American Bar Association

Volume 43, No. 12
December 2007

WASHINGTON LETTER

ONLINE

A PUBLICATION OF THE GOVERNMENTAL AFFAIRS OFFICE, CELEBRATING 50 YEARS OF SERVICE TO THE PROFESSION AND THE NATION

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Regular Features

Defending Liberty Pursuing Justice

ABA president says provisions strike proper balance

House approves bill to protect attorney-client confidentiality

Legislative efforts to protect attorney-client confidentiality and the rights of employees shifted to the Senate last month following passage of H.R. 3013, a bill designed to roll back a number of federal agency policies that the ABA maintains are seriously eroding the attorney-client privilege, the work product doctrine and the constitutional rights of employees.

The bill, which passed the House Nov. 13 by voice vote, would prohibit any federal official from pressuring companies to waive attorney-client privilege, work product or employee legal protections or to consider any voluntary waiver by companies when assessing whether the companies are cooperating during investigations of corporate wrongdoing. The bipartisan legislation was introduced by Rep. Bobby Scott (D-Va.), chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, and is cosponsored by Rep. Randy Forbes (R-Va.), the panel's ranking member, and seven other representatives. Similar legislation, S. 186, was introduced in the Senate earlier this year by Sen. Arlen Specter (R-Pa.) and is pending in the Senate Judiciary Committee.

H.R. 3013 "strikes the proper balance between the legitimate needs of federal prosecutors and regulators and the constitutional and fundamental legal rights of individuals and organizations," ABA President William H. Neukom said after House passage. He emphasized that protecting confidential attorney-client communications from government-compelled disclosure fosters voluntary compliance with the law.

"Government tactics that coerce disclosure, on the other hand, undermine this benefit and our adversarial system of justice, and can threaten the very survival of organizations, including even the largest, most robust corporations," Neukom cautioned.

Although numerous federal government policies in this area raise concerns, the ABA maintains that the most problematic are the Justice Department's policy – set forth in the 2003 Thompson Memorandum and the 2006 McNulty Memorandum – and the Securities and Exchange Commission's policy included in its 2001 Seaboard Report.

In a Nov. 8 letter to all members of the House, Neukom noted that a recent report by former Delaware Chief Justice Norman Veasey demonstrated that the McNulty Memorandum has not significantly reduced the incidence of government-coerced waiver, and federal prosecutors continue to routinely demand waiver of the privilege during investigations despite the new policy. He also pointed out that the McNulty Memorandum and other similar federal policies continue to deny cooperation credit to companies that assist employees with

see "Privilege waiver," page 8

LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
Independence of the Legal Profession. S. 186 and H.R. 3013 would reverse the privilege-waiver and employee rights provisions in the Justice Department's McNulty Memorandum and other similar federal agency policies that instruct federal law enforcement officials to consider these factors in determining whether corporations and others should receive credit for cooperation − hence leniency − in government investigations.	Judiciary subc. held a hearing on the McNulty Memorandum on 3/8/07. Judiciary Committee approved H.R. 3013 on 8/1/07. House passed H.R. 3013 on 11/13/07.	S. 186 was referred to the Senate Judiciary Committee on 1/4/07. Judiciary Committee held a hearing on S. 186 on 9/18/07.		**Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage. See front page.**
Health Care Law. S. 243 would impose a cap on non-economic damages in medical malpractice lawsuits and also cap punitive damages, eliminate joint liability on non-economic damages, and impose a federal statute of limitations in those cases. S. 244, narrower legislation, would limit liability in medical liability cases in the field of obstetrics and gynecology. H.R. 2549 would provide certainty in the Medicare set-aside process for workers' compensation settlements.	H.R. 2549 was referred to the Ways and Means and Energy and Commerce Committees on 5/24/07.	S. 243 was referred to the Health, Education, Labor and Pensions Committee on 1/10/07. S. 244 was referred to the Judiciary Committee on 1/10/07.		**Urges the legal and medical professions to cooperate in seeking a solution to medical liability problems and maintains that federal involvement in the area is inappropriate. In particular, the ABA opposes caps on pain and suffering awards, supports retaining current tort rules on malicious prosecution, collateral sources and contingent fees, and believes that the use of structured settlements should be encouraged. It supports certain changes at the state level in the areas of punitive damages, jury verdicts and joint and several liability.**
Judicial Independence. S. 461 and H.R. 785 would create an inspector general for the judicial branch to investigate claims of misconduct against federal judges. Numerous court-stripping bills have been introduced. S. 352 and H.R. 2128 would provide for media coverage of federal court proceedings. S. 1638 and H.R. 3753 would increase federal judicial pay.	H.R. 785 and H.R. 3753 were referred to the Judiciary Cmte. on 1/31/07 and 10/4/07, respectively. Judiciary subc. held a hearing on judicial salaries on 4/19/07. Judiciary Cmte. held a hearing on H.R. 2128 on 9/27/07.	S. 461 and S. 1638 were referred to the Judiciary Committee on 1/31/07, and 6/15/07, respectively. Judiciary Committee held a hearing on cameras in the courtroom on 2/14/07.		**Opposes initiatives that infringe upon the separation of powers between Congress and the courts. Supports increased judicial pay. Opposes any legislation to change constitutional law by limiting federal court jurisdiction in specific areas. See page 8.**
Legal Services Corporation. The House approved $377 million for the LSC in fiscal year 2008 as part of H.R. 3093. The Senate approved $390 million.	House passed H.R. 3093 on 7/26/07.	Senate passed its version of H.R. 3093 on 10/16/07.		**Supports an independent, well-funded LSC**

