

Recommendations to be Considered by the House Of Delegates at the ABA Annual Meeting

The American Bar Association's House of Delegates will consider a number of resolutions at its annual meeting in Honolulu on August 7 and 8. 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. At this meeting, recommendations scheduled to be debated include state tort law preemption, a "civil Gideon," gender identity discrimination, and capital punishment. For more on recommendations concerning presidential signing statements and law school diversity requirements, please see separate articles in this issue. What follows is a review of some of the resolutions that will be considered in Honolulu.

State Tort Law Preemption

Recommendation 103, sponsored by the Ohio State Bar Association, resolves that "absent Congressional authorization, the ABA opposes the promulgation by federal agencies of rules or regulations that pre-empt state tort and consumer protection laws in instances where the state laws hold parties to a higher or stricter standard than that being promulgated by a federal agency."

The recommendation's accompanying report notes that many state legislatures have adopted laws that more strictly protect people's rights than federal laws, and that many federal agencies have sought to halt this authority by offering regulations that would limit or preempt state law as part of a "silent tort reform" movement. According to the sponsor, it is "a bipartisan conclusion that the efforts by the federal regulators may wind up doing more than Congress to change state laws."

Examples cited by the sponsor include the FDA's recent drug labeling rule, which prevents companies that comply with the new standards from being sued in state courts; the Consumer Product Safety Commission's (CPSC) rule that limits the ability of consumers to recoup damages under state laws for mattresses that catch on fire; and the National Highway Traffic Safety Administration's (NHTSA) proposal to preempt state

laws on safety standards for car roofs and seat positions. Twenty-six state attorneys general have protested this NHTSA proposal.

According to the sponsor, "The regulatory agencies have engineered the new rules in a way that will make them less vulnerable to immediate challenge...[R]egulators placed the language protecting manufacturers in the preamble, which does not customarily deal with changes and is usually treated as accepted fact, not subject to public comment. By putting the preemption language in the preambles of the new rules, the agencies make it difficult for preemptions to be challenged by the affected states and parties."

Some critics of this recommendation would respond that agencies such as the FDA, the CPSC, and NHTSA have greater expertise and information than state legislatures and courts in adopting these laws. They would also note that higher state standards could impede research and development efforts because of the fear of state-level litigation. One federal standard is needed to best protect consumers.

In a paper published by the Federalist Society, former FDA General Counsel Daniel Troy addresses some of the concerns articulated by the sponsor concerning the language in the preamble. He wrote the FDA "had to address preemption in the preamble for legal reasons. But FDA clearly also hopes that, by addressing the relationship of its labeling requirements to state law, the preamble language will reduce the need for the Agency to submit briefs in private lawsuits."

See Table A for more information on this report.

Capital Punishment

The Section of Individual Rights and Responsibilities, the Criminal Justice Section, the Commission on Mental and Physical Disability Law, the ABA Death Penalty Moratorium Implementation Project, the ABA Death Penalty Representation Project, and the Beverly Hills Bar Association sponsor Recommendation 122A. The sponsors urge that each jurisdiction that imposes the death penalty should not permit defendants to be executed or sentenced to death if at the time of the offence "they had significant

limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.” Furthermore, defendants should not be executed if they had a severe mental disorder or disability that impairs their ability “to appreciate the nature, consequences, or

wrongfulness of their conduct; to exercise rational judgment in relation to conduct; or to conform their conduct to the requirements of the law.” The proposal also outlines conditions in which the death penalty may be overturned if an inmate’s “mental disorder or disability significantly impairs his or her capacity to make a rational decision regarding whether to pursue post-conviction proceedings.”

