

**WASHINGTON LETTER**

ONLINE

A PUBLICATION OF THE GOVERNMENTAL AFFAIRS OFFICE, CELEBRATING  
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The ABA House of Delegates approved an array of new policies last month during the ABA's Annual Meeting in San Francisco.

Resolutions approved by the delegates at its two-day meeting Aug. 13-14 included support for legislation to supersede President Bush's July 20 executive order regarding the CIA's treatment of foreign detainees in U.S. custody and to ensure that those detainees are treated according to the 1949 Geneva Conventions. In addition, the delegates supported congressional action to ensure, when possible, that federal civil cases are not dismissed based solely on the state secrets privilege.

The delegates also adopted resolutions addressing youth at risk, the retention and replacement of U.S. attorneys and career government attorneys, the rule of law, and voting assistance for individuals with disabilities.

During the House of Delegates meeting, Supreme Court Associate Justice Anthony M. Kennedy received the ABA Medal, the association's highest honor, for his work advancing the rule of law and working to improve the administration of justice.

Other highlights included the Opening Assembly address by Associate Justice Stephen G. Breyer, who emphasized the importance of maintaining an independent judiciary and transmitting that message to future generations.

In addition, outgoing ABA President Karen J. Mathis passed the gavel to Seattle lawyer William H. Neukom, who will serve as president for the next association year (see article, page 4). Birmingham lawyer H. Thomas Wells Jr. became president-elect.

The following is a summary of the House of Delegates action:

**Bankruptcy**

**Leases.** Urges Congress to amend Section 363(f) of the Federal Bankruptcy Code to 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.

**Civic Education**

**No Child Left Behind.** Urges amendment of the No Child Left Behind Act, if reauthorized, or the adoption other legislation to ensure that all students experience high-quality civic learning.

**Criminal Justice**

**Medicaid for Prisoners.** Urges federal, state, local and territorial governments to maintain the Medicaid eligibility of otherwise-eligible incarcerated

*see "Annual Meeting," page 4*



# LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Independence of the Legal Profession.</b> 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.</p>	<p>Judiciary subc. held a hearing on the McNulty Memorandum on 3/8/07. Judiciary Committee approved H.R. 3013 on 8/1/07.</p>	<p>S. 186 was referred to the Senate Judiciary Committee on 1/4/07.</p>		<p><b>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.</b></p>
<p><b>Health Care Law.</b> 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.</p>	<p>H.R. 2549 was referred to the Ways and Means and Energy and Commerce Committees on 5/24/07.</p>	<p>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.</p>		<p><b>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.</b></p>
<p><b>Judicial Independence.</b> 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 would provide for media coverage of federal court proceedings. S. 1638 would increase federal judicial pay by 50 percent.</p>	<p>H.R. 785 was referred to the Judiciary Committee on 1/31/07. Judiciary subc. held a hearing on judicial salaries on 4/19/07.</p>	<p>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.</p>		<p><b>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.</b></p>
<p><b>Legal Services Corporation.</b> The House approved \$377 million for the LSC in fiscal year 2008 as part of H.R. 3093. The Senate Appropriations Committee approved \$390 million.</p>	<p>House passed H.R. 3093 on 7/26/07.</p>	<p>Appropriations Committee approved draft bill (introduced as S. 1745) on 6/28/07.</p>		<p><b>Supports an independent, well-funded LSC.</b></p>

## Leegin decision consistent with ABA antitrust policy

The ABA told a Senate Judiciary subcommittee in testimony July 31 that the Supreme Court's recent 5-4 decision in *Leegin Creative Leather Products Inc. v. PSKS Inc.*, 551 U.S. \_\_\_\_ (2007), is consistent with ABA policy concerning resale price maintenance agreements between sellers and buyers.

The June 28 decision overruled a 96-year-old precedent that vertical agreements between a supplier and its distributor or retailer on the minimum resale prices for the supplier's products are *per se* violations of Section 1 of the Sherman Act. The decision is in line with the ABA position that agreements between a buyer and seller setting the price at which the buyer may resell goods or services purchased from the seller should not be illegal *per se* but should be evaluated under the antitrust rule of reason. Under the rule of reason, minimum resale price maintenance would be unlawful only if, on balance, its anticompetitive effects can be proven to outweigh its procompetitive effects in a relevant market.

