Institutes “first-inventor-to-file” rule

New patent reform law is most comprehensive revision in 60 years

Legislation signed Sept. 16 by President Obama contains the most comprehensive revision and improvement of U.S. patent laws since 1952, the original date of codification.

“The Leahy-Smith America Invents Act provides much-needed transparency, objectivity, predictability and simplicity in our nation’s patent laws,” according to ABA President Wm. T. (Bill) Robinson III.

Under the new law, P.L. 112-29 (H.R. 1249), the United States will join the rest of the world by instituting a “first-inventor-to-file” rule for obtaining a patent. Although the ABA does not have a position on the entire legislation, the association supports the “first-inventor-to-file” rule, which would replace the current and more complex “first-to-invent” standard that relies on “proof-of-invention” dates.

The ABA backs the shift because the United States stands alone in the world in using the “first-to-invent” standard, which increases the 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.

In addition to establishing the use of the “first-inventor-to-file” rule for the United States, the new law also institutes more timely and cost-effective administrative mechanisms for identifying and removing improperly issued patents, greater transparency in the patent approval process through expanded opportunities for public input, elimination of subjective factors in determining a right to obtain a patent, and elimination of frivolous bounty hunter lawsuits based on technical errors in marking of patented products.

P.L. 112-29 allows congressional appropriators to maintain control of U.S. Patent and Trademark Office (USPTO) funding, which comes entirely from user fees. Although the USPTO is allowed to set and adjust fees, Congress will appropriate the amount the office receives from those fees. Excess fee revenue will go into a reserve account for the agency’s use, subject to the appropriations process. The ABA preferred an earlier version that would have established a revolving fund into which USPTO fee collections would have been deposited and from which the office would have had immediate access to operating funds.
### LEGISLATIVE BOXSCORE

<table>
<thead>
<tr>
<th>ABA LEGISLATIVE PRIORITY</th>
<th>HOUSE</th>
<th>SENATE</th>
<th>FINAL</th>
<th>ABA POSITION</th>
</tr>
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<tbody>
<tr>
<td>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.</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>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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<tr>
<td>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; the Senate Appropriations Committee, $369 million.</td>
<td></td>
<td></td>
<td></td>
<td>Supports an independent, well-funded LSC. See page 3.</td>
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</tbody>
</table>
ABA recommends that DOL reconsider proposed rule

ABA President Wm. T. (Bill) Robinson III urged the Labor Department Sept. 21 to reconsider a proposed rule that the association maintains would require many labor lawyers and law firms to report sensitive and confidential client information to the government.

The proposed rule, implementing Section 203 of the Labor-Management Reporting and Disclosure Act of 1959, would substantially narrow, in a way unintended by Congress, the longstanding “advice” exemption to the “persuader activities” reporting rule issued under the act.

The persuader rule requires employers and their labor consultants, including lawyers, to file extensive periodic disclosures with the department when they are involved in persuading employees on union formation or membership issues. Currently, lawyers are excluded from the rule’s reporting requirements when they merely provide advice or other legal services directly to their employer clients on these unionization issues but have no direct contact with the employees.

In his comment letter, Robinson emphasized that the ABA is not taking sides on a union-versus-management dispute but is defending the confidential client-lawyer relationship and urging the department not to impose “an unjustified and intrusive burden on lawyers, law firms and their clients.” Similar comment letters opposing the proposed rule also were submitted by at least 16 state and local bars from across the country.

The department is proposing major changes to the existing rule that would require lawyers who both provide legal advice to employer clients and engage in any persuader activities to file periodic disclosure reports even if the lawyer had no direct contact with the employees. These reports, in turn, would require lawyers and their employer clients to disclose a substantial amount of confidential client information, including the existence of the client-lawyer relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. The proposed rule also would require lawyers to disclose a great deal of confidential financial information about clients that is unrelated to persuader activities that the act is intended to monitor.

The association also expressed concerns that the proposed rule is inconsistent with Rule 1.6 of the ABA Model Rules of Professional Conduct and many binding state rules of professional conduct dealing with confidentiality of information that closely track the ABA model rule.

