Issue

Regular Features

Defending Liberty Pursuing Justice

Nomination approved by 77-22 Senate vote

John G. Roberts Jr. begins new term as chief justice

Following his Senate confirmation and swearing in Sept. 29, new Chief Justice John G. Roberts Jr. joined the other eight justices for the Oct. 3 convening of the Supreme Court's 2005 term.

The 77-22 Senate vote on Roberts' nomination came after three days of debate, during which Roberts was hailed as a "brilliant legal mind" but also drew criticism for not answering some of the questions posed to him during his confirmation hearings.

Roberts, 50, succeeds Chief Justice William H. Rehnquist, who died Sept. 3 after serving on the court for 32 years, including 19 years as chief justice. Prior to his nomination, Roberts served on the U.S. Court of Appeals for the District of Columbia Circuit for two years. He graduated from Harvard Law School in 1979 and clerked for then Associate Justice Rehnquist in 1980-81. Roberts also served as an associate White House counsel and a principal deputy solicitor general, and was a partner with the law firm of Hogan & Hartson. He presented arguments before the Supreme Court 39 times.

In bringing the nomination to the floor, Senate Majority Leader Bill Frist (R-Tenn.) emphasized that Roberts has "earned respect from both sides of the political divide" and that his record reflects that he is fair, thoughtful, capable, hardworking, driven, and a man of integrity.

Sen. Edward M. Kennedy (D-Mass.), however, said that "the values and perspectives displayed over and over again in Roberts' record cast doubt on his view of voting rights, women's rights, civil rights and disability rights."

The final tally showed that 55 Republicans, 22 Democrats and one independent voted for Roberts, while 22 Democrats voted against the nomination.

The ABA Standing Committee on Federal Judiciary presented its report to the Senate

see "ABA," page 5

President nominates Harriet E. Miers for Supreme Court

President Bush announced Oct. 3 the nomination of White House Counsel Harriet E. Miers to be an associate justice of the U.S. Supreme Court to replace Justice Sandra Day O'Connor, who will retire when her successor is confirmed.

Miers, 60, has never been a judge. She became White House counsel in February of this year after serving as staff secretary, assistant to the president and deputy chief of staff during the Bush administration. As counsel to the president, she has served as the president's top lawyer and principal adviser for judicial nominations.

A native of Dallas, Miers graduated in

see "Miers," page 3

LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
Independence of the Bar. A district court issued a ruling 4/30/04 that the Federal Trade Commission (FTC) went beyond its statutory authority by including lawyers under Title V privacy provisions of the Gramm-Leach-Bliley Act of 1999 (GLBA). The FTC appealed the decision, and the ABA filed a response to the appeal on 1/19/05.				**Opposes any federal laws or regulations that would preempt or interfere with state rules protecting the confidential attorney-client relationship, including the Federal Trade Commission rules applying the privacy protection provisions of Title V of the GLBA.**
Federal Tort Laws. S. 5 and H.R. 516 would expand jurisdiction of federal courts over certain class action cases. S. 354, H.R. 5 and H.R. 534 would cap pain and suffering and punitive damage awards in medical liability cases. S. 397 and H.R. 800 would protect gun manufacturers, sellers and traders from almost all ordinary civil liability.	H.R. 516 and H.R. 534 were referred to the Judiciary Committee on 2/3/05. House passed S. 5 on 2/17/05. Judiciary Committee approved H.R. 800 on 5/25/05. House passed H.R. 5 on 7/28/05.	Judiciary Committee approved S. 5 on 2/3/05. Senate passed S. 5 on 2/10/05. S. 354 was referred to the Judiciary Committee on 2/10/05.	President signed P.L. 109-2 (S. 5) on 2/18/05.	**Supports amending ERISA to allow causes of action to be brought in state and territorial courts against employer-sponsored health plans under state and territorial laws; legislation establishing the use of ADR procedures for resolving disputes between patients and group health plans; federal legislation addressing asbestos litigation issues and class actions. Opposes creating a special tort standard for the gun industry**.
Immigration. S. 119 and H.R. 1172 would ensure that unaccompanied alien children have counsel to represent them in immigration proceedings. S. 1033, S. 1438, and H.R. 2330 seek better enforcement of border security and would reform the nation's immigration system.	H.R. 1172 was referred to the Judiciary Committee on 3/8/05. H.R. 2330 was referred to the Judiciary Committee on 5/12/05.	Judiciary Committee approved S. 119 on 4/14/05. S. 1033 and S. 1438 were referred to the Judiciary Committee on 5/12/05 and 7/20/05, respectively.		**Supports the appointment of counsel at government expense to assist unaccompanied children in immigration proceedings. Supports the humane treatment and legalization of unlawful aliens living in the United States. See page 7.**
Judicial Independence. P.L. 108-447 (H.R. 4818), omnibus fiscal year 2005 appropriations legislation, waived Section 140 of P.L. 97-92 to allow federal judges to receive a 2.5 percent cost-of-living adjustment (COLA).			The president signed P.L. 108-447 (H.R. 4818) on 12/8/04.	**Opposes initiatives that infringe upon the separation of powers between Congress and the courts. Supports increased judicial pay. Opposes enactment of any legislation to change constitutional law by limiting federal court jurisdiction in specific areas.**
Legal Services Corporation. H.R. 2862, fiscal year 2006 appropriations legislation as passed by the House, includes $330.8 million for the LSC. The bill as passed by the Senate includes $358.5 million.	House passed H.R. 2862 on 6/16/05.	Senate passed H.R. 2862 on 9/15/05.		**Supports an independent, well-funded LSC. See page 3.**

