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Inside This Issue

Amendment would protect status offenders

Senate Judiciary Committee approves JJDPA legislation

A juvenile justice authorization bill approved by the Senate Judiciary Committee July 31 includes an amendment supported by the ABA that would phase out statutory authority to confine non-delinquent status offenders in detention centers.

S. 3155 – sponsored by Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.), Ranking Member Arlen Specter (R-Pa.) and Sen. Herb Kohl (D-Wis.) – would authorize more than $3.7 billion over the next five years for programs under the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA).

The amendment, offered by Sen. Ben Cardin (D-Md.), would provide states with three years to develop programs to deal with status offenders, whose offenses, including truancy and running away, would not be considered crimes if they were committed by an adult. After three years, states would be barred from using the Valid Court Order (VCO) exception that has existed since 1980 to allow youth status offenders to be held in secure juvenile facilities following the issuance of a detention order by a judge if the juvenile has violated an earlier VCO.

In a July 14 letter to the committee, ABA Governmental Affairs Director Thomas M. Susman said the exception is undermining the Deinstitutionalization of Status Offenders (DSO) core requirement of the JJDPA, which prohibits the incarceration of status offenders. Unfortunately, according to Susman, this exception has become the rule and has had adverse effects on the well-being of detained juveniles.

Susman said that evidence demonstrates that the over-reliance on the VCO exception is detrimental to youth in a variety of ways. Affected youth are "vulnerable to victimization and at risk of developing delinquent behaviors" while in custody, and the adverse effects have been especially harsh on girls, who are "disproportionately affected" because they have been more likely to run away from home environments characterized by physical or sexual abuse. This makes their incarceration "a particularly cruel and illogical response" according to Susman.

Sound research, he said, has produced evidence demonstrating the success of community-based alternatives, which include family counseling and reunification, crisis intervention, gender-specific programming and runaway shelters. Programs of this nature have "produced positive outcomes for runaways, including family strengthening, school engagement, employment and delinquency prevention," he explained, adding that this comprehensive approach more effec-

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Defending Liberty Pursuing Justice

LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
Independence of the Legal Profession. S. 186, S. 3217 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. S. 2450 would adopt proposed Rule of Evidence 502 regarding inadvertent disclosure of privileged materials.	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 and S. 3217 were referred to the Senate Judiciary Committee on 1/4/07 and 6/26/08, respectively. Judiciary Committee held a hearing on S. 186 on 9/18/07. Judiciary Committee approved S. 2450 on 1/31/08. Senate passed S. 2450 on 2/27/08.		**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.**
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. S. 2662 and H.R. 5480, Medicare funding warning legislation, include medical liability provisions.	H.R. 2549 was referred to the Ways and Means and Energy and Commerce Committees on 5/24/07. H.R. 5480 was referred to the Ways and Means Committee on 2/25/08.	S. 243 was referred to the Health, Education, Labor and Pensions Committee on 1/10/07. Senate rejected attaching the language of S. 244 as an amendment to farm legislation 12/13/07. S. 2662 was referred to the Finance Committee on 2/25/08.		**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. 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.	Judiciary subc. held a hearing on judicial salaries on 4/19/07, and approved H.R. 3753 on 12/12/07. Judiciary Committee held a hearing on H.R. 2128 on 9/27/07.	Judiciary Committee approved S. 1638 on 1/31/08. Judiciary Committee held a hearing on cameras in the courtroom on 2/14/07 and approved S. 352 on 3/13/08.		**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.**
Legal Services Corporation. P.L. 110-161 (H.R. 2764) includes $350.49 million for the LSC in fiscal year 2008. President Bush requested $311 million in his proposed fiscal year 2009 budget.	Appropriations Committee approved $390 million for LSC on 6/25/08.	Judiciary Cmte. held an LSC hearing on 5/22/08. Apps. Cmte. approved $390 million for LSC on 6/19/08.	President signed P.L. 110-161 (H.R. 2764) on 12/26/07.	**Supports an independent, well-funded LSC.**

Justice Integrity Act backed by the ABA

Legislation seeks to eliminate racial and ethnic bias in criminal justice system

The ABA expressed strong support last month for the Justice Integrity Act, legislation proposed in the House and Senate that seeks to eliminate racial and ethnic bias in the criminal justice system.