“In our view, these required disclosures proposed by the department are unjustified and inconsistent with a lawyer’s existing ethical duties under Model Rule 1.6 (and the related state rules) not to disclose confidential client information absent certain narrow circumstances not present here,” Robinson wrote.

He explained that lawyers for employer companies play a key

Senate Appropriations Committee approves $396 million for LSC

The Senate Appropriations Committee approved a fiscal year 2012 funding level of $396 million for the Legal Services Corporation (LSC) last month.

The amount, while proposing an $8 million reduction in the program’s funding, would not cut the program as much as the House Appropriations Committee recommended earlier this year. The House figure of $300 million represents a 26 percent reduction from the current level of $404.2 million, which already had been reduced from $420 million when spending reductions were enacted last April.

The ABA has urged Congress to maintain funding for the LSC at a time when economic conditions have resulted in an all-time high number of people who qualify for and need legal services. More than 63 million Americans, including 22 million children, are now eligible for civil legal assistance. At the same time, LSC-funded legal aid programs are seeing revenue from Interest on Lawyers’ Trust Accounts decreasing and state and private contributors struggling with budget issues.

In correspondence to members of both the House and Senate, the ABA and state and local bar associations emphasized that those benefiting from LSC-funded programs are among the most vulnerable Americans, including veterans returning from combat, domestic violence victims, those coping with the after-effects of natural disasters, families involved in child custody disputes, people with disabilities, and individuals undergoing foreclosure or other housing issues.

On Oct. 5, President Obama signed a continuing resolution, P.L. 112-36 (H.R. 2608), to keep the government funded through Nov. 18. Negotiations on funding for LSC and other programs will continue in the interim.
ABA urges committee to reject amendments to add more mandatory minimums to federal law

The ABA urged the Senate Judiciary Committee last month not to attach amendments to a data security bill that would add mandatory minimum sentences for certain crimes under the measure.

The association specifically opposed an amendment offered by Sen. Charles E. Grassley (R-Iowa) to S. 1151 that would create a mandatory minimum sentence of three years for offenders who intentionally cause or attempt to cause damage to critical infrastructure computers, which store vital databases concerning national security, health, electric power, safety, banking, water supply, transportation or telecommunications.

The committee adopted the amendment by an 11-7 vote before approving the bill by a 10-8 vote on Sept. 22.

Emphasizing that the ABA recognizes the need to protect the nation’s critical computer-based infrastructure, ABA Governmental Affairs Director Thomas M. Susman wrote to the committee Sept. 14 that the association believes, however, that those who willfully damage critical infrastructure computers deserve to be punished to a degree commensurate with the severity of their crime and personal culpability.

“Mandatory minimum sentencing laws are blunt, inefficient tools for addressing criminal conduct,” Susman wrote. He added that “existing evidence does not support any significant public safety benefit resulting from increasing the severity of sentences by imposing longer prison terms.”

Rather than minimizing sentencing disparities among similarly situated defendants, as proponents claim, mandatory minimums are more likely to distort the process assessing an individual’s culpability by placing too much emphasis on a single factor, such as weight in drug cases or loss in fraud cases, Susman said. “In too many cases, sentencing uniformity is attained at the cost of ignoring more important factors that might dictate disparity,” he added.

He pointed out that mandatory minimum laws have caused social and economic harms that include propelling the five-fold increase in the federal prison population since the mid-1980’s. Such laws also have contributed, he said, to the racial disparities that plague federal sentencing and corrections by placing the decision whether to charge criminal conduct under a statute in the hands of the government. Prosecutors control which cooperating defendants are recommended for a waiver of the mandatory minimums for “substantial assistance,” and African Americans historically have received a lower rate of such substantial assistance motions from the government.

Mandatory minimums sentences also tend to over-punish and over-incarcerate, resulting in too many first-time non-violent offenders receiving prison terms in excess of 20 years. Federal prisons are operating at 137 percent of rated capacity, putting guards, prison personnel, and prisoners at real and imminent risk.

