ABA cites critical need for more funding

House Appropriations Committee votes to reduce LSC funding to $300 million

The House Appropriations Committee unanimously approved a draft fiscal year 2012 funding bill that includes $300 million for the Legal Services Corporation (LSC) – a $104 million reduction for the program.

The corporation predicted that, if the cuts are enacted, LSC-funded programs across the country will have to turn away approximately 235,000 low-income Americans seeking civil legal assistance.

“LSC works for millions of American across the country each year,” ABA President Stephen N. Zack said, emphasizing that the tough economy is flooding legal aid offices with new clients facing serious legal problems for which they cannot afford to hire a lawyer. In addition, he said that parts of the country have been devastated by natural disasters in the past few months, and LSC cuts will decimate the operations of the local legal aid providers who normally step in to help in these situations.

In a July 7 letter to committee Chairman Harold Rogers (R-Key.), ABA President-elect Wm. T. (Bill) Robinson III focused on the impact of the proposed cuts in his home state of Kentucky, where four LSC grantees receiving a total of $6.3 million last year closed more than 19,000 cases. Those assisted by the grantees include veterans returning from combat, domestic violence victims, individuals undergoing foreclosure or other housing issues, and families involved in child custody disputes. Reducing LSC appropriations funding by $100 million, Robinson said, would result in a cut of nearly $1.6 million in Kentucky LSC funding.

Robinson also stressed that other funding sources for legal aid have diminished due to the current economy, noting that revenue from Interest on Lawyers’ Trust Accounts (IOLTA) – a major source of funds in every state and the District of Columbia – has fallen drastically.

He explained that, despite best efforts, pro bono work cannot replace LSC funding for civil legal services. Because LSC provides the infrastructure for pro bono systems, Robinson said that reducing funding for legal services grantees would impede attorneys from providing pro bono assistance.

Fiscal year 2012 begins Oct. 1 of this year, and the bill approved by the committee is one of 12 appropriations bills being drafted to fund the federal government. The next step is consideration by the full House.

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<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independence of the Legal Profession. P.L. 111-219 (S. 3987) clarifies that lawyers are not “creditors” under the Fair and Accurate Credit Transactions Act of 2003. The ABA scored a victory in a lawsuit against the FTC regarding application of the act to lawyers when the circuit court dismissed an FTC appeal and declared the case moot. The Securities and Exchange Commission issued final whistleblower rules under the Dodd-Frank Wall Street Reform and Consumer Protection Act that recognize the importance of protecting the attorney-client privilege and the confidential lawyer-client relationship.</td>
<td></td>
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<td>President signed P.L. 111-219 (H.R. 3987) on 12/18/10.</td>
<td>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 front page.</td>
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<td><strong>Health Care Law.</strong> P.L. 111-148 (H.R. 3590), the Patient Protection and Affordable Care Act, and P.L. 111-152 (H.R. 4872), the Health Care and Education Reconciliation Act, overhaul the nation’s health care system. H.R. 2 would repeal health care reform law. An amendment proposed to S. 223, transportation legislation, would have repealed the law. H.R. 5 and S. 218 would preempt state medical liability laws.</td>
<td>House passed H.R. 2 on 1/19/11. Judiciary Cmte. held a hearing on H.R. 5 on 1/20/11 and approved the bill on 2/16/11.</td>
<td>Senate rejected health care repeal amendment to S. 223 on 2/2/11. S. 218 was referred to the Judiciary Committee on 1/27/11.</td>
<td>President signed P.L. 111-148 (H.R. 3590) on 3/23/10 and P.L. 111-152 (H.R. 4872) on 3/30/10.</td>
<td>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 &quot;health courts&quot; that take away jury trials.</td>
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<td><strong>Judicial Independence.</strong> No cost-of-living adjustment was provided for federal judges in 2010 and 2011. S. 348 and H.R. 727 would establish an inspector general for the federal judiciary. S. 755 and H.R. 1416 would help state courts collect overdue court-ordered financial obligations through interception of federal tax refunds. S. 410 would authorize cameras in federal district and appellate court for civil trials.</td>
<td>H.R. 727 was referred to the Judiciary Cmte. on 2/15/11. H.R. 1416 was referred to the Ways and Means Committee on 4/7/11.</td>
<td>S. 348 was referred to the Judiciary Cmte. on 2/15/11. S. 755 was referred to the Finance Committee on 4/7/11. Judiciary Cmte. approved S. 410 on 4/7/11.</td>
<td></td>
<td>Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.</td>
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Retroactivity okayed for cocaine sentencing amendment