TABLE A

THE ABA AND *THE NEW YORK TIMES*

The language of the report accompanying Recommendation 103 mirrors language in a March 10 article published in the *New York Times*. Stephen Labaton describes how “‘Silent Tort Reform’ Is Overriding States’ Power.” Several passages in his piece are identical to passages in the report. (See: <http://www.federalismproject.org/preemption/SilentTortReform.pdf>). *ABA Watch* compares the article with the report below:

STEPHEN LABATON, “‘SILENT TORT REFORM’ IS OVERRIDING STATES’ POWERS,” <i>THE NEW YORK TIMES</i> , MARCH 10, 2006	ABA REPORT ACCOMPANYING RECOMMENDATION 103
Supporters and detractors call it the “silent tort reform” movement, and it has quietly and quickly been gaining ground.	Supporters and detractors alike call it the “silent tort reform” movement.
In January, the Food and Drug Administration approved a drug label rule that pre-empts state laws.	In January 2006 the Food and Drug Administration (FDA) approved a drug label rule that preempts state laws.
Last month, for instance, the bedding industry persuaded the Consumer Product Safety Commission to adopt a rule over the objections of safety groups that would limit the ability of consumers to win damages under state laws for mattresses that catch fire. The move was the first instance in the agency’s 33-year history of the commission’s voting to limit the ability of consumers to bring cases in state courts.	The Consumer Product Safety Commission has been persuaded to adopt a rule over the objections of safety groups that would limit the ability of consumers to win damages under state laws for mattresses that catch fire, when the companies comply with new federal standards. This is the first instance in the Commission’s 33-year history that it took action to limit the ability of consumers to bring cases in state courts.
Pending before the National Highway Traffic Safety Administration are proposals announced last year by the agency that would pre-empt state laws on the safety standards for car roofs and seat positions.	Pending before the National Highway Traffic Safety Administration (NHTSA) are proposals announced last year by the agency that would pre-empt state laws on the safety standards for car roofs and seat positions.
State prosecutors and state lawmakers have also lodged objections. Attorneys general in 16 states, including New York, California and Massachusetts, recently sent a letter to the National Highway Traffic Safety Administration about the effort to preempt roof safety rules. “The state common law court system serves as a vital check on government-imposed safety standards,” the state prosecutors said. They said the proposal “is likely to erode manufacturer incentives to assure that vehicles are as safe as possible for their intended use.”	State prosecutors and state lawmakers have lodged objections. Attorneys general in 26 states, including New York, California and Massachusetts, recently sent a letter to the National Highway Traffic Safety Administration about the effort to preempt roof safety rules. “The state common law court system serves as a vital check on government-imposed safety standards” the state prosecutors said. They concluded that the proposal “is likely to erode manufacturer incentives to assure that vehicles are as safe as possible for their intended use.”
The new regulations are likely to face court scrutiny in the coming years. But the regulatory agencies have engineered the new rules in a way that they hope will make them less vulnerable to immediate challenge. By putting the pre-emption language in the preambles of the new rules, the agencies make it difficult for some consumer and lawyer groups to challenge them.	The new regulations are likely to face court scrutiny in the coming years. But the regulatory agencies have engineered the new rules in a way that they hope will make them less vulnerable to immediate challenge...By putting the pre-emption language in the preambles of the new rules, the agencies make it difficult for the pre-emptions to be challenged by the affected states and parties.

The recommendation is offered in the wake of the 2002 Supreme Court decision *Atkins v. Virginia*. The Section of Individual Rights and Responsibilities formed a task force that considered the repercussions of the ruling. This resulting proposal considers the findings of the task force. It also takes into account the definitions of mental retardation proposed by the American Association of Mental Retardation, the American Psychiatric Association, and the American Psychological Association, along with the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.

The Section of Individual Rights and Responsibilities sponsors the ABA's "Death Penalty Moratorium Implementation Project" as the "next step" in working to obtain a nationwide moratorium on executions. The Project states that administration of the death penalty is often "a haphazard maze of unfair practices with no internal consistency" and urges a moratorium to examine the "evidence showing that race, geography, wealth, and even personal politics" play a role in the process. The ABA, however, does not take a position on the death penalty *per se*.

Gender Identity Discrimination

The Section of Individual Rights and Responsibilities, the Bar Association of San Francisco, and the Beverly Hills Bar Association urge "federal, state, local, and territorial governments to enact legislation prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment, housing, and public accommodations."

