New HUD final rule includes broad lawyer exemption from SAFE Act

The ABA scored another victory this summer when the Department of Housing and Urban Development (HUD) included a broad exemption for attorneys in a new rule implementing the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act).

The action by HUD followed other lawyer exemptions adopted at the urging of the ABA and state and local bars during the past year as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Federal Trade Commission’s final Mortgage Assistance Relief Services (MARS) Rule.

The Dodd-Frank law includes a broad practice-of-law exclusion specifically stating that the new Consumer Financial Protection Bureau (CFPB) will have no supervisory or enforcement authority over lawyers engaged in the practice of law who are in an attorney-client relationship with consumer clients. The new HUD final rule is consistent with the Dodd-Frank exclusion but more closely tracks the attorney exemption in the FTC MARS Rule, which exempts the vast majority of practicing lawyers who help consumer clients renegotiate their mortgages to avoid foreclosure.

HUD included a broad exemption for attorneys in its final rule implementing the SAFE Act after the ABA and state bar associations in Florida, Missouri, New Hampshire, North Carolina and Oregon urged the department to expand a narrower lawyer exemption in the proposed rule to protect the confidential lawyer-client relationship and traditional state court regulation of the legal profession.

The proposed HUD rule would have included lawyers who help clients negotiate or renegotiate their residential mortgages under the definition of “loan originator,” or “third-party loan modification specialist,” thereby subjecting the lawyers to the law’s extensive registration and licensing requirements. After weighing the organized bar’s concerns, HUD determined that licensed attorneys will not be deemed to be engaging in the business of a “loan originator,” and hence will not be subject to the SAFE Act regulatory requirements, if they are providing legal services to their clients and are in compliance with all applicable state court ethical rules and standards.

In its analysis of the final rule, which was published in the June 30 Federal Register, HUD indicated that the proposed rule was changed because of concerns...
### Independence of the Legal Profession


**ABA Position**
- President signed P.L. 111-219 (H.R. 3987) on 12/18/10.
- 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. See front page.

### Health Care Law

**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.

**ABA Position**
- 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.

### Judicial Independence

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.

**ABA Position**
- Supports prompt filling of judicial vacancies. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.

### Legal Services Corporation

**P.L. 112-10 (H.R. 1473)**, continuing appropriations for fiscal year 2011, includes $404.2 million for the LSC. The president requested $450 million for the program in his fiscal year 2012 proposed budget. The House Appropriations Committee approved $300 million for fiscal year 2012.

**ABA Position**
- Supports an independent, well-funded LSC.
HUD excludes lawyers from SAFE Act rule

that construing “engaging in the business of a loan originator” to encompass activities that constitute the practice of law could have negative consequences.

In particular, the department was concerned that the proposed rule could have interfered with regulation of the practice of law by state supreme courts, undermined important aspects of the confidential attorney-client relationship, including the attorney-client privilege, and hindered consumers from being able to obtain legal representation in residential mortgage loan transactions, all of which would undermine the purposes of the SAFE Act.

The department deferred to the new CFPB, which assumed responsibility for enforcing the SAFE Act and numerous other federal consumer protection statutes in mid-July, for a determination of which individuals will be covered as “third-party loan modification specialists” when they help consumer clients to modify their existing mortgages.

ABA President Wm. T. (Bill) Robinson III applauded HUD’s action.

“Lawyers already are subject to extensive state court regulations that impose stringent duties of competency, diligence, confidentiality and undivided loyalty on them, and ensure that they provide the best possible legal representation for their clients,” Robinson said.

“Creating a new overlapping federal layer of regulation on practicing lawyers is unnecessary, and the conflicting standards would ultimately hurt their consumer clients,” he added.

Obama plan will prioritize deportations

The Obama administration announced last month that 300,000 pending deportations of undocumented immigrants in federal immigration courts will be reviewed on a case-by-case basis by a joint task force of the Department of Homeland Security (DHS) and the Department of Justice to determine which cases are low priority and can be administratively closed.

The ABA supports the action as a way to reduce the burden on the immigration adjudication system.

The policy, conveyed to Capitol Hill Aug. 18 by DHS Secretary Janet Napolitano, is intended to focus the government’s efforts on deporting convicted criminals and those who might be a public safety or national security threat.