Susman also pointed out that opposition to mandatory minimum sentencing laws is growing with the realization that the laws remove all discretion from judges who are the most intimately familiar with the facts of a case and who are well-positioned to know which defendants need to be in prison.

Patent reform continued from front page

The association and its Intellectual Property Law Section played a key role in developing the legislation.

House Judiciary Committee Chairman Lamar Smith (R-Texas) called upon the ABA section six years ago when he convened a small group of intellectual property law experts and practitioners to help him identify intellectual property issues in need of review and reform and to recommend specific improvements. Shortly after the patent reform effort began, the section established a Blue Ribbon task force that developed Agenda for 21st Century Patent Reform, a white paper analyzing and making recommendations on the major issues under consideration by Congress. The white paper was revised eight times over a five-year period as new issues became part of the process.

The ABA welcomes enactment of the new law.

“This modernization of our patent laws is well-designed to enhance the efficiency, effectiveness and timeliness of the U.S. patent system, and to improve the competitiveness of America’s inventors and innovators in the worldwide competition,” ABA Intellectual Property Law Section Chair Robert Armitage concluded.
Guardianship is a “double-edged sword” that provides protection yet removes fundamental rights, the ABA said in a statement submitted to a Senate Judiciary subcommittee last month as the association urged the panel to support efforts by the federal government to enhance guardianship systems at the state level.

“The number of individuals in need of guardianship services is spiraling with the aging of the population and growing number of persons with disabilities,” ABA Governmental Affairs Director Thomas M. Susman emphasized for the record of a Sept. 22 hearing before the Subcommittee on Administrative Oversight and the Courts.

He explained that when state courts appoint guardians for people who cannot care for themselves or manage their property, these guardians “face a daunting challenge of finding out what the person wants or would have wanted, or what is in the person’s best interests; of navigating our complex systems of health care, housing and long term care, social services, public benefits and finances; and of being accountable to the court.”

The ABA, a leader in adult guardianship reform, has tracked state guardianship legislation since 1988 and participated in groundbreaking consensus conferences and partnerships with others in studies of guardianship monitoring and public guardianship. The association’s Commission on Law and Aging currently is engaged in a project supported by the State Justice Institute and the Borchard Foundation Center on Law and Aging to develop a handbook for courts on volunteer guardianship monitoring and assistance programs.

Susman noted that a 1987 Associated Press report, which found the system was failing those it was designed to protect, launched the modern guardianship reform movement and triggered statutory changes, new standards and a growing number of state education and training materials. Practices by courts, guardians and others did not automatically follow the statutory reforms, however. There continued to be instances of guardian misconduct, lack of judicial oversight, lack of clear guidelines for guardian performance and decision-making, and a dire need for assistance for family guardians unfamiliar with the legal, judicial and social services systems.

Three Government Accountability Office (GAO) reports also found allegations of abuse, neglect and financial exploitation of seniors and persons with disabilities by court-appointed guardians, as well as lack of coordination between state court handling of guardianship and federal agencies who appoint representative payees. The most recent study, released in July 2011, found that information sharing between the Social Security Administration, the Department of Veterans Affairs and state courts would improve protection of incapacitated adults.

The ABA has extensive policy on state-level guardianship reform, and in February 2009 adopted additional policy “encouraging the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local and territorial standards regarding adult guardianship.”

During the hearing, Robert N. Baldwin, executive vice president and general counsel for the National Center for State Courts (NCSC), emphasized the need for credible data, and he commended subcommittee Chair Amy Klobuchar (D-Minn.) for her interest in assessing the impact of conducting criminal background checks on potential guardians and to test the use of electronic filing of reports by guardians.

Baldwin said that NCSC supports authorization of a federal Guardianship Court Improvement Program (CIP) modeled after the CIP grant program that has improved the process and outcomes in child welfare cases at the state level.