The U.S. Sentencing Commission voted unanimously June 30 to retroactively apply a proposed amendment to the cocaine sentencing guidelines to implement the Fair Sentencing Act of 2010 (FSA).

The proposed amendment is scheduled to go into effect Nov. 1, 2011, unless disapproved by Congress.

The FSA, strongly supported by the ABA, reduced the 100-1 federal sentencing disparity between powder and crack cocaine offenses to 18-1 and eliminated the mandatory minimum sentences for simple possession of crack cocaine. Mandatory minimum sentences of five and 10 years remain, however, for certain amounts of crack cocaine.

According to Sentencing Commission Chair Judge Patti B. Saris, Congress recognized the fundamental unfairness of federal cocaine sentencing policy and ameliorated it through the bipartisan FSA. She said that the commission’s June 30 vote “ensures that the longstanding injustice recognized by Congress is remedied and that federal crack cocaine offenders who meet certain criteria established by the commission and considered by the court may have their sentences reduced to a level consistent with the Fair Sentencing Act of 2010.”

Saris said the commission made its decision on retroactivity after significant deliberation and many years of research on federal cocaine sentencing policy. More than 43,500 comments overwhelmingly in favor of retroactivity were received by the commission when it solicited public input on the issue.

The commission estimates that approximately 12,000 offenders may be eligible to seek a sentence reduction, and an average reduction would be approximately 37 months. The average sentence, even after reduction, will remain at 10 years, but retroactivity of the amendment nevertheless could result in three fewer years of imprisonment for many offenders and a savings of more than $200 million within the first five years.

The ABA expressed support for retroactivity of the proposed amendment during a June 1 Sentencing Commission hearing. James Felman, co-chair of the ABA Criminal Justice Section’s Committee on Sentencing, called retroactive application of the amendment a “moral imperative.”

He emphasized that, prior to enactment of the FSA, threshold levels led to drastic racial sentencing disparities, severe sentences for low-level offenders, and an overburdened federal system.

“Simply stated,” he said, “the purpose of the amendment was to rectify a longstanding and glaring inequity in the sentencing of crack cocaine offenders. This purpose can more fully be achieved through retroactive application to those already visited with sentences now uniformly understood to be unfair. Perhaps no amendment in the history of the commission presents a greater imperative for retroactive application.”

Felman noted that the federal judiciary has the experience and wisdom gained from successful implementation of a retroactive crack cocaine amendment in 2007 when the courts considered and disposed of more than 25,000 petitions for relief.

Attorney General Eric Holder Jr., also testifying June 1 in support of retroactivity, stressed that the sentencing guidelines already make clear that retroactivity of the guideline amendment is inappropriate when its application poses a significant risk to public safety.

Holder also expressed the Justice Department’s view that, even though the FSA contains no specific provision on statutory retroactivity, the Sentencing Commission is well within its authority to make the amendment retroactive.

Patent overhaul clears House

The House passed legislation June 23 to overhaul the patent system after approving an amendment to allow congressional appropriators to maintain control of U.S. Patent and Trademark Office (USPTO) funding, which comes entirely from user fees.

Under the appropriations language in H.R. 1249, as passed by the House, Congress would continue to set USPTO appropriations based on user fee projections, but excess revenue from fees would be put into an account that USPTO could use through further appropriations. This differs from provisions supported by the ABA in earlier versions of patent reform approved by the House Judiciary Committee and passed by the Senate as part of its patent overhaul bill, S. 23. The ABA-supported provisions would establish a revolving fund into which USPTO fee collections would be deposited and from which the office would have immediate access to operating funds.