A lengthy list of common sense guidelines used to prioritize cases was sent to U.S. Immigration and Customs Enforcement (ICE) personnel by ICE Director John Morton in June. Low-priority cases include young people who were brought to this country as children and individuals who are military veterans or are spouses of active-duty military personnel. Other factors being considered include the person’s age, ties to the community, and physical or mental health.

High-priority cases involve individuals posing a clear risk to national security, serious felons, repeat offenders, known gang members, and individuals with egregious records of immigration violations.

“Prioritization, including the prudent use of prosecutorial discretion, is an essential function of any adjudication system,” according to Karen T. Grisez, chair of the ABA Commission on Immigration, who testified in May before the Senate Judiciary Committee. She explained that the practice has not been widely utilized in the immigration context even though there are numerous circumstances in which a respondent is not likely to be removed regardless of the outcome of the legal case.

“The ABA recommends that limited enforcement and adjudication resources should be preserved for conducting removal proceedings against those individuals within our country’s stated enforcement priorities, such as those who present a true risk to our national security or public safety and those the government actually plans to remove,” Grisez said.

She explained that a barrier to the effective exercise of prosecutorial discretion and the efficient handling of cases by DHS trial attorneys is the current practice of assigning attorneys on a hearing-by-hearing basis in removal proceedings. This practice may result in several attorneys being required to become familiar with the same case from one hearing to another rather than a single attorney having overall responsibility for a particular case.

Sen. Richard Durbin (D-Ill.) applauded the administration’s decision as a “fair and just way” to deal with immigrant students who would be helped by the proposed DREAM Act, legislation he introduced this Congress as S. 952. The proposed act, which is supported by the ABA, would provide a path to legal residence and citizenship for young immigrants who meet certain requirements, including successfully completing a criminal background check, demonstrating good moral character, and completing two years of college or military service.

“These students are the future doctors, lawyers, teachers and, maybe senators, who will make America stronger,” Durbin said.
A wide range of issues faced the ABA House of Delegates when it convened Aug. 8-9 in Toronto during the ABA Annual Meeting, and new policies adopted by the delegates address the funding crisis in state courts, support for mandatory civic education in public schools, increased civility in the legal profession, and greater protection of children in the immigration process.

The state court funding policy was developed by the ABA Task Force on Preservation of the Justice System, which is chaired by Theodore B. Olson and David Boies, recipients of this year’s ABA Medal. The policy urges bar associations, governments and courts to take specific actions to respond to the crisis.

The delegates also approved a resolution opposing efforts to amend the U.S. Constitution to alter the grant of U.S. citizenship under the 14th Amendment to any persons born in the United States, including territories, possessions and commonwealths.

The following summarizes the House of Delegates action.

**Administrative Law**

**Employment Discrimination.** Urges the president, Congress and the chair and commissioners of the Equal Employment Opportunity Commission (EEOC) to adopt measures to provide that EEOC employment discrimination hearings conducted are subject to the formal adjudication requirements of the Administrative Procedure Act.

**Civic Education**

**Civic Education.** Recommends that state, local and territorial bar associations urge state and local legislatures, education commissions and school boards to mandate civic education classes/courses in elementary, middle and secondary public schools.

**Courts/Judiciary**

**Cross-Border Class Actions.**

Adopts as best practice the *Protocol on Court-to-Court Communications in Canada-U.S. Cross Border Class Actions and Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings*, dated August 2011, and urges courts and counsel in cross-border class actions cases involving the United States and Canada to adopt the protocols.

**Judicial Disqualification.** Urges states to establish clearly articulated procedures for judicial disqualification determinations and prompt review, by another judge or tribunal, of denials of requests to disqualify a judge; and urges states in which judges are subject to elections of any kind to adopt disclosure requirements for lawyers and litigants who have provided campaign support for a judge before whom they are appearing and guidelines for judges concerning disclosure and disqualification obligations regarding campaign contributions.

**Time Standards.** Adopts the *Model Time Standards for State Courts* and urges state judicial systems to adopt and implement the standards while recognizing in criminal cases that any time standards must acknowledge the caseloads of prosecutors and defense counsel and avoid any rush to case disposition that might compromise justice.

**Court Funding.** Urges state, territorial and local bar associations to document the impact of funding cutbacks to the judicial systems in their jurisdiction, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems.

see “Annual Meeting,” page 5
**Annual Meeting**

**Criminal Law**

**Background Checks.** Urges applicable governmental entities to take all appropriate measures to ensure that the National Instant Criminal Background Check System (NICS) is as complete and accurate as possible so that persons properly categorized as prohibited persons under 10 USC § 922(g) are included in the NICS, and to urge the Department of Justice, the Department of Defense and any other federal agencies to rescind policies that do not require reporting for inclusion in the NICS of applicants who fail voluntary drug tests.

