

# ABA WATCH

## ABA HOUSE OF DELEGATES WILL CONSIDER RECOMMENDATIONS ON JUDICIAL NOMINATIONS, RECUSAL POLICY, SUSTAINABLE DEVELOPMENT, AND ELECTION LAW

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in San Francisco on August 12 and 13. If adopted, these resolutions become official policy of the Association. The ABA, maintaining that it serves as the national representative of the legal profession, may then engage in lobbying or advocacy of these policies on behalf of its members. What follows is a summary of some of these proposals. [A proposal concerning overcriminalization will be separately addressed in this issue of *ABA Watch*.]

### Judicial Nominations

The Standing Committee on Federal Judicial Improvements proposes Recommendation 115, urging the "enactment of comprehensive legislation to authorize needed permanent and temporary federal judgeships, with a particular focus on the federal districts with identified judicial emergencies." Furthermore, the Standing Committee urges President Barack Obama to advance nominees "promptly," with the Senate

"expeditiously" scheduling hearings and votes for nominees, particularly nominees in districts with judicial emergencies.

The accompanying report describes how Article III district courts have experienced a 38% increase in caseloads over the last two decades, while only gaining 4% new judgeships. As of the report's drafting on May 16, 85 judicial vacancies existed with only 24 nominations, with many of these designated as judicial emergencies. This has resulted in many senior federal judges assuming an increased caseload, even though they have very little economic incentive to keep working after their retirements. With the prospect of immigration reform, even heavier burdens could affect both senior and active federal judges.

The Standing Committee urges the serious consideration of the Judicial Conference's proposal for 70 new permanent judgeships, 21 new temporary judgeships, and the conversion of 8 temporary judgeships to permanent positions. The sponsor also urges "additional federal judgeships" in those districts deemed

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## THE FEDERALIST SOCIETY: QUESTIONS FOR JAMES R. SILKENAT, PRESIDENT-ELECT, AMERICAN BAR ASSOCIATION

**Q:** What will be your most important goals for your upcoming ABA presidency, and have you mapped out any strategies for achieving them?

**A:** First let me thank you for the opportunity to communicate with the Federalist Society and its members. My top priority as President of the ABA will be to identify ways to match underemployed lawyers with underserved communities. Our effort is known as the Legal Access Job Corps. We have started convening ABA members and staff, as well as other experts with experience in legal education and pro bono legal assistance, to discuss how the ABA can take a leadership role in addressing the complex issues

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# ABA Criminal Justice Section Resolution Addresses Overcriminalization

This summer, at its annual meeting, the American Bar Association's Criminal Justice Section will sponsor a resolution that addresses the issue of overcriminalization. Resolution 113D seeks to mitigate the consequences of overcriminalization by urging "federal, state, local and territorial governments to re-examine strict liability offenses to determine whether the absence of a *mens rea* element results in imposition of unwarranted punishment on defendants who lacked any culpable state of mind in performing acts that were not *malum in se*, to prescribe specific *mens rea* elements for all crimes other than strict liability offenses, and to

assure that no strict liability crimes permit a convicted individual to be incarcerated." The recommendation will be considered by the ABA's House of Delegates, and if adopted, will become official policy of the Association. *ABA Watch* presents some background on previous ABA action concerning overcriminalization and analyzes the Criminal Justice Section's proposal.

## Background on Overcriminalization

Overcriminalization is broadly defined as the misuse and overuse of criminal law and penalties. As outlined in the ABA's resolution, there has been a sharp  
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## Questions for ABA President-Elect, James R. Silkenat

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involved.

In addition to the Legal Access Job Corps, I want to focus on what lawyers can do to inform the debate and help shape our nation's policies on the most urgent, stalemated issues of our time. Among these issues are immigration, gun violence, and problems with elections that impede our citizens from voting and having their votes count. I believe that lawyers can help in the effort to develop solutions to some of the biggest challenges facing our nation.