In a June 23 letter to all members of the House, ABA Governmental Affairs Director Thomas M. Susman warned that the House-passed language would eliminate the guarantee of certainty and stability in providing paid-for resources to the USPTO and would relegate the flow of funds to operate the nation’s patent system to the existing system of delay and divergence. In the past several years, he noted, more than $700 million of fees paid to the USPTO never reached the office for its use and were diverted to
ABA supports extension of child welfare programs

The ABA recommended last month that Congress reauthorize existing programs and enhance federal efforts that provide key services and supports to families involved, or at risk of becoming involved, in the child welfare system and the state courts that handle such cases.

In a statement submitted for the record of a June 16 hearing before the House Ways and Means Subcommittee on Human Resources, ABA Governmental Affairs Director Thomas M. Susman urged reauthorization of the Stephanie Tubbs Jones Child Welfare Services (CWS) and the Promoting Safe and Stable Families (PSSF) programs of Title IV-B of the Social Security Act. These programs, Susman said, provide vital support to states’ effort to protect at-risk youth and differ from most federal child welfare funding, which is available only after a child enters foster care.

“PSSF is a critical resource because it helps states stabilize families by supporting immediate preventive services while children remain at home and also by funding reunification services so children can be safety returned home in a timely manner,” he explained.

Susman said the ABA recommends a greater funding level for the PSSF to allow the program to enhance substance abuse and mental health treatment as well as housing assistance. In addition, he said the current time limit of 15 months for reunification services should be eliminated so that federally supported reunification efforts can continue among families in appropriate circumstances.

Another critical program is the Court Improvement Program (CIP), which provides $30 million in federal funds to state courts each year to improve their handling of child abuse and neglect cases. Although the CIP has been found to be very successful in addressing the goals of the Adoption and Safe Families Act, reforms are still required in court staffing, case management, judicial selection and training, performance measurement and accountability, and quality legal representation, according to the ABA.

The association recommends that Congress amend the CIP to require state CIPs to improve representation for parties in the child welfare system and to clarify that

House panel approves bill to amend Rule 11 to mandate attorney sanctions

The House Judiciary Committee has approved, on a July 7 party-line vote of 20-13, legislation opposed by the ABA to amend Rule 11 of the Federal Rules of Civil Procedure to reinstate a mandatory sanctions provision that was eliminated in 1993 because it was counterproductive and harmful to the resolution of civil litigation.

H.R. 966, known as the Lawsuit Abuse Reduction Act, would require sanctions against attorneys who bring non-meritorious claims and defenses, which bill proponents claim has skyrocketed. The bill would require, rather than permit, the imposition of monetary sanctions, consisting of attorneys’ fee and other costs resulting from the violation, and eliminate a provision adopted in 1993 that allows parties and their attorneys to avoid sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served.

In a June 1 letter to the committee, the ABA noted that, despite the elimination of provisions in prior bills that would have applied Rule 11 to civil actions brought in state courts and imposed venue requirements under certain circumstances, the association still considers the bill to be ill-advised and unnecessary for three main reasons.

First, the legislation would circumvent the Rules Enabling Act, a process established by Congress to ensure that changes to the federal rules are thoroughly reviewed.

Second, the ABA believes that the proposed revisions are unnecessary and counterproductive, stating that there is no demonstrated evidence that the existing Rule 11 is inadequate or needs to be amended.

The association disagrees with the assertion that there has been a significant increase in the filing of non-meritorious litigation in the 18 years since Rule 11 was revised to permit the discretionary imposition of sanctions.

Third, the legislation ignores the lessons learned from the 10 years that the mandatory version of Rule 11 was in place from 1983 through 1993, according to the ABA. During that time, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time, the letter stated.

“The ABA is not aware of any compelling evidence that there is a demonstrable need to revise Rule 11 or that the proposed amendment would remedy alleged problems,” according to the correspondence.

There has been no action on a Senate version of the legislation, S. 533.

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ABA urges changes in proposed capital counsel rule

The ABA urged the Department of Justice last month to revise a proposed rule intended to implement the certification process for capital counsel systems at the state level because the proposal would not assure that states that receive certification have mechanisms in place to provide the appointment of competent post-conviction counsel.