Congress poised to pass Second Chance Act

The House and Senate reached an agreement last month that clears the way for enactment of the Second Chance Act, a bipartisan bill supported by the ABA that would help former inmates successfully reenter communities.

The legislation, which passed the House as H.R. 1593 Nov. 13 by a 347-62 vote and was expected to pass the Senate in early December, was developed and drafted over several years by leaders of both political parties and enjoys strong bipartisan support.

The bill aims to reduce recidivism by providing grants to states and localities so that they can provide coordinated assistance to those being released from prison. Such efforts include greater access to support and services in numerous areas, including family reunification, job training, education, housing, and substance abuse and mental health services. The legislation also would establish a federal interagency task force on offender reentry, provide for research on reentry, and create a national resource center to collect and disseminate information on best practices in offender reentry.

Grants to states under the bill's provisions would seek to help them reduce crime by improving state prisoner reentry programs, eliminating existing barriers in federal law that adversely affect people with both state and federal convictions, and strengthening federal protections for former prisoners in the areas of employment, housing and voting.

During House debate on the legislation, House Judiciary Committee Chairman John Conyers Jr. (D-Mich.) pointed out that more than two-thirds of the 650,000 men and women leaving federal and state prisons each year are arrested for new crimes within three years of their release.

He said that H.R. 1593 is a "commonsense" piece of legislation that recognizes, despite their best intentions upon release from prison, that "too many ex-offenders lack the education, job skills and stable living arrangements and the substance abuse treatment and health services that they need to successfully reintegrate into our society."

In correspondence to Congress earlier this year, ABA Governmental Affairs Acting Director Denise A. Cardman pointed out that the Second Chance Act would be the "most significant step the federal government has taken to reduce the recidivism rate among ex-offenders," and will not only save the taxpayers money by reducing expenditures on law enforcement and corrections, it also will reduce the other burdens on society imposed by our high rate of incarceration." ■

ABA rally draws hundreds in support of Pakistani lawyers

A rally organized Nov. 14 by the American Bar Association drew several hundred lawyers on a march past the U.S. Supreme Court to show solidarity with Pakistani lawyers and urge an end to martial law in Pakistan.

"We have witnessed the most direct attacks on the rule of law that the world has seen in many years," ABA President William H. Neukom told the group, referring to Pakistani President Musharraf's suspension of the country's constitution and his shut down of the Supreme Court just before it was to rule on the validity of his re-election.

"We are here because we cannot forget the images of hundreds of our brave colleagues assaulted in the streets, carried off in police trucks, and fenced in by barbed wire and concrete barricades," he said and declared that the systematic assault on Pakistan's legal system was a threat to the rule of law in all nations.

ABA efforts to raise awareness of the threat to the rule of law in Pakistan include an online petition from the lawyers of America that may be signed electronically. That petition will be presented to the Embassy of Pakistan this month.

ABA recommends changes in prison legislation

The ABA recommended last month that Congress approve a bill to restore balance to the Prison Litigation Reform Act, which was enacted in 1996 to reduce the number of frivolous lawsuits filed in federal court by prisoners and to decrease the amount of consent decrees governing prison conditions.