**Q: In your view, what is the role of the ABA in the legal profession, but also, more generally, in our society as a whole?**

A: The ABA has four stated goals, which work together to shape the mission of the ABA. The ABA provides outstanding CLE, publications and other programs and resources, including numerous opportunities to connect with lawyers from across the country and throughout the world. We want to enable lawyers to learn their craft more fully and gain greater competence.

Another goal is to improve our profession. We seek to promote the highest quality legal education, to encourage competence, ethical conduct and

professionalism throughout the bar, and to help lawyers contribute to society by performing pro bono and public service work.

A third goal is to eliminate bias and enhance diversity in the ABA, the legal profession and the justice system.

Finally, we aim to advance the rule of law by, among other things, working for just laws, a fair legal process, and meaningful access to justice for all. Our profession is a key aspect of our democracy and free society. We are officers of the court, and our justice system is central to the challenges we face as a society.

**Q: Is there a crisis in the legal profession? How would you respond to critics of the ABA's accreditation process? Is more innovation needed in the training of lawyers, particularly in light of escalating costs and increased student debt?**

A: American legal education is the best in the world, but it has to evolve to keep up with the rapid changes taking place in the legal profession. I am deeply concerned about our law students, our young lawyers and their futures. Many new lawyers have too much debt to work in public interest positions or to make a living by providing affordable legal services.

Last year the ABA commissioned a 20-member Task Force on the Future of Legal Education to determine how law schools, the ABA and other stakeholders can address issues concerning the economics and delivery of legal education. The Task Force is exploring all avenues of legal education and legal practice: from the number of years needed for a law degree, to stu-

# The Lawsuit Abuse Reduction Act of 2013

In a recent letter from Thomas A. Susman of the American Bar Association's Governmental Affairs Office to the House Judiciary Committee, the ABA expressed its opposition to H.R. 2655, the Lawsuit Abuse Reduction Act of 2013, which seeks to "amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes." In particular, the Act "reinstates sanctions for the violation of Rule 11, ensures that judges impose monetary sanctions against lawyers who file frivolous lawsuits, including the attorney's fees and costs incurred by the victim of the frivolous lawsuit, and reverses the 1993 amendments to Rule 11 that allow parties and their attorneys to avoid sanctions

for making frivolous claims by withdrawing them within 21 days after a motion for sanctions has been served."

The ABA opposes the Act for three main reasons. The Association asserts that all changes to the Federal Rules should follow procedures outlined by the Rules Enabling Act, which requires amendments to first be drafted by committees of the Judicial Conference of the U.S. and be subject to public comment before approval by the Conference, then submitted to the U.S. Supreme Court for its consideration, and finally given to Congress to reject, modify, or defer the amendment before it is enacted. The ABA asserts that the Lawsuit Abuse Reduction Act circumvents this "balanced and inclusive" process. The

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dent debt levels, to accreditation standards. It aims to produce a draft report for public comment before the ABA Annual Meeting in August, with a final report to be issued later in the fall.

Since 1952, the Council of the ABA Section of Legal Education and Admissions to the Bar has earned the privilege of recognition by the U.S. Department of Education as the nation's accreditor of programs leading to the J.D. degree. The ABA's accreditation standards are the product of a great deal of research, diverse thought and robust discussion, and they are open to regular review and public comment. Because the ABA's accreditation project is necessarily separate from the leadership of our professional association, I cannot speak for the Council. But it has consistently shown itself to be receptive to recommendations that would improve the standards for the accreditation of law schools.

**Q: In its mission, the ABA states that it is the national representative of the legal profession. Can the Association achieve this goal, and at the same time, stake out positions on controversial issues that significantly divide the ranks of the legal profession? Policy recommendations dealing with the right to abortion, same-sex marriage, racial preferences, and stem cell research come to mind most readily here.**

A: The ABA is by far the nation's largest association of lawyers, with almost 400,000 members. Our members are lawyers from all types of practice, from all across the country and in every legal specialty.

