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ABA president says courts are “well-equipped”

ABA backs DOJ decision to try detainees in federal court

ABA President Carolyn B. Lamm expressed ABA support last month for Attorney General Eric H. Holder Jr.’s decision to pursue prosecution in federal court rather than military commissions of five Guantanamo Bay detainees accused of conspiring to commit the terrorist attacks of Sept. 11, 2001.

“The transfer of these high-profile cases to federal court affirms this nation’s adherence to due process and the rule of law, and clearly establishes that these men are being tried as criminals, not as soldiers in armed conflict,” Lamm wrote to Holder on Nov. 25.

The cases of Khalid Shaikh Mohammed, who has proclaimed himself the mastermind of the 9/11 attacks, and four others have been assigned to prosecutors from the Southern District of New York and the Eastern District of Virginia. The trial will be held in New York City.

“I am confident in the ability of our courts to provide these defendants a fair trial, just as they have for over 200 years,” Holder said in making his announcement Nov. 13. “The alleged 9/11 conspirators will stand trial in our justice system before an impartial jury under long-established rules and procedures,” he explained.

Lamm said that those who plotted the terrorist attacks against the United States must be brought to justice and held fully accountable for their horrific crimes but, no matter how heinous the charges, the long-awaited trials must be both fair and perceived as fair, or the resulting verdicts will not be recognized as legitimate.

“The accused must receive the competent assistance of counsel, be afforded due process and treated as innocent until proven guilty,” she said, emphasizing that Americans would not want U.S. citizens who might be arrested and charged in a foreign state to receive anything less.

“Our federal courts, respected around the world, are well-equipped to handle trials of this magnitude,” Lamm said. “They will provide a fair and impartial forum for bringing these accused criminals to justice and will assure transparency and accountability to victims and the international community.”

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LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Independence of the Legal Profession. On 7/29/09, the Federal Trade Commission (FTC) announced a 90-day delay until 11/1/09 for a "Red Flags Rule" that would include attorneys in the definition of "creditor" and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft. The ABA filed a lawsuit against the FTC on 8/27/09 and a motion for partial summary judgment on 9/23/09 to block the Rule's application to lawyers. On 10/30/09, the court ruled that the FTC has exceeded its authority. The FTC delayed implementation of the rule until 6/1/10.</p>				<p>Opposes the application of the FTC's "Red Flags Rule" to lawyers. 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 page 6.</p>
<p>Health Care Law. The president held a Forum on Health Reform at the White House on 3/5/09. Numerous bills have been introduced and hearings held on various aspects of the health care system, including H.R. 3200, H.R. 3962, S. 1679, S. 1796, and H.R. 3590 as amended by the Senate. S. 1347 and H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p>	<p>Judiciary subcommittee held a hearing on H.R. 1478 on 3/25/09, and approved the bill on 5/19/09. House passed H.R. 3962 on 11/7/09.</p>	<p>S. 1347 was referred to Judiciary Committee on 6/24/09. Health, Education, Labor and Pensions approved draft health care legislation (introduced as S. 1679) on 7/15/09. Finance Committee concluded markup of draft (introduced as S. 1796) on 10/2/09. Senate began consideration of H.R. 3590 on 11/19/09.</p>		<p>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. Supports S. 1347 and H.R. 1478. See page 3.</p>
<p>Judicial Independence. P.L. 111-8 (H.R. 1105) waived Section 140 to allow federal judges to receive a 2.8 percent cost-of-living increase for fiscal year 2009. S. 220 and H.R. 486 would create an inspector general for the judicial branch. S. 1653 and H.R. 3362 would authorize new federal judgeships.</p>	<p>H.R. 486 was referred to the Judiciary Cmte. on 2/9/09. H.R. 3362 was referred to the Judiciary Cmte. on 9/29/09.</p>	<p>S. 220 was referred to the Judiciary Committee on 1/13/09. Judiciary subc. held a hearing on S. 1653 on 9/30/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.</p>
<p>Legal Services Corporation. The House included \$440 million for the LSC in H.R. 2847, fiscal year 2010 funding legislation. The Senate Appropriations Committee approved \$400 million for the LSC in its version of the bill. S. 718 and 3467 would reauthorize the LSC and lift some restrictions.</p>	<p>House passed H.R. 2847 on 6/18/09. Judiciary subc. held an LSC reauthorization hearing on 10/27/09.</p>	<p>Senate passed H.R. 2847 on 11/5/09. S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09.</p>		<p>Supports an independent, well-funded LSC.</p>