Margo Schlanger

"The PLRA has successfully ameliorated the burden imposed on prisons and jails by frivolous prisoner litigation, but it has simultaneously created major obstacles to accountability and the rule of law within our nation's growing incarcerative system," according to Margo Schlanger, a professor of law at Washington University in St. Louis who testified on behalf of the ABA at a Nov. 8 hearing before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security.

Schlanger, a member of the ABA Criminal Justice Section's Corrections Committee and the reporter for the ABA's ongoing work to update the association's standards for the legal treatment of prisoners, cited three major significant problems with the PLRA that disrupt accountability and enforcement of constitutional compliance:

•the ban on awards of compensatory damages for "mental or emotional injury suffered while in custody without prior showing of physical injury" has obstructed judicial remediation of religious discrimination, coerced sex and other constitutional violations typically unaccompanied by physical injury, and undermines the regulatory regime that is intended to prevent such abuses;

•the provision barring federal lawsuits by inmate plaintiffs who have failed to comply with the prisons' internal grievance procedures – no matter how onerous, futile or dangerous such compliance may be for them − obstructs rather than encourages constitutional oversight of conditions of confinement, and strongly encourages prison and jail authorities to come up with even higher procedural hurdles in order to foreclose subsequent litigation; and

•the application of the law's limitations for juveniles incarcerated in juvenile institutions has rendered those institutions largely immune from judicial oversight because so many young people are not able to follow the complex requirements imposed by the states and compliance by parents or guardians on their behalf has been deemed legally insufficient.

In addition, Schlanger noted that a provision that many have read to ban enforceable injunctive settlements unless defendants confess liability for violations of federal law undermines both the availability and effectiveness of court oversight.

Schlanger expressed support for H.R. 4109, the Prison Abuse Remedies Act of 2007, introduced by House Judiciary Committee Chairman John Conyers Jr. (D-Mich.) and subcommittee Chairman Bobby Scott (D-Va.), who pointed out during the hearing that while the number of lawsuits has drastically decreased since passage of the PLRA, court monitoring of prisons also has decreased.

Others testifying in support of changes to the PLRA included David A. Keene, chairman of the American Conservative Union; Pat Nolan, vice president of Prison Fellowships Ministries; and Garrett Cunningham, a former prisoner in the Texas Department of Criminal Justice.

Ryan Bounds, deputy assistant attorney general and chief of Staff in the Office of Legal Policy at the Department of Justice, maintained that the PLRA "represents a well-considered congressional response to real problems that achieved its goals while taking care not to create new perils."

He testified that the "reasonable restriction" of prisoner lawsuits has "preserved the ability of legitimately harmed inmates to gain access to the courts and prevented the negative effects of frivolous cases in ever greater numbers."

No further action has been scheduled on the legislation. ■

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web pages at

http://www.abanet.org/poladv

Retroactivity sought for cocaine sentencing change

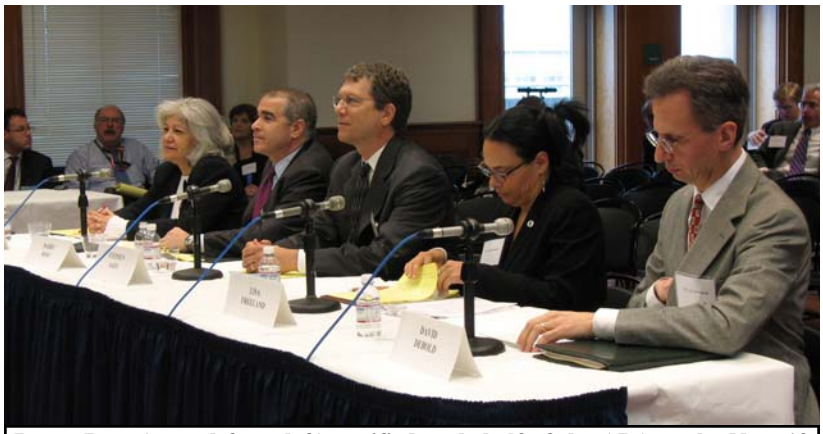
The ABA and other witnesses appearing before the U.S. Sentencing Commission Nov. 13 supported retroactive application of a recent amendment to the sentencing guidelines that eases the 100-1 disparity between crack and powder cocaine sentences.

