ABA WATCH

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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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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

very courts. Judges are, after all, selected to hear cases brought before their courts."

In its conclusion, the sponsors allege that, "Recent Supreme Court cases have cast doubt on whether existing judicial disqualification rules are adequate to assure due process for every litigant. While the concern is reflected in existing rules, reconsideration of those rules and their adequacy may be appropriate." The sponsors do not specify which decisions have cast doubt on due process. The sponsors single out judicial elections for special scrutiny, stating, "Inevitably, when judges are elected, tension will arise between the political demands imposed on them by the election process and their duty to be fair and impartial. In these systems an appropriate balance must be struck to ensure the fair and impartial administration of justice."

Critics of the 2011 recommendation have suggested that the proposals could actually result in a "dramatic escalation in campaign support." Activists, through either individual donations or 527 donations, could be motivated to flood their preferred candidate with money, and even if the preferred candidate were to lose, the opponent could be asked to disqualify himself due to the "debt of ingratitude."

Judicial disqualification is addressed by another recommendation that the House of Delegates will consider. The Standing Committee on Ethics and Professional Responsibility, along with at least four cosponsors, propose Recommendation 108, which "amends the Terminology Section, and the Black Letter and Comment of Rule 2.11 of the *ABA Model Code of Judicial Conduct*" to "provide enhanced guidance to judges, lawyers and the public as to when disqualification of a judge is appropriate due to campaign contributions or independent expenditures made in support of, or in opposition to, the election or retention of a judge or the judge's opponent."

The sponsors of the recommendation describe how the amount of independent expenditures and campaign contributions made during judicial and retention elections has increased over the years, causing concern over how contributions affect "judicial impartiality and independence." To address these concerns, the sponsors recommend amending the *ABA Model Code of Judicial Conduct* in three particular ways. First, they propose changing the definition of two terms of the Model Code: "aggregate" is now defined as all contributions and independent expenditures made to support or oppose a judge's campaign, and "independent expenditures" is defined as "any and all financial and in-kind activity in support of or opposition to a judicial candidate." Second, they suggest dividing Rule 2.11 into three categories of contributions or expenditures that could cause a judge to be impartial: contributions to support a judge's campaign or retention election campaign committee, contributions to oppose a judge's election or retention election including those to an opponent, and independent expenditures made in support of or in opposition to the judge's campaign. Lastly, the sponsors add new comments to Rule 2.11, including Comment 7, which explains what is meant by a "judge's actual knowledge" about a contribution or expenditure to the judge's election or reelection campaign. More specifically, Comment 7 clarifies that "a judge should not be presumed to know about a campaign contribution or expenditure simply because such information is part of a filing made pursuant to campaign disclosure laws or part of a public record."

Critics of these proposals maintain that these amendments are vague and may have unintended consequences on the disqualification of judges. These opponents argue that under the amended Model Code, if a business, union, or law firm made an independent expenditure in excess of the allowed amount to an organization that opposed the judicial candidate's election, they can force that judge to recuse himself simply by having given more than the allowed amount. Some critics question the new guidelines for a "judge's actual knowledge" as outlined in Comment 7, which does not hold judges accountable for having to know anything about contributions or independent expenditures made to their election or reelection campaigns. They suggest that a judge should be responsible for knowing this information since it is in public financial reports.

Election Law

The Standing Committee on Election Law and the Government and Public Sector Lawyers Division propose Recommendation 110, urging non-federal governments to "analyze their election systems and recent experiences of election delays." It further asks them to "enact appropriate legislation or administrative rules to address the causes and potential remedies for election delays, including but not limited to technological improvements to provide statewide database access in real time to all polling places." The recommendation also asks the federal government to enforce the Help America Vote Act (HAVA) and "take appropriate steps to bring

states into compliance."

In the recommendation's report, the sponsors cite past election delays as evidence of the need for election reform. They suggest that voter registration, being the common factor in all elections, should be the central focus of electoral reform. The sponsors suggest that two main steps will help eliminate delays – a statewide voter registration database with real time access and better government enforcement of HAVA's deadlines and requirements. They highlight seven categories that constitute the most common Election Day issues: event management, voting flexibility, voting technology, ballot length, statutory instability, poll workers, and voter confusion.