In overruling the 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, the Court found that although resale price maintenance may harm competition in some circumstances, economics literature is replete with procompetitive justification for manufacturers' use of resale price maintenance. The court's decision pointed out that minimum resale price maintenance can stimulate *interbrand* competition among manufacturers selling different brands of the same type of product – a “primary purpose” of the antitrust laws – by reducing *intra-brand* competition among retailers selling the same brand. The Court added that resale price maintenance may give consumers more options to choose from among low-price, low-service brands; high-price, high-

service brands; and brands falling in between.

Janet L. McDavid, a Washington lawyer and former chair of the ABA Section of Antitrust Law, told the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights at the July 31 hearing that “the economic literature weighs heavily against condemning all minimum resale price agreements to *per se* illegality.” She added that the rule of *per se* illegality should not be applied in these cases because none of the several empirical tests of minimum resale price maintenance proves that the practice is always destructive.



**Janet L. McDavid**

“The ABA supports the Supreme Court's decision that the time has come to extend the rule of reason approach to minimum resale price maintenance because the same motives that manufacturers possess for entering into non-price vertical restraint agreements can also explain their motivation for wanting to enter into minimum resale price maintenance agreements and because such arrangements can achieve efficiencies in distribution,” she testified. Manufacturers, she said, have no incentive to increase the margins that their dealers earn on each sale unless the result would

be greater sales and greater profits for the manufacturers as well.

McDavid also said that the ABA does not believe that applying a rule of reason analysis to minimum resale price maintenance agreements will facilitate coordination or outright collusion among manufacturers and other sellers to fix the wholesale prices at which they sell their products to dealers.

Agreeing with McDavid on the merits of the *Leegin* decision was Stephen Bolerjack of the National Association of Manufacturers. Bolerjack noted that the ruling reflects the progression of antitrust law for the past 30 years in limiting the scope of the *per se* rule. He explained that the decision requires the courts to make decisions based on substance – i.e., “the effect of the restraint on competition in a market” – rather than on formalistic analysis of whether conduct shows an agreement between a manufacturer and a reseller.

Those opposing the decision included former Federal Trade Commission (FTC) Chairman Robert Pitofsky and current FTC Commissioner Pamela Jones Harbour, who spoke on her own behalf. They agreed with the dissent authored by Justice Stephen G. Breyer, who wrote there is no ground for abandoning the well-established antitrust rule previously announced in the *Dr. Miles* case. Breyer concluded that the decision will likely raise the price of goods at retail and create considerable legal turbulence as lower courts seek to develop workable principles.

Subcommittee Chairman Herb Kohl (D-Wis.) expressed concerns over the decision, adding that Congress will need to examine the impact of the decision and “consider whether legislation will be necessary to protect the continued existence of consumer discounts.” ■

## \*\* Annual Meeting \*\* Annual Meeting \*\*

### ABA President William H. Neukom to focus on advancing the rule of law

Seattle lawyer William H. Neukom, who began his one-year term as ABA president last month, has launched the World Justice Project, a “multidisciplinary and multinational effort to foster human well-being by advancing the rule of law.”

Neukom said the project, which involves leading scholars from multiple disciplines in addition to those from the legal profession, consists of four complementary initiatives:

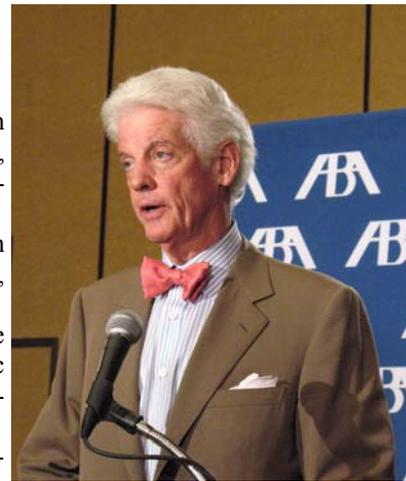
- mainstreaming rule of law advancement into the work of a wide range of disciplines, such as education, labor, media and public health, through multidisciplinary outreach meetings in Europe, Africa, Latin America, Asia and the United States;
- scholarship led by prominent scholars from the fields of economics, law and political science examining why and how the rule of law matters to thriving communities;
- development of a Rule of Law Index to measure countries’ adherence to the rule of law and to identify areas where a country’s rule of law is weak; and
- holding a World Justice Forum in Vienna, Austria, in July 2008 that will bring together 500-700 leaders from different fields to discuss the Rule of Law Index, scholarship and multidisciplinary approaches for advancing the rule of law and developing new and enhanced projects.

Neukom also said that, as ABA president, he will encourage a “goal-based management” for the ABA that makes the best use of available resources and promotes better communication and collaboration within the ABA and with state, local and other national bar associations.