The 100-1 disparity was established by Congress in 1986 and in 1988 under the Anti-Drug Abuse Act. The policy means, for example, that crimes involving just five grams of crack cocaine receive the same five-year mandatory prison sentences as crimes involving 500 grams of powder cocaine. This disparity, according to a 2007 Sentencing Commission report, has a "clearly discriminatory effect on minority defendants convicted of crack offenses."

The sentencing guidelines amendment, which went into effect Nov. 1, raises the crack cocaine quantities that trigger five-year and ten-year mandatory minimum sentences.

Barry Boss, co-chair of the Sentencing Committee of the ABA Criminal Justice Section, commended the commission for its leadership in addressing the issue and urged the commission to make the amendment retroactive. He pointed out that over the years when the commission has amended drug guidelines with the effect of lowering sentences in particular drug cases, those amendments have been made retroactive. Drugs affected by these previous amendments included LSD, marijuana and oxycodone.

"The Commission's current amendment to Section 2D1.1, which would modestly reduce offense levels across the board for crack cocaine, is intended as an interim measure to alleviate the "urgent and compelling" problem associated with the 100-1crack-to-powder ratio. At the very least, principles of fairness, consistency and proportionality should likewise lead the Commission to include this amendment in the list of amendments eligible for reduction under Section 3582(c)(2)," Boss said.



Barry Boss (second from left) testified on behalf of the ABA at the Nov. 13 hearing on cocaine sentencing. Those appearing on the panel were (from left): Carmen Hernandez, National Association of Criminal Defense Lawyers; Boss; Stephen Sady, chief deputy federal public defender for the District of Oregon; Lisa Freeland, a federal public defender for the Western District of Pennsylvania; and David Debold, Practitioners Advisory Group.

He emphasized that the Committee on Criminal Law of the Judicial Conference of the United States and its advisory group of chief probation officers recommend retroactivity and do not view retroactive application of the amendment as imposing an onerous burden upon the federal criminal system. If the amendment is not made retroactive, Boss said, the courts will likely be inundated with a large number of pro se filings.

Estimates are that sentences for 19,500 inmates could be reduced by an average of 27 months and 3,800 would be freed within a year.

The Bush administration, the U.S. Marshals Service, and the Fraternal Order of Police expressed opposition to retroactivity, maintaining that there would be an enormous additional workload on the courts and that large numbers of convicted drug offenders would be released into vulnerable communities. Others countered, however, that each case could be carefully handled to assure that each crack offender would be receiving a sentence range that better serves the end of justice and that dangerous criminals would not be released prematurely.

As the commission considers the retroactivity issue, the ABA is urging Congress to pass S. 1711, a bill introduced by Sen. Joseph R. Biden (D-Del.) that would eliminate the disparity by increasing the five-year mandatory minimum threshold quantity for crack cocaine from five grams to 500 grams and the 10-year threshold quantity from 50 grams to 5,000 grams while maintaining the current mandatory minimum threshold quantities for powder cocaine.

"My bill," Biden said, "both remedies the historic injustice in the current cocaine sentencing laws and focuses federal resources on, and increases penalties for, the big fish, the major drug traffickers and kingpins who drive the drug trade."

In an Oct. 30 letter to Biden, ABA President William H. Neukom commended the senator's efforts. S. 1711 would "restore fairness and a sound foundation to federal sentencing policy regarding cocaine offenses," he wrote. ■

House passes provisions banning torture

The House passed legislation Nov. 14 that would establish uniform interrogation standards for detainees in U.S. custody.

H.R. 4156, emergency war supplemental appropriations legislation passed by a 218-203 vote, includes the language of H.R. 4114, a bill sponsored by Reps. Jerrold Nadler (D-N.Y.) and William Delahunt (D-Mass.). The provisions, known as the American Anti-Torture Act, would extend to all U.S. government personnel the current prohibitions in the *Army Field Manual on Human Intelligence Collector Operations* against the use of certain enhanced interrogation techniques.

In a Nov. 14 letter sent to all representatives in support of the provisions, ABA Governmental Affairs Acting Director Denise A. Cardman said that revelations of abuses by U.S. personnel of prisoners detained in the fight against terrorism severely damaged the United States' reputation as a leader in promoting human rights and the international rule of law. The U.S. military moved to correct the policies and practices that led to abuses through the adoption of the *Army Field Manual* in September 2006. President Bush issued an executive order in 2007, however, that established a different standard permitting "enhanced interrogation techniques" for other federal agents, including those operating secret Central Intelligence Agency (CIA) detention facilities.