The certification process, established by Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005, requires states to make significant and meaningful improvements to their counsel systems providing legal representation to indigent death-sentenced prisoners (including ensuring the quality of appointed counsel) in order to be entitled to the benefits of streamlined review in federal habeas corpus proceedings.

In a June 1 letter to Attorney General Eric H. Holder Jr., ABA President Stephen N. Zack maintained that the proposed rule would lead to improper certification by the attorney general because it “fails to provide substantive, meaningful criteria for evaluating whether a state’s mechanism will actually lead to the appointment of competent counsel.”

Comments submitted to the DOJ by the ABA mark the third time since 2006 that the association has voiced similar concerns about proposed rules to implement Section 507.

The current proposed rule, according to Zack, “raises serious concerns about the quality of representation for capital defendants, the fairness of death penalty proceedings, and the relationships between the federal and state courts in habeas corpus proceedings – issues that long have been and are today of vital concern to the ABA.” The ABA comments emphasize that even though the ABA has no position on the constitutionality of the death penalty or whether Section 507 is good policy, the association is dedicated to the promotion of a fair and effective system for the administration of justice.

The comments state that the proposed rule does not satisfy the mandate for the appointment of competent counsel because it fails to require states to: appoint post-conviction defense teams; meet well-recognized standards for the appointment of competent post-conviction counsel; adopt meaningful performance standards; provide funds for the training, professional development and continuing education of post-conviction counsel; consider defense teams’ existing workload before making appointments; and provide for the timely appointment of counsel.

The ABA recommends that the proposed certification criteria be revised to require compliance with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, originally developed in 1989 and expanded and updated in 2003.

Patent law

other programs.

While the association prefers the funding provisions in the Senate-passed bill, both House and Senate bills include a rule change supported by the ABA.

Provisions in both bills would institute a “first-inventor-to-file” rule for obtaining a patent – an action that would replace the United States’ current and more complex “first-to-invent” standard that relies on “proof-of-invention” dates. The United States stands alone in the world, Susman said, in using the first-to-invent standard, which increases opportunity for competing claims to the same invention and facilitates protracted legal battles in administrative and court proceedings that are extremely costly, in both time and money.

Child welfare

continued from page 4

Title IV-E of the Social Security Act may be used to reimburse states for the cost of legal representation for parents and children.

The association also recommends the establishment of a new federal permanency incentive program to reward states that increase their rates of safe and stable parental reunification and guardianships. Money awarded to states under the program would be reinvested into child welfare services.

The final ABA recommendation suggests a technical change to the Fostering Connections to Success and Increasing Adoptions Act to ensure true school stability for children in foster care during their entire stay in care and to create a common language for state and local education agencies, district and schools to use.

In his statement, Susman emphasized the work of the ABA Center on Children and the Law, which was established in 1978 to help improve children’s lives through advances in law, justice, knowledge, practice and public policy.

During the June 16 hearing, witnesses appearing before the subcommittee to support reauthorization of CWS and PSSF included Bryan Samuels, commissioner of the Administration on Children, Youth and Families in the Department of Health and Human Services; John Sciamanna, American Humane Association; and Tracy Wareing, American Public Human Services Association.
The ABA expressed opposition last month to H.R. 2032, a bill pending in the House Judiciary Committee that the association maintains is unnecessary and would limit the ability of those representing individuals with disabilities from obtaining protection for their legal rights in court.

The bill, sponsored by Rep. Barney Frank (D-Mass.), would prohibit entities that receive federal funds from using those funds to file a class action lawsuit on behalf of residents of intermediate care facilities for the mentally retarded (ICF/MRs) unless the residents have the opportunity, after receiving notice, to opt out of the class.

The provisions of the bill would apply only to class actions filed by Protection and Advocacy Agencies (P&As), which exist in all states and territories as part of a system of legally based advocacy services for individuals with disabilities. P&As are authorized to undertake class actions under the Developmental Disabilities Assistance and Bill of Rights Act of 1975.