Senate begins debate on comprehensive health bill

Numerous ABA policies in play

The ABA is carefully monitoring Senate debate on comprehensive health care reform this month, focusing on numerous provisions of interest to the ABA that would work toward the goal of improving the health care system and increasing access to health care for all Americans regardless of income.

The House passed its version of health care reform, H.R. 3962, by a 220-215 vote Nov. 7, and the Senate leadership's goal is to bring its version of the legislation, H.R. 3590, to a vote before the end of the year.

Major provisions supported by the ABA that are included in the House bill but not the Senate legislation are:

- **McCarran-Ferguson anti-trust exemption.** The House approved provisions supported by the ABA to repeal the exemption from federal antitrust law enjoyed by health and medical malpractice insurers and provide safe harbors for the insurance industry for certain pro-competitive conduct. Related provisions are expected to be offered as an amendment to the Senate bill.
- **Medical-Legal Partnerships.** The House bill would establish a nationwide demonstration project awarding grants to and entering into contracts with medical-legal partnerships to assist patients and their families to navigate health-related programs and activities.
- **End-of-Life Counseling.** Medicare coverage would be provided under the House bill for a voluntary consultation between enrollees and practitioners to discuss advance care planning issues every five

years or more frequently as a patient's health changes.

The Senate bill includes ABA-supported provisions of the Elder Justice Act to establish a multi-pronged coordinated strategy to address elder abuse, neglect and exploitation at the federal, state and local levels. In addition, the Senate measure also would prohibit health insurance discrimination based on conditions arising out of acts of domestic violence.

The Senate bill contains a sense of the Senate encouraging alternatives to medical malpractice litigation,

emphasizing that such alternatives must preserve an individual's right to seek redress in court. The House package would provide federal incentive payments to states that pass legislation offering certificates of merit or "early offers" as alternatives to medical malpractice litigation, provided such legislation does not cap damages or limit attorneys' fees. The ABA, which opposes caps on damages, endorses the use of alternatives to litigation for resolution of medical

see "Health care," page 4



LAW AND NATIONAL SECURITY: The Standing Committee on Law and National Security's 19th Annual Review of the Field, held Nov. 12-13 in Washington, D.C., featured a panel discussion of legislative developments in national security law. The ABA committee's special advisor, Suzanne Spaulding (at podium), of the Bingham Consulting Group, moderated the panel, which included (from left): Chris Donesa, Republican chief counsel, House Permanent Select Committee on Intelligence; Perry Apelbaum, staff director and chief counsel, House Judiciary Committee; Brandon Milhorn, Republican staff director and chief counsel, Senate Homeland Security and Governmental Affairs Committee; and Rick DeBobs, staff director, Senate Armed Services Committee. Other highlights of the meeting included keynote addresses by Homeland Security Secretary Janet Napolitano and Deputy Secretary of State James B. Steinberg. The activities of the ABA committee assist policymakers, educate lawyers, the media and the public, and enable the committee to make policy recommendations to the ABA. The entity is chaired by Harvey Rishikof, professor of national security law at the National War College.

Youth PROMISE Act clears House committee

A House bill designed to help youth stay away from gangs and the criminal justice system has garnered a bipartisan list of 232 cosponsors and cleared the House Judiciary Committee Dec. 2 on its way to the House floor.

H.R. 1064, the Youth Prison Reduction Through Opportunities, Mentoring, Intervention, Support and Education (Youth PROMISE) Act, supports community-based programs to prevent youth from entering the justice system through implementation of evidence-based strategies proven to reduce youth violence and delinquency.