To address poor event management, the sponsors propose that election planners should consider possible accidents, voter overcrowding, parking, machine failure, and natural disasters in their contingency plans, and they should look to other industries for event management best practices. Possible solutions to address the issue of voting flexibility include the expansion of early voting programs, increased absentee voting, more voting centers, and creating an Election Day holiday. Proponents of the recommendation assert that outdated voting technology and insufficient numbers of voting machines sometimes cause voters to spend hours in line. They also maintain that wait times could be shortened by increasing pre-election voter education about candidates, and spreading out voter referendums and ballot propositions to non-presidential elections. They claim that "legal instability," such as confusion over voter identification laws and frequent redistricting, plays a role in election delays. The sponsors propose that legislatures pass laws regarding elections far enough in advance of election dates to allow for voter education and administrative planning. To address the issue of uneducated or unprepared poll workers, the sponsors propose better training, more pay, technical support, and identifying younger poll workers. Lastly, to decrease the problem of "voter confusion," the sponsors recommend that governments maximize voter outreach, and provide translations of materials and onsite translators. The sponsors also contend that failed or ineffective contingency planning routinely causes election difficulties. They propose that states "allow federal oversight of state election contingency planning, increase early voting, and update technology."

The merits of early voting are debatable, according to some critics. Early voting can make it more difficult for political candidates to hold critical debates about key issues. Critics also claim that it puts the emphasis on tactics and campaign strategy over an informed electorate. Voter opinions can change significantly in the three weeks prior to an election, as candidates continue to discuss issues and new facts are brought to light. Other critics contend that early voting has an increased risk of fraud. Not only is it easier for voters to cast fraudulent ballots through an absentee or mail-in process, some critics suggest that early voting also makes it easier for government officials to manipulate the outcome of the vote. For example, officials may choose to open early voting centers only in targeted areas, increasing voter turnout in some places, while ignoring it in others.

Gay and Transgender Panic Defenses

The Criminal Justice Section, along with at least 3 cosponsors, sponsor Recommendation 113A urging "federal, state, local and territorial governments to take legislative action to curtail the availability and effectiveness of the 'gay panic' and 'trans panic' defenses." The recommendation also proposes requiring courts to issue instructions that warn a jury "not to let bias, sympathy, prejudice, or public opinion influence its decision about the victims, witnesses, or defendants based upon sexual orientation or gender identity." The recommendation further specifies that "neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital crime."

The sponsors maintain that in recent decades, criminal defendants charged with homicide, battery, and assault have used "gay panic" as a theory to establish a defense on the grounds of insanity, diminished mental capacity, provocation, or self-defense. Coined by Dr. Edward Kempf, an American psychiatrist, in 1920, the term "gay panic" is used to describe the reaction of an individual who, upon being approached by a homosexual, realizes he or she is attracted to a person of the same sex and panics. The American Psychiatric Association removed this term from the Diagnostic and Statistical Manual of Mental Disorders following its appearance in the 1973 edition. In criminal cases, the term often refers to a circumstance in which a homosexual makes a non-violent sexual advance upon an individual who, as a result, panics and responds in a violent manner. The defendant later argues that the victim's actions caused him to lose his self-control or provoked him to violence. Criminal defendants who use the "gay panic" theory

typically seek a reduction of the charge to manslaughter or a reduced sentence.

The recommendation reports that lawyers usually use the "gay panic" and "trans panic" theories in one of four ways. It is sometimes used to prepare for an insanity defense, in which the defendant argues that the victim's actions caused the defendant to panic and become unaware of the nature of his conduct. In other instances, the defendant argues that his panic caused a diminished mental capacity, which "affected his capacity to premeditate and deliberate or to form the requisite intent to kill." Provocation is another defense, in which the defendant argues that the victim's concealment of their biological gender or non-violent sexual advances provoked the defendant to violence. Finally, self-defense is occasionally used to argue that the advances of the victim caused the defendant to reasonably believe that he was in danger of sexual assault or other serious bodily injury. The sponsors reject all of these defenses and contend, "By arguing that the victim's sexual orientation or gender identity are partially to blame for the killing, the defendant appeals to deeply rooted negative feelings about homosexuality and transgender people."

Supporters of this recommendation suggest that the use of "gay panic" and "trans panic" defenses is detrimental to the lesbian, gay, bisexual, and transsexual (LGBT) community because it sends the message "that the suffering of a gay or trans person is not equal to the suffering of other victims." They also assert that these defenses promulgate stereotypes and negative attitudes about LGBT individuals in society. The sponsors argue that these crimes should be treated as aggravated offense or hate crimes, due to the bias against sexual orientation or gender identity involved.