In a June 15 letter to House Judiciary Committee Chairman Lamar Smith (R-Texas) and Ranking Member John Conyers Jr. (D-Mich.), ABA Governmental Affairs Director Thomas M. Susman wrote that “class actions have long been recognized as providing an efficient and effective form of legal action designed to fairly and adequately protect the interests of a group of individuals with common questions of law and fact pursuant to the Federal Rules of Civil Procedure.”

While the Federal Rules allow class members to opt out of actions involving damages, class members are not permitted to opt out of actions pursuing injunctive relief. If H.R. 2032 were enacted, according to Susman, residents of ICF/MRs would be the only individuals in federal court with the right to opt out of a class action for injunctive relief, which may include actions to address abuse and neglect, unhealthy living conditions, or insufficient staffing at a facility.

He emphasized that H.R. 2032 is unnecessary because the Federal Rules already provide class members with a number of protections to ensure that their voices are heard, including appropriate notice to class members, the ability of class members to intervene as parties in the class to ensure they are adequately represented, and a required fairness hearing before any settlement, dismissal or compromise of the class action is allowed.

“Having a full range of appropriate remedies, including the use of class actions, has been a keystone to protecting the civil and legal rights of individuals with disabilities in all facets of their lives,” Susman concluded.

Judicial Vacancies/Confirmations — 112th Congress* (as of 7/13/11)

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<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
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<tr>
<td>US Supreme Court (9 judgeships)</td>
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<tr>
<td>US Courts of Appeals (179 judgeships)</td>
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<td>US District Courts (678 judgeships)</td>
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<tr>
<td>Court of International Trade (9 judgeships)</td>
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<tr>
<td>Totals</td>
<td>91</td>
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*Includes territorial judgeships
SECOND CHANCE ACT: The ABA urged Congress June 28 to provide full funding of $165 million in fiscal year 2012 for the Second Chance Act, bipartisan legislation enacted in April 2008 to help prisoners successfully reenter communities after completing their incarceration. Current-year funding for Second Chance programs is $83 million, down from the previous year’s amount of $100 million. “With an understanding and sensitivity to the fiscal year constraints facing the federal government, the ABA nonetheless believes that funds spent to reduce recidivism are investments that will more than pay for themselves in long-term savings to society and the criminal justice system,” ABA Governmental Affairs Director Thomas M. Susman wrote in letters to the House and Senate Appropriations Subcommittees on Commerce, Justice, Science and Related Agencies. He emphasized that the act will provide crucial resources at a time when they are desperately needed. He pointed out that the more than 9 million individuals released from jail each year face numerous challenges when returning to the community and that research shows that over half of the released prisoners are re-incarcerated within three years. More than 250 Second Chance grants have been awarded to community and faith-based organizations as well as state, local and tribal governments spanning almost every state in the country, Susman wrote, explaining that the act has fueled public/private partnerships required to tackle the complex task of reducing recidivism. Programs supported by the act include demonstration grants, reentry courts, family-centered programs, substance abuse treatment, employment counseling and mentoring, and other services to improve the transition from prison to community. The House Appropriations Committee included $70 million for Second Chance Act programs in a draft fiscal year 2012 bill approved July 13. In addition, the act is up for reauthorization this year, and the Senate Judiciary Committee was expected this month to mark up S 1231, a bill to extend the act for another five years.

STUDENT LOAN FORGIVENESS: The ABA commended the Department of Education and offered suggestions last month for developing a form to enable borrowers to verify that their employment qualifies them to obtain student loan forgiveness under the Public Service Loan Forgiveness Program (PSLFP). The program, established in 2007, discharges any remaining debt under the William D. Ford Federal Direct Loan Program after 10 years of full-time employment in public service and after the borrower has made 120 payments. In a June 13 comment letter to James Hyler, the acting director of the department’s Information Collection Clearance Division, the ABA recommended several ways to improve the form to avoid confusion and errors. The recommendations included clearly stating to whom the form should be sent and making sure that the borrowers are notified in writing of any problems with their forms. In addition, the ABA suggested that a line be added to include the name under which the borrower obtained the loan and to permit employers to indicate on the forms that the borrower is currently employed and whether the borrower is a full-time or part-time employee. The ABA strongly supports public service loan forgiveness and repayment assistance for law students and maintains that programs such as the PSLFP provide tools for attracting and retaining talented lawyers who can develop a professionalism, competence and efficiency that comes with longer terms of service than many could normally afford.