The proposal, introduced as S. 3245 by Sen. Joseph R. Biden Jr. (D-Del.) and as H.R. 6518 by Rep. Steve Cohen (D-Tenn.), would establish a five-year pilot program to be conducted in the districts of 10 U.S attorneys designated by the U.S. attorney general. The U.S. attorneys would each form an advisory group to gather data on the presence, cause and extent of racial and ethnic disparities that may exist at each stage of the criminal justice system, including investigation and prosecution. At the end of the five-year pilot, the attorney general would be required to submit a comprehensive report on key findings from the districts and recommended best practices coming out of the experience.

Sen. Joseph R. Biden Jr.

"Nowhere is the guarantee of equal protection more important than in our criminal justice system," according to Biden. "The reality is that despite the best efforts and intentions of policy makers, racial and ethnic disparities continue to plague our justice system. We need to step up our efforts in order to root these disparities out," he concluded.

He emphasized that racial disparities are particularly evident in U.S. prisons, where at least 60 percent, and by some estimates nearly three quarters, of prisoners are either African American or Hispanic.

The idea for a task force to study racial and ethnic disparities was included in policy adopted by the ABA in 2004 when the association approved recommendations from an ABA commission formed in response to a request from Supreme Court Justice Anthony Kennedy. Justice Kennedy urged the legal profession to do more to address the issue of racial disparity and other problems within the criminal justice system.

In a July 9 letter to Biden, ABA Governmental Affairs Director Thomas M. Susman emphasized that growing racial disparities work to erode confidence among minorities in the fairness of the criminal justice system.

"All of us have a stake in the rule of law in our justice system," Susman said, "and we must continually aspire to achieve both the perception and reality that our criminal justice system is fair, unbiased and just." ■

Juvenile justice

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tively addresses the underlying factors causing delinquent behaviors that commonly result in status offenses.

In his letter, Susman also expressed the association's support for the overall bill, which he said meaningfully updates and improves many of the federal JJDPA core requirements, research and training resources, and other key areas of the law.

The ABA specifically applauds provisions in S. 3155 to strengthen the JJDPA's core requirements, which, in addition to the DSO, include: sight and sound separation of juveniles from adult offenders; removal of juveniles from adult jails and lockups; and reduction of disproportionate minority contact within the justice system. The legislation would establish a seven-day ceiling for secure detention under the DSO, extend sight-and-sound requirements to keep youth awaiting trials in criminal court out of adult lockups, allow states to permit youth convicted as adults to serve out their sentences in age appropriate facilities, and provide clear direction for states and localities to adopt data-driven strategies with measurable goals to reduce racial and ethnic disparities in the system.

The future of the bill is uncertain given the limited time left in this congressional session.

Legislation would help foster care youth as they age out and transition to adulthood

The ABA is urging the Senate Finance Committee to act quickly to move H.R. 6307, a bipartisan bill the association maintains contains and long overdue improvements to our child welfare system.

The bill, according to the ABA, "will promote critically important connections to services, family, health care and education for children in foster care while also addressing the monumental challenges youth face when they are forced – often at the age of 18 – to leave care and transition to adulthood.

ABA Governmental Affairs Director Thomas M. Susman wrote in a letter to Finance Committee Chairman Max Baucus (D-Mont.) and Ranking Member Charles Grassley (R-Iowa) that more than 24,000 youth "age out" of the nation's foster care system each year and, without the resources and support often provided by a family, they disproportionately join the ranks of the homeless, incarcerated and unemployed. Reps. Jim McDermott (D-Wash.) and Jerry Weller (R-Ill.) introduced H.R. 6307, which passed the House in June, to provide states with the ability to access federal foster care funds for youth until they reach age 21 – a step that will allow the foster youth to be provided with a safe place to live, educational and employment assistance and the guidance of a consistent adult anchor.

Susman said the Midwest Evaluation of Adult Functioning of Former Foster Youth, a five-year study released in May 2005 by the Chapin Hall Center for Children at the University of Chicago, revealed that extending support to youth in foster care past age 18 makes "a measured difference in their ability to achieve economic self-sufficiency and to become productive members of society."

The ABA also supports other provisions in H.R. 6307 that would: increase aid for tribal funding; enhance children's health care and educational requirements; increase federal support for relative caregivers; expand coverage of funding for training of child welfare workers; maintain sibling ties through joint placement; and improve adoption incentives.

Susman recommended that the Senate committee amend the bill to include expanded funding for training judges, lawyers and court personnel who are part of critical decision-making for foster care children. ■

Congress clears HEA reauthorization

President Bush is expected to sign Higher Education Act (HEA) legislation that includes loan forgiveness and repayment provisions to benefit public interest lawyers and also expands the Thurgood Marshall Legal Educational Opportunity Program, which provides practical and financial assistance to help low-income minority or disadvantaged students attend law school.