**Human Trafficking.** Urges state, tribal and territorial legislatures to enact laws that effectively aid minors who are victims of human trafficking by, among other things, permitting their immediate protective custody as dependent children in suitable residential environments, amending juvenile dependency laws, and providing a civil cause of action for child victims to receive compensation and services.

**Sentencing.** Urges the U.S. Sentencing Commission to complete a comprehensive assessment of the guidelines for child pornography offenses, taking into account the severity of each offense and factors pertaining to the current nature of these offenses, offenders, victims and the role of technology in these offenses.

**Correctional Accrediting.** Adopts the Key Requirements for the Certification of Correctional Accrediting Entities, dated August 2011, and urges governments to require that public and private facilities in which adults or juveniles are confined for violations or alleged violations of criminal, juve-see “Annual Meeting,” page 6

---

**Robinson to focus on court funding, membership development and diversity**

Kentucky lawyer Wm. T. (Bill) Robinson III, a former ABA treasurer and past president of the Kentucky Bar Association, began a one-year term as ABA president last month, vowing to continue the association’s role in advocating for adequate state court funding and working toward membership development and greater diversity in the legal profession.

In remarks to the House of Delegates Aug. 8, Robinson acknowledged the work of the Task Force on the Preservation of Justice, appointed by outgoing President Stephen N. Zack to address the severe underfunding of the justice system. In addition to this task force, Robinson indicated that he will continue the work of the Commission on Hispanic Rights and Responsibilities, the Commission on Civic Education in the Nation’s Schools, and the Commission on Disaster Preparedness.

During his speech, Robinson also emphasized that it is imperative that the ABA continue to work on diversifying the legal profession. “Diversity enhances all of us individually and as an association,” he said.

Robinson is the member-in-charge of the Northern Kentucky offices of Frost Brown Todd LLC, a regional law firm of more than 400 lawyers with offices in Kentucky, Ohio, Tennessee, West Virginia and Indiana. An ABA member since 1972, he has served in a variety of leadership roles.

A longtime member of the House of Delegates, he served three years as ABA treasurer and seven years on the Board of Governors. His numerous positions within the association have included chair of the Standing Committee on Governmental Affairs, the Standing Committee on Bar Activities and Services, and the Standing Committee on Substance Abuse.

The primary focus of Robinson’s law practice has been civil litigation, and he has substantial experience in commercial litigation, class actions, product liability defense, environmental litigation, and medical malpractice defense. He has received numerous awards for his work in the law and in his community.

Robinson is a graduate of Thomas More College and the College of Law at the University of Kentucky, where he is in the Alumni Hall of Fame.
nile or immigration laws be accredited by one or more federally certified accrediting entities.

Women in Prison. Urges the Bureau of Prisons, the U.S. Marshals Services, Immigration and Customs Enforcement, and state, tribal and local correctional authorities to develop and implement gender-responsive needs assessments that account for women’s specific needs and to link women prisoners to gender-responsive programming, including programs targeted to parenting responsibilities, the women’s histories of domestic violence and abuse, their distinctive patterns and prevalence of mental health issues, and substance abuse and its co-occurrence with trauma and mental health issues.

Disclosure Rules. Urges federal, state, local and territorial governments to adopt disclosure rules in state and federal courts requiring the prosecution to obtain from its agents and to make timely disclosure to the defense before the commencement of trial or a guilty plea all information known to the prosecution that tends to negate the guilt of the accused, mitigate the offense charges or sentence, or impeach the prosecution’s witnesses or evidence, except when relieved of the responsibility by a protective order.

Rape Kit Backlog. Urges federal, state, local and tribal governments to enact legislation and support appropriate funding to protect sexual crime victims rights by eliminating the substantial backlog of rape kits collected from crime scenes and convicted offenders; and urges governments to adopt policy and/or legislation supporting efforts to test every rape kit booked into police evidence where testing may identify the unknown assailant, can confirm the presence of a known suspect’s DNA, corroborate a victim’s complaint or testimony, or exonerate innocent suspects.

Elder Law Long Term Care. Urges Congress and all federal, state and territorial administrative bodies to continue efforts to expand the availability of home- and community-based services as a viable long term care option to help people of all ages with disabilities live in the community.