The 560-member ABA House of Delegates is our policy-making body and represents a broad cross-

section of the legal profession from all state bars, many local and specialty bars, and Sections and other groups throughout the Association. It considers and votes on positions openly and democratically.

Over the years, the ABA has adopted thousands of policies on a wide array of legal topics. Nearly all of our policies are viewed as nonpartisan positions designed to improve the legal profession or the overall justice system. All voices in the ABA have an equal opportunity to be heard during our highly transparent and deliberative policymaking process. We welcome all lawyers to join the ABA and fully participate in that process.

**Q: How do you respond to the allegation that the ABA, in its adoption of resolutions, has generally sided with plaintiffs lawyers?**

A: This assumption is simply not true. The ABA is committed to supporting a legal system that is effective, just and efficient, while protecting the rights of all parties. While the ABA works with plaintiffs' lawyers on a number of issues, we have taken a very different approach on a number of other key issues, including asbestos liability reform and certain state tort reforms. The ABA also opposes the Sunshine in Litigation Act, which would limit federal courts' ability to keep settlements confidential under Federal Rule of Civil Procedure 26(c).

While some ABA policies may result in favoring plaintiffs more than defendants, many other positions adopted by the ABA House of Delegates could be seen as more defense-oriented. For example, the ABA has adopted policies supporting certain class action and Superfund liability reforms, as well as the greater use of

mediation and other types of ADR instead of lawsuits to resolve disputes. The ABA also has worked successfully in recent years with the U.S. Chamber of Commerce, the Association of Corporate Counsel and other business groups to reverse the Justice Department's attorney-client privilege waiver policy, pass legislation protecting privileged information that banks submit to the Consumer Financial Protection Bureau and enact Federal Rule of Evidence 502, which is designed to reduce discovery costs and uncertainty. These are just a few examples of the ABA's balanced and non-partisan approach to civil justice reform.

**Q: You served on the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism. Should the ABA weigh in on recent debates concerning targeted killings and the use of domestic drones? What concerns do you have, if any, about how the Obama Administration is conducting itself in the war on terror? Do you think the Administration has been sufficiently respectful of "the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees?"**

A: After 9/11, our nation gave expansive powers to the executive branch to combat terrorism, including the use of deadly force. Both the Bush and Obama administrations have used drones under this authority. The ABA House of Delegates has not addressed the use of drones domestically, so it would be inappropriate to offer an opinion at this time.

On broader issues of national security, the ABA maintains its longstanding position that Congressional and judicial oversight of the executive branch is constitutionally essential and required. For example, the ABA insists that the Foreign Intelligence Surveillance Act should not be used to circumvent the First, Fourth and Fifth Amendments. The ABA has also called for confidential access to counsel for military commission trial defendants. These positions predate the current administration and remain our policy.

**Q: How do you define judicial independence? In your view, is a system of "merit selection" and/or judicial elections a better system of selecting judges? Should the ABA have a position on that? What about partisan vs. non-partisan judicial elections?**

A: The judiciary, one of the three co-equal branches of government, upholds the Constitution from

encroachment by the other two branches. Given this unique role, it is essential that courts operate in a fair, impartial and independent manner. Judicial independence means that judges are able to carry out their duties free from political pressure, inappropriate outside influences or fear of repercussions that result from unpopular decisions. An independent judiciary requires fair and competent judges who have been selected based on merit, who are accountable to the judicial code of ethics as well as to the law and the Constitution, and who can rely on the allocation of adequate resources for facilities, security and compensation.

When judges are forced to become politicians who run for office, fundraising ability and public opinion can become more important to judicial selection than knowledge of the law and judicial temperament. To compound matters, the public perception of how courts function and fidelity to the rule of law suffers.

ABA policy favors a commission-based appointive system of judicial selection. In states following other models, it is preferable to minimize the politicization of judicial selection by avoiding contested and partisan elections, providing for terms of significant length for judges who are subject to retention or re-election, ensuring that appropriate guidelines exist for the disclosure of campaign contributions and establishing clearly articulated disqualification procedures.