H.R. 4137, cleared for the president July 31, is the first major overhaul of the HEA in more than a decade. The legislation contains programs "that respond to new and longstanding national needs in both our educational system and our workforce, including the administration of justice," according to ABA Governmental Affairs Director Thomas M. Susman in a letter to the conferees as they were negotiating to iron out differences between the House and Senate versions.

Susman expressed the ABA's strong support for the loan forgiveness and repayment programs included in the bill, highlighting the fact that many prosecutor and public defender offices are understaffed and are unable to effectively recruit new lawyers in light of the crushing student loan debt law students must assume and the comparatively low pay the public interest positions offer.

The four new loan forgiveness and repayment programs include:

- The John R. Justice Prosecutors and Defenders Incentive Act. Offers state and local prosecutors and public defenders $10,000 per year in exchange for a one-time renewable three-year commitment.
- The Legal Assistance Loan Repayment Program. Provides civil legal assistance lawyers with $6,000 per year in renewable three-year contracts up to $40,000;
- Loan Forgiveness for Service in Areas of National Need. Provides no more than $2,000 per year for five years to public sector employees that include those in public interest legal services such as prosecutors, public defenders, or legal advocates in low-income communities at non-profit organizations.
- Perkins Loan Cancellation for Public Service. Includes a

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Bill seeks more resources, separate line-item budget for Law Library of Congress

In a move strongly supported by the ABA, Reps. Zoe Lofgren (D-Calif.) and Daniel Lungren (R-Calif.) introduced legislation July 28 that, in addition to providing additional funding for the Law Library of Congress (LLOC), would establish a separate budget line-item and create a program to enhance the Law Library's services.

Lofgren said the legislation, H.R. 6589, will help ensure that the Law Library "will have the resources needed to maintain and expand its collections while at the same time modernizing its systems." The Law Library, she said, maintains a unique and world-renowned collection that is an invaluable resource both to the Congress and the nation, and "we have an obligation to future generations" to provide for its continuation.

A House Administration Committee hearing on Library of Congress management issues last fall brought together the following participants (from left): former Rep. William H. Orton, member, ABA Standing Committee on the Law Library of Congress; Hon. William S. Sessions, member, advisory commission, ABA Standing Committee on the Law Library of Congress; Law Librarian of Congress Rubens Medina; Librarian of Congress James H. Billington; and Tedson J. Meyers, chair, ABA Standing Committee on the Law Library of Congress, who testified on behalf of the ABA.

The bill would authorize $3.5 million for building, maintaining and administering the LLOC, including cataloguing the library's collections. The bill also directs the Librarian of Congress, beginning in fiscal year 2010, to ensure that all amounts attributable to salaries and expenses of the Law Library are set forth as a separate line item from other Library of Congress salaries and expenses.

The proposed new program – named after Charles H.W. Meehan, the first Law Librarian of Congress – is intended to support the mission of the Law Library and may be carried out through agreements and partnerships with other government and private entities, including the ABA and the American Association of Law Libraries. The legislation also would allow the program to accept private donations and voluntary services.

Representatives of the ABA Standing Committee on the Law Library of Congress have been working with Lofgren to develop H.R. 6589 and presented testimony twice this Congress urging increased funding and resources for the LLOC. During the hearings, ABA standing committee Chair Tedson J. Meyers and former Rep. William Orton, a member of the ABA standing committee, emphasized that the Law Library houses more than 2.3 million legal volumes and periodicals from around the world and is the world's largest repository of legal materials.

Meyers noted that as a result of the library's international law collection, which includes the Global Legal Information Network database of statutes and other legal information from around the world, the LLOC is now recognized as an "anchor for the Rule of Law worldwide."

Both Meyers and Orton conveyed, however, that the library has suffered heavy budget constraints for more than 15 years and nearly one-third of the collection has not been properly catalogued and classified. There have been moments, Orton said, that "qualified observers feared that Law Library was at risk of becoming a museum rather than a world-class institution." ■

HEA reauthorization

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percentage of loan cancellation based on years of service for persons in specified public service jobs that include federal public defenders and community defenders.

The ABA also strongly supports the reauthorization through 2014 of the Thurgood Marshall Legal Educational Opportunity Program, which is administered by the Council on Legal Education Opportunity (CLEO). The legislation authorizes $5 million per year and expands eligibility for the program's services to students in secondary schools. Grant activities are expanded to include pre-college and summer academic programs.