Rights of Older Persons. Encourages the U.S. Department of State and the United Nations and its member states to support the ongoing processes at the United Nations and the Organization of American States to strengthen protection of the rights of older persons, including the consideration of an international and regional human rights instrument to accomplish this goal.

Election Law Voter Registration. Supports efforts to improve voter registration see “Annual Meeting,” page 7

Judicial Vacancies/Confirmations — 112th Congress* (as of 9/1/11)

<table>
<thead>
<tr>
<th>Court</th>
<th>Vacancies</th>
<th>Pending Nominations</th>
<th>Confirmations</th>
</tr>
</thead>
<tbody>
<tr>
<td>US Supreme Court (9 judgeships)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>US Courts of Appeals (179 judgeships)</td>
<td>18</td>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>US District Courts (678 judgeships)</td>
<td>74</td>
<td>45</td>
<td>32</td>
</tr>
<tr>
<td>Court of International Trade (9 judgeships)</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>93</strong></td>
<td><strong>56</strong></td>
<td><strong>35</strong></td>
</tr>
</tbody>
</table>

*Includes territorial judgeships
practices, and urges commitment by states and local election jurisdictions to develop the necessary compatible technology and resources to implement improvements.

Emergency Preparedness

**Law Practice.** Urges all lawyers regularly to assess their practice environments to address risks that may arise from any natural or manmade disaster and compromise their ability to protect their clients’ interests and maintain the security of their clients’ property; and urges bar associations to create committees dedicated to emergency management planning and response.

**Victims.** Opposes the adoption of laws that would alter the legal duty of reasonable care that relief organizations and health care practitioners owe individuals harmed by a natural or manmade disasters; and supports educational programs about the duty of care owed to victims of a natural or manmade disaster.

Environmental Law

**Climate Change.** Urges the U.S. government to ensure that federally recognized Indian tribes may participate fully in policy discussions and government-to-government meetings on the issue of climate change domestically and in international fora, and to provide adequate and equitable financial and other support for tribes to carry out measures relating to climate change.

Family Law

**Abused Children.** Adopts the Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings, dated August 2011.

**Gun Violence**

**Concealed Weapons.** Supports laws that give law enforcement in jurisdictions that allow the carrying of concealed weapons broad discretion to determine whether such activity requires a permit or license; and opposes laws that limit such discretion by mandating the issuance of a permit or license to all persons who simply satisfy minimum prescribed requirements. Opposes federal legislation that would force states to recognize permits or licenses to carry concealed weapons issued in other states.

Health Law

**Genetic Testing.** Urges federal, state and territorial governments to assure that predictive and diagnostic medical genetic testing provided online, via the telephone, or by any other direct-to-consumer method complies, at a minimum, with certain specified requirements.

Immigration Law

**Minor Children.** Urges Congress to enact legislation and the Department of Homeland Security to adopt policies that assure that information pertaining to location and transfer of immigration detainees who are parents of minor children is shared among immigration authorities, state and local child welfare agencies and state courts; that length of one’s status as an immigration detainee cannot be the sole basis for not making reasonable efforts to reunify children with their parents; and mandate collection and reporting of annual data on the number of U.S.-citizen children impacted by detention and deportation of parents or primary caregivers and the costs involved.

**Children in Proceedings.** Urges the Department of Homeland Security to revise its policies to allow detained parents, legal guardians and primary caregivers access to an attorney to help them understand the legal issues related to their minor children and to represent their interests in state court custody, dependency and other legal actions related to their children; and recommends that such persons be provided an opportunity for meaningful participation in judicial proceedings involving their children’s custody and welfare.

see “Annual Meeting,” page 8
Unaccompanied Children. Urges federal and state governments to enact legislation for the protection of unaccompanied and undocumented immigrant children and U.S.-citizen children of noncitizen parents that includes screening to determine whether the child is eligible for immigration relief because he or she is a victim of crime, abuse, neglect or abandonment; repatriation that adheres to intercountry protocols; full access for U.S.-citizen children to vital government documents; and training for judges and attorneys who work in the field.

Deportation. Supports application of the Immigration and Nationality Act to allow persons outside the United States to pursue motions to reopen or to reconsider removal (deportation) proceedings on the same basis and subject to the same restrictions that apply to persons who file such petitions from within the United States.