Currently a partner in the Seattle office of K&L Gates, Neukom was Microsoft’s executive vice president of law and corporate affairs for 17 years, during which he managed Microsoft’s legal, government affairs and philanthropic activities.

Neukom’s ABA involvement includes serving as chair of the Young Lawyers Division, on the Board of Governors as ABA secretary, and as the Washington state delegate to the ABA House of Delegates. He has chaired the ABA Fund for Justice and Education, the ABA’s Governance Commission, and the ABA Task Force on Goal VIII, which examined the association’s rule of law programming. He also has been active in community work and served as a member and chair of the Dartmouth College Board of Trustees and as a member of the Greater Seattle Chamber of Commerce Board of Trustees.

Neukom earned his A.B. degree from Dartmouth College and his LL.B. from Stanford University.



William H. Neukom

persons to provide continuity of Medicaid eligibility to persons newly released from custody.

#### **Disability Law**

**Accessible Websites.** Urges those in the legal profession to create and maintain their websites in an accessible manner for individuals with visual, hearing, manual and other disabilities by making sure their websites are compatible with assistive technology.

#### **Disaster Planning/Recovery Legal System Preparation.**

Adopts 12 principles to govern the planning, preparation and training for responses to a major disaster to preserve the rule of law and ensure that justice will continue to be dispensed during and after the disaster.

**Rebuilding.** Urges Congress to create an independent, bipartisan commission to investigate and recommend the appropriate measures to rebuild the infrastructure of the Gulf Coast damages by Hurricanes Katrina and Rita, to provide rea-

sonable hurricane and flooding protection for the people living in disaster-prone areas, and to recommend appropriate measures designed to prevent or mitigate problems in responding to natural disasters in the future.

#### **Domestic Violence**

**Standards.** Adopts the black letter Standards of Practice for Lawyers Representing Victims of Domestic Violence, Sexual Assault and Stalking in Civil Protection

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Order Cases, including the preface, dated August 2007.

### Elder Law

**Retirement.** Recommends that mandatory age-based law firm retirement policies be discontinued and that law firms evaluate senior partners individually consistent with the firm's performance criteria.

### Election Law

**Disabilities.** Urges federal, state and local governments to improve the administration of elections to



**Reps. Dan Lungren (R-Calif.) and Ed Perlmutter (D-Colo.) discussed the homeland security agenda of the 110th Congress Aug. 12 during the ABA's Annual Meeting.**

facilitate voting by all individuals with disabilities, including people with cognitive impairments that increase in frequency with age.

### Health Law

**Partnerships.** Encourages lawyers, law firms, legal services agencies, law schools and bar associations to develop medical-legal partnerships with hospitals, community-based health care providers, and social service organizations to help identify and resolve diverse legal issues that affect patients' health and well-being.

**Emergency Care.** Supports the study of regionalization of the nation's emergency care system and hospital emergency departments, including the need for legislation or rulemaking to improve disaster preparedness and response and to increase accountability within the emergency care system

### Individual Rights

**Pay Discrimination.** Urges Congress to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), and federal age or disability employment discrimi-

nation laws to ensure that in claims involving discrimination in compensation, the statute of limitations runs from each payment reflecting the claimed unlawful disparity.

### International Law

**Weapons.** Urges the United States to sign and ratify the amended Article 1 and Protocols III, IV and V of the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, banning the use of incendiary weapons and blinding laser weapons as well as setting standards on marking, clearance, removal and destruction of unexploded or abandoned mortar shells, grenades, artillery rounds and bombs.

**Trade.** Supports the International Trade Commission's adoption of certain procedures relevant to its compliance with the Government in the Sunshine Act, 5 U.S.C. § 552 (b).

### Law Practice

**Contingencies.** Urges bar associations and courts to develop and implement programs and procedures to encourage lawyers to plan for law practice contingencies by designating in advance another lawyer who is willing and able to assume a lawyer's practice or to assist in the transfer of client matters and files in the event the lawyer develops physical or mental disability that significantly impairs his or her ability to practice law, or the lawyer has died, disappeared, been suspended or disbarred, or otherwise been restricted from the practice of law.

### Legal Education

**Standards for Approval of Law Schools.** Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting Interpretation 302-10, concerning opportunities for law student participation in pro bono activities; amending Standard 801(a), regarding the effective date of the decision of the council to grant or deny approval; and adopting Interpretation 509-3, regarding publication of academic calendars.