Senate bill provides increased LSC funding

The Senate approved fiscal year 2006 appropriations legislation in mid-September that includes $358.5 million for the Legal Services Corporation (LSC) – a significant increase from the program's current appropriation of $330.8 million.

The increased LSC funding was approved in the Senate as part of an agreement between Sens. Tom Harkin (D-Iowa) and Richard Shelby (R-Ala.), who chairs the Senate Appropriations Subcommittee on Commerce, Justice and Science. The agreement, which added $34 million to what had been included in the committee version of the bill, provides that $8 million of the increase will be funneled directly to LSC programs assisting victims of Hurricane Katrina.

The Senate passed the appropriations bill, H.R. 2862, by a 92-4 vote on Sept. 15. The next step in the process is a conference with the House, which included level funding for LSC in the version of the legislation it passed June 16.

The ABA supports increased funding for the LSC. ABA President Michael S. Greco pointed out in a Sept. 7 letter to selected senators that despite the combined efforts of LSC-funded programs, private attorneys and bar associations, up to 80 percent of the basic civil legal needs of the poor are not being met.

A recent LSC survey reports that at least half of all eligible persons who seek legal services from LSC-funded programs are turned away for lack of resources, Greco said, and a new LSC survey reports that women, most of whom have dependent children, represent up to 74 percent of LSC-funded programs' client base.

He added that the Census Bureau announced in early September that since 2003, an additional 1.1 million people are now living in poverty. "In addition to being unable to meet the legal needs of the pre-existing low-income population, LSC funded programs provide assistance to those who suddenly qualify and need legal assistance, such as when a natural or national disaster strikes," he emphasized.

Explaining that LSC-funded programs were instrumental in assisting September 11 victims and their families, Greco pointed out that LSC-funded programs now will be called upon to assist the victims of Hurricane Katrina. Since Greco's letter, the Gulf Coast has been hit by a second disaster, Hurricane Rita, further increasing the needs in that area and in other parts of the country where hurricane victims have relocated. ■

Miers nomination

continued from front page

1970 from Southern Methodist University Law School. She was the first woman hired by the Dallas law firm of Locke, Purnell, Rain & Harrell and was the first woman president of the firm. In 1996, after the firm merged to become the 400-member firm of Locke, Liddell & Sapp, Miers became the co-managing partner. During her career as a trial litigator, her clients included Microsoft, Walt Disney Co. and SunGard Data Systems Inc. She also served a two-year term as an at-large member of the Dallas City Council. From 1995 until 2000, she served as chair of the Texas Lottery Commission after being appointed by then Gov. Bush.

Photo: ABAJ/Rob Crandall

Harriet E. Miers speaking in April at ABA Day in Washington

Miers has been an active member of local, state and national bar associations. She became the first woman president of the Dallas Bar Association in 1985 and the first woman president of the State Bar of Texas in 1992. Her involvement with the ABA included the chairmanship of the Rules and Calendar Committee of the ABA House of Delegates and membership on the ABA Governance Committee and the ABA Consortium on Legal Services and the Public. Miers has been the recipient of numerous awards.