"The ABA believes that there should be a uniform standard requiring anyone acting under the color of U.S. authority to abide by the principles of humane treatment contained in Common Article 3 of the Geneva Conventions and the *Army Field Manual*," she wrote. "In condemning and outlawing cruel and inhumane treatment of prisoners, military leaders have acknowledged that torture does not yield reliable information and could give our enemies legal justification for abusing captured Americans," Cardman said.

"The use of torture contradicts our values as Americans and our commitment to the protection of human rights," said Delahunt, who chairs the House Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight. "By adopting these provisions from our legislation, the House of Representatives is making it clear that all forms of torture – such as waterboarding – are wrong and will not be condoned."

Nadler, chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, agreed, pointing out that torture violates the legal and moral standards of all civilized nations" and "has never been an effective interrogation method."

Two days after House passage of H.R. 4156, the Senate failed, by a 53-45 vote, to garner the 60 votes needed to limit debate and proceed to a vote on the measure. Congress is expected to consider including the anti-torture provisions in other legislation being debated this session. ■

Judicial Vacancies/Confirmations — 110th Congress (as of 12/4/07)

Court	Current Vacancies	Pending Nominations	Confirmations
US Supreme Court (9 judgeships)	0	0	0
US Courts of Appeals (179 judgeships)	14	11	5
US District Courts (678 judgeships)	32	18	29
Court of International Trade (9 judgeships)	0	0	0
Totals	46	29	36

Washington News Briefs

BANKRUPTCY: The ABA urged Congress last month to pass a technical amendment to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) (P.L. 109-8) to clarify provisions related to certain sales of real property. The proposed amendment, which would alter 11 U.S.C. § 363(f) of the Federal Bankruptcy Code, would clarify that a sale of real property free and clear of an unexpired lease under which the debtor is the lessor can be accomplished only if the non-debtor lessee is granted the same rights afforded to non-debtor lessees when their leases are rejected. The amendment would overrule the 2003 decision by the Seventh Circuit Court of Appeals in *Precision Industries Inc. v. Qualitech Steel SBQ LLC (In re Qualitech Steel Corporation)*, 327 F. 3d 537 (7th Cir. 2003). That decision held that real estate owned by a debtor could be sold free and clear of an unexpired lease under Section 363(f). "The *Qualitech* decision contradicts the intention of the drafters of Section 363(f) and is problematic," ABA Governmental Affairs Acting Director Denise A. Cardman wrote in Nov. 15 correspondence to leaders of the House and Senate Judiciary subcommittees considering draft technical corrections legislation for BAPCPA. She explained that if the amendment were adopted by Congress, the leasehold interest held by a non-debtor would survive a sale, thereby permitting the non-debtor lessee to remain in possession during the term of the lease notwithstanding the concurrent or subsequent rejection of the lease in the debtor's bankruptcy case. She also recommended that the amendment be narrowly drawn to grant non-debtor lessees the same rights afforded to them by 11 U.S.C. § 365 (h) upon rejection of leases in bankruptcy cases. In addition, she urged that the amendment provide that neither the adoption of the amendment with regard to sales of real property nor the failure to adopt a comparable amendment with regard to sales of other types of property "shall be construed to modify, impair, supersede or otherwise affect, directly or by implication, existing authority concerning the impact of sales of property other than real property on the interests of non-debtor parties in such property."

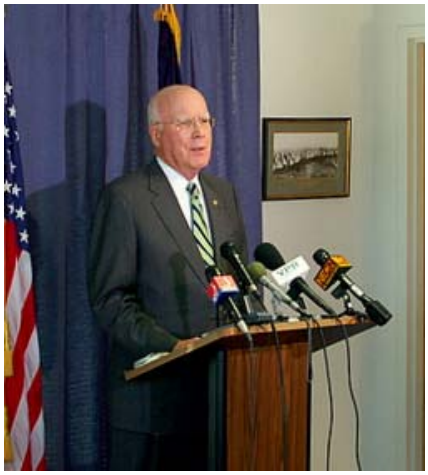
STATE LEGISLATIVE WORKSHOP: State and local bar association government relations professionals convened Nov. 14 in Raleigh, North Carolina, for the annual three-day State Legislative Workshop, which is sponsored by the National Association of Bar Executives (NABE) Government Relations Section in cooperation with the ABA State Legislative Clearinghouse. This year's program featured presentations on a variety of topics, including "Judicial Independence and J.A.I.L. 2.0," "ABA/NABE Resources and Legislative Review," "Administrative Best Practices," "Grassroots Lobbying," and "Specialized Courts." Also on the agenda were discussions of political trends and emerging issues in the states. A special presentation, "The Duke/Nifong Debacle," highlighted prosecutorial discretion, attorney ethics and state bar disciplinary procedures.