In addition, the legislation allows the Marshall program to work in collaboration with state-based and state bar programs that share the same mission of helping disadvantaged students overcome obstacles to pursue an education in the field of law. ■

ABA opposes bypassing of Rules Enabling Act

The ABA expressed its opposition last month to H.R. 5884, a bill that that would circumvent the Rules Enabling Act to restrict the authority of the federal courts under Federal Rule of Procedure 26(c) governing discovery.

The Rules of Enabling Act process provides that changes in the rules of evidence will be considered and drafted by committees of the U.S. Judicial Conference, released for public comment, and submitted to the U.S. Supreme Court for consideration and promulgation. Only then are rules transmitted to Congress, which has the ultimate power to veto any rule before it takes effect.

In a letter to the House Judiciary Committee on Commercial and Administrative Law, which held a hearing on H.R. 5884 on July 30, ABA Governmental Affairs Director Thomas M. Susman wrote that "congressional failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the act and potentially harm the effective functioning of the judicial system."

The bill would limit a court's ability to enter an order:

• restricting disclosure of information obtained through discovery;

• approving a settlement agreement restricting the disclosure of such information; or

• restricting access to court records in civil cases unless the court makes certain findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure of such information is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the asserted privacy interest.

"We respectfully believe that the current version of Federal Rules of Civil Procedure 26(c) and the case law applying Rule 26(c) give federal judges more than enough latitude to determine when to enter a protective order and what provisions should or should not be in it and to do so on a case-by-case basis in light of the particular facts and circumstances," Susman wrote.

He described ABA policy on secrecy and coercive agreements, which recommends to the federal courts that where information obtained under secrecy agreements indicates risk of hazards to other persons or reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after a hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information. In addition, he said no protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or

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Judicial Vacancies/Confirmations — 110th Congress (as of 8/5/08)

Court	Current Vacancies	Pending Nominations	Confirmations
US Supreme Court (9 judgeships)	0	0	0
US Courts of Appeals (179 judgeships)	10	8	10
US District Courts (678 judgeships)	31	29	48
Court of International Trade (9 judgeships)	0	0	0
Totals	41	37	58

Washington News Briefs

DISASTER RESPONSE: The ABA last month expressed support for the creation of a bipartisan independent commission to study the issues relating to rebuilding the Gulf Coast in the aftermath of Hurricanes Katrina and Rita. Establishment of a commission "would create an opportunity for a bipartisan panel of experts to undertake a comprehensive review that analyzes and makes recommendations about appropriate steps to address the current needs of Gulf Coast residents, bolster our preparedness, and mitigate the future vulnerability of our communities to natural disasters," ABA Governmental Affairs Director Thomas M. Susman said in July 10 correspondence to the Senate Homeland Security and Governmental Affairs Committee and the House Transportation and Infrastructure Subcommittee on Economic Development, Public Buildings and Emergency Management. "Despite the tremendous resources provided by the federal government and the passage of almost three years since the hurricanes hit, countless persons in the Gulf Coast region continue to suffer tremendous upheaval in literally every facet of their lives," Susman said. The rebuilding of neighborhoods, towns and cities, he explained, has raised troubling issues relating to the destruction of low-income housing, exclusionary zoning and the emphasis on commercial development. An independent commission would have the opportunity to synthesize analyses and reports by various governmental agencies and academic and research institutions and to recommend effective strategic steps to resolve the remaining problems. Susman emphasized the ABA's longstanding interest in bolstering disaster response efforts, pointing out that the ABA Task Force on Hurricane Katrina, in place days after the hurricane, provided immediate assistance to victims by establishing a website with helpful information and links for victims as well as volunteers. In addition, thousands of lawyers volunteered to staff legal assistance hotlines, travel to the affected region, and provide office space to displaced lawyers.

HIV/AIDS: The president signed legislation July 30 that reauthorizes global programs to fight the spread of HIV/AIDS, tuberculosis and malaria. P.L. 110-293 (H.R. 5501) authorizes funding for the programs at $48 billion over five years. Congress also included provisions in the bill supported by the ABA to repeal the ban on HIV-positive visitors to the United States. More than 200 organizations – including the American Medical Association, the World Health Organization and the American Public Health Association – had urged repeal of the ban, which medical experts have stated has no scientific basis. ABA Governmental Affairs Director Thomas M. Susman pointed out in a July 15 letter to all senators that the United States remained one of only 12 countries that continued to impose the HIV ban, which the association said is "a 20-year-old vestige of misunderstanding" that perpetuated irrational stigma and discrimination against people with HIV or AIDS. The ABA urged senators to reject an effort by Sen. Jeff Sessions (R-Ala.) to amend the bill to remove the repeal language. Sessions ultimately did not offer the amendment to retain the ban, but instead introduced language that was adopted to advise the public about the risks of contracting HIV from blood exposures, to investigate unexplained infections, and to promote universal precautions in health care settings.