Access to Counsel. Supports measures by the Department of Justice’s Executive Office of Immigration Review and the Bureau of Immigration Appeals to improve access to competent legal counsel for individuals in immigration removal proceedings; and supports measures to combat the unauthorized practice of immigration law and immigration practitioner fraud.

Citizenship. Urges Congress to reject any resolution proposing an amendment to the U.S. Constitution that would alter, in any way, the grant of U.S. citizenship under the 14th Amendment to any persons born in the United States (including territories, possessions and commonwealths); and urges Congress and all state, territorial and local legislative bodies to reject any proposal that seeks to alter the right of U.S. citizenship under the Citizenship Clause of the 14th Amendment through the enactment of legislation or an interstate compact.

Intellectual Property Law

Definiteness. Supports the continued application by courts of certain legal principles to determine if an issued patent claim meets the definiteness requirements under 35 USC § 112, second paragraph.

Judicial Relief. Adopts policy relating to the rights of an applicant denied a patent by the U.S. Patent Office and who has exercised the right provided by federal statute to bring a civil action in the U.S. District Court for the District of Columbia to obtain the patent. Supports the right of the applicant to introduce new evidence in the district court subject only to limitations generally applicable in federal civil litigation.

Patent Eligibility. Adopts policy supporting the principle that laws of nature, physical phenomena and abstract ideas are not eligible for patenting under 35 USC § 101, and supports the principle that a patent claim limited to a new application of a law of nature or physical phenomenon meets the requirements of Section 101 where such new application manifests itself in a process, machine, manufacture or composition of matter, including a process, other than a mental process, for the treatment of a particular disease or other medical condition.

International Law

Blanket Prohibitions. Opposes federal or state laws that impose blanket prohibitions on consideration or use by courts or arbitral tribunals of foreign or international law, or on consideration or use of the entire body of law or doctrine of particular religion.

Economic Development. Urges Congress to fund U.S. participation in capital increases and replenishments for the World Bank, the Inter-American Development Bank, the African Development Bank and the European Bank for Reconstruction and Development to further longstanding ABA goals in the promotion of the rule of law in economic development.

International Trade. Supports development and harmonization of international trade and commerce law and the establishment of predictable systems of secured
continued from page 8

lending in developing countries through the reform of commercial laws, including secured transactions law; and encourages lawyers to support and participate in efforts to have secured transactions reform adopted in developing countries.

Legal Education

Practice-ready Lawyers. ABA should take steps to assure that law schools, law firms, continuing legal education providers and others concerned with professional development provide the knowledge, skills and values that are required of the successful modern lawyer; and urges legal education providers to implement curricular programs intended to develop practice-ready lawyers, including, but not limited to, enhanced capstone and clinical courses that include client meetings and court appearances.

Native American Students. Urges the Law School Admissions Council and ABA-approved law schools to require additional information, including tribal citizenship, tribal affiliation or enrollment numbers, and/or “heritage statements,” from individuals who indicate on their applications for testing and/or admission that they are Native American.

Student Loan Debt. Urges Congress to enact legislation that assists individuals who are experiencing financial hardship due to excessive levels of student loan debt but are not covered by the provision of the student loan overhaul enacted in March 2010; and urges commercial lenders to assist such individuals by developing and implementing certain loan repayment and forgiveness programs.

Employment Data. Urges all ABA-approved law schools to report employment data that identifies whether graduates have obtained permanent or temporary full-time or part-time employment within the legal profession, whether in the private or public sector, or whether in alternative professions; and urges the law schools to make data on employment and salaries of their graduates, as well as other cost-related law school data, readily available to applicants and other individuals. Urges the Section of Legal Education and Admissions to the Bar to consider revising the ABA Standards for Approval of Law Schools to require law schools to provide on their websites, and other reasonable methods of communication, more data on employment and placement of graduates.

Legal Profession

Civility. Affirms the principle of civility as a foundation for democracy and the rule of law and urges lawyers, ABA member entities and other bar associations to take meaningful steps to enhance the constructive role of lawyers in promoting a more civil and deliberative public discourse. Urges government officials, media, political parties, etc., to strive for more civil public discourse in the political arena. Supports government action that promotes civility.

Lobbying

Lobbying Disclosure. Urges Congress to update and strengthen the Lobbying Disclosure Act of 1995 (LDA) by narrowing the threshold for those exempted from registering under the LDA, requiring fuller reporting of lobbying activities, forbidding certain conflicts of interest, and providing for more effective enforcement of the LDA.