Others testifying before the panel included Kay E. Brown, GAO; Deb Holtz, Minnesota Office of Ombudsman for Long Term Care, and Naomi Karp, AARP Public Policy Institute.
Congress considers extension of anti-trafficking act

Bills to reauthorize and strengthen the Trafficking Victims Protection Act have begun moving through both houses of Congress, with approval early this month of legislation by the House Foreign Affairs Committee and markup for a similar bill expected shortly by the Senate Judiciary Committee.

The law, first enacted in 2000 and reauthorized three times since then, seeks to abolish human trafficking by providing protection to trafficking victims, particularly child victims, and giving prosecutors tools to gain cooperation from witnesses and informants who can provide vital testimony in human trafficking prosecutions. In 2008, the law was amended to strengthen protection for unaccompanied children by, among other things, requiring that pro bono legal representation be provided for unaccompanied alien children in their immigration matters, where possible, at no expense to the government.

The House Foreign Affairs Committee approved a two-year extension for the act Oct. 5 when it adopted H.R. 2830, legislation sponsored by Rep. Christopher Smith (R-N.J.). The Senate bill, S. 1301, would reauthorize the act for four years.

“Human trafficking is a modern-day form of slavery in which victims are forced into labor or sexual exploitation,” Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) said during a Sept. 14 hearing on the Senate bill, which he cosponsored. Although the United States has made significant strides on this issue, much work remains to be done, he said. Recent government estimates reveal that between 15,000 and 20,000 people are trafficked to the United States annually, and thousands more children in this country are bought and sold in the commercial sex industry every year.

During the hearing, officials from the Department of Homeland Security (DHS) and the Department of Justice (DOJ) described their efforts to combat human trafficking under the law.

Kelly Ryan, acting deputy assistant secretary for the Office of Immigration and Border Security, DHS, described the Blue Campaign, through which 17 DHS components collaborate on prevention, protection, prosecution and partnership. The department also has played a critical role in providing victim assistance to foreign victims of trafficking in the United States, Ryan said.

The DOJ Office of Justice Programs’ emphasis has been on comprehensive “wrap-around” services for trafficking victims, according to Principal Deputy Assistant Attorney General Mary Lou Leary. This means support and advocacy for victims during their interaction with

Judicial Vacancies/Confirmations — 112th Congress*  
(as of 10/12/11)

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<tr>
<td>Court of International Trade (9 judgeships)</td>
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*Includes territorial judgeships

see “Efforts” page 8
ACUS: Legislation to reauthorize the Administrative Conference of the United States (ACUS) now awaits Senate action after being approved Sept. 22 by the Senate Judiciary Committee. H.R. 2480, which overwhelmingly passed the House by a 382-23 vote in August, would authorize nearly $9 million over three years for ACUS, an independent federal agency providing non-partisan recommendations for improving federal agency procedures. ACUS, which was terminated in 1995 after nearly 30 years, resumed full operation in April 2010 and currently is conducting more than 10 research projects and numerous studies. Topics include e-rulemaking, the effect of judicial standards in civil litigation on the work of administrative agencies, and the potential use of science advisory panels. ACUS also is encouraging agencies to utilize video hearings more fully as a means of achieving significant cost savings, as well as many other proposed administrative reforms. H.R. 2480 would limit the amount available to ACUS each year for official representation and entertainment expenses for foreign dignitaries to no more than $2,500, and the Senate committee amended the bill to require ACUS to submit to the president and Congress, within 90 days, a report on the operations, current projects, finances and employee levels. ACUS also would be required to submit an annual budget. The ABA has long supported ACUS and its resurrection, emphasizing its proven track record of success and its key role in implementing numerous important laws in the past, including the Equal Access to Justice Act, the Congressional Accountability Act, the Government in the Sunshine Act and the Administrative Dispute Resolution Act.