Critics of the recommendation argue that it promotes the idea that anyone who is shocked or upset by homosexual advances or nondisclosure of biological sex by transgender individuals is unreasonable and biased. Some critics contend that nondisclosure of biological gender before intimate sexual activity is a type of "sexual fraud." They assert that this fraud could cause an intense reaction and trigger a reasonable person to respond violently. Similarly, they suggest that an unwanted sexual touching, though non-violent, could be adequate provocation to a violent reaction. Opponents of the recommendation are concerned by the claim that "no non-violent sexual advance should be seen as adequate provocation to violence," as it could eliminate the ability of men and women to defend themselves against unwanted touching.

Right to Housing

The Commission on Homelessness and Poverty and at least six cosponsors sponsor Recommendation 117, which "urges governments to promote the human right to adequate housing for all through increased funding, development and implementation of affordable housing strategies and to prevent infringement of that right." The sponsors trace the right to President Franklin Roosevelt, who proposed during his 1944 State of the Union address "a 'second Bill of Rights,' including the right of every American to a decent home."

The sponsors urge the legal community to take an active role to provide adequate housing. "Adequate housing" is defined as in the recommendation's report as housing that meets the seven minimum standards laid out by the Committee on Economic, Social and Cultural Rights (CESCR). These standards include "legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location near employment options, healthcare facilities, schools, child care centers, and other social facilities; and cultural adequacy in housing design."

The recommendation's sponsors advocate securing adequate housing for all who lack it and eliminating policies that violate this right. The sponsors call on federal, state, and local governments "to recognize that homelessness is a *prima facie* violation of the right to housing, and to examine the fiscal benefits of implementation of the right to housing as compared to the costly perpetuation of homelessness." The sponsors state that homelessness continues to grow in the United States, with cities throughout the country experiencing a 16% increase in homelessness in 2011, and the number of homeless school children increasing by one million within one school year. Domestic violence victims, children who have aged out of foster care, and those released from prison are some categories of people who are increasingly experiencing homelessness.

The sponsors urge the federal government to be a leader in housing rights at home and abroad. They recommend several ways for this to be done, including prioritizing funding for public housing, assessing the impact of current and future legislative and policy decisions on adequate housing, prohibiting all state and local governments from violating this right, and supporting international agreements that further the commitment of all countries to this resolution.

While critics generally agree that some Americans struggle with housing difficulties, they offer a different perspective on solving the issue. Opponents of this recommendation assert that it is not the duty of government to interfere in any free market, including the housing market. They point to past government action in the housing market as a warning to the public about the possible consequences of increased government involvement. For example, they look to the difficulties that followed government incentives to mortgage companies to issue loans to individuals with less than adequate credit. They highlight rent control programs, which artificially lower the market price for low to mid-income apartments, creating a shortage of affordable apartments and reducing the incentive for landlords to provide well-maintained buildings and high standards of living.

Sustainable Development

The Section of Environment, Energy, and Resources has proposed Recommendation 105, which reaffirms the ABA's commitment to sustainable development, described as "the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations." The recommendation further urges the legal community and law schools to use sustainable practices in their facilities and to educate students and lawyers about the importance of this issue.

The accompanying report notes that the ABA has long been concerned about environmental protection. The sponsor emphasizes that the Association has launched a number of initiatives in the past decade to address this issue, including the ABA-EPA Law Office Climate Challenge Program, which encouraged law offices to use energy and green practices more effectively. In the future, the sponsor anticipates publishing an environmental rule of law index in association with the World Justice Project.

Supporters describe international summits like the Earth Summit of 1992 and the 2012 U.N. Conference on Sustainable Development in Rio de Janeiro (Rio+20) as the foundation of the sustainable development movement. The Rio+20 Conference produced a document entitled *The Future We Want*, outlining sustainable development goals and environmental concerns. Utilizing principles adopted from these summits, the Environment Section advocates a three-pronged approach to sustainability that includes "environmental protection, economic development, and social justice." Currently, the United States has no national legislative framework directing and regulating sustainability within its borders. The recommendation anticipates that such a framework, accompanied by the creation of a national council or authority on sustainability, will soon exist.

The sponsor offers sustainable development goals for three target groups – governments, lawyers, and legal associations. The recommendation urges that "U.S. government should take a leadership position in ongoing and future negotiations on sustainable development, including climate change." It also maintains that non-federal governments should focus on enacting regulations and laws that "effectuate the transition to sustainability." It suggests that lawyers use sustainable practices in their facilities and foster sustainability in their communities through legal projects and client education. The recommendation also encourages legal and bar associations to create programs that help others effectively use sustainable practices, such as awards for best business practices and individual contribution to American sustainable development.