In a Dec. 1 letter to committee Chairman John Conyers Jr. (D-Mich.) and Ranking Member Lamar Smith (R-Texas), ABA Governmental Affairs Director Thomas M. Susman expressed the ABA's strong support for the bill. He explained that H.R. 1064 differs from other pending bills because it focuses federal policies and federal funds on sound prevention methods rather than incarceration and stricter penalties.

"The Youth PROMISE Act is a critically important proposal that will keep young people out of the criminal justice system," Susman said.

The bill, which would authorize a total of \$1.4 billion for fiscal years 2010 through 2014, includes authorization and funding for 12 new grant programs. Under the act, communities facing the greatest youth gang, delinquency and crime challenges would come together via a local counsel that includes law enforcement, community-based organizations, schools, faith organizations, health and social services, and mental health providers. A comprehensive local plan would be developed and implemented to support young people and their families and make communities safer, reduce victimization and help at-risk young people to lead law-abiding and healthy lives, free from gangs, delinquency and criminal involvement.

Also included in the bill are provisions to hire and train youth oriented policing officers, to support youth prevention and intervention strategies, and to provide for increased local coordination of federal juvenile delinquency prevention programs. A National Commission on Public Safety Through Crime and Delinquency would be created to study the effectiveness of crime and delinquency prevention strategies and make recommendations to Congress. In addition, the U.S. Sentencing Commission would be required to conduct a study examining the federal system of sentencing minors.

During the markup, the committee rejected an amendment offered by Rep. J. Randy Forbes (R-Va.) that would have amended the U.S. criminal code to make "gang crime" a federal crime, defining such crime as conduct committed by a "criminal street

gang." A "criminal street gang" would be defined as a formal or informal group of three or more individuals who commit two or more gang crimes in two or more separate criminal episodes. The amendment also would have established mandatory minimum sentences for certain "gang crimes," with crimes resulting in death eligible for the death penalty.

Following the committee's approval of the bill, sponsor Rep. Robert C. "Bobby" Scott (D-Va.) said that "we have come one step closer to helping communities implement evidence-based strategies to address youth violence problems."

Similar legislation, S. 435, is pending the Senate Judiciary Committee. ■

Health care

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malpractice disputes when such alternatives are entered into only on a voluntary basis after a dispute has arisen.

Both bills also include provisions supported by the ABA that would provide that health plans apply the same level of treatment benefits to substance abuse-related disorders as they do to other medically necessary care.

Provisions approving the formation of interstate health insurance compacts in consultation with the National Association of Insurance Commissioners are included in both bills. The ABA urges that Congress, when it consents to the creation of an interstate health insurance compact agency, should prescribe the administrative procedures to be employed by the agency, provide for judicial review of agency action, and specify the standards of judicial review.

ABA Midyear Meeting



**Feb. 3-9, 2010
Orlando, Florida**

Federal bill on incorporation is premature

ABA opposition grounded in three fundamental aspects of legislation

The ABA expressed opposition last month to S. 569, incorporation transparency legislation that the association maintains would unnecessarily regulate state incorporation practices and impose government-mandated suspicious activity reporting (SAR) requirements on the legal profession.



Kevin L. Shepherd

Sens. Carl Levin (D-Mich.), Charles E. Grassley (R-Iowa) and Claire McCaskill (D-Mo.) introduced the legislation to curb state practices that allow persons to form corporations and limited liability companies (LLCs) without knowing or even asking the identity of the beneficial owners of the corporations. Levin said in introducing the bill that criminals are exploiting this weakness by forming new U.S. corporations and LLCs and using these entities to commit crimes such as drug trafficking, money laundering, tax evasion, financial fraud and corruption.