ABA ANNUAL MEETING: New York City will host the 2008 ABA Annual Meeting, which will feature more than 1,600 programs and events for more than 10,000 attendees Aug. 7-12. The 555-member House of Delegates will meet Aug. 11 and 12 to consider policy recommendations on issues that include proposed changes in the Federal Rules for Criminal Procedure, child welfare, conditions in detention facilities, the International Criminal Court, reporting of medical errors, tribal justice systems, judicial nominations, and election administration. U.S. Attorney General Michael B. Mukasey will address the delegates, and Patricia M. Wald, former chief judge of the U.S. District Court for the District of Columbia and a former judge for the war crimes tribunal at The Hague, will receive the ABA Medal, the association's highest award. A special program during the House of Delegates meeting will bring together noted experts on journalism and the First amendment to discuss proposed legislation to protect journalists from undue legal pressure to reveal confidential sources. Another highlight will be the passing of the presidential gavel from ABA President William H. Neukom to incoming President H. Thomas Wells Jr. In addition, William C. Hubbard will assume the chair of the House of Delegates as Laurel G. Bellows finishes her two-year term.

House panel debates definition of "homeless"

ABA supports use of expanded definition for HUD programs

The House Financial Services Committee approved a four-year reauthorization of the McKinney-Vento Homelessness Assistance Act July 31 following an intense debate about the definition of "homeless person" and who should be eligible for federal assistance under various government programs.

H.R. 840, as originally introduced by the late Rep. Julia Carson (D-Ind.), would have changed the definition of "homeless person" under the act for programs administered by the Department of Housing and Urban Development (HUD) so that it would match the definition being used by the Department of Education (ED) and the Department of Health and Human Services (HHS) to determine program eligibility.

The language would have included as homeless any individual sharing the housing of others or living in a motel, hotel, camping grounds, or emergency shelter. The version approved by the committee, however, would expand the definition to encompass only those staying with others in motels and facing eviction within 14 days and those fleeing domestic violence.

While Reps. Judy Biggert (R-Ill.) and Geoff Davis (R-Ky.) had planned to offer an amendment during markup of the bill that would have restored the expanded language of the original bill, they reached an agreement with committee Chairman Barney Frank (D-Mass.) that the discussions about the language would continue in an effort to give communities more flexibility to address the needs of homeless populations.

The ABA supports the expanded definition, explaining in a July 18 letter to the committee that the narrower definition of homeless person used by HUD excludes many of the homeless individuals who rely on alternative housing arrangements. For example, ED and HHS consider children of individuals who are sharing the housing of others or living in motels, hotels, trailer parks or camping grounds as "homeless," thereby making available to them a range of health and education programs those departments oversee, including Head Start, the Runaway and Homeless Youth Act, and the Individuals with Disabilities Education Act.

Unfortunately, HUD does not recognize these persons as "homeless," thereby denying them access to the federal housing assistance they critically need – at least until they are willing to move into the streets.

"It is unconscionable that we would force families into such a dilemma: to move onto the streets in order to receive housing assistance," Susman wrote, adding that providing housing assistance to families when they are most vulnerable is the "very foundation of the federal response to homelessness and a wise investment in persons' future self-sufficiency and ending reliance on federal programs in the future."

The House is expected to vote on H.R. 840 in September. ■

Protective orders

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records furnished pursuant to such an order, including the attorneys' notes and other work product, unless the attorney for a plaintiff refuses to agree to be bound by the order after the case has been concluded.

Also, any provision in a settlement or other agreement that prohibits an attorney from representing any other claimant in a similar action against the defendant should be void and of no effect, according to the ABA policy.

Susman noted that the Judicial Conference Committee on Rules of Practice and Advisory Committee on Civil Rules of the Judicial Conference concluded that changes such as those recommended in H.R. 5884 are not warranted. This would suggest that legislative action may be unnecessary and would undermine the federal courts' rules-development process, he said. ■

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/publications.shtml.

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