**Rules of Procedure for Approval of Law Schools.** Concurs in the action of the Council of the Section of Legal Education and Admissions to the Bar in adopting amendments to Rule 13 (Action Concerning Apparent Non-Compliance with Standards), Rule 18 (Compliance with Sanctions or with Remedial or Probationary Requirements), Rule 20 (Major Change in the Organizational Structure of a Provisionally or Fully Approved Law School), and Rule 21 (Major Change in the Program of Legal Education or Provisionally or

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Fully Approved Law Schools).

### Litigation

**Civil Trial Practice.** Adopts the black letter of the *Updated Civil Trial Practice Standards*, dated August 2007.

### Military Law

**Association Membership.** Urges all bar associations and other appropriate regulatory bodies to adopt a policy that provides for the waiver or suspension of association dues, continuing legal education requirements and other member obligations for members who are serving in the U.S. armed forces and are performing services in a combat zone as designated by an executive order of the president of the United States.

### National Security

**Detainee Treatment.** Urges Congress to enact legislation to supersede the president's executive order of 7/20/07, which authorizes the Central Intelligence Agency to operate a program of detention and interrogation of detainees that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Convention of 8/12/49, and to enact legislation to ensure that foreign persons detained by the U.S. government are treated in accordance with the minimum protections afforded by Common Article 3 and in a manner fully consistent with the standards of treatment and interrogation techniques contained in the new U.S. Army

*Field Manual on Intelligence Interrogation* issued in September 2006.

**State Secrets.** Supports procedures and standards designed to ensure that, whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege, and urges Congress to enact legislation to codify rules governing federal civil cases implicating the state secrets privilege that would advance the objective.

### Rule of Law

**Global Environment.** Urges governments, businesses, nongovernmental organizations and other organizations to consider and integrate Rule of Law initiatives with global environmental issues.

**Corporate Citizenship.** Encourages corporations, lawyers, law firms and other professionals to promote and encourage corporate citizenship and ethical corporate behavior in multinational business to support the rule of law and to encourage governments to pursue policies that support corporate citizenship.

**Trafficking.** Urges federal, state, local, territorial and tribal governments to pass legislation and authorize and appropriate funding that strengthens protection and assistance for victims of trafficking in persons within the United States or abroad, as well as bolsters prevention efforts and encourages bar associations to engage members of the legal profession in raising awareness of trafficking in persons in their communities and in pro-

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### Judicial Vacancies/Confirmations — 110th Congress (as of 9/5/07)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	0
US Courts of Appeals (179 judgeships)	16	9	3
US District Courts (678 judgeships)	33	19	23
Court of International Trade (9 judgeships)	0	0	0
Totals	49	28	26

## Washington News Briefs

**ACUS:** The ABA expressed support last month for fiscal year 2008 funding of \$3.3 million for the Administrative Conference of the United States (ACUS), which was originally established in 1964 as the federal government's in-house adviser on, and coordinator of, administrative procedural reform. ACUS enjoyed bipartisan support for more than 25 years and advised all three branches of government before being terminated in 1995. Congress revived and reauthorized ACUS in 2004, but no funding has been provided. "Once ACUS is provided with this very modest funding, the agency will be able to restart its operations and begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assessing and recommending possible administrative reforms within the Department of Homeland Security (DHS) and its Federal Emergency Management Agency (FEMA)," ABA Governmental Affairs Acting Director Denise A. Cardman wrote Aug. 1 to the chairs and ranking members of the Senate and House Appropriations Committees. Cardman pointed out that two recent Congressional Research Service studies showed that ACUS proved to be an extremely useful and cost-effective agency for many years. "ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars of the private sector to work together to improve how our government functions," she wrote. Significant achievements include responsibilities for implementing a number of statutes, including the Equal Access to Justice Act, the Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act.

**SENTENCING:** In an Aug. 24 letter to the U.S. Sentencing Commission regarding proposed priorities for 2008, the ABA reiterated the association's earlier support for priorities regarding the development of additional alternatives to incarceration, expansion of diversion and deferred adjudication options, and the expansion of the "safety-valve" to non-drug cases. In the letter, ABA Governmental Affairs Acting Director Denise A. Cardman suggested that the commission, as a research topic, study the effectiveness of alternatives to incarceration in the prevention of recidivism. She also expressed support for the commission's tentatively identified priority regarding cocaine sentencing policy, under which it currently takes 100 times the amount of powder cocaine as crack to trigger the same five-year and ten-year mandatory sentences. An amendment proposed by the commission and set to go into effect Nov. 1 would modestly reduce offense levels across the

board for crack cocaine as an interim measure to alleviate the problems associated with the 100-1 ratio. The ABA recommended in its letter that the commission include the cocaine amendment in its list of amendments that should be retroactive. Cardman pointed out that past retroactive amendments to the drug guidelines related to LSD, marijuana and oxycodone have generally benefited Caucasian defendants. "Given the racially disparate impact of the 100-1 ratio and the public perception that our drug laws are racially discriminatory," she said, making the cocaine amendment retroactive is "the only fair and principled course." Other issues included in the commission's proposed priorities, which were published for comment July 31, include: implementation of crime legislation enacted during the 110th Congress; continuation of policy work regarding immigration offenses; continuation of policy work on criminal history; and guidelines simplification.