In accepting the nomination, Miers said, "The wisdom of those who drafted our constitution and conceived our nation as functioning with three strong and independent branches has proven truly remarkable. It is the responsibility of every generation to be true to the founders' vision of the proper role of the courts in our society. If confirmed, I recognize that I will have a tremendous responsibility to keep our judiciary system strong, and to help ensure that the courts meet their obligations to strictly apply the laws and the Constitution." ■

ABA urges repeal of attorney liability provisions

The ABA is urging Congress to reconsider and modify provisions in this year's bankruptcy reform law that will increase the liability and administrative burdens of bankruptcy attorneys under the Bankruptcy Code.

In Sept. 16 letters to the House and Senate Judiciary Committees, ABA Governmental Affairs Director Robert D. Evans said that unless the provisions are promptly remedied, they may have "serious effects on the nation's bankruptcy system in general, as well as on the availability of pro bono legal representation for the many victims of Hurricane Katrina."

The provisions, scheduled to go into effect Oct. 17, would require debtor bankruptcy attorneys to:

•certify the accuracy of the debtor's bankruptcy schedules of assets and liability, under penalty of harsh court sanctions;

• certify the ability of the debtor to make future payments under reaffirmation agreements; and

•identify and advertise themselves as "debt relief agencies" subject to a host of new intrusive regulations that will interfere with the confidential attorney-client relationship.

Evans explained that although the ABA did not take a position on the bankruptcy reform law (P.L. 109-8) in its entirety, the ABA and many state and local bars throughout the country strongly oppose the attorney liability provisions for many reasons.

The requirements that debtor attorneys must verify the existence and value of all of a client's assets and debts could add several thousand dollars to the cost of representing debtors, making legal representation unaffordable for many debtors. The harsh new certification requirements for attorneys and the "debt relief agency" liability and regulations will drive many debtors' bankruptcy attorneys from the practice altogether, leaving many thousands of debtors without any legal representation at all, Evans warned.

The ABA also is concerned that the provisions unfairly establish separate legal standards for one particular type of attorney. In addi-

see "Bankruptcy," page 5

President signs temporary HEA extension

Work on HEA reauthorization continues

President Bush signed legislation Sept. 30 to extend authorization for Higher Education Act (HEA) programs through the end of this year.

The measure, P.L. 109-81 (H.R. 3784), gives Congress three more months to work through differences in the House and Senate versions of HEA reauthorization bills.

The HEA, which authorizes billions of dollars in funding for programs assisting colleges and universities as well as subsidized loans for students, was last reauthorized in 1998 and was functioning on a one-year extension that expired Sept. 30.

HEA reauthorization bills, H.R. 609 and S. 1614, have been approved by the House Education and the Workforce Committee and the Senate Health, Education, Labor and Pensions Committee, respectively. Both would reauthorize the Thurgood Marshall Legal Educational Opportunity Program at $5 million annually for six years. The Thurgood Marshall program, administered by the Council on Legal Education Opportunity (CLEO), provides practical and financial assistance to low-income, minority or disadvantaged students to help them gain access to and complete legal studies. CLEO, a non-profit project of the ABA Fund for Justice and Education, is a partnership founded in 1968 by seven organizations that has assisted more than 7,000 students in receiving their law degrees.

The ABA strongly supports the Thurgood Marshall program, which helps foster diversity in the legal profession. In an April 15 letter sent to the House Appropriations Subcommittee on Labor, Health and Human Services and Education, then ABA President Robert J. Grey Jr. noted that the latest data indicates that applications for law school among some minority groups are in decline and financial disadvantage is cited a primary reason (see May 2005 *Letter*).

In addition, both bills contain provisions to allow persons with drug offense convictions to receive federal student financial aid under certain circumstances. According to the ABA, prospective students should not be denied access to loans, grants and scholarships because of a past drug offense if there is no current evidence of drug abuse and their debt to society has been paid (see June 2005 *Letter*).