FATF: The ABA submitted additional comments Sept. 16 to the Financial Action Task Force (FATF), an international body created in 1989 to develop and promote policies at the national and international levels to combat money laundering and terrorist financing. The FATF is now in the process of updating and refining its anti-money laundering and terrorist financing standards and plans to convene a public consultation meeting in early November on its Consultation Paper with the intention of adopting revised standards at its February 2012 plenary meeting. In the ABA’s comment letter to John Carlson, principal administrator for the FATF Secretariat, Kevin L. Shepherd, chair of the ABA Task Force on Gatekeeper Regulation and the Profession, echoed the association’s earlier requests that the FATF reach out and engage in an active dialogue with all stakeholders, including the ABA and other legal sector representatives. Shepherd also explained that meaningful engagement with the legal sector is particularly important not only because of its “gatekeeper” role, but also because of its role in advising both the financial institutions as well as other designated non-financial businesses and professions, including lawyers. The ABA, which has recommended ways to improve the FATF’s anti-money laundering standards, urged the entity to engage – sooner rather than later – with the legal profession on the substantive issues raised in the Consultation Paper. “Absent this engagement,” Shepherd said, “there is a likelihood that the revised standards will fail to achieve the desired goals.” He also recommended that, as a way to enhance transparency and strengthen the rationale and overall legitimacy of the consultation process, the FATF have public deliberations on the Consultation Paper with a written record of the decisions so that a legislative history exists of its choices and reasons for those choices. The ABA previously submitted related comments on the FATF’s Consultation Paper in January and June of this year.

NATIONAL CRIMINAL JUSTICE COMMISSION: The need for comprehensive review of America’s criminal justice system is clear, the ABA said in a letter this month to all senators urging them to support and cosponsor S. 306, a bill sponsored by Sen. Jim Webb (D-Va.) to create a National Criminal Justice Commission. “At every stage of the criminal justice process – from the events preceding arrest to the challenges facing those reentering the community after incarceration – serious problems undermine basic tenets of fairness and equity, as well as the public’s expectations for safety,” ABA Governmental Affairs Director Thomas M. Susman wrote in an Oct. 3 letter. “The result,” he added, “is an overburdened, expensive, and often ineffective criminal justice system.” Susman pointed out that it has been four decades since the last comprehensive study of the nation’s criminal justice system, and the “machinery” responsible for criminal justice is larger and more complex than ever with a greater overlap between federal and state law. The United States imprisons 2.3 million people – more than any other nation in the world – and an unprecedented numbers of ex-offenders face increased collateral consequences of conviction when they are released without job skills or treatment for substance abuse. The final report of the commission will make recommendations based on best practices at all levels of government. “At a time when state and federal spending for corrections and public safety programs is under intense fiscal pressures, the national commission will serve a critical need in reexamining the balance between federal and state criminal justice responsibilities and how best to direct limited federal resources,” Susman concluded.
Efforts continue in fight to combat human trafficking

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law enforcement and after the prosecution has concluded, she explained. “Wrap-around” also entails short-term and long-term assistance in coordination with the Department of Health and Human Services and culturally competent services that treat victims with dignity and respect.

The ABA strongly supports reauthorization of the Trafficking Victims Protection Act and adopted additional policy at the August 2011 Annual Meeting focusing on treatment of trafficked children within the United States who are often treated as criminals rather than victims. The policy urges state, local and tribal legislatures to aid minors who are victims of human trafficking in several ways, including permitting their immediate protective custody as dependent children and, except in extreme and compelling circumstances, not charging children under the age of 18 with certain crimes or status offenses that are incident to their trafficking situation.

The policy also urges Congress to enact legislation that enhances state, tribal, territorial and local efforts to combat trafficking of minor children through support-

Labor Department

continued from page 3

role in helping these entities and their officials to understand and comply with the applicable law and to act in the entity’s best interest. To maintain the trust and confidence of the employer client and provide it with effective legal representation, its lawyers must be able to consult confidentially with the client, he said.

“Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client and provide appropriate legal advice,” Robinson declared.

In conclusion, Robinson urged the department to reaffirm its longstanding broad interpretation of the advice exemption with respect to lawyers engaged in the practice of law. He also recommended that the department narrow the scope of the financial disclosures required by the rule so that disclosure is required only for those receipts and disbursements that relate directly to the employer clients for whom persuader activities were performed.