**DEATH PENALTY REPRESENTATION:** The ABA expressed concerns last month about a proposed rule that is intended to implement Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005. That section of the law offers a drastically streamlined habeas corpus review in death penalty cases to states in exchange for improvements in their post-conviction defense processes. In comments submitted Aug. 25 to the Department of Justice, the ABA stated that while the association has not taken a position on whether Section 507 is good policy, the association believes that the department ignores key aspects of the legislation in its proposed rule. According to the ABA, the proposed rule "would allow states to obtain streamlined review without ensuring that capital defendants receive competent counsel (or that such counsel is appropriately compensated) in post-conviction proceedings." Calling the proposed rule "deeply and fundamentally flawed," the association said that, in addition to ignoring significant aspects of the statute as well as established legal benchmarks for how key terms are to be understood and defined, the proposed rule fails to establish uniform standards regarding the content of state applications as well as the criteria the attorney general is to utilize in evaluating applications. In addition, the proposed rule's notice, comment and review procedures for the applications fall well below agency rulemaking standards under the Administrative Procedure Act as well as the Due Process Clause, the comments said. The comments also recommend that the ABA's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* be incorporated into the evaluation process to add objectivity.

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viding pro bono legal services to victims of trafficking.

**Fair and Impartial Courts.** Adopts the *Principles on Judicial*



**ABA President-Elect H. Thomas Wells Jr., of Birmingham, Alabama, is set to become president in August 2008.**

*Independence and Fair and Impartial Courts*, dated August 2007.

**Judicial Independence.** Supports the United Nations *Basic Principles on the Independence of the Judiciary*; the International Bar Association *Minimum Standards for Judicial Independence*, and the Bangalore *Principles of Judicial Conduct*, and urges the U.S. gov-

ernment to support these standards.

### **Substance Abuse**

**Alcohol and Drugs.** Affirms the principle that dependence on alcohol or other drugs is a disease, and supports the principle that insurance coverage for the treatment of alcohol and drug disorders should be at parity with that for other diseases.

### **U.S. Attorneys**

**Partisan politics.** Supports the principle that the appointment, retention and replacement of U.S. attorneys and career government attorneys, and the exercise of their professional judgment and discretion, should be insulated from improper partisan political consideration.

### **Uniform State Laws**

**Limited Liability.** Approves the Revised Uniform Limited Liability Company Act (2006), promulgated by the National Conference of Commissioners on Uniform State Laws as an appropriate act for state to adopt.

### **Youth at Risk**

**Foster Care.** Encourages bar associations, judges and attorneys to lead and promote efforts to create comprehensive support and services for youth who "age out" of foster care and other former foster youth until at least age 21, and urges amendment of applicable law and court and child welfare practices.

**Homelessness.** Urges Congress to amend Subtitle VII-B of the McKinney-Vento Homeless Assis-

tance Act to clarify that the act applies to all children and youth in foster care, and to significantly increase funding to support the school stability, enrollment, attendance, and success of all eligible children and youth.

**Sexual Orientation.** Encourages measures to promote the safety and well-being of lesbian, gay, bisexual, transgender and questioning (LGBTQ) youth who are homeless or involved in the foster care system, to provide permanent placement in LGBTQ-friendly homes, and to protect LGBTQ youth in the homeless youth and foster care system from discrimination and violence.

**Status Offenders.** Encourages jurisdictions to pass laws that require the provision of evidence-based pre-court diversion and early intervention services for youth who are alleged to have committed status offenses such as truancy, ungovernability, or running away, and supports the use of in-home or community-based services as an alternative to secure detention.

### **Other Action**

The delegates rejected, by a 149-238 vote, a proposal that would have supported a change in U.S. Patent and Trademark Office (USPTO) rules to allow qualified foreign attorneys living outside of the United States to practice before the USPTO regardless of whether their countries offer reciprocal registration to U.S. attorneys. ■

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