The Senate bill, which was approved Sept. 8 by the Senate committee, also includes an ABA-supported amendment to the Income Contingent Repayment Option of the William Ford Direct Lending Program to shorten the threshold for loan forgiveness for those who make long-term commitments to public service. Under the ICR option, borrowers may repay their consolidated loans at an affordable percentage of their gross incomes rather than under the traditional 10-year repayment schedule. Any remaining balance after 25 years is forgiven. S. 1614 would allow forgiveness after 10 years if borrowers serve those 10 years in qualifying public service careers. ■

ABA committee presents a "well qualified" rating for Roberts

continued from front page

Judiciary Committee Sept. 15, explaining that the ABA panel found Roberts "well qualified" for appointment as chief justice of the United States.

ABA Standing Committee Chair Stephen L. Tober explained that the ABA committee rated Roberts twice for nominations to the Supreme Court − first when he was nominated in July to replace retiring Justice Sandra Day O'Connor and again when that nomination was withdrawn in early September so that Roberts could be nominated to succeed Rehnquist.

Thomas Z. Hayward Jr., who chaired the ABA committee from 2003 to 2005, oversaw the first investigation of Roberts' professional qualifications to be an associate justice. The panel based its evaluation on interviews with more than 300 judges, lawyers and community leaders throughout the nation, reviews of Roberts' decisions and selected memoranda from the National Archives, and a personal, detailed interview with the nominee. The panel unanimously concluded that he was "well qualified" for that position and submitted his rating to the Senate Judiciary Committee on Aug. 17.

When President Bush nominated Roberts to become Chief Justice on Sept. 6, the 2005-2006 ABA committee had taken office the month before with a new chair and seven new members. The new committee performed a supplemental investigation directed solely at determining whether the nominee had the requisite additional leadership and administrative skills that would be required of him as chief justice.

With a compressed time-frame in which to complete its supplemental evaluation before confirmation hearings were to begin Sept. 12, the committee conducted interviews with well over 80 judges, lawyers and community members who had firsthand knowledge of Roberts' leadership and management skills, reviewed the background materials and report of the 2004-2005 committee, and interviewed Roberts. The 2005-2006 committee found the nominee "well qualified" to handle the administrative and leadership responsibilities of chief justice.

Tober − accompanied at the hearing by Hayward and Pamela A. Bresnahan, who represented the District of Columbia Circuit on the 2004-2005 ABA committee − testified that the ABA committee, based on the two ratings, was "fully satisfied that, by virtue of his academic training, his service in the federal government, his experience in private practice, his scholarly writings, his distinguished service for the past two years on the federal bench, and his administrative and leadership skills, Judge Roberts meets the highest standards required for service on the U.S. Supreme Court as Chief Justice." ■

Representatives of the ABA Standing Committee on Federal Judiciary appearing before the Senate Judiciary Committee Sept. 15 were (from left): Pamela A. Bresnahan; Stephen L. Tober, chair; and Thomas Z. Hayward Jr., immediate past chair. They were accompanied by committee member Sheila Slocum Hollis (at right).

Bankruptcy

continued from page 4

tion, Evans said the costs associated with the new requirements will greatly reduce the availability of pro bono bankruptcy representation for victims of Hurricane Katrina and for many other poor Americans.

The association is proposing that the current attorney liability provisions be replaced with tough new non-dischargeable sanctions against debtors who lie on their bankruptcy schedules and new language urging the bankruptcy courts to enforce more vigorously the existing Rule 9011 of the Federal Bankruptcy Rules when misconduct by any party is shown. Evans suggested that the new language could be included in a technical corrections bill or any other appropriate legislative vehicle that the judiciary committees may consider before the act's Oct. 17 effective date.

House and Senate pass VAWA provisions

Both bills expand legal assistance to victims

The House and Senate have both passed bills that include provisions to reauthorize the Violence Against Women Act (VAWA), a law originally passed in 1994 that provides funding to support programs that improve efforts to combat domestic violence.

The original act, which established new federal crimes for domestic violence, sexual assault and stalking, also created the National Domestic Violence Hotline. In addition, the law authorizes funds for civil legal services for victims of domestic violence and helps train local, state and federal agencies to do a better job of preventing violence against women and assisting its victims.