Testifying Nov. 5 before the Senate Homeland Security and Governmental Affairs Committee, Kevin L. Shepherd, a member of the ABA Task Force on Gatekeeper

Regulation and the Profession, emphasized that the ABA supports all reasonable and necessary domestic and international efforts to combat money laundering, tax evasion, and terrorist financing activity. He emphasized, however, that the association believes that federal legislation is premature and is neither necessary nor the most effective means for addressing the concerns that prompted S. 569.

“The ABA believes that a more effective and workable solution would involve collective and collaborative action of state government representatives working with the U.S. Department of Treasury and U.S. Department of Justice,” Shepherd testified.

Shepherd said the ABA’s opposition to S. 569 is grounded in three fundamental aspects of the legislation that would:

- federalize state incorporation practices;
- create a new class of financial institutions likely to include lawyers, known as formation agents, that would be subject to enhanced anti-money laundering requirements; and
- potentially impose SAR requirements forcing lawyers to report to governmental authorities a suspicion that their clients are engaging in money laundering or terrorist financing activity.

He said that because lawyers assist clients in forming corporations and LLCs, the designation of formation agents as financial institutions could sweep in lawyers and treat them as the functional equivalent of banks. He also said that the SAR requirements are in direct conflict with ethical obligations of confidentiality, the attorney-client privilege, and fundamental aspects of the attorney-client relationship.

Shepherd emphasized that the ABA has been working collaboratively with legal professionals throughout the world, FATF and the Treasury Department to develop risk-based guidance on client due diligence to enhance the ability of legal professionals to identify and avoid illicit money laundering and terrorist financing activity.

David S. Cohen, assistant secretary for terrorist financing, Treasury Department, and Jennifer Shasky, senior counsel to the deputy attorney general at the Justice Department, both supported S. 569 as an important step in the right direction but recommended that amendments be added to clarify definitions and strengthen the legislation to address various concerns. ■

Guantanamo

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The five detainees were first charged under a military commission system established in 2006 that was opposed by the ABA and determined by the courts to be constitutionally flawed. Although significant procedural improvements were made in the military commission system as part of national defense authorization legislation signed by the president Oct. 28, Lamm said a decision to resume the five detainees’ prosecution in military commissions “would have failed to provide the credibility that is essential to acceptance of any final verdict.”

ABA proposes amendments to CFPA bill

Maintaining that pending legislation, H.R. 3126, would grant a new Consumer Financial Protection Agency (CFPA) excessive new powers to regulate lawyers engaged in the practice of law, the ABA sent the House Financial Services Committee a set of proposed amendments that seek to rectify the problem while still protecting consumers.

“The ABA is very concerned about the breadth of H.R. 3126 as it would affect lawyers and their ability to represent their clients and interfere with traditional state court regulation of lawyers,” ABA Governmental Affairs Director Thomas M. Susman wrote in a Nov. 19 letter to committee Chairman Barney Frank (D-Mass.) and committee members.

Susman explained that although the legislation includes a general lawyer exclusion, the exclusion is largely nullified by a broad exception that would allow the new agency to regulate lawyers who engage in any “financial activity.” An expansive definition of “financial activity” in the bill would make lawyers subject to the many substantive provisions of the legislation and make them “covered persons” fully regulated by the CFPA just as if they were a mortgage lender or a non-bank financial institution.

For example, the broad definition would allow the CFPA to regulate the legal advice and other core legal services that bankruptcy lawyers, consumer debtor lawyers and many general practitioners routinely provide to their clients. The “financial activity” definition also

would cover many activities in which lawyers routinely engage that are merely incidental to the provision of legal services, including providing real estate settlement services; acting as a financial adviser; money transmitting; and acting as a custodian of money.

The lawyer exclusion is further limited by a second exception that would subject most lawyers to the registration, reporting and examination requirements of Section 129 of the bill.

The ABA is recommending that the bill be amended to eliminate the financial activity exception to the general attorney exclusion and to delete the provisions subjecting lawyers to the Section 129 requirements.

If those changes were made, according to Susman, the CFPA would still retain the authority to regulate lawyers to the same extent that existing federal agencies currently regulate lawyers under the “enumerated consumer laws” that would be transferred to the new agency under the legislation. The amendments also would make the existing lawyer exclusion in the bill parallel to the exclusion provided to accountants.