**Q: In its efforts to improve justice abroad, how do you think the ABA ought to define the rule of law?**

A: In 2006, the ABA adopted three core principles of the legal profession, each of which contributes to a functioning rule of law. They are an impartial and independent judiciary, an independent legal profession and access to justice for all people throughout the world. The ABA supports these principles through a range of activities in the United States and through its international Rule of Law Initiative, which works with in-country partners in more than 60 countries to build sustainable institutions and societies that deliver justice, foster economic opportunity and ensure respect for human dignity. I encourage readers to visit [www.abarol.org](http://www.abarol.org) to learn more about the ABA's work in these areas.

An excellent, and even more complete, definition of the rule of law has been voiced by the World Justice Project, which the ABA helped start in 2008. See [www.worldjusticeproject.org](http://www.worldjusticeproject.org).

**Q: Is overcriminalization a problem? If so, what**

## **reforms would you support?**

A: The ABA has long called for more careful scrutiny and steps to reform the unchecked growth of federal criminal law and the attendant expansion of the federal criminal justice system. We have increasingly worked with the Federalist Society, the National Association of Criminal Defense Lawyers, the Heritage Foundation and other groups on this issue.

In 1998, the ABA Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, issued a report titled “The Federalization of Criminal Law.” It noted that as the federal courts were increasingly burdened with cases traditionally handled in state courts, the federal criminal justice system had grown in unprecedented scale, size and cost to fulfill new duties, leading to serious problems in the administration of justice.

Other observers have reported that since the 1998 report the pace of new federal criminal law has continued unabated. After decades of expansive federal action, experts estimate that more than 4,500 separate federal criminal statutes are now scattered throughout the federal code without any coherent organization. There is also widespread recognition that the result of decades of expansion of federal crime has resulted in the criminalization of behavior that often lacks criminal intent and would better be managed by civil fines or other non-criminal sanctions.

We welcome the formation this year of a special Task Force on Over-Criminalization by the House Judiciary Committee and the opportunity it presents for the ABA, the Federalist Society and others to bring attention to this problem and to focus attention on legislative and administrative solutions.

## **Q: How do you define diversity in the legal profession?**

A: Democracy requires diversity of thought and perspective. The legal profession and our justice system, via implementation of and adherence to the rule of law, are guardians of our democracy. It is therefore imperative in protecting our democracy that the legal profession and the justice system are diverse in their makeup. This applies from ensuring that all parties have access to justice in our adversarial system to working to include as broad a range of perspectives as possible in our profession and justice system.

Historically, our profession would have benefitted significantly from full participation by women and racial

and ethnic minorities. More recently, our awareness of the need to diversify the legal profession has expanded to people with disabilities and people of differing sexual orientations. Our profession and the rule of law, and hence our democratic society, are made stronger when we are open and inclusive.

The ABA aims to promote full and equal participation in the legal profession. Unfortunately, the profession’s demographics stubbornly fail to mirror the society we serve, and too many obstacles to success and fulfillment remain. It is important for the ABA to continue to identify such barriers and work to remove or at least limit them. This, of course, requires us to diversify our ranks as much as possible so we can learn from people with differing perspectives.

## **Q: Do you believe that there has been a decline in public respect for the legal profession, and if so, what can the ABA do about it?**

A: While there will always be those who bash lawyers, I believe that most people, most of the time, value the legal profession’s role in a free and democratic society. People recognize our value when they want a business deal done right, a will drafted precisely or a criminal case resolved justly. People see and respect the work of pro bono and public service lawyers who help children at risk, abused women, immigrants in detention and families facing eviction. The ABA’s numerous public education, pro bono and public service initiatives—not to mention the excellent programs of state, local, and specialty bar associations—contribute to the positive image of lawyers by providing assistance to those in need. Our Model Rules of Professional Conduct, which are adapted by and enforced in the states, also enhance the image of lawyers by helping to ensure that they are trustworthy and competent.