The House passed its VAWA provisions Sept. 28 as part of a Justice Department (DOJ) authorization bill, H.R. 3402. The provisions are similar to those in H.R. 2786, which was introduced by Rep. Mark Green (R-Wis.), who pointed out during debate that the act "has helped millions of women and children find safety, security and self-sufficiency." Green and Rep. John Conyers Jr. (D-Mich.), however, opposed a provision in a manager's amendment sponsored by House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.) that they said would weaken the core of the STOP grant program. The STOP program provides

Rep. Mark Green

state formula grants for funding collaboration efforts between police and prosecutors and victim services providers as well as legal assistance for victims. The provision, approved by a 225-199 vote, would strike language from the STOP program that specifically targets women of color and immigrant women who have experienced domestic violence.

Following the House action, the Senate passed its bill, S. 1197, sponsored by Sens. Joseph R. Biden Jr. (D-Del), Arlen Specter (R-Pa.) and Orrin G. Hatch (R-Utah).

S. 1197, passed by voice vote Oct. 4, includes new provisions to help abused women maintain secure employment by permitting battered women to take limited employment leave to address the violence, such as attending court proceedings or moving to a shelter. An-

see "VAWA," page 8

Judicial Vacancies/Confirmations — 109th Congress (as of 10/5/05)

Court	Current Vacancies	Pending Nominations	Confirmations
US Supreme Court (9 judgeships)	1*	1	1
US Courts of Appeals (179 judgeships)	12	7	6
US District Courts (678 judgeships)	36	15	4
Court of International Trade (9 judgeships)	1	0	0
Totals	50	23	11

**Justice Sandra Day O'Connor has announced her retirement, effective when a successor is confirmed.*

Washington News Briefs

ASYLUM: The ABA urged the Department of Homeland Security (DHS) Sept. 30 to work with the Department of Justice to promptly issue regulations on the granting of asylum to women refugees fleeing gender-based violence. In a letter to DHS Secretary Michael Chertoff, ABA Governmental Affairs Director Robert D. Evans emphasized that the protection of women refugees fleeing brutal harms such as honor killing, trafficking for prostitution, domestic violence and female genital cutting has been among the most important refugee issues facing policymakers in recent years. Evans applauded a position expressed in a DHS brief to the attorney general in February 2004 that in certain circumstances domestic violence may form the basis of asylum claims. He expressed concerns, however, over delays in resolving the issue as a matter of national policy and reports of Immigration and Customs Enforcement trial counsel making arguments diametrically opposed to the DHS position. "The excessive delay in the issuance of positive regulations governing the recognition of these claims is causing hardship and suffering for many women whose cases remain in legal limbo," Evans wrote.

FOREIGN JUDGMENTS: The ABA voiced its opposition last month to H. Res. 97, a resolution to express the sense of the House regarding the appropriate use of foreign judgments, laws and pronouncements by the federal courts. The resolution, sponsored by Rep. Tom Feeney (R-FL) and approved Sept. 29 by the House Judiciary Subcommittee on the Constitution, states that the U.S. judicial decisions regarding the meaning of the U.S. Constitution should not rely on foreign judgments, laws or pronouncements unless they have been incorporated into U.S. law by Congress or they inform an understanding of the original meaning of the U.S. Constitution. In a Sept. 30 letter sent to House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.), ABA Governmental Affairs Director Robert D. Evans wrote that the resolution assumes that the federal judiciary already has relied inappropriately on foreign judgments, specifically in the sexual privacy case of *Lawrence v. Texas*, 539 U.S. 588 (2003). He explained that in that case, the Supreme Court used foreign law not as precedent but rather as a tool to contrast and analyze U.S. jurisprudence. "While specific clauses of the resolution provoke concerns, our overriding objection to H. Res. 97 is that it unnecessarily intrudes on the independence of a co-equal branch of government and of the judges that the political branches have nominated and confirmed," Evans wrote. He emphasized that the "central issue addressed in the resolution – the appropriate use of foreign sources by our federal courts − is an evolving issue and it has implications for many other issues, such as the pitfalls and advantages of consulting other legal traditions, whether our courts should engage in comparative constitutional analysis, the effect of globalization on the types of cases that our courts are asked to settle, and the impact on foreign policy of the judgments of our courts."