Critics of the recommendation suggest that the sponsors place an undue emphasis on the use of regulations, laws, and government policies to advance sustainable development. They contend that a free market approach to climate change, energy, poverty, and other concerns should be taken. According to critics, government planners should not determine what kinds of energy will be available to consumers. If sustainable development is truly important, consumers will naturally voice their support for it in their purchases. Instead, critics argue, concerned groups should focus on public awareness campaigns and educational programs that encourage consumers to make environmentally responsible choices.

Some opponents of the recommendation also suggest that reports of global warming have been greatly inflated by scientists who had incentives to exaggerate the issue. Media and government hype about the "impending doom of climate change" only increases the likelihood that legislatures will enact unsound policies that could create economic harm. They suggest that alternative energy should be emphasized. For example, the United States is already lowering greenhouse emissions faster than any other developed country through the use of nuclear power and fracking. They argue that the recommendation's proposed framework would be filled with unnecessary regulations that impose legal costs on

businesses that might otherwise create breakthroughs in energy development.

2013 ABA Awards

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employment, public contracting or public education, as unconstitutional. In its announcement of the award, the Association stated that Judge Henderson is receiving this award for his "pioneering role breaking color barriers, his contributions to social justice, his lifelong government service, and his history in and commitment to the civil rights movement."

John Marshall Award

Chief Judge Robert M. Bell of the Maryland Court of Appeals will be awarded the John Marshall Award, presented by the Justice Center of the ABA's Judicial Division. The award is given each year to an individual who has made significant advancements in judicial independence, justice system reform, or public awareness. Judge Bell has served at all four levels of Maryland's courts, and in 1996, he became the first African-American to lead the Maryland judiciary. The ABA credits Judge Bell with running the Maryland court system according to his "guiding judicial principles: fuller access to justice; improved case expedition and timeliness; equality, fairness and integrity in the judicial process; judicial branch independence and accountability; and restored public trust and confidence in the court system." He retired from his position as chief justice on the Maryland Court of Appeals in July 2013.

Margaret Brent Women Lawyers of Achievement Award

This year the ABA is awarding the Margaret Brent Women Lawyers of Achievement Award to Hon. Mazie K. Hirono, Sara Holtz, Hon. Gladys Kessler, Marygold Shire Melli, and Therese M. Stewart. This award is named after Margaret Brent, the first woman lawyer in America, and it "honors outstanding women lawyers who have achieved professional excellence in their area of specialty and have actively paved the way to success for others.

Hon. Mazie K. Hirono

Senator Hirono is currently representing Hawaii in the United States Senate as a Democratic member. She was the first female to be elected as Senator from Hawaii, and she is also the first Asian-American woman to serve in the U.S. Senate. Previously, Senator Hirono was the Lieutenant Governor of Hawaii. She also served in the U.S. House of Representatives and the Hawaii House of Representatives.

Sara Holtz

Sara Holtz owns and operates ClientFocus, an organization that "helps women lawyers become successful rainmakers." She wrote a book on this subject entitled, *Bringin' in the Rain: A Woman Lawyer's Guide to Business Development*. Previously, Ms. Holtz served as vice president and general counsel at Nestle Beverage Company and division counsel at Clorox Company. She was the first woman to chair the Association of Corporate Counsel.

Hon. Gladys Kessler

Judge Gladys Kessler is a senior judge on the U.S. District Court for the District of Columbia. She was appointed in 1994 by President Bill Clinton. Previously, she served as an associate judge on the Superior Court of D.C. She has also worked for the New York City Board of Education and owned her own public interest law firm. Judge Kessler has held the office of president in the National Association of Women Judges and serves on the ABA Conference of Federal Trial Judges.

Marygold Shire Melli

Ms. Melli is the Voss-Bascom Professor of Law Emerita at the University of Wisconsin Law School and an affiliate of The Institute for Research on Poverty. She has served as associate dean of the law school, and as chair of the University Committee, which is the executive committee of the university faculty. Ms. Melli was previously vice-chair of the Wisconsin Supreme Court's Board of Lawyer Competence, as well as chair of the National Conference of Bar Examiners. She is a member of the American Law Institute and the International Society of Family Law where she currently serves as a vice-president and as chair of the Scientific Committee.

Therese M. Stewart

Ms. Stewart is the chief deputy city attorney for San Francisco, California. She has become well-known for her work in the California state and federal court cases regarding same-sex marriage. Previously, she was a litigation partner at Howard, Rice, Nemerovski, Canady, Falk & Rabkin. She served as a lead attorney on the