The ABA also recommended that the committee clarify Section 136 of the bill to avoid inadvertently granting the CFPA dual, overlapping authority with the state supreme courts to regulate lawyers when the CFPA or a claimant merely alleges that a lawyer is not in compliance with the existing state courts rules.

The House is expected to consider the CFPA provi-

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Judicial Vacancies/Confirmations — 111th Congress (as of 12/7/09)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	1
US Courts of Appeals (179 judgeships)	19	9	3
US District Courts (678 judgeships)	77	10	7
Court of International Trade (9 judgeships)	0	0	0
Totals	96	19	11

Washington News Briefs

CHILD PLACEMENT: The ABA expressed support last month for H.R. 3827, a bill that would promote permanency for children waiting in foster care by removing sexual orientation, gender identification and marital status as bars to child placement decisions when the placement is in the best interest of the child. "Ending categorical discrimination based on sexual orientation will open more homes to foster children," ABA Governmental Affairs Director Thomas M. Susman said in a Nov. 10 letter to Rep. Fortney "Pete" Stark (D-Calif.), the bill's sponsor. Susman pointed out that there is a shortage in the child welfare system of qualified individuals willing to adopt or foster a child, and of the estimated 500,000 children in the foster care system more than 129,000 are legally available for adoption. Susman cited 30 years of scientific research showing overwhelmingly that children raised by lesbian and gay parents do as well emotionally and psychologically as children raised in heterosexual households. Experts estimate that gay and lesbian parents are raising four percent (more than 65,000) of all adopted children and fostering three percent (more than 14,000) of all foster children. Despite the research and statistics, several states restrict adoption based on sexual orientation and marital status and one-third of child welfare agencies in the United States reject gay and lesbian applicants. In addition to prohibiting any entity receiving federal assistance from discriminating against prospective adoptive or foster parents solely on the basis of their sexual orientation, gender identification or marital status, the bill would require the Government Accountability Office, within five years, to study and report to Congress on whether states have substantially complied with the act.

HIV/AIDS: The Department of Health and Human Services and the Centers for Disease Control issued a final rule Nov. 2 that removes human immunodeficiency virus (HIV) infection from the list of "communicable diseases of public significance" that bar aliens from entering the United States. The rule also removes references to HIV from the scope of examinations required as part of the immigration process. The ABA has supported the removal of HIV status as a bar for immigrant visitors, asylees and refugees since 1989. Last year, enactment of the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization (P.L. 110-293) cleared the way for new regulations. "The removal of the HIV travel and immigration ban will bring the United States in line with the global commu-

nity and reinforce the U.S. commitment to fighting the HIV pandemic," ABA Governmental Affairs Director Thomas M. Susman wrote in comments submitted by the ABA in August during consideration of the new rule. Susman called the restriction "discriminatory and inappropriate given current medical knowledge about HIV/AIDS transmission and infection." In related action, President Obama signed legislation Oct. 30 that reauthorizes the Ryan White HIV/AIDS Resource Emergency Act, a law first enacted in 1990 that supports the largest federal program specifically designed to provide HIV/AIDS care and treatment to areas hardest hit by the AIDS epidemic. The program provides services to more than 500,000 individuals each year through metropolitan areas, states, and local community-based organizations. The new law, P.L. 111-87 (S. 1793), authorizes \$2.5 billion in fiscal year 2010, an annual amount that will increase to \$2.7 billion by fiscal year 2013.