The accompanying report declares that "people who have, or are perceived as having, a non-traditional gender identity or gender expression face discrimination in all facets of life." Thus, the sponsors recommend laws and policies to prohibit this discrimination and ensure that decisions made about employment, housing, and public accommodations are based on "*bona fide* qualifications rather than stereotypes or prejudices." For example, the sponsors would endorse laws that prohibit men from being harassed because they look or act "too feminine." Passing these kinds of laws "sends a strong message to the community regarding the dignity of transsexual and transgender people." Additionally, "legislating nondiscrimination on the basis of gender identity and expression protects not only transgender people, but all individuals from being penalized for failure to conform with stereotypes linked to gender."

Legal Representation

Recommendation 112A, sponsored by the Task Force on Access to Civil Justice and several other ABA entities, "urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody." The sponsors do not define what constitutes "low income;" rather, it wishes to leave that definition to each individual jurisdiction.

In the accompanying report, the sponsors note that this recommendation is consistent with the ABA's long history of support for the principle of "equal justice" in the United States. According to the report, the ABA is a "powerful and persuasive voice" in the "fight to maintain federal funding for civil legal services."

The sponsors maintain that legal aid must be provided at public expense because private charity has proved insufficient to cover the need. This compares unfavorably to European and Commonwealth countries, which offer legal assistance to all citizens when needed. The sponsors assert, "The United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve." As a result, only a "fortunate few" of those who cannot afford legal counsel enjoy effective access to justice when they need it.

The sponsors claim that this recommendation is supported by American constitutional principles, citing *Gideon v. Wainwright*, which requires states to provide lawyers for defendants in criminal cases who are not able to afford their own attorneys. While in *Lassiter v. Dept. of Social Services*, the Court held that there is no absolute right to court appointed counsel for indigent litigants in cases brought by the state to terminate parental rights, the sponsors express their hope that the U.S. Supreme Court will eventually reconsider the outcome of that case and the "unreasonable presumption" behind it.

According to the sponsors, the constitutional principles underlying the *Gideon* case are grounded in undeniable truths. Because the American legal system is so complex, "non-lawyers lack the knowledge, specialized expertise, and skills" to perform the necessary responsibilities of defending themselves in the courtroom, and thus they are "destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer." Further, courts

must face the additional problems of preserving judicial neutrality, balancing court time, and achieving an outcome that is “understood by pro se participants and does not lead to further proceedings before finality is reached.” The sponsors declare that, while their ultimate objective is to look for this right in federal due process and equal protection law, the resolution first seeks to foster the “evolution of a civil right to counsel” in the individual states, grounding such a right in the provisions of state constitutions and laws. Once this goal is achieved, it is likely to “provide doctrinal support” for future consideration of this right in the federal constitution.

The sponsors suggest funding of between \$60-100 per low-income individual, with the increase resulting in only a “comparatively minor budgetary item.” Many who oppose the idea of a “civil Gideon” argue that this amount underestimates the true cost. Many cities and states which are suffering from budget deficits would be unable to obtain additional funding to cover this amount.

Critics would also caution using the examples of European and Commonwealth legal systems as reasons why a “civil Gideon” is needed. These countries have very different legal systems than the United States, ranging in how they use the jury system, their use of contingency fees and payments, and other procedural differences.

Diversity

Recommendation 113, sponsored by the ABA Presidential Advisory Council on Diversity in the Profession and several other ABA sections and state bar associations, “urges the American Bar Association and all state, territorial and local bar associations to work with national, state and territorial bar examiners, law schools, universities and elementary and secondary schools to address significant problems facing minorities within the pipeline to the profession.” The sponsors also urge several other strategies to recruit and prepare minority students for a career in law. The resolution results from an ABA and Law School Admissions Council-sponsored conference that examined “the best ways to strengthen the pipeline” of minority students into the profession.

The accompanying report emphasizes the ABA’s belief that diversity in the legal profession is “essential” for the justice system. The report gives statistical information concerning the racial/ethnic disparity problems in American schools and universities, from pre-

kindergarten programs to law schools. Such problems include fewer applicants to post-secondary education, lower LSAT scores, lower admissions and matriculation rates into law schools, higher attrition rates during law school, and lower bar passage rates upon completion of law school.