## **Q: Conservatives are often on the fence about joining the ABA, maintaining it is a partisan organization, both in its policy positions and in its leadership. What would you say to disgruntled conservatives and others who might feel that it is a waste of time to join the ABA because their perspectives would not be valued or respected?**

A: The ABA’s doors are wide open to all lawyers. I encourage all lawyers to join and become active in the ABA for a number of reasons.

First, joining the ABA provides all lawyers, regardless of their political views, with great opportunities for

professional and practice development. Second, the ABA devotes the bulk of its time and energy to improving the legal system and the practice of law in ways that transcend political philosophy. For example, the ABA plays a leading role in protecting the independence of the legal profession by updating the Model Rules of Professional Conduct. We lobby Congress and federal agencies to preserve the attorney-client privilege and refrain from imposing costly and unnecessary new regulations on lawyers engaged in the practice of law.

The leadership and membership of the ABA's Sections and other practice groups are diverse. For example, our Criminal Justice Section has prosecutors and defense counsel alike. Our Labor and Employment Law Section has union and management lawyers. Our Administrative Law and Antitrust Law Sections have government and private lawyers. Our Litigation Section has plaintiffs' and defense counsel.

And, as I mentioned, we frequently work with groups like the Federalist Society to advance an independent legal profession and fairness in our laws.

As the largest association of lawyers in the world, the ABA welcomes and, indeed, thrives on differing perspectives.

## ABA House of Delegates

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judicial emergencies.

As of July 25, 85 current vacancies existed with only 29 pending nominations (7 circuit, 22 district). 35 of the vacancies are deemed emergencies. Of these nominations, 3 are on the District of Columbia Circuit, a circuit in which total pending appeals have dropped 10% in the last eight years.

### **Judicial Disqualification and Recusal**

The Indiana State Bar Association, and at least six cosponsors, propose Recommendation 10B, urging states and territories to "review their judicial disqualification procedures to assure the fair and impartial administration of justice," as well as "establish procedures that include objective minimum standards for judicial disqualification when there is a substantial

risk of actual bias or when a judge's impartiality might reasonably be questioned." In reviewing procedures, the recommendation also asks governments to consider "direct and indirect financial expenditures supporting or opposing a judicial candidate's selection, time period of conflict, and method and jurisprudence of judicial selection."

In 2011, after the U.S. Supreme Court decision in *Caperton v. A.T. Massey Coal Co.*, the ABA House of Delegates adopted Resolution 107, which "urged states to articulate clear standards for judicial disqualification and procedures for reviewing disqualification rulings" and encouraged states utilizing judicial elections to "adopt campaign disclosure rules for judges, litigants, and lawyers." [For more on this proposal, please see the [August 2011 issue of ABA Watch](#)] Recommendation 10B is designed to complement Resolution 107.

The sponsors assert in the recommendation's accompanying report that states and territories need to remove ambiguous rules that leave room for individual interpretation. They contend that judges are likely to take a cautious approach when deciding whether they need to recuse themselves, which could result in recusal when it is unnecessary. Therefore, the sponsors maintain that "ambiguous rules will most often fail to strike the proper balance and will interfere with a judge's duty to hear cases." To avoid this problem, the sponsors recommend that states adopt bright-line and objective rules that leave no room for interpretation and that will ensure policies are fairly and consistently enforced.

The costs and time involved in researching donation information would create an onerous burden on a judge, according to the sponsors. Alternatively, if the burden for disclosure was placed on attorneys, the sponsors suggest states would need to make careful determinations of which disclosures were material, as opposed to only those creating the appearance of injustice.

The sponsors recommend that states should carefully scrutinize independent expenditures donated by both individuals and 527 organizations. They suggest that states should carefully consider which independent expenditures create risks of bias and impartiality and should lead to mandatory disqualifications. Additionally, states should consider rules about the appearances in court of campaign employees like chairmen or treasurers. This is important because "members of the bar are most likely to be active in judicial elections as those most familiar with the candidates and that laudatory civic participation should not be a bar to practice in those