SERVICEMEMBER PROTECTION: The ABA is recommending that Congress pass legislation to establish certain requirements for creditors who are extending consumer credit to members of the armed forces or their dependents so that servicemembers would be protected from abusive lending practices. H.R. 97, sponsored by Rep. Sam Graves (R-Mo.), would amend the Servicemembers Civil Relief Act to prohibit a creditor from imposing an annual percentage rate greater than 36 percent and to set forth mandatory loan disclosures. The bill, labeled the Servicemembers Anti-Predatory Lending Protection Act, also would prescribe criminal penalties for violations. In correspondence to Graves in August, Gen. Earl E. Anderson, USMC (Ret.), chair of the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP), wrote that the ABA appreciates Graves' effort on behalf of soldiers and sailors to shield them from unethical and usurious lending terms that could financially ruin a servicemember or his or her family. "As these men and women are willing to make the ultimate sacrifice for low or modest compensation, it in incumbent on us to ensure that they are sufficiently protected such that their focus on their duties remains undivided," Anderson said. Among other services, the LAMP Committee supports and coordinates Operating Enduring LAMP, a network of more than 50 programs across the nation enabling lawyers to provide civil legal assistance pro bono to military servicemembers and their families. He pointed out through this work, ABA members "know first-hand the complex legal issues that servicemembers face when shouldering financial burdens they did not anticipate because of intentionally misleading or fraudulent fine print."

2006 Midyear Meeting

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VAWA reauthorization

continued from page 6

other new provision is the creation of a tribal deputy director in the DOJ Office of Violence Against Women to coordinate federal tribal policy focusing on violence against Indian women.

Both the House and Senate provisions would increase authorized funding for the act's legal assistance program from $40 million to $65 million.

The ABA, which has made VAWA reauthorization a legislative priority for the 109th Congress, expressed its strong support during a Senate Judiciary Committee hearing on S. 1197 in July (see August 2005 *Letter*).

"We believe that S. 1197 strikes an appropriate balance between renewing core programs, closing loopholes, expanding successful programs, and developing critically needed initiatives for children and prevention efforts," ABA Governmental Affairs Director Robert D. Evans said in a statement to the committee and in letters to the Senate leadership and the bill's sponsors.

Evans specifically highlighted the provisions in Title I of the bill, which focuses on the justice system's response to domestic violence. "By reaffirming the need for a coordinated community response from victim services agencies, legal aid, law enforcement, prosecution and the courts, VAWA 2005 increases the likelihood of positive outcomes for victims of domestic violence and their children," he said.

Evans also pointed out that the act's Civil Legal Assistance and STOP Grants programs have improved and aided in the prosecution of domestic violence sexual assault and child abuse cases, provided necessary training and support for law enforcement personnel and increased civil legal service for victims of domestic violence, especially in the areas of civil protection orders and family law. Nevertheless, nearly 70 percent of victims of domestic violence still are without legal representation.

"VAWA must be reauthorized to ensure that the strides that have been made to make victims safer are continued and reaffirmed." he emphasized. ■

Federal courts in Louisiana relocate under new law

In the aftermath of Hurricane Katrina, the Fifth Circuit Court of Appeals and the U.S. District Court for the Eastern District of Louisiana relocated last month after President Bush signed legislation Sept. 9 allowing federal courts to hold special sessions outside their circuits or districts in emergency conditions.

The ABA had urged prompt enactment of the legislation, P.L. 109-63 (H.R. 3650), pointing out that judicial business in the areas affected by Hurricane Katrina had come to a complete halt and that the courts were prohibited from temporarily resuming operations out of the geographical area in which they are authorized to sit. It was impossible to determine how long the disruption may continue, the ABA maintained.

In a letter to Congress Sept. 2, ABA Governmental Affairs Director Robert D. Evans pointed out that "court delays may impede the timely resumption of commercial activities and unnecessarily add to the anguish of many hurricane victims."

The Fifth Circuit reopened for business in Houston Sept. 21 and plans to remain there for three months. The district court judges and employees are relocating to three separate sites: Baton Rouge, Houma and Lafayette.

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American Bar Association, 740 15th Street, N.W., Washington, D.C. 20005-1022. (202) 662-1017.
Rhonda J. McMillion, editor; Carl A. Glad, Legislative Assistant
mcmillionr@staff.abanet.org