TERRORISM RISK INSURANCE: The Senate passed legislation Nov. 16 to extend the Terrorism Risk Insurance Act (TRIA) for seven years and retain the current $100 million trigger level for coverage, rejecting House-passed provisions for a 15-year extension and an expansion of coverage to nuclear, biological, chemical and radiological attacks. TRIA, first enacted as a temporary measure in 2002 after the 9/11 terrorist attacks, is scheduled to expire Dec. 31. Under the law, the federal government helps insurers cover losses due to terrorist attacks after a certain threshold is met, and the law has stabilized the price of terrorism insurance by reducing the amount of risk to be borne by insurers. The ABA supports a long-term or permanent TRIA authorization. "In order to prevent market disruption, it is critical for Congress to act promptly so that new policies for 2008 can be written by insurers and purchased by policyholders prior to TRIA's expiration," ABA Governmental Affairs Acting Director Denise A. Cardman wrote to the Senate Finance Committee in October. Committee Chairman Christopher J. Dodd (D-Conn.) emphasized during Senate debate on the bill, H.R. 2761, that "as long as the threat of terrorism remains, we must act to ensure that terrorism insurance remains available and affordable."

ABA urges immediate pay increase for federal judges

The ABA urged the Senate and House Judiciary Committees last month to approve bipartisan legislation that would provide an immediate pay increase for federal judges.

"Paying our judges adequately is an investment in the future excellence of our courts," ABA Governmental Affairs Acting Director Denise A. Cardman wrote in letters to members of both committees. "We have repeatedly ignored the warnings of our justices and judges that persistently inadequate judicial salaries are undermining the judiciary as an institution by deterring a growing pool of candidates from seeking judgeships and acting as a disincentive for experienced judges to remain on the bench for life," she said.



Sen. Patrick J. Leahy

S. 1638 – introduced by Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.), Sen. Orrin G. Hatch (R-Utah), Senate Majority Leader Harry Reid (D-Nev.), Senate Minority Leader Mitch McConnell (R-Ky.), Sen. Dianne Feinstein (D-Calif.) and Sen. Lindsey Graham (R-S.C.) – would increase the salaries of federal judges by 50 percent.

H.R. 3753, introduced by House Judiciary Committee Chairman John Conyers Jr. and 23 cosponsors, would provide a smaller increase of 41.3 percent. The House bill also would repeal a provision of law that requires an extra step of explicit congressional approval for any salary increases for federal judges.

In her letters, Cardman acknowledged that a major congressional objection to enacting judicial pay legislation is that it will disturb pay parity between members of Congress and federal judges by breaking the linkage in base salary levels. While agreeing that the salaries of both members of Congress and judges need to be raised, she said, however, that history has demonstrated that since emergence of the notion of linkage of the base salaries of top-level federal officials in 1969 whenever disparities in salary levels between congressional members and judges have arisen over the years, pay parity has always been restored quickly. This is because of the public policy conviction that there should be inter-branch pay parity for work of comparable complexity and importance, she explained.

Cardman added that no matter what legislative vehicle is used to provide public servants in upper levels of government with the pay raises they deserve, a temporary delinkage of congressional and judicial salaries will inevitably result because of the 27th Amendment to the Constitution. That amendment, ratified in 1992, requires that no law changing the compensation of senators or representatives shall take effect until a House election has intervened.

The Senate and House Judiciary Committees are expected to mark up pay legislation in December. ■

Privilege waiver

continued from front page

their legal defenses or decline to fire them for exercising their Fifth Amendment rights.

"By forcing companies to punish employees long before any guilt has been shown, these federal policies weaken the constitutional presumption of innocence and undermine principles of sound corporate governance," he concluded.

No further action has been scheduled on the Senate version of the legislation following a Senate Judiciary Committee hearing in September.

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.abanet.org/poladv/letter/home.html.
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