The sponsors cite a number of reasons why fewer minorities have entered the legal profession. These reasons include inadequate preparation for schooling and poor-performing elementary schools; the perception of minorities that “law is the enemy” because of racial profiling, “overrepresentation” of minorities on death row, and the American cultural distaste for lawyers; and the reliance on the LSAT. A significant gap exists between the LSAT scores of white and black students. While the sponsors acknowledge that the test is considered “a reliable predictor of law school success and first-time bar exam passage,” they fear that this fact is preventing minority students from being accepted into law schools. Another “stumbling block” on the pipeline is the “inability (or unwillingness) of many law schools to create and foster an inclusive and welcoming environment for minority students.” The sponsors offer solutions to this problem, including providing diversity training at schools and “making diversity a stronger factor in accreditation considerations.”

The sponsors explain that the solution to the diversity pipeline problem is “collaboration.” This collaboration must take place among bar associations, law firms, corporations, law schools, colleges, elementary and high schools, government officers, and the judiciary, among many others. The sponsors encourage such organizations to provide mentoring, funding, academic programs (such as pre-law programs), employment opportunities, and other services to minority students. The sponsors admit that funding for the Diversity Pipeline project will be a challenge, but that obvious sources would include law firms, corporations, bar associations, foundations, and community organizations. The outreach involved in this project should ideally start with K-12 students, where there is a greater chance of positively influencing minority students in such a way that prepares them for college and law school. The efforts should not end with law school graduation, moreover; law firms and legal employers should engage in “affirmative outreach efforts” in order to hire more minority attorneys.

The sponsors conclude that the efforts will be fruitful, despite the many barriers to recruitment. They state, “Diversity efforts will encounter inherent obstacles

as long as there remain too few people of color who decide to enter the profession in the first place. Forward-thinking legal employers have already accepted this reality, and label their diversity pipeline ‘donations’ as recruitment expenses.”

For more on diversity requirements for law schools, please see page 2 in this issue.

Homelessness

The Commission on Homelessness and Poverty, the Senior Lawyers Division, and the Standing Committee on Legal Aid and Indigent Defendants offer two proposals concerning the legal rights of the homeless. Recommendation 108A offers principles concerning Homeless Court Programs. These proposals include:

- Prosecutors, defense counsel, and the court should all agree on what offenses should be tried before the homeless court;
- Defendant participation should be voluntary, community based-service providers should determine by what criteria individuals should be eligible for participation in the homeless court program, defendants should not be required to waive any legal protections afforded by due process;
- The process should recognize attempts by defendants to improve their lives;
- Participation in community-based services should replace certain sanctions;
- Defendants who complete appropriate services prior to appearing before the homeless court should have minor charges dismissed and more serious charges reduced.

The ABA adopted a policy in 2003 urging the creation of homeless courts. The program “focuses on what the defendant has accomplished on his or her road to recovery and self-sufficiency rather than penalizing him or her for mistakes made in the past.”

Recommendation 108B “urges federal agencies to include within the definition of ‘homeless person’ individuals who lack a fixed, regular, and adequate nighttime residence, including those who are sharing the housing of others due to loss of housing, economic hardship, or similar reasons and those who are living in motels, hotels, or camping grounds.”

The sponsors note that up to 840,000 individuals are homeless on a daily basis, and up to 3.5 million are homeless per year. The causes of this “crisis” include

the lack of affordable housing, stagnant wages, and a low minimum wage.

The sponsors criticize the Department of Housing and Urban Development’s (HUD) definition of homelessness. The sponsors fear the many homeless families with children would not qualify as homeless under HUD’s definition, which disqualifies those who double up in housing or live in motels. The sponsors note that families often double-up, stay in motels, or camp, rather than live on the street, in cars, in abandoned buildings, in emergency shelters, or in transitional housing. However, these families would meet the Department of Education’s broader definition of homelessness if they were doubled-up in housing or living in makeshift arrangements. HUD’s definition would “undermine their education, making it difficult or even impossible to maintain school enrollment or attendance.”