PATENTS OMBUDSMAN: In a Nov. 25 comment letter to the U.S. Patent and Trademark Office (USPTO), the ABA supported the agency's efforts to create a Patents Ombudsman Pilot Program that "is intended to provide patent applicants, attorneys and agents with assistance with application-specific issues including prosecution advancement concerns." According to the Oct. 27 *Federal Register* notice announcing the pilot program, the USPTO stated a goal that all requests for assistance and related issues be considered and addressed by the ombuds within 10 business days. In the ABA letter, Governmental Affairs Director Thomas M. Susman said that the association adopted policy in 2004 endorsing the revised *Standards for the Establishment and Operation of Ombuds Offices* because the association found that the role of ombuds in various entities, how they function, and the issues they address vary wide and significantly. He said that individuals who come to ombuds for help cannot know what to expect, and the offices may be established in ways that compromise their effectiveness. He urged the USPTO to adopt several key amendments to its pilot program consistent with the ABA standards so that ombuds may better fulfill their functions and individuals who seek their assistance may do so with greater confidence in the integrity of the process. "All ombuds must operate with certain basic authorities and essential characteristics," Susman said, emphasizing that the standards clarify that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds.

ABA urges passage of non-discrimination measure

Association President Lamm emphasizes long tradition of active opposition to discrimination

The ABA is urging Congress to pass the Employment Non-Discrimination Act of 2009 (ENDA), which would prohibit employment discrimination on the basis of actual or perceived sexual orientation or gender identity.

In letters to the House Education and Labor Committee and the Senate Health, Education, Labor and Pensions (HELP) Committee, ABA President Carolyn B. Lamm emphasized the ABA's long tradition of active opposition to discrimination. The ABA first adopted policy in 1989 which calls upon local, state and federal lawmakers to prohibit discrimination on the basis of sexual orientation in employment, housing and public accommodations. That policy was expanded in 2006 to include actual or perceived gender identity or expression.

"Every year in this country, qualified, hardworking individuals are denied employment opportunities because of their sexual orientation and gender identity, resulting in a significant loss of human potential," Lamm wrote. Such discrimination, she said, runs contrary to the association's "underlying commitment to the ideal of equal opportunity – that no person should be denied basic civil rights because

of membership in a minority group."

Currently, 29 states lack laws ensuring employment nondiscrimination on the basis of sexual orientation, and 38 lack laws prohibiting discrimination on the basis of gender identity. ENDA, introduced as S. 1584 and H.R. 3017, would make employment discrimination based on sexual orientation or gender identity illegal in federal, state, and local governments, as well as in private companies with more than 15 employees. However, the legislation would not apply to religious entities or other organizations that are exempt from the religious discrimination provisions of Title VII of the Civil Rights Act of 1964.

During a Sept. 23 hearing on H.R. 3017 before the House Committee on Education and Labor, Rep. Tammy Baldwin (D-Wis.) emphasized that ENDA does not create special rights for individuals, but rather provides remedies and a chance for justice, stating that "symbolically, ENDA says that irrational bias has no place in the workplace."

Other witnesses at the hearing included Rep. Barney Frank (D-Mass.), the sponsor of H.R. 3017 with 193 cosponsors, and Stuart Ishimaru, acting chairman of the U.S. Equal Employment Opportunity Commission. Ishimaru voiced the Obama administration's strong support for the legislation as a priority, stating that "having a statu-

tory framework" such as ENDA "that makes certain actions illegal is an important step" towards eliminating discrimination.

At a Nov. 5 hearing before the Senate HELP Committee, Chairman Tom Harkin (D-Iowa) stated that S. 1584 most likely will be taken up next year. The Senate bill, which is sponsored by Sen. Jeff Merkley (D-Ore.), has 43 cosponsors. ■

CFPA

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sions as part of a larger financial regulatory reform package beginning as early as the week of Dec. 7.

In related action, Susman also sent a letter Dec. 1 to Sen. Christopher Dodd (D-Ct.), chairman of the Senate Banking, Housing and Urban Affairs Committee. That committee is preparing to mark up a comprehensive draft financial reform package that includes provisions to create a CFPA without a lawyer exemption.

Susman urged Dodd and the committee to add provisions to exclude lawyers engaged in the practice of law from the expansive new regulatory powers that would be granted to the CFPA and adopt specific amendments proposed by the ABA.

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>. © 2009 American Bar Association. All rights reserved.

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