Military Law

Returning Veterans. Urges Congress to amend the Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA) by adding provisions to require employers to provide certain reasonable accommodations for returning veterans with combat injuries that may not manifest themselves until after a return to work; authorize the award of attorneys’ fees, costs and damages to redress violations of the act; make agreements to arbitrate a dispute under the act unenforceable; and authorize the Department of Labor to investigate patterns and practices of USERRA violations.

National Security

Detainees. Urges the president and the Department of Defense to assure that there is an opportunity for public notice and comment regarding the rules governing the “continued law of war detention” periodic review required for Guantánamo detainees under a March 2011 presidential executive order.

Uniform State Laws

Notarial Acts. Approves the Revised Uniform Law on Notarial Acts, promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as appropriate legislation for states desiring to adopt the specific substantive law suggested therein.

Other Highlights

During the House of Delegates meeting, Kentucky lawyer Wm. T. (Bill) Robinson III became ABA president, vowing to focus his presidency on the state court funding crisis, volunteerism, membership, and diversity in the profession (see article, page 5). Laurel G. Bellows, of Chicago, will serve as president-elect.

The six-day Annual Meeting also featured more than 1,400 events, including 200 continuing legal education programs. U.S. Supreme Court Justice Stephen G. Breyer emphasized to those attending the Opening Assembly the importance of civic education in advancing the rule of law.
U.S. LAWYERS IN INDIA: As the United States resumes negotiations with India on a bilateral investment treaty (BIT), the ABA is urging Secretary of State Hillary Clinton to include provision of legal services on the agenda. In a July 28 letter to Clinton, then ABA President Stephen N. Zack noted the importance of India as the fourteenth biggest trading partner of the United States and expressed hope that this bilateral trade and investment will flourish in the future. “A critical element in increasing the size of that trade and investment and the relationship between the two nations is the provision of legal services in their support,” he wrote. “Such services of lawyers well versed not only in the laws of the United States and India but also cross-border transactions and arbitration matters are plainly essential for such an increase. Obviously the ability of lawyers in the United States to provide such services is an important issue for the ABA and its members.” The ABA Model Rule for Licensing and Practice by Foreign Legal Consultants, as adopted by 32 U.S. jurisdictions, allows overseas licensed lawyers, including those from India, upon acceptance of a registration with the local bar or court, to establish offices in the United States and provide legal services to businesses in this country. There is an effort, however, in India to deny reciprocal treatment to U.S.-licensed lawyers, Zack said. He urged the State Department to advocate that the government of India establish a similar rule allowing non-Indian lawyers to provide advice to their clients in India on laws of their home jurisdictions. Zack also expressed hope that the courts in India would not intervene in this matter, citing a lawsuit pending in the High Court of Madras in which a private Indian lawyer seeks to limit the ability of U.S. lawyers to travel to India and give advice on their home jurisdictions’ laws to Indian clients or to U.S. clients who are present in India. The case involves many of the largest U.S. law firms as well as British and Australian law firms.

CONGO CONFLICT MINERALS: The ABA urged Congress on Aug. 18 to enact a technical amendment to the Congo conflict mineral disclosure provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The amendment would clarify the definition of “persons” who are subject to the conflict minerals disclosure requirements of the act. In a letter to the House Financial Services Committee and the Senate Banking, Housing and Urban Affairs Committee, ABA Governmental Affairs Director Thomas M. Susman explained that these provisions in the Dodd-Frank Act sought to discourage companies from providing financial support to those engaged in the ongoing armed conflict in the Democratic Republic of the Congo by creating a detailed regime for disclosing certain information regarding Congo conflict minerals to the Securities and Exchange Commission (SEC). Unfortunately, according to Susman, although the SEC applied the correct definition of “persons” who are subject to the requirements in its proposed rule implementing this section of the act, the definition of such “persons” is vague in the statute and should be clarified by Congress. “By clarifying this key term, Congress can provide meaningful guidance to the SEC, the State Department, and private sector entities regarding the statute’s intended scope while preventing unnecessary legal challenges to the definition used in the SEC rule,” Susman said. The ABA also urged Congress to incorporate the technical amendment in any future legislation modifying the Dodd-Frank Act. The comments in the ABA letter were prepared in coordination with the ABA Task Force on Financial Markets Regulatory Reform and the ABA Section of Administrative Law and Regulatory Practice.