The sponsor proposes that all federal agencies broaden the definition of homelessness “as a means to ensure that homeless men, women, and children are able to access transitional or permanent housing assistance.”

Domestic Violence

Recommendation 110, sponsored by the Commission on Domestic Violence, urges federal, state, local, territorial, and tribal governments to enact or to amend domestic violence civil protection order statutes so as to protect victims who are dating or have dated their perpetrator of domestic violence, even if they do not have a child with, live with, or are not married to the perpetrator.

The sponsor describes domestic violence as “a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation, and emotional, sexual, or economic abuse to control the other partner in the relationship.” Women are at a greater risk than men of being a victim of such violence, and the perpetrator is often someone to whom the woman is not married. The article reports that more than 4 in every 10 incidents of domestic violence involve people who are not married.

Many states have current or former relationship requirements for those seeking civil protection orders. Some require that the parties are or have been married or living together, and some require that they have children together or are related by blood or marriage. Thus, people in abusive relationships who do not meet these requirements are often without recourse for protection through the civil protection order. Such

people include high school and college students, who experience the highest rates of domestic violence per capita, according to the article. The majority of these students are not married to, living with, or do not have a child with the perpetrator.

The sponsor states that such victims of abuse will not have adequate protection without a civil protection order: “Typically, it is only the violation of a civil protection order that carries the criminal sanctions necessary for police enforcement.” These orders are issued by civil courts, and they are intended to protect the victim from future abuse. They require that the perpetrator stay a certain distance from the victim and her children, not hit or abuse the victim, and not contact the victim.

The sponsor further claims that current domestic violence civil protection order statutes fail to protect homosexuals in abusive relationships: “To ensure that the same protections are provided to victims of domestic violence in same-gender relationships, protection order statutes must not require marriage between the victim and the partner as a prerequisite, since same gender couples may not marry in most states in the country.” The sponsor asserts that the goal of these statutes is to prevent abuse “wherever it is occurring in the domestic relationship,” and that victims of domestic violence in dating relationships are no less victims than those who are married to, live with, or have a child in common with the perpetrator.

Substance Abuse

Recommendation 109, sponsored by the Standing Committee on Substance Abuse, “urges all federal, state, territorial and local legislative bodies and government agencies to adopt laws and policies that require health and disability insurers to provide coverage for the treatment of both abuse and dependence on drugs and alcohol that is based on the most current scientific protocols and standards of care so as significantly to

enhance the likelihood of successful recovery for each person.”

In the accompanying report, the sponsor asserts that, although alcohol and other drug use is “voluntary,” research shows that chronic use causes other serious health problems, including demonstrable alterations of brain chemistry. The sponsor declares that “[t]oday, there is greater recognition and acceptance than ever before of the fact that addiction is a treatable, chronic illness.” Yet, current insurance laws and regulations covering private and public insurers do not usually require comprehensive substance abuse treatment. Many insurers do not cover specific services, many limit the number of units of service or provide coverage for no or extremely limited continuing care. The report explains that this is problematic because alcohol and substance abuse and dependence are “chronic, relapsing illnesses;” thus an individual may use up his insurance coverage and then be “forced to rely on the use of public funds, such as Medicaid and State substance abuse treatment systems.” These sources of funding are insufficient because they were intended to be “safety nets” rather than primary insurance for those in need of treatment. Furthermore, many individuals with alcohol or drug use disorders are placed in treatment programs based on availability and affordability, “regardless of whether or not the treatment program is appropriate for the individual.”

The sponsor maintains that effective care can facilitate remission of alcohol or substance abuse and dependence, “similar to the successful treatment of other chronic illnesses such as diabetes, hypertension, and asthma.” Thus, standard insurance benefits should provide coverage for a full continuum of care, as they do with these other chronic illnesses. The insurance plan should allow for the most clinically appropriate strategy for the individual. The sponsor further claims that ancillary services, such as childcare and transportation, should also be identified and included within treatment plans.



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