USE OF MILITARY FORCE: Experts convened on Capitol Hill July 11 for a panel discussion entitled “From Yemen to Libya: The Role of Congress in Authorizing the Use of Force.” The program, sponsored by the ABA Standing Committee on Law and National Security and cosponsored by the ABA Standing Committee on Governmental Affairs and the Reserve Officers Association, considered two questions on the use of force being weighed in Congress: whether to authorize force in Libya and whether to amend the Authorization for Use of Military Force enacted in 2001. Moderated by Harvey Rishikof, chair of the Standing Committee on Law and National Security, the panel featured the following individuals: Deborah Pearlstein, associate research scholar, Woodrow Wilson School for Public and International Affairs, Princeton University; Daniel Silverberg, senior deputy chief counsel, minority staff, House Committee on Foreign Affairs; Suzanne Spaulding, principal, Bingham Consulting Group, and of counsel, Bingham McCutchen; Benjamin Wittes, senior fellow and research director in public law, The Brookings Institution; and Roger Zakheim, deputy staff director and general counsel, majority staff, House Committee on Armed Services.
ABA cites importance of legal services to the elderly

The Older Americans Act (OAA), originally enacted in 1965, is up for reauthorization again this year, and the ABA is urging Congress to amend the act to improve the delivery of legal services to the elderly.

In a June 9 letter to the Senate Special Committee on Aging, which held a hearing on OAA reauthorization May 26, ABA Governmental Affairs Director Thomas M. Susman emphasized that legal assistance assures access to essential income, programs and benefits for seniors who are at the greatest risk of being institutionalized, abused, exploited or neglected. Such at-risk seniors include the more than 5.2 million seniors living at or below the poverty level and 3.3 million seniors who are geographically, socially or culturally isolated.

According to the letter, the most recent annual data gathered by the Administration on Aging in 2008 shows that OAA legal assistance helped an estimated 87,000 seniors to navigate complex systems that provide income, health care, nutrition and housing and to resolve numerous other legal problems ranging from debt collection to advance care planning. An examination in 2010 of the need for legal assistance for at-risk seniors and the current service delivery capacity revealed that the need is at least four times greater than the ability of the system to meet the need.

“Reauthorization presents an opportunity to utilize the lessons we have learned from more than three decades of experience in supporting legal assistance under the OAA and to improve its efficiency, focus and quality,” Susman wrote, providing the committee with nine principles developed by the ABA for consideration by Congress.

The principles include: creating a high-quality coordinated legal services system in each state that prioritizes services for individuals with the greatest social economic need as well as those at risk of institutional placement; funding national support centers composed of national organizations with expertise in law and aging and utilizing a national legal advisory committee; utilizing uniform standards and procedures that build on the ABA Standards for the Provision of Civil Legal Aid; and strengthening state legal assistance developers.

The principles also urge that Congress give states the flexibility to engage providers of legal services without imposing advocacy restrictions on the providers who are not funded by the Legal Services Corporation.

Senate Special Aging Committee Chairman Herb Kohl (D-Wis.) emphasized during the hearing that OAA programs serve more than 10 million older Americans nationwide and that OAA funding was cut by 17 percent this year even though the need for the programs has increased.

He said his priorities for reauthorization of the act will address services for the 44 million family members who provide care for elderly relatives. He added that he will seek to strengthen the act’s Long Term Care Ombudsman program.

Those testifying during the hearing included former First Lady Rosalyn Carter, who founded the Rosalyn Carter Institute for Caregiving in 1987; and Kathy Greenlee, assistant secretary for the Administration on Aging in the Department of Health and Human Services. Greenlee emphasized the importance of helping older individuals manage chronic diseases, improving the Senior Community Service Employment Program, and combating Medicare and Medicaid fraud and abuse.